



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5, 1.7, 4.2, and 7.3. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 99-03
September, 1999**

Topic: Communication with represented parties; conflict of interest.

Digest: A lawyer retained as counsel for a savings and loan association may not contact an applicant for a home loan to be issued by the savings and loan association if it is known that the home loan purchaser is represented by counsel. Further, such communication constitutes improper solicitation of professional employment for pecuniary gain.

Ref: Illinois Rules of Professional Conduct, rules 1.5, 1.7, 4.2, 7.3
ISBA Opinion No. 644 (December 8, 1990)
ISBA Opinion No. 86-15 (May 13, 1987)

FACTS

A customer applies for a home loan from a savings and loan association ("S & L"). The loan is approved and the customer informs the S & L that he has hired Attorney B as his lawyer for the loan transaction and closing. Attorney A actively represents the S & L in other matters. Attorney A contacts the customer directly to advise that he represents the S & L and to suggest that the customer retain attorney A in the matter as well. Attorney A proposes that he would charge the customer \$150 to \$250 for the transaction. At the same time, the attorney receives a fee from the S & L of \$75 to \$100 on each such matter, for a total fee of \$225 to \$325 for this transaction.

Attorney A also advises that his fee for this matter would be more reasonable than the amount which attorney B would charge for services.

QUESTION

The inquirer asks generally whether the practices of attorney A are permitted under the Rules of Professional Conduct.

OPINION

The described fact situation poses two primary problems:

A. Solicitation of Professional Employment

Rule 7.3, entitled "Direct Contact with Prospective Clients," states as follows:

Except as provided in this Rule 7.3 ..., a lawyer shall not, directly or through a representative, solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain.

We assume that the customer is not a relative, close friend or prior client of attorney A, and therefore this matter does not appear to fall within any of the exceptions of Rule 7.3. As a result, we conclude that attorney A has violated the proscriptions of Rule 7.3 by directly contacting the customer as a prospective client and requesting that the customer retain him/her in relation to the real estate loan transaction. This constitutes a solicitation of professional employment.

B. Attorney Communication with a Represented Party

Rule 4.2, entitled "Communications with Person Represented by Counsel" states as follows:

During the course of representing a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

Under the facts as stated, the customer specifically advised the S & L that attorney B is his attorney in this matter. Attorney A must also be aware that the customer has retained attorney B for legal services because the subject of attorney A's communication with the customer was the comparative costs for legal services of attorney A and attorney B.

Attorney A has violated Rule 4.2 because he/she has communicated with a party who the lawyer knows is represented by attorney B. The subject of the communication between them is the same subject on which attorney B represents the customer. Further, this communication does not fall within exceptions identified in Rule 4.2. Thus, the communication is prohibited as a contact with a person who is already represented by counsel.

Two additional issues are suggested by the fact situation, although neither has been submitted as a

specific focus of the inquiry. First, even if the described conversation between attorney A and the customer was not an improper solicitation and communication with a represented party, the Committee cautions that there would likely be substantial concerns as to the propriety of undertaking such a joint representation of a lender and borrower because of the conflicts of interest which are inherent in such a situation. See Rules of Professional Conduct, Rule 1.7. For further consideration of this issue, reference is made to ISBA Opinion No. 644 (December 8, 1990), which discusses the conflict of interest problems of a lawyer representing a lender and borrower in a mortgage loan transaction, as well as ISBA Opinion No. 86-15 (May 13, 1987), which indicates that it is generally improper for a lawyer to represent both the buyer and seller in a real estate transaction.

Second, the fact situation identifies the amounts to be charged by Attorney A for the transactions, who proposes that his/her fee would be more reasonable than Attorney B's fee. Consistent with its longstanding policy in such matters, the Committee makes no comment on whether the proposed fees are in compliance with Rule 1.5's requirement that "A lawyer's fee shall be reasonable."

As presented in the hypothetical fact situation, the conduct of attorney A would violate the Rules' proscriptions against communication with a represented party and of solicitation of a prospective client.

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