



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-05
January 2012

Subject: Prospective Client; Conflict of Interest

Digest: It would be improper for a lawyer to represent a person adverse to a prospective client who had previously consulted with the lawyer in the same matter and disclosed significantly harmful information during the consultation absent both persons' informed consent.

References: Illinois Rule of Professional Conduct 1.18;

King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358 (4th Dist. 1977);

In re the Marriage of Newton, ___ Ill.App.3d ___, 955 N.E.2d 572 (1st Dist. 2011).

FACTS

Wife makes an appointment to see Attorney concerning a contemplated divorce. At Attorney's request, Wife fills out a "marital information sheet" giving certain biographical information for Attorney's use in preparing a petition for dissolution of marriage. A conference ensues at which time Wife and Attorney discuss Attorney's hourly rates, some of the biographical information provided, and the fact that Husband is having an affair with another woman. Attorney explains the law regarding her rights, including advice concerning support, visitation, maintenance and property rights. The consultation ends without a commitment to employ Attorney for further services.

One month later, Husband comes to see Attorney with the express purpose of hiring him as his attorney in the marital action involving Wife. The Attorney consults with Husband and learns that Wife, following her earlier discussion with the Attorney, hired another attorney to represent her. The Wife, through the other attorney, has now filed divorce proceedings against Husband. Issues with respect to child custody, financial and other matters will be contested.

QUESTION

Can Attorney represent Husband in view of the fact that Wife never indicated to Attorney that she wanted to hire him and, in fact, hired another attorney?

OPINION

Whether or not Wife indicated to Attorney that she wanted to hire Attorney, or in fact hired another lawyer, is not dispositive of the ethical issue presented by the above factual scenario. *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358 (4th Dist. 1977). Also not dispositive is the analysis, employed in *King*, of whether an attorney-client relationship arose between the prospective client and the lawyer. Under Illinois' 2010 RPC, the question presented in this inquiry requires an analysis under new RPC 1.18 ("Duties to Prospective Client").

Under RPC 1.18(a), Wife is considered to be a "prospective client." RPC 1.18(c) ("A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.") RPC 1.18(b), (c), and (d) further set forth the duties owed to these "prospective clients." The duties include restrictions on a lawyer's representation of persons adverse to a prospective client as well as prohibitions on the use of any information learned during an initial consultation.

The analysis of whether Attorney can represent Husband after previously consulting with Wife begins with RPC 1.18(c). This Rule establishes that it is a conflict of interest for a lawyer to represent a person with interests "materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in that matter." RPC 1.18(c). In the fact scenario presented above, the marital proceedings between Wife and Husband are clearly the same matter. In addition, as Husband and Wife are opposing parties in a contested divorce we believe their interests are materially adverse as well.

However, the analysis of what may be "significantly harmful" information to Wife (as a prospective client) may not be so clear. Neither the Rule nor its Comments provide any guidance on what constitutes the potentially disqualifying "significantly harmful" information. (Importantly, the Comments to the Rule do note that a lawyer may want to limit his or her initial consultation with a prospective client only to information sufficient to determine whether a conflict of interest may exist and also may condition conversations with a prospective client on that person's agreement, as long as its informed, that no information disclosed during the consultation will prohibit the lawyer from representing an adverse party. See RPC 1.18 Comment [3], [4], and [5].) Although no detailed facts are included in the inquiry, it appears that biographical information sufficient to prepare a petition for dissolution, knowledge about the Husband's affair, and information allowing Attorney to provide advice on a number of marital issues would likely fall within the realm of information that "could be significantly harmful." *Cf. In re the Marriage of Newton*, ___ Ill.App.3d ___, 955 N.E.2d 572 (1st Dist. 2011)(Attorney-client relationship formed after lawyer met with person for 1.5 to 2 hours and discussed information and issues related to

marriage and impending divorce). Nevertheless, this is a very fact specific question. If significantly harmful information was received, Attorney would be prohibited from representing Husband (subject to exceptions noted below). RPC 1.18(c) also makes it clear that the conflict would be imputed to all members of Attorney's firm.

Notwithstanding the existence of a conflict under RPC 1.18(c), two exceptions are available that might allow the representation to proceed. These exceptions apply even if significantly harmful information has been conveyed to the lawyer. Although facts to establish either exception are not provided in the inquiry, the exceptions are worth noting. First, under RPC 1.18(d)(1), the representation would be permissible if both the affected client and the prospective client give their informed consent to the representation. (Lawyers should take special note that "informed consent" is now a defined term at RPC 1.0(e). The definition imposes significant obligations on the lawyer to disclose to the client: all the facts and circumstances related to the particular situation; exploration of the material advantages and disadvantages of the action; and a discussion of available options and alternatives. See RPC 1.0, Comments [6] and [7].) Second, under RPC 1.18(d)(2), a partner of the lawyer receiving the information could represent a party adverse to a prospective client as long as: (1) the lawyer involved in the consultation was timely screened from the representation; and (2) the lawyer took reasonable measures to avoid exposure to disqualifying information.

Finally, regardless of whether RPC 1.18(c) or (d) would allow Attorney to represent Husband, Attorney owes Wife a duty under RPC 1.18(b) not to "use or reveal information" learned in the initial meeting with Wife. However, this duty can be waived if the Wife gives informed consent to its use or the information has become generally know. See RPC 1.9(c) and RPC 1.9 Comment [8].

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