



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7 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. 822
April 9, 1983**

Topic: Conflict of Interest Appearance of Impropriety Attorney hiring another to represent him while both attorneys are frequently adversaries to each other.

Digest: It is not improper for Lawyer B to represent Lawyer A when each frequently represent clients adverse to each other provided Lawyer B makes full disclosure to such clients and obtains consents therefrom.

Ref.: ISBA Opinion No. 724
Canons 4 and 9
Rule 5-105(a), (b), (c)

FACTS

Lawyer A and Lawyer B frequently represent clients adverse to each other and at present are involved in several cases in which their clients are on opposite sides. Lawyer A wishes to engage Lawyer B to represent him in a suit in which A is a party and our opinion is sought as to whether Lawyer B may accept such employment.

OPINION

A somewhat similar issue was discussed in Opinion 724 where we held that two lawyers could represent opposing clients even where one of the lawyers had represented the other in the past. We pointed that

while a lawyer's function is, by necessity, often adversarial in nature he is constantly working with other lawyers with the result that not only professional but often social relationships arise.

None of these factors, we pointed out, "should judgment by a lawyer on behalf of his client."

We pointed out in the Opinion that if a lawyer has developed such a close professional or social relationship with another lawyer so that his independent professional judgment would be affected, he should withdraw from any employment in which the lawyer is on the other side.

In the same Opinion, however, we went on to discuss whether A and B could represent adversaries if the lawyer-client relationship still existed between A and B.

In that situation, the Committee noted that the facts gave rise to an appearance of professional impropriety even if the independent professional judgment of either lawyer is not affected. We concluded the Opinions by stating that not only should such appearance of professional impropriety be avoided but, it also dictates "refusal of or withdrawal from employment".

Upon further reflection of the facts presented in Opinion 724 as well as the Illinois Code of Professional Responsibility, we are of the opinion that our decision in 724 as it relates to the situation when the lawyer-client relationship still exists was too definitive.

While Canon 9 clearly directs lawyers to avoid the appearance of impropriety the Rules relating to Canon 9, pertaining as they do to the conduct of former judges and public officials as well as implications by lawyers of improper influence over others, are of little assistance in this situation.

An analysis of prior Opinions, however, reveals that this Committee has never intended to hold that the mere existence of circumstances giving rise to an appearance of impropriety requires automatic withdrawal from or refusal of employment by a lawyer.

Without attempting to diminish the cautionary admonitions of Canon 9, we are of the opinion that although lawyers must make every effort to avoid the appearance of impropriety, it is impossible to establish definitive rules regarding his employment when such an appearance exists. The lawyer, professional that he is, must in the end be guided by his personal conscience in determining whether or not he should represent a client.

In making such a determination, however, a lawyer is obligated to consider the entire Code of Professional Responsibility including Canon 5 and those Rules thereunder which relate to the exercise of independent professional judgment on behalf of a client.

Rule 5-105(a) and 105(b) prohibits lawyers from accepting or continuing employment where "independent professional judgment...will be or is likely to be adversely affected". Such a prohibition is not without exception, however, and that exception is contained in Rule 5-105(c) which allows a lawyer to represent multiple clients if (1) it is obvious that he can adequately represent the interest of each and (2) if each consents to the representation after full disclosure of the possible effect of such representation on the exercise or the lawyer's independent professional judgment on behalf of each.

While it is possible that others may question the propriety of representing a lawyer while, at the same

time, representing clients with positions adverse to that lawyer's clients, we find nothing presented in the facts justifying speculation that either A or B's clients will be prejudiced or harmed by such representation.

We further see no appearance of impropriety which, standing alone, automatically would preclude Lawyer B from accepting employment by Lawyer A. Because of the possibility that such representation could affect Lawyer B's independent professional judgment on behalf of those clients whose interests are adverse to those of Lawyer A's clients, however, we conclude that Rule 5-105(c) compels both lawyers to make full disclosure of such representation to those clients affected and to obtain consents from each of them. The committee would further note, moreover, that this conclusion presumes that each lawyer, in accordance with Canon 4, has authorized the disclosure.

To the extent that Opinion 724 is inconsistent herewith it is overruled.

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