



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-13
May 2012

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

Digest: A lawyer may not continue to represent a plan commission or city council after the lawyer's partner has appeared before those bodies to oppose a zoning change. The lawyer's recusal from the plan commission's or city council's consideration of the partner's zoning matter will not remove the conflict of interest. However, the plan commission and city council 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. If the lawyer's partner represents others in the zoning matter before the plan commission or city council, the partner must disclose the representation and conform to the applicable rules regarding candor to a tribunal.

References: Illinois Rules of Professional Conduct, Rules 1.0(e), 1.0(i), 1.7, 1.10(a), and 3.9

ISBA Advisory Opinion Nos. 12-12 (May 2012); Opinion 11-04 (March 2011); Opinion 09-02 (January 2009); Opinion 94-21 (March 1995); and Opinion 86-4 (August 1986).

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

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

FACTS

The inquiring lawyer is a City Attorney and as such sits with and advises the City Council and City Plan Commission, including the rendering of legal opinions. A partner in the inquiring lawyer's law firm personally opposes a zoning change in the partner's neighborhood and has appeared and spoken in opposition to the change, both before the Plan Commission and Council.

QUESTIONS

Three questions are posed by the inquiring lawyer:

1. May the partner of the City Attorney appear personally or on behalf of clients before the Plan Commission or Council, both of whom are advised by the City Attorney?
2. May the City Attorney advise the Plan Commission and Council on matters in which a partner or associate advocates a particular position?
3. Must the inquiring lawyer resign as City Attorney to avoid the appearance of conflict of interest or impropriety?

OPINION

With respect to the first two questions, as a general matter, any person is entitled to appear or represent himself or herself pro se before a public body. However, if that person is also a lawyer associated in a law firm, the appearance could create a conflict of interest for the lawyer as well as other lawyers in the firm. The relevant Illinois Rule of Professional Conduct 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.

From the facts presented, it is difficult to determine whether the partner's opposition to the zoning change is "directly adverse" to the Plan Commission or the City within the meaning of Rule 1.7(a)(1). If the partner is attacking a zoning ordinance provision that has been enacted, then the partner would be acting "directly adverse" to the City, resulting in a conflict under Rule 1.7(a)(1). For purposes of Rule 1.7(a)(1), it does not matter if the inquiring lawyer excuses himself from Plan Commission or Council consideration of the partner's opposition or that the partner's opposition is unrelated to any other representation of the City by the firm. *See* Comment [6] to Rule 1.7 (lawyer may not act as advocate in one matter against a person the lawyer represents in some other matter, even when matters are wholly unrelated). The partner's conflict is imputed by Rule 1.10(a) to every other lawyer associated in the firm, and as a result, the inquiring lawyer may not continue representation of the City in any matter, unless there is informed consent as discussed below.

If the partner is appearing before the Plan Commission or Council only to advocate a particular policy position for the Plan Commission or Council to consider, then the partner would not be "directly adverse" to the law firm's clients (Plan Commission and City) within the meaning of Rule 1.7(a)(1). Nevertheless, if there is a significant risk that the lawyer's representation of either the Plan Commission or the City

would be materially limited by the lawyer's responsibilities to a third person (the partner) or by a personal interest of the lawyer (an interest in accommodating or not alienating the partner), then there would be a conflict of interest under Rule 1.7(a)(2). Comment [8] to Rule 1.7 explains that even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. Under the facts presented, there appears to be a significant risk of material limitation of the inquiring lawyer's representation of the Plan Commission or the City concerning the partner's zoning matter because it is unlikely that the lawyer could render detached, objective advice. 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. Because conflicts of interest are determined with respect to clients, rather than particular matters, recusal by the lawyer from discussions of the partner's opposition does not remove the conflict. Again, unless there is informed consent as discussed below, the lawyer must withdraw from any representation of the Plan Commission or City.

In this situation, however, Rule 1.7(b) would permit continued representation in unrelated matters notwithstanding the concurrent conflict of interest if the lawyer reasonably believes that the lawyer or the firm will be able to provide competent and diligent representation to the Plan Commission and the City, and each gives informed consent. Illinois 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).

The term "informed consent" is defined in Rule 1.0(e) 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 explains that the information required depends on the nature of the conflict and the nature of the risks involved.

Consent to the inquiring lawyer's conflict of interest by the Plan Commission and the City is permissible. 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 12-12 (May 2012); Opinion 94-21 (March 1995); and Opinion 86-4 (August 1986).

Even if the partner's opposition is considered to be a "litigation" matter, if the City is represented in that matter by other counsel not associated with the inquiring lawyer's firm, then consent by the Plan Commission and the City 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). With respect to the third question, as explained in ISBA Opinion 12-12 (May 2012), the notion of avoiding the “appearance of impropriety” is no longer a standard of lawyer professional conduct in Illinois.

Although the subject was not raised by the inquiring lawyer, the law firm and the partner who opposes the zoning change should be mindful of Rule 3.9, which was added to the Illinois Rules of Professional Conduct in 2010. Rule 3.9 provides that a “lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c) and 3.4(a) through (c).” As explained in Comments [1] and [2] to Rule 3.9, legislative and administrative agencies have a right to expect lawyers to deal with them as they deal with courts, even if the rule subjects lawyers to regulations that are inapplicable to advocates before those agencies who are not lawyers. Comment [3] notes, however, that it does not apply to representation of a client in otherwise permitted lobbying activities. (The Illinois clarification regarding lobbying is not part of the ABA Model Rules comment.) If the partner in the situation presented appears before the Plan Commission or the Council to represent himself or others opposing the zoning change, then Rule 3.9 would apply to that representation.

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 the disclosure of the nature of any representation, as well as conflicts of interest, may be relevant to lawyers who represent, or appear before, public entities.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

© Copyright 2012 Illinois State Bar Association