



**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 May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5, 1.6, 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.**

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**Opinion No. 92-22  
May 12, 1993**

Topic: Conflict of Interest; former client. Attorney Fees; discharged attorney.

Digest: 1. Use of any information relating to representation cannot be used by attorney to disadvantage of former client.  
2. Absent consent, confidences and secrets of client gained in the course of professional relationships cannot be disclosed.  
3. Use of client confidences and secrets as well as any information relating to the representation of a client, may be used or revealed by attorney to the extent necessary to defend accusation of wrongful conduct.  
4. Discharged attorney entitled to quantum meruit compensation.

Ref.: Illinois Rules of Professional Conduct, Rules 1.2, 1.5, 1.6 and 1.9  
ISBA Opinions on Professional Conduct, Nos. 91-5, 91-11 and 91-20  
King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358 (1977)  
Loggins v. Estate of Magid, 226 Ill.App.3d 147, 589 N.E.2d 603 (1992)

## **FACTS**

A client employed Attorney A to represent her in a workers' compensation case. After some time, the client hired new counsel, Attorney B, for the workers' compensation claim. After reviewing the

facts surrounding the injury on which the claim was based, Attorney B determined that a third party claim for personal injuries should have been filed. The statute of limitation, however, had run and no third party action could be instituted.

Attorney B then filed a legal malpractice claim on behalf of the client against Attorney A.

Attorney B tried the client's claim and obtained an award of permanent total disability, a decision that was affirmed by the Illinois Industrial Commission on appeal. Attorney C, respondent's attorney throughout this action, filed a Petition for Review under provisions of Section 19(h) of the Illinois Workers' Compensation Act contending that a change in circumstances warranted a review of the decision.

Attorney C has advised Attorney B that the petition is supported by photographs depicting the client performing physical actions which would be prohibited by the condition determined by the client's physician and on which client's successful claim had been based. Attorney B has learned that these photographs may have been taken by persons employed by Attorney A, presumably for the defense of the legal malpractice case. However, the facts do not disclose whether the photographs were taken by Attorney A prior to or following the termination of the attorney/client relationship.

### **QUESTIONS**

1. Under the foregoing circumstances, is the disclosure of photographs of the client a violation of the Rules of Professional Conduct?
2. Is an attorney who has been discharged by a client entitled to attorney fees for services performed prior to termination of the attorney/client relationship?

### **OPINION**

Rule 1.9, in pertinent part, states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter:

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(2) Use information relating to the representation to the disadvantage of the former client unless:

(A) such use is permitted by Rule 1.6....

Rule 1.6 prohibits an attorney, during or after termination of the professional relationship, from using or revealing a confidence or secret of the client without consent, subject to exceptions including confidences and secrets necessary to "defend the lawyer...against an accusation of wrongful conduct."

The proscription in Rule 1.9 applies to any "information relating to the representation" irrespective of whether or not that information was gained during the professional relationship.

This Opinion assumes that Attorney A had no knowledge that the client engaged in any fraudulent

conduct concerning her workers' compensation claim which would trigger the attorney's ethical responsibilities under Rule 1.2.

If Attorney A gained the information about the photographs in the course of the professional relationship, Rule 1.6 prohibits A from using or revealing them as confidences or secrets likely to be detrimental to the client, unless the client consented after disclosure. However, A may use the photographs without client consent to the extent necessary to defend the malpractice claim under the aforementioned exception to the general exception to the general application of Rule 1.6.

Rule 1.9 also precludes Attorney A from using the photographs even if taken after the professional relationship was terminated since they are clearly related to the representation from the client by A and would be to the disadvantage of the client in the 19(h) proceeding. However, if A gained knowledge of the photographs after his discharge by the client, he could use them to the extent necessary to defend the malpractice claim pursuant to the exception in Rule 1.9 quoted above for disclosures permitted under Rule 1.6 without client consent.

This opinion is consistent with the views expressed in Advisory Opinions 91-5, 91-11 and 91-20.

Opinion 91-5 involved an executor's attorney who formerly represented a creditor on a claim against a legatee of the estate now being garnished by the same creditor represented by independent counsel. The Opinion expressed the view that representation of the executor concerning the garnishment is prohibited as being substantially related to the representation of the judgment creditor and might involve the use of information to the disadvantage of the former client unless the judgment creditor consented after disclosure.

Opinion 91-20 expresses the same view, citing King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358.

Opinion 91-11 involved an attorney's representation of a client negotiating a lease against a real estate development firm formerly represented by the attorney in lease negotiations. In addition to the application of Rule 1.9 to that factual situation, the Opinion states that those facts could be a violation of Rule 1.6 inasmuch as the attorney acquired confidences in negotiating leases for his former client which could not be used or revealed without the consent of the former client.

A discharged attorney is entitled to be compensated on a quantum meruit basis for the services rendered prior to the termination of employment. Loggins v. Estate of Magid, 226 Ill.App.3d 147, 589 N.E.2d 603 (1992). Under the facts presented here, no opinion is expressed concerning the effect of any violation of Rules 1.6 or 1.9 upon Attorney A's attorney fee claim. See, e.g. King v. King, (supra) 367 N.E.2d 1358, 360, which states in reversing an attorney fee award:

An attorney cannot recover from the party that he has wronged for legal services where he has represented adverse, conflicting, and antagonistic interests in the same litigation." (Citing cases)

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