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);

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
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.