



ISBA Professional Conduct Advisory Opinion

Opinion No. 21-03

May 2021

Subject: Conflict of Interest

Digest: A law firm seeking to represent the employees of an adverse corporate entity in matters unrelated to the current dispute may do so, but only if the firm determines it can comply with Rule 1.7 and the appropriate parties provide informed consent.

References: Ill. Sup. Court R. Prof'l Conduct 1.7- Conflict of Interest

Ill. Sup. Court R. Prof'l Conduct 1.1 – Competence

Ill. Sup. Court R. Prof'l Conduct 1.3 – Diligence

Ill. Sup. Court R. Prof'l Conduct 1.6 – Confidentiality

Ill. Sup. Court R. Prof'l Conduct 1.8(f) – Compensation from third party
ISBA Opinion No. 94-21

ABC Trans Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc., 90 Ill.App.3d 817, 832 (1st Dist. 1980).

Bartels and C&B Real Estate, LLC v. Clement, 2019 IL App (1st) 181034-U

Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill.App.3d 467 (3rd Dist. 1979)

District of Columbia Bar issued Ethics Opinion 309

The N.Y. County Lawyers' Ass'n Ethics Op. 724 (1998)

Los Angeles County Bar Ass'n Formal Op. 471 (1994)

Board of Professional Conduct of the Supreme Court of Ohio issued Board Op. 2019-1

FACTS

Attorneys A and B are in a firm together. Attorney A represents an individual client (Client 1) in an employment matter against an “entity.” Attorney B is contacted by the entity to handle immigration matters for individuals entering the United States to work for the entity. Attorney B informs the entity regarding the current employment dispute in which Attorney A is representing an individual adverse to the entity. Entity waives any potential conflict of interest.

QUESTIONS

Does the fact pattern described in the inquiry create a conflict of interest? If so, can the conflict be waived by the clients to permit Attorney B’s representation of the entity and/or employees in immigration matters?

DISCUSSION

If the attorneys can comply with Ill. Sup. Court R. Prof’l Conduct 1.7 and the appropriate parties execute conflict waivers and give informed consent, any conflict in this fact pattern could be waived and Attorney B could accept referrals from entity to assist the entity’s employees in immigration matters.

Ill. Sup. Court R. Prof’l Conduct 1.7 Conflict of Interest: Current Clients provides

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

I. The Firm’s Relationship with Client 1

Prior to approaching Client 1 with a written conflict waiver, the firm must examine whether a conflict exists under Ill. Sup. Court R. Prof'l Conduct 1.7(a) and, if so, whether the conflict is waivable under Ill. Sup. Court R. Prof'l Conduct Rule 1.7(b). While there is no direct conflict of interest under Ill. Sup. Court R. Prof'l Conduct 1.7(a)(1), a conflict does exist under Ill. Sup. Court R. Prof'l Conduct 1.7(a)(2) as the firm is already in litigation adverse to the entity, even though it is based on an unrelated employment dispute. Potentially, there is a significant risk that representation of Client 1 may be materially limited by the firm's representation of the entity and/or its employees. Comment 2 of the Rule lays out the first conditions the firm must consider. The firm must

1. Clearly identify the client or clients;
2. Determine if a conflict exists;
3. Decide if the conflict is consentable;
4. Consult with all affected clients to obtain consent.

Client 1 is a clearly identified client. Under the unique fact pattern presented, both the entity and its employees must be considered as separate clients.

The firm will be required to examine, under Comments 3, 6 and 8 to the Rule, whether it can adopt "reasonable procedures, appropriate for the size and type of the firm and practice" to overcome the conflict. The attorneys will be required to determine whether the firm's representation of Client 1 will be "materially limited" by the firm's representation of the entity and/or its employees in immigration matters. Would information the firm obtained in its representation of Client 1 hinder its representation of the entity and/or its employees in the immigration matters? Would the firm obtain information from the entity and/or its employees in the immigration matters that would jeopardize its relationship with Client 1? Would aggressive prosecution of Client 1's case affect Attorney B's relationship with the entity and/or its employees? Would Attorney A be resistant to filing sanctions motions against the entity for fear of jeopardizing the relationship with the entity or its employees? If Attorney A cannot vigorously represent Client 1 for fear of losing the entity's and/or its employees' business, then Attorney A may be in violation Ill. Sup. Court R. Prof'l Conduct 1.1 (competence) and Ill. Sup. Court R. Prof'l Conduct 1.3 (diligence) for failure to adequately represent Client 1. If Attorney A determines that he or she cannot diligently represent Client 1, then it is a nonconsentable conflict.

In conjunction with Comment 8, Comment 15 requires the firm to consider "whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest." If the circumstances dictate that the attorneys cannot reasonably conclude that they will be able to provide competent and diligent representation to both clients, then the rules would require Attorney B to decline from representing the entity and/or its employees. As an example of how other states have directly addressed this issue, The Board of Professional Conduct of the Supreme Court of Ohio issued Board Op. 2019-1, finding that an attorney in such cases may not withdraw from representing the current client to undertake the new, adverse client's representation even where the matters are unrelated.

Illinois ethics opinions and case law, both under the previous rules as well as the current rules, permit the proposed representation if the conditions above can be met. In ISBA Opinion No. 94-21, it was determined that it is not automatically improper for an attorney to sue a current client (public body) in an unrelated matter if both clients consent after full disclosure. If the municipality retained the law firm to defend it in a personal injury suit, the same law firm could represent a separate client against the municipality in an unrelated zoning matter. *ABC Trans Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill.App.3d 817, 832 (1st Dist. 1980).

While *Bartels and C&B Real Estate, LLC v. Clement*, 2019 IL App (1st) 181034-U is an unpublished opinion, there is guidance that can be taken. The court affirmed the circuit court judgment denying plaintiffs' motion to disqualify defendant's counsel. Clement began working at Bartels' company, SMS in the 1990's and ultimately became a 20% shareholder of SMS. While Clement was employed at SMS, Bartels and Clement each invested in a building purchase. C&B was formed to manage that investment. Bartels and Clement were both members of C&B. Clement was named as the managing member. A dispute arose over the management of the investments. Plaintiffs, Bartels and C&B Real estate LLC, filed suit against Clement alleging breach of contract, gross negligence and breach of fiduciary duty.

Plaintiffs filed a motion to disqualify defendant's counsel because he represented another company in a lawsuit against SMS which was still pending. Plaintiffs argued that because both Bartels and Clement were shareholders in SMS, the attorney had a conflict by suing SMS while appearing for Clement, individually in the pending suit.

The circuit court denied the motion finding that neither Bartels nor Clement were individually named in the suit, only SMS. The court held that the attorney was in the best position to determine if a conflict of interest. The attorney filed an affidavit stating that there was no conflict. As the opposing party cited no facts that a violation of Ill. Sup. Court R. Prof'l Conduct 1.7 existed, there was no basis to disqualify the attorney.

The Firm's Relationship with Entity

In the inquiry, as phrased, Attorney B has treated the entity as a client as the entity has waived any conflict regarding Attorney A's representation of Client 1. From the facts provided, the entity will be determining which immigration matters will be referred to Attorney B. While unstated, it is assumed that the entity will also be paying the firm for Attorney B's services, not the employees. The relationship between the firm and the entity is not clarified in the fact pattern, but appears to be limited to the referral of immigration matters to Attorney B. However, because Attorney A is representing Client 1 in a matter directly adverse to the entity, it is necessary that the entity waive this conflict. Depending on what conflict the entity waived, a new waiver may need to encompass the issues affecting Client 1 as well as the individual employee matters, including Attorney B's duty of confidentiality to each employee.

Under Ill. Sup. Court R. Prof'l Conduct 1.8(f) the entity is permitted to pay for the legal fees incurred by its employees in the immigration matters even if it is not directly the client in those matters. Attorney B must obtain informed consent from each of the employees, must ensure that the entity does not interfere with Attorney B's professional judgment in relation to the

representation of the employees and must also keep all information related to the representation of the employee confidential, including from revealing any information to the entity.

The Firm's Relationship with Entity's Employees

While the original inquiry makes no reference to Attorney B's duty to the employees whom Attorney B is representing in the immigration matter, each employee will become a client during the immigration process. Attorney B will be required to obtain confidential information from the employee in order to competently represent each employee in the immigration application process. The Alliance of Business Immigration Lawyers (ABIL), in its publication, Immigration Law and Procedure in a Nutshell (Rev. 2018), *Chapter 15: Ethical Dimension of Immigration Practice* advises that a dual representation situation is created in such cases. While this will most likely have no effect on or conflict with Attorney A's representation of Client 1, Attorney B has duties separate and apart from any conflict between Client 1 and the entity. As noted above, under Ill. Sup. Court R. Prof'l Conduct 1.8(f), Attorney B will owe each of the employees, as clients, the duty of confidentiality and may not reveal any information obtained in the representation of the employee to the entity. Because the firm is already in litigation with the entity, a conflict waiver must be obtained from each employee disclosing the conflict with Client 1.

II. The Conflict Waivers

Each client will be required to give informed consent to waive the conflict prior to Attorney B undertaking any representation of the entity's employees. Ill. Sup. Court R. Prof'l Conduct 1.7(b)(4) requires that each client give informed consent for the waiver to be valid.

Client 1 Waiver

Once the firm determines it can overcome the hurdles of Ill. Sup. Court R. Prof'l Conduct 1.7(b), it can then approach Client 1 with a waiver of the conflict of interest. Attorney A must "disclose all facts and circumstances which in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make a free and intelligent decision regarding the representation." *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill.App.3d 467, 473-74 (3rd Dist. 1979). The attorneys will also be required to assess whether Client 1 understands the nature of the proposed representation of the entity and/or its employees in the immigration matters and whether or not it will materially limit Attorney A's representation of Client 1.

The attorneys will also need to address whether, under Comment 22, the existing client can give informed consent and waive future conflicts as the immigration matters arise. The more specific and comprehensive the explanation of the future representation, the greater the likelihood the client will have the requisite information to make an informed decision to waive any future conflict. However, the comment also warns against "blanket waivers," stating that "if the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not likely that the client will have understood the material risks involved." For instance, Client 1 may be willing to give consent if he or she believes that the proposed representation of the entity's employees will be small in number or sporadic over the course his or her relationship with Attorney A. However, if the referrals become numerous, then Client 1 may decide that the firm's

relationship with the entity has become more important to the firm and may question whether the firm's continued representation of the employees is interfering with the representation of Client 1. A blanket waiver in this case would not be in Client 1's best interests.

The District of Columbia Bar issued Ethics Opinion 309 in which it opined that advance waivers are not prohibited by the Rules of Professional Conduct so long the waivers comply with the requirement of informed consent. Factors including the specificity of the circumstances surrounding the waiver as well as the sophistication of the client asked to provide the waiver may render waivers invalid. In D.C. Ethics Op. 265 the committee expressed doubts of the validity of such waivers where the "client is not a sophisticated consumer of legal services."

In 2000, the ABA's Ethics 2000 Commission stated that an advance waiver will probably not stand "unless it identifies the opposing party or at least a class of potential opponents, as well as giving the client sufficient information to appreciate the nature of the likely matter and its potential effect on the client." The opinion also advised that when each potential conflict in the future arises, the attorney should revisit the issue and make sure that the new client is also apprised of the conflict and can also submit a waiver. The N.Y. County Lawyers' Ass'n Ethics Op. 724 (1998) and Los Angeles County Bar Ass'n Formal Op. 471 (1994) have opined that advance conflict waivers are permissible, particularly where the waiving client is sophisticated. The firm will need to consider whether Client 1 may issue a blanket waiver to cover all potential immigration assignments from entity or whether Client 1 would be required to execute a separate conflict waiver for each matter as it arises. Best practices may require Client 1 to execute separate consent waivers for each employee referral sent by the entity.

Waiver by the Entity

As described in the fact pattern, the entity has already waived any conflict related to Attorney A's representation of Client 1. As the details of the waiver have not been provided, the only comment that can be made is that the waiver must provide sufficient information to apprise the entity of the issues so that entity can provide informed consent the firm representing Client 1 as well as its employees seeking immigration counsel from Attorney B.

Waiver by the Entity's Employees

Each employee must give informed consent to waive any conflicts with both Client 1 and the entity. As in the case of the waiver to be given by the entity, each employee must be given information described in this opinion that provides the employee sufficient information so that the employee can provide informed consent to the firm representing Client 1, as well as being informed of Attorney B's relationship with the entity.

CONCLUSION

Attorney B may represent the entity and/or its employees in immigration matters only if the representation of Client 1 will not be materially limited by the Attorney B's proposed representation of the entity and/or its employees. If the attorneys determine that the representation of Client 1 will be materially limited by the proposed representation of either the entity or its employees, then Attorney B must refrain from representing the entity and/or its employees.

Attorney B may represent the entity or its employees in the immigration matters so long as Attorney A and Attorney B reasonably believe that they will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent. Although the rules do not require a written waiver of the conflicts of interest, best practices would dictate that the attorney consider obtaining, from each affected client, a written waiver of the conflict.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

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