



ISBA Professional Conduct Advisory Opinion

Opinion No. 21-01
March 2021

Subject: Conflict of Interest

Digest: A concurrent conflict of interests exists if a lawyer represents the surviving spouse as the administrator of his deceased spouse's testate estate and also represents the surviving spouse in renouncing the will and in seeking a spousal award. The conflict is waivable if: (i) the lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client, including the surviving spouse, individually and in a fiduciary capacity, (ii) the lawyer makes clear her relationship to the parties involved, and (iii) each affected party, including the spouse individually, the beneficiaries or, if applicable, the natural or court-appointed guardian of minor beneficiaries, or a guardian ad litem appointed to protect their interests, gives informed consent.

References: Paragraph 17 to Preamble to 2010 Illinois Rules of Professional Conduct (Scope)
Rule 1.7 of the 2010 Illinois Rules of Professional Conduct
Comment 27 to Rule 1.7 of the 2010 Illinois Rules of Professional Conduct
Michigan State Bar Ethics Opinion RI-350, July 26, 2010
ISBA Advisory Opinion 96-05(citing to ISBA Opinion 94-21) October, 1996
Michigan State Bar Informal Ethics Opinion RI-79, April 19, 1991

FACTS

Wife made a will that left the residue of her estate in trust for the benefit of her two disabled children who are not the children of her surviving husband. The will does not leave anything to

husband. The will named the wife's parents as executor and successor executor; however, they are deceased, and no additional successor executor was named in the will.

Husband retains Lawyer to petition the court to be appointed administrator of his wife's estate with the will annexed. In addition, husband has informed Lawyer of husband's desire to: (i) renounce the will and take his statutory share, and (ii) claim a spousal award.

QUESTION

Does the lawyer have a concurrent conflict of interest if she represents the surviving spouse as the personal representative of his deceased spouse's will and concurrently assists the surviving spouse in renouncing the will and seeking a spousal award?

If so, is the conflict waivable?

DISCUSSION

Rule 1.7 of the Illinois Rules of Professional Conduct of 2010¹ ("RPC") provides guidance for conflicts of the type described in this inquiry.

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) 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.

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent. (Emphasis added).

The initial question arising from this inquiry is: 'who is the lawyer's client;' the fiduciary or the estate and its beneficiaries. Comment 27 to RPC 1.7 indicates there is no single definition because each situation is fact specific.² Thus, the answer to "who is the lawyer's client," the

¹ M.R. 3140 (July 1, 2009 effective January 1, 2010). Rule 1.7: Conflict of Interest: Current Clients

² Comment 27 to RPC 1.7 explains that conflict questions may arise in estate planning and estate administration. *For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the*

executor or the estate, could invoke questions of fact or substantive law which are beyond the scope of the Rules of Professional Conduct. “Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”³

If we assume the husband, and not the estate and its beneficiaries, is the client, RPC 1.7(a)(2) recognizes that the lawyer could nonetheless have a concurrent conflict of interest if she has responsibilities to **third persons**, such as the beneficiaries of the will. The concurrent conflict arises even if she advises and assists her client in exercising rights granted to him by the Illinois Probate Code. The lawyer must be sensitive to the distinction between lawful conduct and ethical conduct; where they converge and where they diverge.

The exception to the general prohibition of RPC 1.7(a) requires the lawyer to initially determine if she “reasonably believes” she will be able to provide competent and diligent representation to each affected client. *See* RPC 1.7(b)(1). ISBA Advisory Opinion 96-05 citing to ISBA Advisory Opinion 94-21, explained that whether a lawyer “reasonably believes” her dual representation will not adversely affect her relationship is determined by an objective, not subjective, standard based on what the “reasonable lawyer” would do.⁴ It reinforced that the exceptions to the dual representation prohibition, including “reasonable belief” and “client consent” are in the conjunctive.

In the State Bar of Michigan Informal Ethics Opinion RI-79 the inquiry questioned whether the lawyer who represents a personal representative of a decedent's estate in a fiduciary capacity may represent the personal representative in an individual capacity on issues pertaining to election against a will, family allowances, and constitutional challenges to the amount distributed to beneficiaries and heirs. The Opinion explained the answers to these questions required a

circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.” (Emphasis added).

³ As explained in paragraph 17 of the Preamble of the Illinois Rules of Professional Conduct of 2010.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

⁴ Compare, RPC 1.0 Terminology: ...

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

determination as to whom the lawyer represents, the personal representative or the beneficiaries of the estate and to whom the lawyer owes duties of confidentiality, loyalty, accountability and independent professional judgment.

Applying [then current] Michigan Rule 1.7(b)(2) to the inquiry, Informal Opinion RI-79 concluded that the lawyer who represents a personal representative of a decedent's estate in a fiduciary capacity may not represent the personal representative in an individual capacity on issues pertaining to election against a will, family allowances, and constitutional challenges to the amount distributed to beneficiaries and heirs, **unless**, pursuant to Rule 1.7(b)(1), the lawyer reasonably believes the representation will not be adversely affected and pursuant to Rule 1.7(b)(2), the client consents after consultation.⁵ The standard to be applied was whether a "disinterested lawyer" would reasonably believe the representation would not be adversely affected.

On July 26, 2010, the State Bar of Michigan published Informal Ethics Opinion RI-350 to address confusion over certain prior opinions.

The Professional Ethics Committee is to interpret the Michigan Rules of Professional Conduct (the MRPC or the Rules). Those Rules themselves do not provide the criteria for establishment of a client-lawyer relationship. Indeed, the Preamble (Scope) to the Rules states:

[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.⁶

In other words, determination of "who is the client" requires an examination of applicable substantive law, which is beyond the scope of the Committee's charge."

...The identity of the client presents a substantive legal issue to be determined by the lawyer under the particular circumstances of the representation. The answer to that question is not found in the Rules of Professional Conduct, and is not itself a matter of legal ethics; and the Committee's statements in answering the question are not authoritative....

The situations considered in the two opinions provide the basis for a number of meaningful conclusions under MRPC, which we summarize here:

⁵ In the absence of an entry of appearance by the children's biological father as the natural guardian, or the appearance by a plenary guardian, it is likely that the court would appoint guardian ad litem at an early stage in the proceedings to represent the interests of the disabled beneficiaries. Arguably, such guardian would be capable of giving informed consent contemplated by RPC 1.7(b)(4).

⁶ *c.f.*, note 3, *supra*.

...3. *It is a conflict of interest for a lawyer to represent both the fiduciary and a beneficiary unless the personal interests of the beneficiary are fully consistent with the obligations of the fiduciary and both parties have consented, as required under MRPC 1.7. Whether the fiduciary and the beneficiary are the same person or different persons makes no difference.*

We believe the Michigan Opinions RI-79 and RI 350 are consistent with our interpretation and application of Illinois Rules 1.7(a) and 1.7(b). These advisory opinions properly focused on conflicting interests, not conflicting persons.

The personal representative/surviving spouse in our inquiry has a fiduciary obligation to act for the benefit of all beneficiaries of the estate. That obligation can give rise to conflicting interests for the lawyer if she assists the spouse in obtaining a greater share of the estate at the expense of the disabled children. The lawyer's concurrent representation of the surviving spouse in renouncing his wife's will and seeking a spousal award would be designed to increase the spouse's share of the estate, to the detriment of disabled children, to whom the personal representative owes fiduciary duties. Accordingly, Rule 1.7(a)(2) is implicated and the lawyer's representation of the surviving spouse in an individual capacity is materially limited by her representation of the personal representative/surviving spouse in a fiduciary capacity.

Unless all of the conditions of Rule 1.7(b) are satisfied, the lawyer for the personal representative should avoid assisting the surviving spouse in seeking rights and benefits permitted by the Illinois Probate Code because those rights and benefits are materially adverse to the interests of the estate's beneficiaries.

CONCLUSION

A lawyer **should not** represent the surviving spouse as the administrator of his deceased wife's estate and also represent the surviving spouse in renouncing the will and in seeking a spousal award, **unless:** (i) the lawyer reasonably believes that she will be able to provide competent and diligent representation to the surviving spouse, individually and in a fiduciary capacity, (ii) the lawyer makes clear her relationship to the parties involved, and (iii) she obtains informed consent from each affected person, including the surviving spouse, the beneficiaries, or, if applicable, the natural or court-appointed guardian of the beneficiaries, or a guardian ad litem appointed to protect their interests.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.