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 May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(b), 1.7, and 1.8(a). 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. 92-4**
**October 23, 1992**

Topic: Conflict of Interest

Digest: It is not improper for an attorney to act as general counsel to a corporation and serve as a board member of that corporation so long as there is full disclosure to the board any possible conflicts that might arise through his law practice or his friend's and the attorney refrains from entering into any non-legal business transactions with his corporate client.

Ref.: Illinois Rules of Professional Conduct, Rules 1.4(b), 1.7(b) and 1.8(a)
ABA Model Rules, Rule 1.7
ISBA Opinion 783

**FACTS**

Attorney A is general counsel to a not-for-profit corporation and serves on the board of the same corporation. He is directly involved in the day to day decision making required by the business interests and concerns of the corporation. Attorney A is a friend of Attorney B who is a fellow board member. Attorney B is actively engaged in a business relationship with the corporation. Attorney B is also employed by a corporation wholly owned and controlled by Attorney A's law partner.

The inter-relationship between Attorney A, Attorney B and Attorney A's law partner has been completely disclosed to the corporation, and Attorney A has disavowed any interest in Attorney B's business endeavor and/or with his law partner's company. Attorney A has refrained from participating in any vote taken at the board level which might or could produce an economic benefit to Attorney B or his company.

Despite this, various shareholders perceive a conflict.

**QUESTIONS**

1. Is there a violation of Rule 1.7 or 1.8, given the perception on the part of the shareholders of a possible conflict of interest?
2. Should the attorney decline further representation of the not-for-profit corporation, and should the attorney resign from his board position?

**OPINION**

Rule 1.7(b) of the Rules of Professional Conduct states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's...own business interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after disclosure...." ABA Model Rule 1.7 is virtually identical.

First, based on the facts presented, Attorney A appears to have no business interests involving the corporate client.

Second, there does not seem to be a violation of this Rule in this case because the relationship has been fully disclosed, the corporation has consented, and the attorney has recused himself from any decisions that might lead to a conflict.

The ABA Model Rules require "consultation" with the client before consent can be secured. The Model Rules define "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." This is comparable to the requirements of Illinois Rule 1.4(b) and to the definition of "disclosure" in the Illinois Terminology. It would appear from the facts that Attorney A has fully disclosed such information to the Board. However, if the attorney was still concerned in this regard, then part of his advice to the client could be that the client obtain independent counsel regarding any questionable aspects of the transaction, then there would definitely be no problem with disclosure and consent.

Further, the comments to ABA Model Rule 1.7 admonish the attorney to carefully weigh his responsibilities as board member and as corporate counsel in an ongoing test for conflicts between the two roles. Resolving such conflict questions ultimately rests with the attorney undertaking representation.

Rule 1.8 of the Rules of Professional Conduct states, in part:

> (a) Unless the client consented after disclosure, a
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> lawyer shall not enter into a business transaction with the client if:

(1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or
(2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

Attorney A does not violate Rule 1.8 because he has not entered into a business transaction with his client, and, in fact, he has refrained from any participation in activities that might be regarded as such.

Attorney A's final concern seems to be that his continued participation as corporate counsel involves an appearance of impropriety. The comment to the ABA Model Rules, Rule 1.9, states quite clearly that the ABA Model Rules do not continue the appearance of impropriety of Canon 9 of the ABA Model Code. Similarly, the Illinois Rules of Professional Conduct no longer contain such a reference. Therefore, for a conflict to be a violation of the Rules, it must be an actual conflict. Apparent conflicts do not violate the Rules so long as there is no actual conflict involved. ISBA Opinion 783 addresses a similar issue in which opposing counsel was the attorney's uncle. It was not a per se disqualification of the attorney; rather, the propriety of that relationship depended on the effect of the relationship on the attorney's professional judgment.

In conclusion, therefore, attorney A does not violate Rule 1.7(b) when the attorney fully discloses any possible conflicts to the client, and determines that there is in fact no such conflict. When attorney A refrains from entering into any business transactions with his client and refrains from any activities that may be regarded as such, Rule 1.8 is not violated. In order for a violation of the Rules to occur, there must be an actual conflict, not merely a perception of conflict or "appearance of impropriety."

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