ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7. See also ISBA Ethics Advisory Opinion 91-11. 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. 870 **Topic: Conflict of Interest**
April 27, 1984

Digest: It is professionally proper for an attorney to represent a client when the attorney has a financial interest in a client's competitor only if there is consent of the client.

Ref: Rules 4-101(b), 5-101(a), 5-104(a),
ISBA Opinion No. 644

FACTS

Attorney is a principal stockholder and officer in a corporation. The business the corporation conducts is in direct competition with another corporation that the attorney performed legal services for. Part of the fees charged by the attorney to the client corporation consisted of future profits based upon the performance of the client corporation.

QUESTION

Whether it is a conflict of interest for an attorney who has a business interest in one corporation to represent a competitor of that corporation.

OPINION

There are several provisions of the Code of Professional Responsibility which apply to the factual situation presented. Those provisions are:

Rule 4-101(b) Except when permitted under Rule 4-101(c) and (d), during or after termination of the professional relationship to his client, a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client;
(2) Use a confidence or secret of his client to the disadvantage of the client; or
(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Rule 5-101(a) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

Rule 5-104(a) A lawyer shall not enter into a business transaction with a client if they have conflicting interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

It is obvious from the factual situation presented to the Committee that all of the above rules are applicable to the situation and that unless there is a full disclosure to, and waiver of any conflict by the client corporation, the lawyer cannot represent a corporation when he is the principal shareholder of and an officer of a competing corporation.

Management, meaning directors, officers, and sometimes controlling shareholders, owe various duties to their corporation and sometimes to the community of corporate interests: the shareholders, and, possibly, at least when the corporation is insolvent, the creditors. Broadly speaking, the duties of management are (a) to act intra vires and within their respective authority, (b) to exercise due care, and (c) to observe applicable fiduciary duties.

In the course of his duties as an officer of one corporation and an attorney for another, he is certain to receive knowledge of a confidential nature concerning business activities, efforts to obtain future business or customers, information concerning threatened or potential litigation and other items of information too numerous to set forth. Whether he receives this information as a primary shareholder, officer or attorney would make little difference. The potential for a violation of the rules is simply too great and too obvious unless the client or clients are given full disclosure of the dual relationship of the attorney and consent to that relationship and waive any potential conflict or use of confidence by the attorney.

In ISBA Opinion 644, this Committee discussed the issue of representation of multiple clients in the same transaction. There we said that if it is obvious that each client can be adequately represented and if each client consents after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of

each client, then each multiple employment is professionally proper. That same logic and reasoning is applicable to the lawyers' relationship with the client corporation in the matter presently under consideration. However, as we said in Opinion 644, while a theoretical fact situation can be envisioned in which such representation would be professionally proper, whether in practice such employment is proper, whether in practice such employment is proper must depend upon the fact thereof and all doubts must be resolved against the employment.