ISBA Professional Conduct Advisory Opinion

Opinion No. 18-02
January 2018

Subject: Conflict of Interest; Imputed Disqualification; and Screening.

Digest: As a means to avoid imputation of a conflict within a lawfirm, screening is only available when a lawyer becomes associated with a firm. Screening is not available to insulate existing members of a firm from each other's potential conflicts.

References: Illinois Rules of Professional Conduct 1.2, 1.6, 1.9(a), and 1.10;

Illinois Supreme Court Rule 506(a)(2), 907(a);

735 ILCS 5/506 (2016)

H. Gunnarsson, *Guardian ad litem, Attorney for the Child, Child Representative: How's the System Working*. 95 Illinois Bar Journal 352 (July 2007)).

FACTS

In 2003, while a solo practitioner, Attorney A was appointed to serve as a guardian *ad litem* in a visitation matter. Attorney A states that he recalls no specifics of the case except that the children were very young and that he filed a report with the court. Attorney A states his file was destroyed in 2012. Attorney A met Attorney B in 2006, they married in 2007, and formed the A&B law firm in 2013. Attorney B has been contacted by the father to represent him for child custody and abatement of child support. The A&B law firm has a standing procedure to screen Attorney B from the work performed by Attorney A as a solo practitioner.

QUESTION

Is Attorney B disqualified from representing the father in the child custody and abatement of child support matter?

OPINION

The question is whether any conflict incurred by Attorney A should be imputed to Attorney B. In order to answer the inquiry, we must first address the role played by Attorney A and the ethical implications of serving as a guardian *ad litem*.

Attorney A was appointed as a guardian *ad litem* pursuant to Section 506 of the Illinois Marriage and Dissolution of Marriage Act. 735 ILCS 5/506 (West 2014). For matters ranging from visitation to child support, Section 506 gives a trial court the discretion to appoint an attorney to any of a trio of roles: attorney for a child, guardian *ad litem,* and child representative. A guardian *ad litem* under Section 506 serves primarily an investigative function. Section 506(a)(2) requires a GAL to investigate the facts, interview the parties and submit recommendations to the court.

The children were never the clients of Attorney A. Unlike an attorney for a child, a Section 506 GAL does not enter into an attorney-client relationship. Instead, the role of the guardian *ad litem* is guided by the lodestar of the "best interest of the child." This critical distinction has overriding implications for duties spelled out in the Rules of Professional Conduct. Unlike with a client, a GAL need not abide by the child's decisions. (See Rule 1.2). Nor is a GAL bound by a duty of confidentiality. (See Rule 1.6) The wishes of a child and respect for a child's privacy may both inform and mold the guardian *ad litem's* recommendations, but it is the best interests of the child and not the relation to the child as a client, that defines the role and responsibilities of the guardian *ad litem*. In direct contrast to an attorney for the child, a Section 506 GAL is obligated to disclose statements made by the child, or any of the parties, if it is in the best interest of the child. (*See H. Gunnarsson, Guardian ad litem, Attorney for the Child, Child Representative: How's the System Working).* 95 Illinois Bar Journal 352 (July 2007)).

As the duties of a Section 506 GAL are distinct from those in an attorney-client relationship, the application of the Rules of Professional Conduct to any conflicts is indirect. Notably, Rule 1.9(a) prohibits an attorney who has "formerly represented a client" from representing another person in the same or a substantially related matter. As GAL Attorney A did not "formerly represent a client," but the attempt to modify child custody and child support otherwise fits under Rule 1.9(a). Thus, analysis of the conflicts incurred by a GAL inevitably compares the duties of a GAL to those in an attorney-client relationship.

The Illinois Supreme Court has provided some guidance in this regard. Recognizing that custody proceedings should be child-focused and fair to all concerned, the Supreme Court implemented a set of Rules regarding Child Custody Proceedings. (Article IX, Rules 900 through 908, adopted February 10, 2006, effective July 1, 2006). Supreme Court Rule 907(a) incorporates the conflicts provisions in the Rules of Professional Conduct to the trio of roles under Section 506. Supreme Court Rule 907(a) provides:

> (a) Every child representative, attorney for a child and guardian *ad litem* shall adhere to all ethical rules governing attorneys in professional practice, be mindful of any conflicts in the representation of children and take appropriate action to address such conflicts. Supreme Court Rule 907(a)

Although the plain language of Supreme Court Rule 907(a) does not specifically state that serving as a GAL creates the same potential for conflicts as an attorney/client relationship, the Comments

clearly state that "Paragraph (a) sets out the responsibility of an attorney representing a child *in any capacity* to act in accordance with the rules of ethics and avoid conflicts of interest." (Emphasis added) Thus, Attorney A had a duty to avoid any representation that conflicted with his prior role as guardian *ad litem*.

Accordingly, Attorney A, practicing alone, would be prohibited by Rule 1.9(a) from representing either parent in a subsequent custody matter. The question then becomes whether this disqualification is imputed to Attorney B and, if so, whether a screening of Attorney A from any participation in the matter would negate such imputation of Attorney A's conflict to Attorney B.

Initially, we conclude that Attorney A's conflict would be imputed to Attorney B under the provisions of Rule 1.10(a), which provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

In the present instance, Attorney A's conflict does not stem from a personal interest on the part of Attorney A. Accordingly, under Rule 1.10(a), Attorney A's conflict would be imputed to other members of his firm, including Attorney B.

The question then turns to whether the screening provision contained in Rule 1.10(e) negates such imputation of Attorney A's conflict to Attorney B. Rule 1.10(e) provides as follows:

> (e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

To determine whether such screening provision would be applicable in the present instance, where it is sought to be applied to insulate a partner from disqualification due to a conflict on the part of an existing partner rather than a newly associated lawyer just joining the firm, requires discussion of the genesis of the screening provisions contained both in Illinois Rule 1.10 and in the corresponding ABA Model Rule, and the differences therein.

Illinois was in the forefront of jurisdictions enacting a screening provision to relieve attorneys in a law firm from disqualification by reason of a partner's conflict. As originally enacted, such Rule clearly applied only in the instance of a lawyer becoming newly associated with a firm. Such Rule was enacted in 1990, some twenty (20) years before the ABA enacted a screening rule applicable to private lawfirms. The Illinois Rule as enacted in 1990 provided, in relevant part, as follows:

(b) When a lawyer becomes associated with a firm (emphasis added), the firm may not represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the newly associated lawyer (emphasis added) has no information protected by Rule 1.6 or 1.9 that is material to the matter, or

(2) the newly associated lawyer (emphasis added) is screened from any participation in the matter.

Such Rule remained unchanged until its amendment in July, 2009, effective January, 2010. (To be later discussed)

In the interim, in August, 2001, the American Bar Association considered and rejected the proposal of a screening Rule which would for the first time under the Model Rules permit screening of private lawyers moving between lawfirms (the Model Rules did already provide a screening rule applicable to the movement of governmental employees or judges). The proposed screening provision would have provided a method to avoid the vicarious disqualification of a lateral lawyer's new firm from a representation adverse to a client of the lawyer's former firm.

In February, 2009, the ABA for the first time added a screening Rule applicable to remove imputation in a private lawfirm setting. The Rule as then enacted provided as follows:

(a) while lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless:

* * *

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom

As stated, Illinois then, in July, 2009, effective January, 2010, amended the Illinois screening provision contained in Rule 1.10. The amendment, however, did not adopt the language of the newly enacted ABA Rule, but instead adopted the Rule that had been presented and rejected in 2001. Such Illinois amendment, as previously recited, retained in paragraph 1.10(e) the language of the prior Illinois Rule, which was also the language contained in the rejected ABA

rule, that "when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9..."

Thus, the Illinois and Model Rules as to private lawfirm screening differ, with the ABA's Rule more broadly applying "while lawyers are associated in a firm," while the Illinois screening provision applies, as has always previously been the case in Illinois, "where a lawyer becomes associated with a firm." In fact, it should be noted that the general imputation language as set forth in Illinois Rule 1.10(a) contains the broader ABA imputation language applying "while lawyers are associated in a firm," while the screening provision of Rule 1.10(e) applies "when a lawyer becomes associated with a firm." Such is not a distinction without a difference.

Accordingly, we conclude that, notwithstanding the fact that ABA Model Rule 1.10's screening provision may apply more broadly to permit screening of attorneys subsequent to when they are joining the firm, the Illinois screening provision applies only when a newly associated lawyer is joining the firm. This being the case, the conflict of Attorney A in the present instance is imputed to Attorney B, and the screening provision of Rule 1.10(e) does not apply to relieve such conflict.
