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 1.9 and 5.6. 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. 94-15
January, 1995

Topic: Conflict of Interest - Former Client

Digest: (1) A lawyer who has formerly represented a client in a divorce action, child support and visitation proceedings and multiple real estate transactions, one of which was jointly for the former client and current client has a conflict of interest preventing representation of the current client in a divorce action against the former client.
(2) A party seeking the disqualification of former counsel bears the burden of proving that present and prior representations are substantially related.
(3) Where prior representation is substantially related to the current action, there is an irrebuttable presumption that confidential information was disclosed, thereby precluding representation of the current client absent consent of the former client.

Ref.: Illinois Rules of Professional Conduct Rules 1.9 & 5.6
ISBA Opinion Nos. 110, 363, 86-6, 91-20 & 90-5
LaSalle National Bank v. Triumvera Homeowners Association, (1st Dist. 1982) 109 Ill. App. 3d 654, 65 Ill. Dec. 218, 440 N.E.2d 1073
Hannan v. Watt, (1st Dist. 1986) 147 Ill. App. 3d 456, 100 Ill. Dec. 945, 497 N.E.2d 1307
Duncan v. Merrill, Lynch, Pierce, Fenner & Smith (1981 5th Cir.), 646 F.2d 1020, cert. denied, 454 U.S. 895, 102 S.Ct.394, 70 L.Ed.2d 211
Weglarz v. Bruck (1st Dist. 1984) 128 Ill. App. 3d 1, 83 Ill. Dec. 266, 470 N.E.2d 21
Skokie Gold Standard Liquors v. Joseph E. Seagram & Sons, Inc., (1st Dist. 1983) 116 Ill.App.3rd 1043, 72 Ill. Dec. 551, 452 N.E.2d 804

In re: Corrugated Container Antitrust Litigation, (5th Cir. 1981) 659 F.2d 1341

FACTS

Attorney A represented Client B (wife) in a dissolution of marriage action filed against her husband. Client B and the husband entered into a settlement agreement wherein Client B was awarded certain real estate (Lot D) and a judgment of dissolution of marriage was entered based on the agreement. Attorney A's representation of Client B ended after the entry of that judgment.

Subsequently, Client B hired Attorney A to represent her in a post-judgment matter regarding child support and visitation, presumably involving her former husband. These issues were finally resolved and Attorney A's representation on the post-judgment matters ended. Also during this time, Attorney A was hired by Client C to represent him in a dissolution of marriage action against his wife. Settlement was reached and judgment entered.

Subsequently, Client B married Client C. After the marriage, Client B sold the real estate (Lot D). Client B hired Attorney A to represent her in the sale of this Lot D with the usual duties, such as preparing closing documents and attending the closing.

Client B and Client C, as husband and wife, hired Attorney A to represent them in the purchase of another piece of real estate (Lot E), with the usual duties, such as reviewing the title commitment and closing documents as well as attending the closing.

Attorney A had no personal knowledge of whether any of the proceeds paid to Client B from the sale of Lot D was used to purchase Lot E, or what bank account was used to hold these funds. Attorney A has only a general recollection of a conversation with Client B and Client C after their marriage that some of the sale proceeds from Lot D were used to purchase Lot E.

Some years later Client C wishes to hire attorney A to represent him in a dissolution of marriage action against Client B who has now hired counsel of her own, Attorney F. One of the issues in this dissolution action is the division of the equity in Lot E.

Attorney F claims that Attorney A cannot ethically represent Client C in this dissolution action because of an alleged conflict of interest.

Attorney A claims that there is no similarity of facts, circumstances or legal issues of the previous representation of Client B which are involved in the current representation of Client C. Additionally, Attorney A asserts that he obtained no confidential information in his prior representation of Client B which would be relevant or contrary in the representation of Client C.

QUESTION

Whether a lawyer who has formerly represented a client in a divorce action, child support and visitation proceedings and multiple real estate transactions, one of which was jointly for the former client and current client, may represent the current client in a divorce action against the former client.

OPINION

The Illinois Rules of Professional Responsibility provides in pertinent part as follows:

Rule 1.9 - Conflict of Interest: Former Client

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

(1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or

(2) use information relating to the representation to the disadvantage of the former client, unless;

(A) such use is permitted by Rule 1.6; or

(B) the information has become generally known.

Preliminarily, the Committee is eager to assist the members of the bar by expressing its opinions concerning the applicability of the Rules of Professional Conduct to various factual situations. It is important to remember, however, that the Committee, in so doing, relies only upon those facts stated in the submitted hypothetical questions. There is no dearth of written opinions under Illinois law pertaining to motions to disqualify counsel based upon a perceived conflict of interest against a former client of that attorney. In most such cases, pleadings, briefs, affidavits and exhibits were submitted to the courts together with testimony and argument at full-blown evidentiary hearings.

There is no blanket prohibition in the Illinois Rules of Professional Conduct barring a lawyer from representing a party in an action against a former client. The Committee has previously, however, cautioned lawyers undertaking such representation to do so only after careful analysis of the consequences such representation may have upon the property rights of the former client and, further, only when such representation would not result in the revelation of confidences or secrets which could be used to the advantage of the prospective client and the disadvantage of the former client. See ISBA Opinion Nos. 110, 363. Interestingly, Rule 5.6 prohibits a lawyer from making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties. Presumably, a party to a divorce agreement could not require either party's lawyer to agree not to represent any future spouse in a divorce action against them.

In LaSalle National Bank v. Triumvera Homeowners Association, (1st Dist. 1982) 109 Ill. App. 3d 654, 65 Ill. Dec. 218, 440 N.E.2d 1073, the court held that Canon 4 ("A lawyer should preserve the confidences and secrets of a client.") and Canon 9 ("A lawyer should avoid even the appearance of professional impropriety.") of the Illinois Code of Professional Responsibility provided a basis for attorney disqualification. The court found the relevant test is "Where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, that latter will be prohibited." LaSalle National Bank v. Triumvera Homeowners Association, (1st Dist. 1982) 109 Ill. App. 3d 654, 655, 65 Ill. Dec. 218, 225 440 N.E.2d 1073, 1080, (citation omitted). The rationale for such disqualification was to enforce the attorney's obligation of absolute fidelity to the client and to guard against the danger of inadvertent use of confidential information.

The Illinois Rules of Professional Conduct have now deleted any reference to the "appearance of impropriety" as an ethical test or standard. A court applying the substantial relationship test must carefully examine the factual context of both the previous and current representations to determine whether disqualification is required.

A party seeking the disqualification of counsel bears the burden of proving that present and prior representations are substantially related. Hannan v. Watt, (1st Dist. 1986) 147 Ill. App. 3d 456, 100 Ill.

Dec. 945, 497 N.E.2d 1307; Duncan v. Merrill, Lynch, Pierce, Fenner & Smith (1981 5th Cir.), 646 F.2d 1020, cert. denied, 454 U.S. 895, 102 S.Ct.394, 70 L.Ed.2d 211. In Hannan v. Watt, supra, the court found no reason to disturb the lower court's finding upon an evidentiary hearing that no substantial relationship existed between an attorney's prior representation and the current representation. In so doing, the court distinguished its prior holdings in Weglarz v. Bruck (1st Dist. 1984) 128 Ill. App. 3d 1, 83 Ill. Dec. 266, 470 N.E.2d 21 and LaSalle National Bank v. Triumvera Homeowners Association, supra. The court said:

> In Weglarz we held that, since the attorney sought to be disqualified not only helped set up the very business entities which were being challenged in the subsequent representation but also had represented both the plaintiff and defendant jointly in establishing the entities, the subsequent action attacking those entities was substantially related to the prior representation. Similarly, in LaSalle National Bank we concluded that the disqualification of counsel was warranted where the issues and clients were identical in the two adverse representations...
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> In order for disqualification to be warranted, plaintiffs needed to demonstrate precisely how the subject matters of the prior representations are connected with the matters of the pending merger. Plaintiffs, however, instead showed only a similarity in the type of proceedings involving the previous and current mergers. A mere similarity in types of proceedings does not establish a substantial relationship. (citation omitted) Hannan v. Watt, 100 Ill. Dec. 945, 951.

There are conflicting standards stated in the case law applicable to disqualification of counsel. On the one hand, the court has held that any doubts raised by conflict of interest issues should be resolved in favor of attorney disqualification. Skokie Gold Standard Liquors v. Joseph E. Seagram & Sons, Inc., (1st Dist. 1983) 116 Ill.App.3rd 1043, 72 Ill. Dec. 551, 452 N.E.2d 804. On the other hand, the court has also held that disqualification of counsel serves to destroy attorney-client relationships by effectively preventing a party from freely retaining counsel of choice and, as such, is regarded as a drastic measure which the courts should approach with continence and grant only as a last resort. Hannan v. Watt, supra.

In Skokie Gold Standard Liquors v. Joseph E. Seagram & Sons, Inc., supra, the court reviewed the federal decisions which had uniformly held that once it was shown that a prior representation was substantially related to the action in question, there is an irrebuttable presumption that confidential information was disclosed. The rationale for this rule, which the Skokie Gold Standard Liquors court found persuasive, is found in In re: Corrugated Container Antitrust Litigation, (5th Cir. 1981) 659 F.2d 1341, 1347, where the court stated:

> ***[I]t is evident that the presumption arising under the substantial relationship test is not the ordinary type of presumption that is intended to obviate the need for proof where proof would be difficult. Instead, this presumption is intended to prevent proof that would be improper to make. The presumption avoids compelling the former client to prove the very things that he seeks to keep confidential. If the presumption were rebuttable, that is, if the attorney could attempt to prove that he did not recall any disclosure of confidential information, or that no confidential information was in fact disclosed, this would also defeat the purpose of keeping the client's secrets confidential. The confidences would be disclosed during the course of rebutting the presumption by the attorney, or if the presumption was considered rebutted, the client might again be put into the anomalous position of having to show what confidences he entrusted to his attorney in order to prevent those confidences from being revealed. We conclude the presumption of disclosure is not susceptible of rebuttal by proof. Skokie Gold Standard

Liquors v. Joseph E. Seagram & Sons, Inc., 72 Ill. Dec. 551, 560.

Therefore, there is no necessity for any inquiry into issues concerning whether or if confidences or secrets were disclosed. The crux of the analysis is simply whether a current matter is substantially related to the former matter.

This Committee has previously opined that a law firm may not represent a spouse in a dissolution proceeding against a former divorce client where the outcome could adversely affect the former client's property obtained in the original divorce proceedings. ISBA Op. 86-6. Additionally, the Committee has also expressed its opinion that an attorney should not undertake representation of a husband in a divorce action where one month earlier the same attorney had interviewed the wife as a potential client, explaining her rights under the law, attorney's hourly rates and other information, even where the consultation ended without a commitment to employ that attorney. ISBA Op. 91-20. Lastly, this Committee has also expressed its opinion that a lawyer is prohibited from
representing a husband in a divorce action where that lawyer had previously represented the husband and the wife in other joint matters. ISBA Op. 90-5.

Inasmuch as the facts related in the hypothetical question coincide with the former opinions of this Committee, we find a violation of Rule 1.9.

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