



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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Opinion No. 11-02
January 2011

Topic: Conflict of Interest; Restrictions on a Lawyer's Practice

Digest : A conflict of interest would be created between Lawyer's representation of one client and other similar clients if Lawyer were to sign a confidentiality agreement required by an accounting firm that would prohibit Lawyer from divulging a package of ideas developed by the accounting firm that would reduce the client's tax obligations. For purposes of the Illinois Rules of Professional Conduct, a lawyer cannot agree to keep confidential interpretations of the law.

References: Illinois Rules of Professional Conduct, Rules 1.7, 5.5, and 5.6 (b)

ABA Formal Opinion No. 93-371 (1993)

ABA Formal Opinion No. 00-417 (2000)

Restatement Third, The Law Governing Lawyers, section 121 (2000)

FACTS

Accounting Firm tells Client A that Accounting Firm will disclose to Client A a package of ideas that can significantly reduce Client A's taxes if: (1) Client A pays Accounting Firm a fee for the information and (2) Client A and Client A's Lawyer each enter into a confidentiality agreement pursuant to which Client A and Lawyer agree to never divulge the ideas in the package.

QUESTION

If Lawyer signs the Confidentiality Agreement, would Lawyer have a conflict of interest in

representing Clients B, C, and D who could benefit from the ideas she has obtained from Accounting Firm but agreed not to disclose?

OPINION

For purposes of this opinion, we will assume that the package of ideas (the “Information”) includes interpretations and applications of the tax laws and regulations that would be useful to Lawyer in performing legal services for Clients B, C and D. Thus, we assume that once Lawyer has learned of the Information, she will be prohibited from applying ideas that would directly assist her representation of other clients.

Based upon that assumption, if Lawyer were to sign the Confidentiality Agreement, Lawyer would have a conflict of interest in representing Clients B, C and D. Pursuant to Illinois Rule 1.7:

- (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.

Similarly, section 121 of the Restatement, Third Edition, provides that a conflict of interest exists if “there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.” As noted in the comment to the Restatement, the prohibition against conflicts of interest “seeks to enhance the effectiveness of legal representation. To the extent that a conflict of interest undermines the independence of the lawyer’s professional judgment or inhibits a lawyer from working with appropriate vigor in the client’s behalf, the client’s expectation of effective representation could be compromised.” In the case at hand, the Lawyer’s own interests in honoring the Confidentiality Agreement would “materially limit” her responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D.

Rule 1.7(b) does permit a lawyer to represent a client in a conflict situation if certain conditions are met: (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. As for the first condition, it does not appear that Lawyer could reasonably assume that withholding material tax strategies would not adversely affect Clients B, C, and D. The lawyer could not provide competent and diligent representation to each affected client. With regard to the fourth condition in Rule 1.7 (b), it is highly unlikely that Clients B, C and D would ever consent to Lawyer withholding information from them once Clients B, C and D were informed that such information might save them significant tax dollars. In short, it does not appear that Lawyer could overcome the conflict. Thus, for the purposes of the Illinois Rules of Professional Conduct, a lawyer

cannot agree to keep confidential interpretations of the law.

This situation is distinguishable from one in which a lawyer agrees to keep confidential certain proprietary information such as manufacturing processes that may be disclosed to a lawyer while conducting a due diligence investigation of a third party corporation. In such a case, the industry-related proprietary information might be beneficial to other clients whom the lawyer represents in the same industry. This confidential information would not, however, be useful to the lawyer in performing legal services. Therefore, despite her confidentiality pledge, the lawyer could generally continue to represent other clients in the same industry because the lawyer's inability to use the industry-related proprietary information would not impede the lawyer's ability to perform legal services for those clients.

Two other issues are presented if Lawyer were to agree to keep the Accounting Firm's tax plan confidential. The first issue is whether the Lawyer's agreement not to divulge useful information to other clients constitutes an impermissible restriction on Lawyer's right to practice under Rule 5.6. Rule 5.6 provides that:

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of a relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

The Confidentiality Agreement to be signed by Lawyer does not fall squarely within Rule 5.6 because it is not part of a partnership or employment agreement pursuant to 5.6(a), nor is it "part of the settlement of a client controversy," under Rule 5.6(b). Nonetheless, the restrictions placed on Lawyer's ability to represent other clients similar to Client A in the future without facing a conflict of interest may go to the spirit of Rule 5.6.

ABA Formal Opinion No. 93-371 cited three reasons for Rule 5.6(b):

First, permitting such agreements restricts the access of the public to lawyers, who, by virtue of their background and experience, might be the very best available talent to represent these individuals....Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of future clients.

The third reason applies in the situation at hand. The terms of the Confidentiality Agreement would create a conflict between the interest of Lawyer's current Client A and those of future clients who

could benefit from the knowledge gained by Lawyer from Accounting Firm.

ABA Formal Opinion No. 00-417 also looked at Rule 5.6(b) in determining whether, under the ABA Model Rules of Professional Conduct, “a lawyer representing a party in a controversy may agree to a proposal by opposing counsel that settlement of the matter be conditioned on the lawyer not using any of the information learned during the current representation in any future representation against the same opposing party.” The Opinion concluded that such an agreement not to use information learned in the representation would effectively restrict the lawyer’s right to practice in violation of Rule 5.6 (b).

A final issue raised by Lawyer’s promise to hold Accounting Firm’s tax advice confidential is whether Lawyer’s actions could be considered assisting Accounting Firm in the unauthorized practice of law. Pursuant to Illinois Rule 5.5(a), a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. As noted in Comment (2) to Rule 5.5, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. We have assumed that the tax package to be disclosed by Accounting Firm to Client A contains legal advice or analysis. Although the services performed by accountants and lawyers do overlap in some areas, there is a line that can be crossed at some point at which the accountant’s services may become the “practice of law.” Unauthorized practice of law questions are very fact specific and therefore no opinion can be stated on that issue given the general facts presented in the inquiry.