



ISBA Professional Conduct Advisory Opinion

Opinion No. 16-03
June 2016

Subject: Conflict of Interest; Former Client.

Digest: A lawyer who represents the second wife in obtaining child support for her two young children from a former husband has a conflict of interest with the first wife of the same husband under Rule 1.9 because of his previous representation of the first wife in obtaining child support from that same husband for her child who is now 15 years old. The lawyer also has a “material interest” conflict under Rule 1.7 in connection with his representation of the second wife in her child support claim. These two Rules require the lawyer to obtain the informed consent of both wives in order to undertake the representation.

References: Illinois Rules of Professional Conduct 1.9

Illinois Rules of Professional Conduct 1.7

Illinois Rules of Professional Conduct 1.6

Illinois Marriage and Dissolution of Marriage Act, Section 505 (750 ILCS 501 et seq)

FACTS

The inquirer asks whether the inquirer has a conflict of interest by representing the second wife in a child support matter seeking support for two minor children. The lawyer previously represented a prior wife of the same husband and obtained child support for a child who is now 15 years old.

QUESTION

Do the Rules of Professional Conduct preclude the inquirer from representing the second wife in a child support claim while the husband is under child support obligations to his first wife whom the lawyer also represented?

ANALYSIS

Rule 1.9 is entitled “Duties to Former Clients”. For purposes of this opinion, we have assumed that the Inquirer is no longer representing the first wife. Therefore, the first wife is a “former client” of the Inquirer and Rule 1.9 applies to the matter at hand.

Under Rule 1.9, the inquirer is precluded from representing another person “in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives consent”. A concern underlying the Rule is the possibility of the lawyer revealing or misusing confidential information learned in the prior matter.

The two representations appear to be “substantially related” in that the Inquirer is seeking additional child support payments from the same person from whom his former client is currently receiving payments. Moreover, Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 501 et seq) sets forth detailed “guidelines” regarding the percentage of a parent’s net income that the court may order for child support. The court may deviate from the guidelines if, after considering the best interests of a child, the “financial resources and needs” of a parent warrant the deviation. Because the same parent (i.e., the husband) is involved in both matters, the representation of the second wife is substantially related to the representation of the first wife, whose minor child is continuing to receive support from the husband.

The question then is whether the interests of the second wife are “materially adverse” to the interests of the first wife. We believe they are insofar as an award of child support in the second case may affect the ability of the husband to continue to make the required payments for the support ordered in the first case, even though under court order to do so.

Although we do not have any facts regarding the ability of the husband to pay support for all three children, as noted above, the success of the lawyer in pursuing the second claim may affect the ability of the husband to continue the payments to the first child. Therefore, depending on the circumstances, the interests of the second client could be viewed as “materially adverse” to the interests of the former client, and informed consent should be obtained from the first wife in order to avoid a violation of Rule 1.9. In this regard, in obtaining the consent, the lawyer should apprise his former client of the potential consequences an award in the second matter may have on the ability of the husband to pay the original support, including a discussion of the application of the guidelines and criteria for support awards as set forth in 750 ILCS 505.

We also believe the lawyer’s representation of the second wife may be problematic, and that under Rule 1.7 she also must give informed consent to the representation. Rule 1.7 is the general conflict rule. It prohibits “concurrent” conflicts of interest. Such a conflict may exist

under either of two situations: first, “where the representation of one client will be directly adverse to another client” (1.7(a)(1)); and second, where there is a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation involves a “concurrent conflict” under section 1.7(a)(1). There is no direct adversity between the two wives, and the lawyer is seeking support only for the children of the second wife.

However, we believe there is a “material interest” conflict under section 1.7(a)(2) because the ability of the husband to pay continued support to the child of the first wife is likely to determine his ability to pay support to the children of the second wife. Thus the lawyer may be less than vigorous in pursuing support in the latter instance, knowing that the husband may not have the capability of making the required payment for all three children. However, if the inquirer reasonably believes he or she can provide competent and diligent representation of the second wife, the lawyer can do so by obtaining the “informed consent” of the second wife to the continued representation, as she is the person who is “affected” by the potential conflict of interest. Consent need not be obtained from the first wife under 1.7, because the lawyer is no longer representing her in a child support claim, but, as discussed initially, consent from the first wife is likely to be required by IRPC 1.9 if the lawyer wishes to continue the representation.

Finally, we note that the confidentiality requirements of Rule 1.6 and Rule 1.9 must be followed. Under the Rules, a lawyer cannot “reveal” information relating to the representation of a client (Rule 1.6(a)) or a former client (Rule 1.9(c)(2)), and under Rule 1.9(c)(1), a lawyer may not “use” information relating to the representation of a client to the client’s disadvantage. We do not have any facts to indicate that the lawyer will, in representing the second wife, reveal or use information relating to the representation of first wife. Because the informed consent of the first wife is required under Rule 1.9, it will be a simple task for the inquirer to also obtain her consent to reveal or use information about the representation if the lawyer believes that will be necessary.

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