



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-12
May 2012

Subject: Appearance of Impropriety, Conflict of Interest – Personal Interests;
Imputed Disqualification; Government Representation

Digest: A lawyer may not continue to represent a school district against which the lawyer’s partner has initiated an adverse proceeding. Recusal from consideration of the partner’s adverse proceeding will not remove the conflict of interest. However, the school board may give informed consent to the lawyer’s continued representation in unrelated matters if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation despite the conflict of interest. The notion of avoiding the “appearance of impropriety” is no longer a standard of lawyer professional conduct in Illinois.

References: Illinois Rules of professional Conduct, Rules 1.0(e), 1.0(i), 1.7, and 1.10(a)

ISBA Advisory Opinion Nos. 11-04 (March 2011); Opinion 09-02 (January 2009); Opinion 94-21 (March 1995); and Opinion 86-4 (August 1986)

Restatement Third, The Law Governing Lawyers § 122, Comment g (2000)

Schwartz v. Cortelloni, 177 Ill.2d 166, 685 N.E.2d 871 (1997)

In re Vrdyolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990)

Miller v. Norfolk & Western Railway Co., 183 Ill. App. 3d 261, 538 N.E.2d 1293 (4th Dist. 1989)

FACTS

The inquiring lawyer, a partner in a law firm, regularly represents a school district. Another firm partner has initiated a proceeding against the district to require it to send the partner's child to a private school for children with learning disabilities. The matter has been submitted to the State Board of Education for a due process hearing. The State Board's decision may subsequently be appealed to the Circuit Court by the losing party. The inquiring lawyer has excused himself from school board executive sessions when the partner's matter has been discussed. The school board is currently counseled regarding this matter by special counsel employed by a consortium of school districts to handle such disputes. Some members of the community have suggested that this situation creates an appearance of impropriety, requiring the firm to withdraw from any representation of the school district.

QUESTIONS

Two questions have been submitted by the inquiring lawyer:

1. May the lawyer continue to serve as counsel for the school district regarding matters other than the adverse proceeding initiated by his partner?
2. Must the lawyer resign as counsel for the school district to avoid the appearance of conflict of interest or impropriety?

OPINIONS

1. With respect to the first question, the relevant Illinois Rules of Professional Conduct are those dealing with conflicts of interest and the imputation of conflicts of interest. The general rule regarding concurrent conflicts of interest is Rule 1.7, which provides:

(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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(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.

The general rule regarding imputation of conflicts of interest is Rule 1.10(a), which provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

It appears from the inquiry that the lawyer's representation of the school district predated the partner's adverse proceeding. It also appears that the partner is acting *pro se* in the adverse proceeding. The partner's proceeding is "directly adverse" to the school district, a current firm client, which results in a conflict of interest under Rule 1.7(a)(1). For purposes of Rule 1.7(a)(1), it does not matter that the inquiring lawyer has excused himself from the school board's consideration of the partner's adverse proceeding or that the partner's adverse proceeding is unrelated to any other representation of the district by the firm. *See* Comment [6] to Rule 1.7 (a "lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated"). The partner's conflict is imputed by Rule 1.10(a) to every other lawyer associated in the firm. As a result, the inquiring lawyer may not continue representation of the district in any matter, unless there is informed consent as discussed below. *See* Comment [4] to Rule 1.7 (if conflict arises after representation has been undertaken, lawyer ordinarily must withdraw unless lawyer obtains informed consent).

If the inquiring lawyer's partner has retained other counsel not associated in the firm to handle the proceeding against the district, that fact would change the analysis, but not the ultimate result. In that situation, the inquiring lawyer himself would have a conflict under Rule 1.7(a)(2) with respect to the partner's adverse proceeding. As

explained in Comment [8] to Rule 1.7, a conflict exists if there is a significant risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer's other responsibilities or interests. Under the facts presented, it appears implausible that the inquiring lawyer could render detached, objective advice to the district regarding his partner's adverse proceeding. In a similar situation, ISBA Opinion 11-04 (March 2011) concluded that a lawyer's zeal in cross-examining his partner's spouse would be materially limited by loyalty to his partner, citing Comment [3] to Rule 1.10 (if loyalty to other firm lawyer materially limited representation, that personal disqualification imputed to other lawyers in firm). Because conflicts of interest are determined with respect to clients, rather than matters, recusal by the lawyer from school board discussions of the partner's adverse proceeding does not remove the conflict. Nor does the fact that the partner's adverse proceeding is unrelated to the firm's other work for the district resolve the conflict.

In this situation, however, Rule 1.7(b)(1) would permit the lawyer and the firm to continue representation of the school district in unrelated matters notwithstanding the conflict of interest if the inquiring lawyer reasonably believes that the firm will be able to continue to provide competent and diligent representation to the district in the unrelated matters, and both the school board and the lawyer's partner give informed consent, confirmed in writing. Rule 1.0(i) defines "reasonably believes" to denote that the "lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Prior ISBA opinions have also concluded that a lawyer's reasonable belief when seeking consent to a conflicted representation must be objectively reasonable under the circumstances. *See, e.g.*, ISBA Opinion 09-02 (January 2009); and Opinion 94-21 (March 1995).

Rule 1.0(e) defines "informed consent" as the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." In conflict situations, Comment [18] to Rule 1.7 further explains that the information required depends on the nature of the conflict and the nature of the risks involved.

If the school district is represented with respect to the partner's adverse proceeding by other counsel not associated with the lawyer's firm, then the school board's consent would not be prohibited by Rule 1.7(b)(3) because the matter does not involve the assertion of a claim by one client against another client represented by the lawyer [or firm] in the same litigation. As explained in Comment [17] to Rule 1.7, the prohibition applies when the lawyer seeks to represent clients who are aligned directly against each other in the same litigation or other proceeding before a tribunal. *See also Restatement Third, The Law Governing Lawyers* § 122, Comment *g(iii)* (2000) (for conflict to be nonconsentable, clients must be represented by same lawyer and aligned directly against each other in same litigation).

Although there is contrary authority in a few states, Illinois law permits public entities to consent to conflicts of interest of their counsel. *Miller v. Norfolk & Western*

Railway Co., 183 Ill. App. 3d 261, 538 N.E.2d 1293 (4th Dist. 1989); ISBA Opinion 94-21 (March 1995); and Opinion 86-4 (August 1986). From the facts given, the inquiring lawyer does not appear to be a member of the school board, and therefore would not be subject to *In re Vrdolyak*, 137 Ill.2d 407, 560 N.E.2d 840 (1990), which concluded that even with full disclosure, a lawyer-legislator may not represent government employees adverse to the unit of government of which he was a member. 137 Ill.2d at 424, 560 N.E.2d at 846.

2. With respect to the second question, the notion of avoiding the “appearance of impropriety” is no longer a standard of lawyer professional conduct in Illinois. The concept originated with Canon 9 of the 1980 Illinois Code of Professional Responsibility, which stated: “A lawyer should avoid even the appearance of impropriety.” The 1980 Code was repealed and superseded in 1990 by the Illinois Rules of Professional Conduct, which were modeled after the 1983 American Bar Association Model Rules of Professional Conduct. See *Schwartz v. Cortelloni*, 177 Ill.2d 166, 179, 685 N.E.2d 871, 877 (1997). Neither the 1983 ABA Model Rules nor the 1990 Illinois Rules mentioned the “appearance of impropriety.” Comment [5] to 1983 ABA Model Rule 1.9 explained the absence of the “appearance of impropriety” rubric from the 1983 ABA Model Rules as the result of two concerns: first, it was little more than a matter of subjective judgment; and second, because “impropriety” was undefined, the term “appearance of impropriety” was question begging. (The 1990 Illinois Rules had no comments.) In *Schwartz*, the Illinois Supreme Court noted and adhered to the rejection of the “appearance of impropriety” standard by Comment [5] to 1983 ABA Model Rule 1.9. 177 Ill.2d at 179; 685 N.E.2d at 878.

Former Comment [5] to 1983 ABA Model Rule 1.9 was deleted as part of the 2002 revisions to the ABA Model Rules. As a result, there is no mention of the “appearance of impropriety” in the 2002 version of the ABA Model Rules or Comments. Likewise, there is no mention of the “appearance of impropriety” in the 2010 Illinois Rules of Professional Conduct or Comments, which were based on the 2002 ABA Model Rules and Comments. Given this clear legislative history, the “appearance of impropriety” is no longer a standard for professional discipline of lawyers in Illinois.

Finally, it should be noted that this opinion attempts to address only issues arising under the Rules of Professional Conduct. Illinois statutes, local ordinances, and other rules regarding conflicts of interest may be relevant to lawyers who represent, or appear before, public entities.

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