ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2, 1.7, and 2.4. 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. 04-03
April 2005

TOPIC: Conflict of interest, representation of parties with adverse interests; Limiting scope of representation.

DIGEST: A lawyer who mediated a divorce settlement between unrepresented husband and wife may not prepare a proposed judgment of dissolution of marriage, a marriage separation agreement and joint parenting agreement for husband and wife and allow husband and wife to file said documents as *pro se* litigants.

REF: Illinois Rules of Professional Conduct ("IRPC"), Rules: 1.2, 1.7

ISBA Advisory Opinion, Nos. 849, 85-06, 98-06.

Illinois Supreme Court Rule 137

Illinois Uniform Mediation Act, 710 ILCS 35/1, et seq.

Ricotta v. California, 4 F.Supp.2d 961(S.D.Cal. 1998); aff'd, 173 F.3d 861 (9th Cir. 1999).

Whitmer v. Munson, 335 Ill. App. 3d 501, 781 N.E.2d 618 (2002)

Wittekind v. Rusk, 253 Ill. App. 3d 577, 625 N.E.2d 427 (1994).

Mediation Council of Illinois Professional Standards of Practice for Mediators, Section VI (Revised April 2003)

FACTS

A divorce lawyer acts as a mediator in domestic relations matters. At the conclusion of a successful mediation between husband and wife – neither of whom are represented by counsel – lawyer-mediator drafts a proposed judgment of dissolution of marriage, marriage separation agreement and joint parenting agreement.

Lawyer does not place lawyer's name on the documents and does not enter an appearance for either husband or wife. The parties take the documents drafted by lawyer-mediator, file those documents with the court, and appear *pro se* at all subsequent court hearings.

QUESTIONS

May a lawyer who mediated a divorce settlement between unrepresented husband and wife prepare a proposed judgment of dissolution of marriage, a marriage separation agreement and a joint parenting agreement for husband and wife?

May the lawyer who drafted these documents for unrepresented husband and wife allow them to file these documents with the court and appear *pro se* at all subsequent court hearings?

OPINION

It is improper for a lawyer who mediated a divorce settlement to draft a proposed judgment of dissolution of marriage, marriage separation agreement and joint parenting agreement for unrepresented parties.

When drafting said documents for these unrepresented litigants, the lawyer-mediator moves beyond the role of mediator and takes on the role of lawyer representing both parties. This creates a conflict of interest that the lawyer-mediator cannot cure.

As explained in ISBA Opinion No. 92-05, "Where a lawyer acts as a mediator in a dispute, the lawyer cannot represent any of the parties in the underlying dispute" without violating IRPC 1.7 (a) if the lawyer seeks to represent both parties or IRPC 1.7 (b) if the lawyer seeks to represent one party.

Rule 1.7 provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

Additionally, although not controlling, the Committee finds the following guidance provided by the Mediation Council of Illinois Professional Standards of Practice for Mediators, Section VI (Revised April 2003), instructive. The guidelines provide:

D. Independent Legal Counsel

The mediator has a duty to advise the mediation participants to obtain legal counsel and advice prior to reaching an understanding. A referral for legal advice should be made before the decision making process and not after the participants have already reached a full accord to which they may have made an emotional commitment. Mediators, including attorney-mediators, shall not advise either party as to their legal rights or responsibilities so as to direct the parties' decision on an issue. Each party must be referred to independent legal counsel for that advice. A single attorney to advise the participants as to the law in the course of a mediation is not a substitute for independent legal advice.

Finally, the conflict issues created by the lawyer-mediator attempting to represent even one of the parties to the mediation after the mediation concluded is exacerbated by the Illinois Uniform Mediation Act, 710 ILCS 35/1. In relevant part, this Act creates a mediation privilege that precludes disclosure of any communication made in the mediation process. 710 ILCS 35/4. Although subject to waiver in certain circumstances, the existence of the mediation privilege could itself interfere with the subsequent representation of either party under IRPC Rule 1.7.

This conflict exists even when, as a result of the divorce mediation, both husband and wife agree. In ISBA Opinion No. 98-06, the Committee pointed out:

A divorce, even when uncontested, is litigation. It involves the filing of a lawsuit and a judgment being entered against both parties. . . . Thus, the lawyer cannot represent opposing sides in even an "uncontested" divorce. Consent by the wife cannot make such joint representation of opposing sides in the same case proper.

The Committee believes that, under these facts, the lawyer-mediator represents both husband and wife when the lawyer-mediator prepares the proposed judgment of dissolution of marriage, marriage separation agreement and joint parenting agreement. The Committee concludes that such action by the lawyer would constitute representing two parties with adverse interests in violations of IRPC 1.7(a).

The Committee contrasts the facts presented in this inquiry from those of a typical divorce mediation at the conclusion of which the mediator memorializes for the represented parties the agreements reached during the mediation. Lawyers for the parties then draft final documents, based on the mediator's report, to present to the court to conclude the litigation.

Addressing the second question presented, the Committee believes that under the facts presented by this inquiry, this lawyer-mediator may not limit the scope of legal representation to the preparation of a proposed judgment of dissolution of marriage, a marriage separation agreement and a joint parenting agreement.

Illinois Rule of Professional Conduct 1.2(c) allows a lawyer to limit the objectives and the scope of representation upon client consent after disclosure. In ISBA Opinion 849, the Committee opined that a lawyer, asked by a client to prepare certain pleadings for the client acting *pro se*, could do so without entering an appearance in the proceeding or otherwise participating in the proceeding. The Committee noted that the client must give "his fully informed consent to such limitation of employment" and that the lawyer must take reasonable steps to avoid foreseeable prejudice to the client including being certain that the client fully understands the merits of the client's position, the position the other party to the litigation is likely to take, the procedures involved in the trial - including the requirements for a valid prove-up, and the consequences of the lawyer not appearing in the proceeding.

In ISBA Opinion 85-06, the Committee limited the application of Opinion 849. In Opinion 85-06, the Committee found it improper for a lawyer to establish a representation model for his serving petitioners filing for bankruptcy which would include advising clients, preparing petitions and pleadings for clients, and otherwise holding himself out as a lawyer for these clients, but not appearing on behalf of the clients instead having them appear *pro se* in court and court-related proceedings.

The Committee held that the representation model described in Opinion 85-06 falls

> far short of the ethics and professional obligations of a lawyer to a client . . . By sending the client to court after preparation of the petitions showing the client to be *pro se*, the lawyer has taken part in a plan or scheme to avoid his punctual fulfillment of professional commitments and he has failed to treat the court with the proper courtesy and consideration.

Subsequent to both of these opinions, on June 19, 1989, the Illinois Supreme Court adopted Illinois Supreme Court Rule 137. The rule provides, in relevant part:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 137 has been applied to litigants signing *pro se* pleadings. *Whitmer v. Munson*, 335 Ill. App. 3d 501, 781 N.E.2d 618 (2002); *Wittekind v. Rusk*, 253 Ill. App. 3d 577, 625 N.E.2d 427 (1994).

Relying on the 9th Circuit U.S. Court of Appeal's opinion interpreting Federal Rule 11 finding that a lawyer mislead the court when he ghostwrote documents *pro se* litigants filed with the court, the Committee believes that under the facts presented in this inquiry it would be improper for the lawyer-mediator to prepare a proposed judgment of dissolution of marriage, marriage separation agreement and joint parenting agreement and allow the husband and wife to sign them and file them in court while professing to proceed *pro se*. *Ricotta v. California*, 4 F.Supp.2d 961(S.D.Cal. 1998); aff'd, 173 F.3d 861 (9th Cir. 1999).

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