ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7. 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 Number 851 **Topic: Conflict of Interest**
(November 8, 1983)

Digest: A lawyer representing a corporation in bankruptcy proceedings may not at the same time file a Workmen's Compensation claim on behalf of a former employee of the corporation arising from an injury suffered while in the employ of the corporation.

Ref: Rule 5-105(a); ISBA Opinion 581;
Ill. Rev. Stat. 1981, ch. 48, par. 138.4(g);
Equitable Casualty Underwriters v. Industrial Commission, 322 Ill. 462, 153 N.E. 685 (1926).

FACTS

An attorney representing a corporation in bankruptcy proceedings has been asked by a former employee of the corporation to file a Workmen's Compensation claim arising from injuries suffered while working for the corporation. The attorney intends to file such a claim directly against the employer's Workmen's Compensation insurance carrier, not naming the corporation as a party.

QUESTION

Under the above circumstances, can the attorney ethically represent the former employee in a

Workmen's Compensation claim arising from his employment with the attorney's corporate client?

OPINION

It is our opinion that the inquiring attorney may not represent the individual in the prosecution of the Worker's Compensation claim.

Initially, as a matter of law, we do not believe that the inquiring attorney can, as he suggests, directly proceed against the Workmen's Compensation carrier without previously or concurrently proceeding against the former employer. Section 138.4(g) of the Workmen's Compensation Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.4 (g)) does provide for primary liability on the part of the insurance carrier should the employer fail to pay compensation for which he is liable. Such section also authorizes making the insurance carrier a party in proceedings in which the employer is also named. However, as stated in Equitable Casualty Underwriters v. Industrial Commission, 322 Ill. 462, 153 N.E. 685, 687 (1926), such section of the Act contemplates that a proceeding has already been or is concurrently being brought against the employer and his liability established therein, followed by a refusal to pay. The Act does not authorize the procedure foreseen by the inquiring attorney herein, whereby the employer would be totally bypassed and the insurer sued exclusively. It thus appears under the present circumstances that any action against the insurer would be premature absent the submission of a claim against the corporate employer followed by a refusal or inability of the corporation to satisfy the claim. Obviously, in such instance the attorney would be in the untenable position of representing both parties to the Workmen's Compensation claim in clear violation of Rule 5-105(a). See also ISBA Opinion 581.

Our answer would be the same even were the attorney authorized by the Workmen's Compensation Act to proceed against the carrier without also proceeding directly against the employer. While the employer would not in such instance be named as a party, it would nonetheless be a party in interest to the same extent as would any other person nominally involved in litigation but whose possible exposure is covered by insurance. The attorney may also be put at odds with representatives of the corporation he is representing in an effort to establish the corporation's liability under the Workmen's Compensation Act so as to establish the sufficiency of the individual client's claim against the carrier. To the same end, he may well during his representation of the corporation have learned confidential information which would be susceptible of use on behalf of the individual claimant. Finally, despite the pendency of the bankruptcy proceedings, the corporation may nonetheless be financially affected by the bringing of an action against the insurer. In this regard it should be pointed out that we have not been advised by the inquiring attorney as to the section of the Bankruptcy Act under which the corporation's proceeding was filed. We must thus assume the possibility of the corporation's having further life after the conclusion of the bankruptcy. In such case, the corporation could be adversely affected by an increase in insurance rates or possible subrogation rights on behalf of the insurer. Under any of the above circumstances, it is apparent that the interests of the individual claimant would be at such odds with those of the corporation as to prohibit the attorney's dual representation under Rule 5-105(a).

For the foregoing reasons, it is our conclusion that the inquiring attorney may not represent the potential Workmen's Compensation claimant in the present circumstances.