



ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(b), and 1.7 with its Comment [35]. 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. 02-01
October, 2002**

Topic: Conflict of Interest

Digest: Absent disclosure and consent, a lawyer cannot represent an insurer with regard to a claim where the insurer's interests are inconsistent with those of a reinsurer on whose Board the lawyer sits.

Ref.: Illinois Rules of Professional Conduct, rule 1.7(b) and 1.4(b)
ISBA Advisory Opinions on Professional Conduct, Nos. 95-01, 92-04, 88-05, 870 and 483
Oregon Opinion No. 91-116 (1991); Iowa Opinion No. 94-4 (1994);
Vermont Opinion No. 91-8 (1991); California Opinion No. 1993-132 (1993)

FACTS

A lawyer provides property insurance coverage advice to various insurance companies who issue policies that they then reinsure with other companies. The original issuing company is the primary insurer, and is the lawyer's client.

The lawyer has been asked by one of the reinsurers to join its Board of Directors. He is

concerned as to possible conflicts that may arise from such relationship in instances where the company on whose Board he sits reinsures the policy issued by a company he is representing.

QUESTIONS

1. Does a conflict exist in the above situation, and can it be overcome by disclosure and consent?
2. When the inquiring lawyer represents other insurers who are competitors of the company on whose Board he sits, must he disclose to them his position on the Board?

OPINION

Several previous opinions of this Committee have discussed the issue of a lawyer's sitting on the board of a company that he represents. See Opinion Nos. 95-01, 92-04 and 483. No prior opinion has discussed a lawyer sitting on the board of a company whose interests may be inconsistent with those of his client. However, such issue is no different than others in which a lawyer's own business or personal interests, or duties to a third party, may impact on his representation of a client. Such situations are governed by Rule 1.7(b), which provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

1. the lawyer reasonably believes the representation will not be adversely affected; and
2. the client consents after disclosure.

In the present instance, the lawyer would be representing the underlying insurance company with regard to property insurance claims under policies that it has insured. At the same time, the lawyer would be a Director of the reinsurer whose obligations under its policy of reinsurance may arise if the matter is not resolved within the retained liability of the underlying insurer.

The tension between the interests of the two insurers is apparent. On the one hand, the lawyer, in representing the underlying insurer, may have to counsel the client that the exposure on a claim is in excess of its retained liability, and that participation must be sought from the reinsurer. On the other hand, as a Director of the reinsurer, he must act in the interests of the reinsurer in seeking to have the claim resolved within the limits of the underlying company, thereby saving money for the reinsurer.

It is therefore clear that a conflict exists under Rule 1.7(b) between the lawyer's positions on behalf of the two companies with regard to claims reinsured by the company of which he is a Director. Such has similarly been the conclusion in ethics opinions from other states. Oregon Opinion No. 91-116 (1991); Iowa Opinion No. 94-4 (1994); Vermont Opinion No. 91-8 (1991); California Opinion No. 1993-132 (1993).

The question then becomes whether such conflict may be overcome by the consent of the parties following disclosure pursuant to Rule 1.7. As stated in the Rule, not only must such consent be given, but the lawyer must also reasonably believe that the representation will not be adversely affected by his being a director of the reinsurer. The majority of opinions from other states have concluded that no *per se* conflict exists that would preclude representation even upon giving of consent (Oregon Opinion No. 91-116 [1991]; Vermont Opinion No. 91-08 [1991]; California Opinion No. 1993-132 [1993]), although at least one has differed with such conclusion (Iowa Opinion No. 94-4 [1994]). However, we are in accord with the majority to the effect that, in most instances and dependent upon the circumstances (which must be continually reviewed throughout the representation), the conflict is waivable by consent following disclosure.

With regard to the inquirer's second question, we are of the view that a lawyer's presence on the board of his client's competitor is of such possible significance to the client as to require the communication of such fact under Rule 1.4(b) in order to allow the client to make informed decisions about the representation. In fact, past opinions of this Committee would dictate that the lawyer also obtain the client's consent to the representation pursuant to Rule 1.7(b). To this effect, we concluded in ISBA Opinion No. 88-05 that while the fact that two clients are in the same business does not of itself result in a conflict requiring client consent, a lawyer serving on the board of a competing company rises to a higher level and, under the predecessor to Rule 1.7, requires consent of the client after disclosure. See also ISBA Opinion No. 870, in which we concluded that consent be obtained by a lawyer seeking to represent a client when the lawyer has a financial interest in the client's competitor. Accordingly, it would appear that disclosure must be made and consent obtained from the lawyer's client in the circumstances presented.