



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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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 1.6 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. 98-01  
July, 1998**

Topic: Conflict of Interest; Confidentiality

Digest: Lawyer may represent a beneficiary of a trust in an action against the trustee even though lawyer had previously represented trust, beneficiary and trustee in condemnation suit involving trust property.

Ref.: Illinois Rules of Professional Conduct Rules 1.6, 1.9.  
Schwartz v. Cortelloni, et. al. 226 Ill.Dec. 416, 177 Ill.2d 166, 685 N.E.2d 871, (1997).  
LaSalle National Bank v. County of Lake, 703 F.2d 252 (7<sup>th</sup> Cir. 1983).  
First National Bank v. St. Charles National Bank, 105 Ill. Dec. 739, 152 Ill.App.3d 923, 504 N.E.2d 1257 (1987).

## **FACTS**

Beneficiary of trust seeks to retain lawyer to represent her in breach of fiduciary duty claim against Trustee. The Beneficiary's husband created the trust by his will. Twelve years earlier the lawyer had represented the trust in a condemnation proceeding involving real estate owned by the trust. In that action the Trustee paid the lawyer's fees and costs with trust funds. Also, the lawyer filed an appearance for all defendants, including the Beneficiary and the Trustee. The Trustee retained his own lawyer to represent him personally and as Trustee.

The Beneficiary's breach of fiduciary duty claim does not challenge the Trustee's action in the condemnation proceeding. Rather, she seeks an accounting for trust property and damages for improper conduct by the Trustee. The Trustee agrees that (1) the lawyer has never represented the Trustee personally; (2) the lawyer's prior representation was for the benefit of the trust and Beneficiary; (3) the lawyer never received confidential communications from the Trustee; and (4) the Trustee never used his personal funds to pay the lawyer.

## QUESTION

Does the lawyer's prior appearance for the Trustee in the condemnation action preclude the lawyer's representation of the Beneficiary in her action against the Trustee?

## OPINION

Although the Trustee may have been only a nominal defendant in the condemnation action, the lawyer's appearance on the Trustee's behalf in that action resulted in the formation of a lawyer-client relationship. Rule 1.9(a), Conflict of Interest: Former Client, states:

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.

Under Rule 1.9 the lawyer is prohibited from representing the Beneficiary in her action against the Trustee, only if the matters involved in the two representations are the same or substantially related. *Schwartz v. Cortelloni, et al.*, 226 Ill.Dec. 416, 177 Ill.2d 166, 685 N.E.2d 871 (1997). In *Schwartz*, the Illinois Supreme Court adopted the three-part inquiry set forth in *LaSalle National Bank v. County of Lake*, 703 F.2d 252 (7<sup>th</sup> Cir. 1983). In this inquiry the court must (1) make a factual reconstruction of the scope of the former representation; (2) determine whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters; and (3) consider whether the information is relevant to the issues raised in the litigation pending against the former client.

In the facts presented by this inquiry, the scope and nature of the lawyer's prior representation were limited to the trust's real estate subject to the condemnation proceeding. The lawyer may have gained confidential information regarding the trust property in general. However, because the Beneficiary is not contesting the Trustee's activities in connection with the condemnation, such information does not appear to be relevant to the Beneficiary's claim against the Trustee. *Schwartz, supra* (Lawyer who had represented the guardian of defendant 40 years earlier in connection with the sale of real estate owned by the guardianship's estate was not precluded from representing

plaintiff in partition action against real estate retained by defendant.); First National Bank v. St. Charles National Bank, 105 Ill. Dec. 739, 152 Ill.App.3d 923, 504,N.E.2d. 1257 (1987) (Although lawyer had represented defendant in her business and learned confidential information regarding her assets, court found no substantial relationship with lawyer's retention by plaintiff in foreclosure action against defendant's real estate. The court noted that the lawyer had not represented the defendant for five years and the composition of her assets had changed.)

Given, the limited scope and nature of the lawyer's prior joint representation of the Beneficiary and Trustee, and the fact that the proposed representation of the Beneficiary is not substantially related to the subject matter of that joint representation, the Committee concludes that the lawyer may represent the Beneficiary in her action against the Trustee.

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