ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5, 7.1, 7.2, and 7.3. 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. 86-16
May 13, 1987

Topic: Client contact and division of fees upon withdrawal of associate from firm

Digest: A departing associate and the firm may both seek the consent of the associate's clients to continued representation. Fees earned during the associate's employment by the firm should be divided according to the employment agreement, but that agreement may not require sharing of fees earned subsequent to withdrawal.

Ref.: Rules 2-101, 2-103 and 2-107
ISBA Advisory Opinion Nos. 84-15, 84-13, 725, 432
CBA Opinion No. 83-2
ABA DR 2-108(A)
ABA Model Rule 5.6
Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied, 442 U.S. 907 (1979).
Corti v. Fleisher, 93 Ill.App. 3d 517, 521 (1981).
Gray v. Martin, 663 P.2d 1285, 1290 (Or.App. 1983).
Dwyer v. Jung, 336 A.2d 498 aff'd 348 A.2d 208 (N.J. 1975)

FACTS

Several questions have been raised with respect to the anticipated withdrawal of an associate from a law firm. The inquiry from the firm states that the associate has entered into an agreement at the beginning of his employment which provided that the associate would surrender all future business referred to the associate by old or new clients of the associate where such referrals were made after the employment date.

QUESTIONS

The firm now inquires whether the employment agreement would be an ethical limitation or otherwise preclude the associate from continuing to represent the associate's clients if those clients wished to continue such representation after his withdrawal from the firm. With respect to communications with such clients, the firm asks whether the associate may seek consent to his continuing representation, and if so, whether there are any restrictions on such communications. The firm also inquires whether it may attempt to solicit the business of those clients, and if so, whether any restrictions apply to the firm's communications. Finally, the firm asks whether it may attempt to collect fees from the clients or the associate after the associate's departure, where all legal work was done by the departing associate and the matters involved in the associate's pre-employment clients or post-employment referrals.

OPINION

Our response to these inquiries is restricted to the ethical issues which the proposed conduct of the parties presents under the Illinois Code of Professional Responsibility. We note that the Illinois code has incorporated neither Disciplinary Rule 2-108(a) of the American Bar Association Model Code of Professional Responsibility (1969) nor the successor Rule 5.6 of the American Bar Association Model Rules of Professional Conduct (1983), which provide that except for an agreement concerning benefits upon retirement, a lawyer shall not participate in making an employment agreement that restricts the right of a lawyer to practice after termination of the relationship. The Supreme Court Committee Commentary to Illinois Rule 2-107 notes that this ABA provision was "deleted on the grounds that the common law relating to restrictive covenants is sufficient to handle the problem, and that lawyers should not be subject to disciplinary action for entering into such agreements." We express no opinion as to the validity of the employment agreement as between the firm and the associate under the common law relating to restrictive covenants, nor doe we express any opinion whether the proposed conduct of the parties might constitute interference with existing contractual relationships involving the associate, the firm, and the clients in question. See, e.g., Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied, 442 U.S. 907 (1979).

With respect to the firm's first inquiry, the informed choice of each client will govern who continues to represent that client, notwithstanding the terms of the employment agreement. Corti v. Fleisher, 93 Ill.App. 3d 517, 521 (1981); Gray v. Martin, 663 P.2d 1285, 1290 (Or.App. 1983); Dwyer v. Jung, 336 A.2d 498 aff'd 348 A.2d 208 (N.J. 1975). Thus, the clients in question are free to choose to be represented by the departing associate, the firm, or neither.

With respect to communications with clients, we concluded in Opinion Nos. 432 and 84-13 that it is permissible under Rule 2-101 for an associate to advise clients for whose representation the associate was responsible of his departure from a firm. In its Opinion No. 83-2, the Chicago Bar Association also concluded that such contact was permissible under Rule 2-101. Further, in our

Opinion No. 84-13, we concluded that a departing associate may, consistent with Rule 2-103, inform clients that they have the right to continue with the firm or transfer their files to the departing associate. Because the firm also had an attorney-client relationship with the clients in question, the firm may itself contact such clients with respect to continuing their representation with the firm, and such contact would be permissible under Rule 2-103. Whether initiated by the departing associate or the firm, any private communications would be subject to the applicable standards of Rule 2-101 and 2-103 which require, for example, that such communications shall not contain any false or misleading statements.

With respect to the division of fees, we note that Rule 2-107(a) does not apply to the division of fees with a partner or associate of the firm. See Opinion No. 725. For that reason, fees earned while the associate was an employee of the firm are subject to division according with the terms of the employment agreement.

With respect to fees earned by a former associate subsequent to withdrawal from a firm, we concluded in Opinion No. 84-15 that an employment agreement which provided that a departing associate must, for a period of two years, remit to the firm a portion of all fees earned from any client who was a client of the firm at the time of the associate's withdrawal, violated Rule 2-107. As stated in Opinion No. 84-15, a law firm has no ethical or legal right to the continued patronage of any client, and attempts to require a division of fees without proportionate division of services or responsibilities are contrary to Rule 2-107 and thus are improper.

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