



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was WITHDRAWN as to Digest 1, and AFFIRMED as to Digests 2 and 3 by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6(a), 1.7, 8.4(f), 6.2(a), and 8.4. The portions of this opinion were 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. 90-25
March 9, 1991**

Topic: Conflict of Interest; Judicial Campaigns

~~Digest:1. It is improper for an attorney, whose firm represents an insurance company in most of the company's insurance defense work, to be appointed the administrator of a decedent's estate and settle a wrongful death claim with the insurance company, absent full disclosure to the heirs of the estate and to the insurance company and absent their consent to such appointment.~~

2. It is improper for attorneys to sign a surety bond on behalf of another attorney from the same firm, when the firm has been hired by the attorney to represent him in his capacity as administrator of a decedent's estate.

3. It is not necessarily improper for a judge to appoint an attorney as administrator of an estate, even though that attorney has made financial contributions to the judge's campaign committee, and another attorney from the same firm served on the judge's campaign committee when the judge sought to be elected to his present judicial post; whether the attorney should accept such appointment depends upon whether the appointment is likely to result in a violation of the Rules of Professional Conduct or other law, and ultimately

whether the acceptance of the appointment will be prejudicial to the administration of justice.

Ref.: Illinois Rules of Professional Conduct, Rules 1.6(a), 1.7, 3.5(h), 6.2(a), 8.4;
ISBA Opinion Nos. 802, 866, 85-11, 86-15, 87-6, 88-5, 89-3;
In re Estate of Nuyen, 111 Ill.App. 3d 216, 443 N.E.2d 1099 (2d Dist. 1982)
In re Estate of Phillips, 3 Ill. App. 3d 1085, 1099, 280 N.E. 2d 43 (2d Dist. 1972)

FACTS

The Trust Us Insurance Co. provides insurance coverage to a municipality located in central Illinois. This insurance coverage includes defense of the municipality in a wrongful death claim filed by the administrator of the estate of a deceased individual. The ABC Law Firm in central Illinois concentrates in insurance defense work and is employed by the Trust Us Insurance Co. for most of the company's insurance defense in central Illinois. However, it appears that ABC does not represent the Trust Us Insurance Co. in its defense of the wrongful death claim against the local municipality.

A dispute arose among the heirs and creditors of the decedent's estate regarding the capabilities of the estate's administrator. As a result, certain heirs and creditors filed a petition for removal of the administrator. The trial court granted the petition and suggested that a particular partner of the ABC Law Firm be appointed as successor administrator. Certain heirs objected to the partner's appointment as successor administrator and filed a notice to produce various information concerning the past business dealings between the partner, the ABC Law Firm, and the Trust Us Insurance Company. The partner refused to provide this information and the circuit court appointed the partner of the law firm as successor administrator over the heirs' objection.

Upon his appointment, the partner hired the ABC Law Firm to represent him in his capacity as administrator. The partner also filed a surety bond with respect to his appointment as administrator of the estate. This surety bond was secured by the signature of two of the partner's co-partners at ABC. Also in his capacity as administrator, the partner filed a petition to compromise the estate's wrongful death suit against the municipality based upon a settlement offer from the Trust Us Insurance Co. in its defense of the municipality.

The same circuit court judge has presided over both the probate action and the wrongful death suit. The ABC partner who was appointed administrator has made financial contributions in the past to the campaign committee of the circuit court judge in the judge's candidacy for seats on the circuit and appellate courts. In addition, another attorney of the ABC Law Firm served on the judge's campaign committee when the judge campaigned for his present judicial position.

QUESTIONS

- ~~1. Whether it is proper for an attorney, whose firm represents an insurance company in most of the company's insurance defense work, to be appointed administrator of a decedent's estate and settle a wrongful death claim with the same insurance company?~~
2. Whether it is proper to allow attorneys to sign a surety bond on behalf of another attorney from the same firm, when the firm has been hired by the attorney to represent the attorney in his

capacity as administrator of a decedent's estate?

3. Whether it is proper for a judge to appoint an attorney as administrator of an estate, when that attorney has made financial contributions to the judge's campaign committee, and another attorney from the same firm served on the judge's campaign committee when the judge sought to be elected to his present judicial post?

OPINION

~~I. With respect to the first question, the Committee notes that the relationship between an administrator and a decedent's estate is not generally one of an attorney to his client *per se*. In re Estate of Nuyen, 111 Ill. App. 3d 216, 443 N.E.2d 1099 (2d Dist. 1982). However, in his capacity as administrator of the decedent's estate, the partner of ABC owes a fiduciary duty to the heirs and creditors of the estate, and may be removed where there exists "a conflict of interest which interferes with the objective administration of the estate." In re Estate of Phillips, 3 Ill. App. 3d 1085, 1099, 280 N.E. 2d 43 (2d Dist. 1972). In order to preserve the integrity of the fiduciary duties owed by the administrator to the heirs and creditors of the estate, and in order to ensure respect for the ethical considerations underlying the Illinois Rules of Professional Conduct, the Committee concludes that the partner of ABC, in his capacity as administrator of the decedent's estate, is governed by the Illinois Rules of Professional Conduct in his relations with the heirs of the estate.~~

~~Illinois Professional Conduct Rule 1.7 provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to or materially limited by the lawyer's responsibilities to another client. If the lawyer reasonably believes that representation will not adversely affect or limit his relationship with another client, the attorney must nevertheless obtain the consent of each client following disclosure. "Disclosure" is defined in the Illinois Rules of Professional Conduct as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."~~

~~In light of Rule 1.7 the partner appointed administrator of the estate is not permitted to act as administrator if such appointment will be directly adverse to or materially limited by the interests of the Trust Us Insurance Company. In addition, if the partner reasonably believes that his appointment will not adversely affect or limit his relationship with the Trust Us Insurance Company or the heirs and creditors of the estate, the partner must obtain the consent to this appointment, following disclosure, from both the heirs of the estate and the Trust Us Insurance Company.~~

~~Some of the heirs of the estate objected to the partner's appointment as administrator of the estate. The partner refused to disclose information requested by the heirs regarding the involvement of the partner and the ABC Law Firm in their past representation of the Trust Us Insurance Company. Under this fact situation because the partner failed to provide disclosure to or obtain consent from the heirs under the wrongful death act, the Committee concludes that the partner's acceptance of the appointment violates Rule 1.7 of the Illinois Rules of Professional Conduct.~~

~~The partner's appointment as administrator of the estate is also governed by Rule 1.6(a), which states that a "lawyer shall not, during or after termination of the professional relationship with the client, use or reveal confidence or secret of the client known to the lawyer unless the client consent after disclosure." Numerous ISBA Opinions have noted the potential conflict of interest, and possible divulgence of client secrets or confidences, presented by circumstances analogous to the~~

instant matter.

~~For example, an attorney must be sensitive to the possibility that he "might be tempted or required to use confidential information obtained from the *** client," and the "lawyer must have no doubt as to [his] ability to exercise independent professional judgment on behalf of the client ***." ISBA Opinion No. 85-11; see also ISBA Opinion 88-5. Also, if the clients consent following full disclosure, "the adequacy of this representation must continuously be monitored, and if the circumstances become such that the adequacy of the attorney's representation on behalf of either client becomes less than obvious, he must withdraw from each such representation." ISBA Opinion No. 86-15. "Moreover, his disclosure to the clients prior to undertaking the representation must refer to the possible necessity of such subsequent withdrawal." Id. The ultimate inquiry is whether the rights of all clients are fully protected regardless of the outcome of the various claims involved. See, e.g., ISBA Opinion Nos. 87-6 and 89-3.~~

~~In the instant fact pattern, the partner's appointment risks that he might use confidential or secret information with respect to either the estate or the insurance company. The attorney appointed administrator cannot guarantee his full and adequate legal representation of the estate, or the complete protection of the rights of both the estate and the insurance company. Under these circumstances, the Committee concludes that the partner's appointment violates Rule 1.6.~~

II. With respect to the second question, in ISBA Opinion No. 802, the Committee concluded that it "is professionally improper for an attorney, representing the personal representative of an estate, to act as surety on the personal representative's bond." Relying upon disciplinary rules now codified in Illinois Professional Conduct Rules 1.7 and 1.8, the Committee concludes that the "combination of the potential for conflict, the guarantee of financial assistance and the business nature of the relationship must be avoided by attorneys representing the personal representative of an estate, and that the attorney for the personal representative of the estate is precluded from acting as surety on the bond of his client."

The Committee reaffirms its adherence to this conclusion in the instant matter.

III. The final question raises the issue of whether it is proper for a judge to appoint an attorney as administrator of an estate, when that attorney has made financial contributions to the judge's campaign committee, and another attorney from the same firm served on the judge's campaign committee when the judge sought to be elected to his present judicial post.

Illinois Professional Conduct Rule 3.5(h) permits an attorney to make financial contributions to the campaign committee of a judge, and to provide volunteer services to a political committee. In ISBA Opinion No. 866, the Committee determined that an "attorney who has contributed to and/or participated in a judge's election campaign is not precluded from appearing before that judge in subsequent judicial proceedings." Nevertheless, Rule 6.2(a) provides that an attorney shall decline appointment by a tribunal "for good cause, such as *** representing the client is likely to result in violation of these Rules or other law ***." Also, Rule 8.4(a)(5) stated that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice ***."

In light of these provisions of the Illinois Rules of Professional Conduct and the Committee's prior ethical opinion, the Committee concludes that it is not necessarily improper for a judge to appoint an attorney as administrator of an estate, when that attorney has made financial contributions to the judge's campaign committee, and another attorney from the same firm served on the judge's campaign committee when the judge sought to be elected to his present judicial post. However, the attorney should decline to represent a party if this appointment is likely to result in a violation of the Rules of Professional Conduct or other law, and if acceptance of the appointment will be prejudicial to the administration of justice. The instant fact pattern reveals that the attorney appointed administrator faces a conflict of interest as detailed in the previous sections of this Opinion. Given these circumstances, the Committee believes that the appointment was improper and should have been declined by the attorney.

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