



**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 1.6, 1.7, 1.9, and 1.10. 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. 05-01
January 2006**

TOPIC: Former Client; Conflict of Interest; Confidentiality

DIGEST: A lawyer may represent a client in a matter unrelated to a prior divorce proceeding in which the lawyer represented former client who now may testify against his current client. However, the lawyer may not cross-examine the former client unless it can be done both without using information relating to the prior representation to the disadvantage of the former client and without materially limiting his ability to effectively cross-examine the former client to the detriment of the current litigation client.

REF: Illinois Rules of Professional Conduct, Rules 1.6, 1.7, 1.9 and 1.10

ISBA Opinions No. 90-05 (November 1990), No. 91-20 (January 1992) and No. 98-01 (July 1998)

American Bar Association Formal Opinion 92-367 (October 16, 1992)

Swanson v. Wabash, Inc., 585 F. Supp. 1094 (N.D. Ill. 1984).
Restatement Second, Agency, Section 395, Comment *b*

FACTS

The inquiring lawyer previously represented a client in a divorce proceeding, since resolved, but does not currently represent her in any matter. The lawyer now represents another client, who was “indicated” by the Department of Children and Family Services (DCFS) for abuse and neglect of her child, before an administrative hearing to contest the finding of abuse. Prior to the hearing, the DCFS lawyer provided a list of prospective witnesses who would testify in the matter. The list included the former divorce client who presumably will testify adversely against the current client. Prior to giving any testimony, the former divorce client advised the litigants that she still considered the lawyer to be her lawyer and did not wish to be cross-examined by him. The lawyer stated that he did not presently represent or have an active file on the former divorce client. He also stated that he would decline any request to represent her in any new matter.

QUESTIONS

1. Is the lawyer prevented from continuing to represent the current client at the administrative hearing?
2. If the lawyer may represent the current client, may the lawyer also cross-examine the former client? If not, should he have co-counsel conduct any cross-examination?

OPINION

The threshold issue raised by the objection of the prior divorce client is whether that person should be considered a “current” or “former” client of the lawyer. The determination of when a client becomes a “former” client is situation specific and depends on various factors. When a lawyer has not clearly terminated the professional relationship with a client at the conclusion of a matter, it could be argued that a lawyer-client relation still exists under the circumstances. In this inquiry, the inquiring lawyer has stated that he no longer represents the divorce client. Without further information, we will assume that the divorce client is a former client for purposes of this opinion.

If the divorce client were considered a “current” client, the inquiry would be governed by Rule 1.7, the general conflict of interest rule. Rule 1.7(a) provides that a lawyer shall not represent a client if the representation will be “directly adverse” to another client. In a situation where a lawyer attempts to cross-examine a current client who has testified adversely to another client, ABA Formal Opinion 92-367 (October 16, 1992) holds that the lawyer’s litigation client should be considered “directly adverse” to the witness client if the examination is likely to result in some “concrete disadvantage” to the witness. Where there is such a “concrete disadvantage” to the witness client, the lawyer would face a disqualifying conflict in the absence of appropriate client consent. This conclusion is consistent with Comment [6] to ABA Model Rule 1.7 (2004). Without additional facts, the Committee must assume that the lawyer’s attempt to discredit the testimony of the divorce client or impugn her veracity would constitute a “concrete disadvantage” to the divorce client. Thus, if the divorce client were still a current client, the lawyer would be prohibited by Rule 1.7(a) from accepting the representation in question.

Because we have assumed that the prior divorce client is a “former” client, Rule 1.9 applies. That rule provides:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
 - (1) represent 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 consents after disclosure; or
 - (2) use information relating to the representation to the disadvantage of the former client, unless:
 - (A) such use is permitted by Rule 1.6; or
 - (B) the information has become generally known.

Under the limited facts submitted in this inquiry, the current matter involving a DCFS neglect and abuse hearing for the new client is not the same matter as the former client’s prior divorce proceeding, nor does it appear to be substantially related. *See* ISBA Opinion No. 98-01 (July 1998). Thus, the lawyer would not be precluded by Rule 1.9(a)(1) from representing the new client in the DCFS matter without the former client’s consent.

The next issue is whether the lawyer may cross-examine the former client in the DCFS hearing. (The former client could consent to being cross-examined by her former lawyer, *see* ISBA Opinion No. 91-20 (January 1992), but the facts submitted suggest that she would be unwilling to do so.) Under Rule 1.9 (a) (2), it would appear that the lawyer may cross-examine the former client as long as he does not use “information relating to the representation” of the former client to the “disadvantage” of that person, unless the information that the lawyer planned to use to attack the testimony of the former client was either subject to permissive disclosure under a specific exception to Rule 1.6, which seems unlikely in this situation, or has become “generally known.”

The rules do not define what information is “generally known” for this purpose. The concept appears to be borrowed from the law of agency, which also imposes duties of confidentiality upon agents. Comment *b* to Section 395 of *Restatement Second, Agency* defines a matter of general knowledge that an agent may use freely without liability to the principal as “common knowledge in the community.” This definition seems consistent with the purposes of Rule 1.9.

In considering whether the cross-examination of the former client would be permitted in this case, the lawyer also should be mindful that the information protected by Rule 1.9 (a)(2) consists of any “information relating to the [prior] representation,” which is broader than a “confidence or secret,” the information protected by Rule 1.6, the general rule on client confidences. Any information protected by Rule 1.9(a)(2) may not be used to the “disadvantage” of the former client. As noted above, an attempt to discredit the testimony of the former client or impugn her veracity would be considered a disadvantage to the former client. Thus, the lawyer may cross-examine the former client only if (1) it can be done without the use of any information related to the prior representation, unless the information to be used was also a matter of common knowledge in the community, and (2) the obligations to the former client are not a material limitation on the continued representation of the current client.

If the lawyer concludes that he is able to cross-examine the former client in spite of his obligations under Rule 1.9, the lawyer must also consider whether meeting those obligations might materially limit his ability to effectively cross-examine the former client to the detriment of the current litigation client. Under Rule 1.7(b), the lawyer should not continue the representation of the current client unless he reasonably believes that the representation of the current client will not be adversely affected by those obligations and the current client (but only that client) consents after disclosure.

Finally, if the lawyer is prohibited from conducting the cross-examination of the former client under Rule 1.9, that conflict may not be cured simply by having another lawyer in the same firm conduct it. Under Rule 1.10 on imputed disqualification, if one lawyer in a firm is prohibited from undertaking a representation, so is every lawyer in the firm. *See* ISBA Opinion No. 90-05 (November 1990). However, the lawyer may consider asking co-counsel (a lawyer from another firm who may be representing a co-party) to conduct the cross-examination. *See Swanson v. Wabash, Inc.*, 585 F. Supp. 1094 (N.D. Ill. 1984). If a co-counsel is not available, the lawyer should seek another, unaffiliated lawyer to conduct the cross-examination.