



**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 1.7, and 4.3. 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. 98-06
January, 1999**

Topic: Unrepresented party, lawyer proceeding against in divorce, giving advice to; Conflict of interest; Representing opposing parties in litigation.

Digest: Lawyer may represent husband against wife in divorce where wife is not represented; but lawyer may not, at same time, represent husband and wife jointly in filing for bankruptcy.

Ref.: Illinois Rules of Professional Conduct, Rules 1.7, 4.3
ABA Model Rule 1.7
ISBA Advisory Opinions on Professional Conduct Nos. 88-03, 91-20, 93-14, 94-21, 95-05
Mindscape, Inc. v. Media Depot, Inc., 973 F.Supp. 1130, 1131-32 (N.D. Cal. 1997)
Flatt v. Superior Court, 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950, 955-56 (1994)
In re Marriage of Carlson, 101 Ill.App.3d 924, 428 N.E.2d 1005 (1981)
King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358 (1997).

FACTS

A lawyer is asked to represent a husband in an uncontested divorce. Thereafter, the lawyer is also asked to file for bankruptcy on behalf of both the husband and the wife.

QUESTIONS

1. Can the lawyer represent the husband in an uncontested divorce?
2. Can the lawyer represent the husband against the wife in the divorce and at the same time represent both husband and wife in filing for bankruptcy?

OPINION

1. Proceeding against and advising unrepresented spouse.

The lawyer may properly represent the husband in the divorce case where the wife is unrepresented, regardless of whether the divorce is contested or uncontested. Under these circumstances, the lawyer should recommend to the wife that she retain counsel. The lawyer should also make it clear to the wife, preferably in writing, that he cannot represent her in the divorce since he cannot represent opposing sides in litigation. A divorce, even when uncontested, is litigation. It involves the filing of a law suit and a judgment being entered against both parties.

Generally, the lawyer cannot represent a person and litigate against that person in the same law suit. The lawyer's fiduciary duty of loyalty to the client and Illinois Rule of Professional Conduct 1.7, Conflict of Interest, forbid representing opposing sides in the same suit. The Comments to ABA Model Rule 1.7(a), which is identical to Illinois Rule 1.7(a), specifically states that this rule prohibits representation of opposing parties in litigation. ABA Model Rules Annotated, 3rd Edition, Rule 1.7 Comment [7], p. 94. Case law is to the same effect. Mindscape, Inc. v. Media Depot, Inc., 973 F.Supp.1130, 1131-32 (N.D.Cal. 1997); Flatt v. Superior Court, 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950, 955-56 (1994). Thus, the lawyer cannot represent opposing sides in even an "uncontested" divorce. Consent by the wife cannot make such joint representation of opposing sides in the same case proper.

If a lawyer consults with one spouse about a divorce but is not retained, that lawyer generally cannot represent the other spouse in a subsequent divorce; however, if the first spouse consents after full disclosure, such representation is permissible. See King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358 (1977); ISBA Opinion No. 91-20 (lawyer who interviewed wife in connection with divorce but was not retained cannot represent husband against wife in divorce, without wife's consent after full disclosure).

In addition, a lawyer for one spouse in a divorce may not give legal advice to an unrepresented spouse in the case on the effect or implications of the divorce or documents generated by it, nor may the lawyer imply to the unrepresented spouse that the lawyer is disinterested in the matter. See Illinois Rules of Professional Conduct 4.3, Dealing with Unrepresented Persons; ISBA Opinion 88-03 (improper for lawyer for one spouse to give legal advice to unrepresented spouse); ISBA Opinion 93-14 (lawyer may communicate with unrepresented person but should dispel inference lawyer is disinterested). Rule 4.3 further provides that if the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, "the lawyer shall make reasonable efforts to correct the misunderstanding."

If the wife declines to obtain counsel to represent her in the divorce, it is prudent for the husband's lawyer to suggest in writing to the wife that she at least retain a lawyer to review any settlement or other documents that she will be asked to sign or that will be filed with the court.

The lawyer should also take care that any settlement agreement with an unrepresented spouse is not so one sided that it can later be set aside as unconscionable. See In re Marriage of Carlson, 101 Ill.App.3d 924, 428 N.E.2d 1005 (1981).

2. Husband's lawyer in divorce case also representing husband and wife in contemporaneous bankruptcy filing

A lawyer cannot properly represent the husband in a divorce from the wife and at the same time represent both the husband and the wife in filing for bankruptcy.

Illinois Rule of Professional Conduct 1.7 provides that a lawyer may not represent a client if the representation "will be directly adverse to the other client" unless (1) "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" and (2) "each client consents after disclosure." Whether it is reasonable for a lawyer to believe that representing both spouses in the bankruptcy will not adversely affect the relationship with either or both those same spouses in the divorce is determined by an objective standard. That standard is what a disinterested, reasonably prudent and competent lawyer would believe. ISBA Opinions 94-21 and 95-05. On the facts as stated, it is unlikely that a disinterested lawyer could reasonably conclude that suing or litigating against a wife whom the lawyer also currently represents in bankruptcy would not adversely affect the relationship with the wife and the lawyer's duty of loyalty to the wife. It is also likely that the lawyer's filing on behalf of the wife in bankruptcy would adversely affect the relationship of the lawyer with the husband, for whom he is suing the wife for divorce. See generally, Flatt v. Superior Court, 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950, 955-56 (1994). Because the proposed joint bankruptcy representation will likely adversely affect the lawyer's relationship with the clients and thus will not meet the requirements of Rule 1.7(a)(1), the question of whether the clients could also waive or consent to this conflict under Rule 1.7(a)(2) is not relevant.

In addition, since the parties are currently involved in a divorce, their interests in the bankruptcy proceeding are also likely to be so much in conflict, that consent after full disclosure would not likely be feasible, even if the "no adverse effect on the relationship" requirements of Rule 1.7(a)(1) could be met.

Accordingly, because of the fiduciary duty owed to the clients, the likely adverse affect of the joint representation on the clients under Illinois Rule 1.7, and the conflicting interests of the parties, the lawyer cannot properly represent the husband in the divorce case and at the same time represent both the husband and the wife in the bankruptcy. The problems with this kind of joint representation cannot be cured by consent after full disclosure.

Under some circumstances, a lawyer may represent an entity and litigate against that entity in an unrelated matter if the clients consent after full disclosure, where the suit will not adversely affect the relationship with the sued client. See ISBA Opinions 94-21 (not necessarily improper for lawyer to sue public body-client on unrelated matter if both clients consent after full disclosure) and 95-05 (not necessarily improper to sue City-client in unrelated matter where both clients consent after full disclosure). However, in this case the parties are individuals and it is not reasonable to conclude the lawyer's relationship with the husband and the wife would not be

adversely affected by the lawyer suing the wife in the divorce case while at the same time representing her and her husband in the bankruptcy filing.

If the lawyer is initially asked by the husband to represent both him and his wife in bankruptcy, the lawyer should satisfy himself that there are no conflicts, such as a contemplated divorce, that would prevent the lawyer from representing both parties in the bankruptcy. If the husband indicates he and his wife are contemplating divorce, the lawyer should inform the husband that he cannot represent them both in the bankruptcy unless the lawyer can reasonably conclude the representation will not adversely affect either client and each client consents after full disclosure. The lawyer should also discuss with the husband whether joint representation would adversely affect his relationship with the husband, and whether making the necessary full disclosure to the wife so that he may represent them both, will be in the best interests of the husband.

If, without a divorce on the horizon, both the husband and wife together initially come to see the lawyer to discuss the lawyer's joint representation in bankruptcy, and a conflict later develops, the confidential information the lawyer has obtained may prevent the lawyer from representing either party later if one party refuses to consent to the lawyer representing the other party. See generally, King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358 (1977).

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