



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**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.**

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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 1.3, 1.5, 1.7, 1.8, and 1.16(a)(2). See also ISBA Ethics Advisory Opinion 87-03. 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.**

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**Opinion No. 90-26  
March 9, 1991**

Topic: Conflict of Interest; Division of Fees

Digest: A lawyer has an obligation to determine the existence of possible conflicts of interest at the outset of the representation. Upon learning of a conflict of interest, a lawyer should immediately inform his or her client and if consent is not secured for continued representation, should immediately withdraw.

If a lawyer must withdraw from representation due to conflict of interest, he or she shall not be entitled to share in fees arising out of that matter. If, however, the representation is not based upon contingent fee, the lawyer shall not be entitled to any fee following the date upon which a conflict was determined or reasonably should have been determined to exist.

Ref.: 1990 Illinois Rules of Professional Conduct, Rules: 1.3, 1.5, 1.7, 1.8 and 1.16(a)(2)

## **FACTS**

Lawyer entered into an attorney-client agreement with client as to recovery for personal injuries incurred by client in a three-car collision. Liability is clearly upon the other two drivers, both of whom are insured. Driver A's insurance company A accepted liability, agreeing to pay for a portion of client's damage and injury. Driver B is insured by Company B which company the lawyer's firm

represents as to a large number of claims in the county involved. Some time after learning that Driver B was insured by Company B, attorney informed client of her firm's representation of Company B in other matters.

Lawyer pursued settlement with both insurance companies and informed insurance company B that should settlement not be achieved that the matter would be referred to another lawyer for suit.

Settlement of the claim with Company B was not achieved and three days prior to expiration of the Statute of Limitations Lawyer filed suit on behalf of client and wrote client informing client of the filing and that she was referring the matter to another lawyer because of the involvement of Lawyer's firm with Company B and also indicating that there would be a sharing of fees with the other lawyer based upon costs advanced and past and future work. Client retained a lawyer other than the one recommended by lawyer.

### **QUESTIONS**

1. When a lawyer learns of a conflict of interest between a client and herself arising from prior and continuing representation of the insurance company of the driver against whom the client has a claim, may the lawyer continue to represent the client prior to filing of suit?
2. Should a lawyer share in the division of lawyer's fees arising from an action in which the lawyer would have a conflict of interest if handling the action herself?

### **OPINION**

A lawyer should decline representation when he or she believes that a conflict of interest would exist. Rule 1.7(b) provides that a lawyer shall not represent a client where the representation of the client may be materially limited by the lawyer's responsibility to another client unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after disclosure. The continuing representation by the lawyer's firm of the insurance company insuring the party against whom a claim is made creates a clear conflict of interest for the lawyer. Under the present facts, the Committee does not believe that Client's interests could not be adversely affected.

In the instant facts, the lawyer apparently did not know the insurance company of Driver B at the time the attorney-client relationship was established. However, when the name of the insurance company was learned, lawyer should have immediately communicated with the client as required by Rule 1.4(b). Rule 1.16(a)(2) provides that the lawyer should withdraw when the lawyer knows or reasonably should know that continued employment will result in violation of the Rules.

Rule 1.3 provides that a lawyer should act with reasonable diligence and promptness in representing a client. Such promptness and diligence includes determining the existence of conflicts of interest as to both Rules 1.7 and 1.8 at the outset of the representation and continuing to monitor the potential of conflicts surfacing during representation. Failure to promptly inform the client of a conflict and failure to promptly withdraw upon learning of the conflict of interest results in a breach of the rules.

Rule 1.5(f) provides "...a lawyer shall not divide a fee with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which

discloses:

1. That a division of fees will be made;
2. The basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division; and
3. The responsibility to be assumed by the other lawyer for performance of the legal services in question."

Where a representation of a client would not be permitted due to a conflict of interest, the lawyer should decline representation of the client and if referring the matter to another attorney should not enter into an agreement in which the attorney would receive any fees arising out of the representation. To continue representation in the presence of a conflict places the lawyer in the position of proceeding at his or her own risk as to any services rendered after the point at which the lawyer knew or reasonably should have known of the existence of the conflict.

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