

CONFLICT OF INTEREST ISSUES IN EMINENT DOMAIN LITIGATION AND IN OTHER GOVERNMENT REPRESENTATION

IMITATION OF (SOMEONE'S) LIFE SCENARIOS

First and foremost, always keep in mind the initial statement in the Preamble to the Illinois Rules of Professional Conduct concerning a Lawyer's Responsibilities: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."

FACT PATTERN #1

Jennifer and two associates from Barely There law firm, seeking greater workday flexibility and more independence in client selection, recently left that firm and formed their own LLC: **As You Like It** with Jennifer, Jeanne and Zach all being equal partners in the new firm located in Diamond Lake. Each of them brought a few clients from the old firm, including the Village of Diamond Lake for which Zach handles the Village's ordinance prosecution, permitting processes, administrative hearings and zoning and plan commission matters. Cashing In, a small local bank, is a client that Jeanne brought to the new firm, although the services she provides are limited.

Virginia Woolf, a Diamond Lake resident, was impressed by the **As You Like It** website and now is seeking their advice on the sale of her palatial home which she says is necessary to raise funds to self-publish her new book. Ms. Woolf has already secured an eager buyer without a broker's assistance and she is hoping this transaction will be simple and fast and the attorney fees minimal. After all, the buyer has made a down payment to Ms. Woolf and has signed an agreement to purchase the house 'as is'.

As Jennifer has done a few closings and is also an avid reader, she jumps at the chance to handle this closing and asks her new client to execute a retainer agreement so she can begin collecting essential information for the closing. How would you advise Jennifer to address the following circumstances?

1. In the list of Special Exceptions, the title report Jennifer ordered for the property shows a Notice of zoning code violation from the Village of Diamond Lake related to construction of a swimming pool without a permit or a zoning variance. Jennifer advises Ms. Woolf that this lien is a serious problem she must address. In response, Ms. Woolf claims the pool is unused, empty and covered and asks Jennifer to negotiate a forgiveness of the zoning penalty. Can Jennifer do that in light of her partner Zach's limited but very specific representation of the Village? Alternatively, can she just seek his input? (See IRPC 1.7, 1.11(c) and definitions of and rules and comments on 'informed consent'.)

2. The real estate taxes are delinquent for the past two years and have been bought by 'Gotcha', a company that has been scooping up similar nearby residential properties. Urged by resident complaints, the Diamond Lake Village Board recently enacted an ordinance requiring companies like 'Gotcha' to follow stringent business permitting and notice procedures. Can Jennifer use this ordinance, with Zach's help, to thwart the company's efforts to further encroach upon Ms. Woolf's title? (IRPC 1.7, 1.11)
3. Due to an apparent default in Ms. Woolf's mortgage payments, the lender has filed a foreclosure action in the circuit court as evidenced by a *lis pendens*. It seems the lender is an affiliate of Cashing In, the local bank which Jennifer's partner Jeanne represented previously and has retained through her transition to the new firm. Can Jennifer represent Ms. Woolf in the foreclosure proceeding in order to help save the home or at least negotiate a resolution that will help Ms. Woolf stay in her home for a while, obtain a respite on or refinancing of her mortgage, or get the case dismissed on a technicality? (See RPC 1.7 and 1.9)
4. Without Jennifer's knowledge, Zach (remember him? he's one of Jennifer's partners) has just been hired by a major nearby bank on a new matter: representing it in an investigation by the FDIC. This is a coup for him, as he was previously employed by the Department of Financial and Professional Regulation as an investigator and thus had substantial exposure to how the IDFPR's government regulatory processes operate. Zach has not yet received any documents related to the case or met with Bank staff to discuss the matter. (Multiple IRPC Rules, including 1.6 (confidentiality), 1.7, 1.11; and the 'revolving door prohibitions' at www.illinois.gov/oeig/RevolvingDoor.)
5. When she learns that her new client likes the **As You Like It** website, Jennifer gives Ms. Woolf several of the firm's new brochures about their services and asks her to distribute them to friends. (Lawyer Advertising)
*Also consider the recent case of *Searcy v. The Florida State Bar* in which the U.S. District Court for the Northern District of Florida, Tallahassee Division, in its Order on the Merits issues on September 30, 2015, held that the ban under Rule 4-7.14 of the State Bar ethics rules banning lawyers from advertising their expertise in an area of law unless they are Bar certified is an unconstitutional restraint on commercial speech.

FACT PATTERN #2

Jordan, a solo practitioner with a background in criminal prosecutions and in handling routine real estate transactions who knows some State government officials, has just secured a contract to represent a state agency eager to sue "In Your Pocket", one of its grantees, for misappropriating grant funds for an unauthorized purpose. This contract is welcome news because Jordan just learned his part-time work for the City of Chicago representing the City in administrative hearings on parking, traffic and building code violations would not be renewed. Not wanting to rely solely on income from the

inadequately funded, ineptly managed and still unapproved state budget, and having lost the Chicago business, Jordan is actively marketing his practice in handling varied real estate transactions, especially for commercial deals. Through a referral, Jordan receives a call from the President of Sky High, the tax deed purchaser of a large vacant site in a gentrifying Chicago neighborhood on which the owner wants to build a Whole-Hearted Fitness Center with space at least for a restaurant, a sports injury clinic and a drop-in center for homeless veterans.

In light of the facts, consider these questions:

1. During Jordan's conversation with the President of Sky High, Jordan learns that the drop-in center is a program operated by 'In Your Pocket', the NFP that Jordan will soon be investigating. However, Jordan believes that program was not one of those funded by the state agency grant so he decides that the investigation assignment would not prevent him from representing Sky High, whose business would catapult him into a new sphere of elite commercial real estate clientele and enable him to reach out to developers. Is Jordan able to represent Sky High? (IRPC 1.7, 1.8, 1.9, 1.11, revolving door prohibitions, informed consent, loyalty to former clients.)
2. Would it make a difference in the question of Jordan's representing the company if Sky High has just received a letter from the Office of the Chicago Corporation Counsel advising that, in cooperation with the Cook County State's Attorney's Office, (1) it is pursuing an investigation into criminal activity believed to have occurred on the site of the proposed Sky High project during the time the property was abandoned, and (2) that it is preparing to make that site an official crime scene, thus impeding Sky High from access to the site? (IRPC 1.7, 1.9 and the Ethics Rules of the City of Chicago.)
3. If Jordan requests a waiver so he can keep his government appointment and also represent Sky High, what must he disclose and to whom, and whose consents would be required? (IRPC 1.7, particularly 1.7(b), and note the difference in the 'informed consent' requirement between the Illinois RPC (writing not required) and the ABA Model Rules (consent must be written). See also IRPC 1.6 and 1.11.)
4. After some soul searching, Jordan decides he is uneasy about handling both matters so he refers Sky High to a colleague who represents shopping centers and can advise Sky High regarding its zoning variance application. However, he tells Sky High he will handle the due diligence for the commercial loan Sky High is seeking and for the review of its leases to prospective tenants. Can Jordan represent Sky High in this limited matter? (IRPC 1.7, 1.11)
5. Should Jordan tell Sky High about the state investigation of 'In Your Pocket'? (IRPC 1.6 re: confidentiality, 1.7 and 1.11.) Will Jordan's representation of Sky High be compromised if he is privy to particular information regarding 'In Your Pocket' and its program that might be detrimental but is unable to so advise Sky High of that information? Consider whether Jordan's ability to freely advocate for Sky High will be materially limited due to what he knows.

FACT PATTERN #3

Remember Jeanne, a partner in the new three member firm **As You Like It?** She lives in unincorporated Dade County and would like to move to Diamond Lake where her new office is located and so her daughter can attend the Montessori School in that community. The School is housed in a multi-use office building a mile from her workplace. Jeanne, a new member of the Montessori School's Board and its only attorney, volunteers to negotiate the upcoming Montessori lease renewal without checking on the identity of the landlord which was a client of her former law firm years ago. Although Jeanne never met the landlord, she did review the documentation for the purchase of the building at the request of her supervising partner from the former firm who was taking care of the owner's financing and the obtaining of zoning approval for the building. Additionally, while at her former firm, she assisted another partner in his representation of the owner in an IDOT condemnation proceeding that sought and obtained a strip of land along the front of the owner's property to allow for the widening of the street.

While Jeanne is reading through the lease documents, she realizes it is the same building and owner but believes she has no knowledge from the prior work she performed that would jeopardize that work or that would affect her ability to fairly and fully protect the interests of the Montessori School in the negotiations for its lease renewal, even though Jeanne thinks the stated rental is far too high in relation to the School's budget, the average family income in the area, the low price that the landlord paid for the building, the very low interest rate it obtained for its loan through the Department of Commerce and Economic Opportunity as part of the State's 'Diversity Development Dividends Program' to provide low interest loans to eligible business enterprises, and the market value of the property she recalls from the appraisals she read to prepare for the IDOT condemnation case. Besides, Jeanne is simply a volunteer and Montessori is not exactly her client; instead she considers she is doing her share of important 'pro bono' type of work. Moreover, if it's a problem, her firm has malpractice insurance.

Overriding question: Can/should Jeanne continue to 'represent' the School as a volunteer in the lease negotiation, and if so, what steps should she take to protect the School, herself, her firm and her former firm? If not, what ethics rules can she use to gracefully rescind her offer to help the Montessori School with its lease negotiation process? Additionally, what is she free or not free to tell the School Board and Administration about the landlord and her concerns regarding the financial and other terms of the proposed lease renewal?