ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and 1.9. 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. 91-26
April, 1992

Topic: Conflict of Interest. Concurrent representation of several insurers in coverage issues while prosecuting subrogation claims against some of the insurers on behalf of the others.

Digest: An attorney may prosecute subrogation claims against an insurer whom he represents in other matters, only with the informed consent of all parties.

Ref.: 1990 Illinois Rules of Professional Conduct, Rules 1.7(a), (b), (c) and 1.9
ISBA Opinions on Professional Conduct Nos. 829, 90-3, 90-30 and 90-31.
Westinghouse Electric Corp. v. Gulf Oil Corp. (7th Cir. 1978), 588 F.2d 221, 225.
Analytica, Inc. v. NPD Research, Inc. (7th Circ. 1983), 708 F.2d 1263, 1266.

FACTS

The inquiring attorney represents several insurance companies in matters involving contested questions of coverage under homeowners and commercial property insurance. He also represents some of the same companies in subrogation litigation. From time to time, the subrogation claims asserted by some of his insurer clients are asserted against persons indemnified by other companies whom he also represents. "Generally, although not always" the insurers conduct subrogation defense through personnel other than those with whom the attorney deals while advising and representing those companies in resolving coverage questions.

In the past, the attorney has proceeded on the premise that no conflict is presented as long as the subrogation cases arise out of incidents other than those involved in the coverage issues. In light of

Emerging Conflict of Interest Issues, 79 Ill. Bar J. 628 (Dec. 1991), the attorney asks whether his activities create a conflict of interest.

QUESTION

May an attorney who advises or represents an insurance company on disputed questions of policy coverage assert a subrogation claim against that company's policyholder on behalf of a different insurer?

OPINION

The facts present a prima facie conflict of interest. In effect, the attorney is asserting claims against current clients. Those claims involve events which the attorney has received no information from the subrogation defendant insurer. In any given case, however, the attorney's prior advice on a disputed question of coverage may have an impact on the insurer's reaction to a subrogation claim. Moreover, in the course of representing the subrogation defendant insurer in other matters, the attorney has acquired information concerning business practices and philosophies which would be useful in negotiating settlements of such claims. The provisions of Rule 1.9 which prohibit such actions with respect to former clients, apply with equal effect to current clients.

Another aspect of the problem is the possibility that the attorney's exercise of professional diligence in a subrogation matter might be compromised by his unwillingness to strain his relationship with the defendant insurer. See, ISBA Opinions No. 829 (1983).

Prior opinions have made it clear that the possibility of a conflict is sufficient to preclude multiple representation, even if an actual conflict has not developed. ISBA Opinion 90-3. Where an attorney's opponent has been his client in other matters, "doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." Westinghouse Electric Corp. v. Gulf Oil Corp. (7th Circ. 1978), 588 F.2d 221, 225. If in prosecuting the subrogation cases the attorney would find useful information obtained from the defendant insurer in other contexts, "it is irrelevant whether he actually obtained such information and used it against his former client." Analytica, Inc. v. NPD Research, Inc. (7th Circ. 1983), 708 F.2d 1263, 1266.

Our prior opinions, however, establish with equal force the proposition that the informed consent of a competent client can waive a conflict where the circumstances justify the attorney's belief that his representation will not be affected adversely. See ISBA Opinion Nos. 90-30 and 90-31. In this case the attorney's clients are sophisticated business organizations with ample alternative access to legal advice. The attorney's obligation is to communicate to all clients "information reasonably sufficient to permit the client to appreciate the significance of the matter in question." (See definition of "Disclose" in the Terminology section of the Illinois Rules of Professional Conduct.) The discharge of that obligation in the context of this inquiry should present only a minimal challenge.

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