



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 *In re Vrdolyak*, 137 Ill.2d 407, 560 N.E.2d 840 (1990). See also ISBA Ethics Advisory Opinion 90-17. 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. 803
January 28, 1983

**Topic: Conflict of Interests; No
waiver after disclosure of public interest**

Digest: A conflict of interest exists which prevents a lawyer or his firm from representing a regional planning commission of which the lawyer serves as a member.

Ref: Supreme Court Rule 5-101;
ABA Formal Opinions 181, 271; ABA Informal Opinion 930;
ISBA Opinions 483 and 791; ISBA EC 8-6;
Drinker Legal Ethics, p. 120; Ill. Rev. Stat., ch. 102, § 3.

FACTS

A lawyer serves as a Commissioner of a regional planning commission which, under Title 15 USC Sec. 636 et. seq., reviews applications to the Small Business Administration for loans and, if approved, recommends submission of the application to the SBA. Under new legislation, the Commission incurs a portion of the guarantee liability on the loans. The lawyer also serves as Chairman of the Loan Review Committee of the Commission which submits recommendations to the Commission. If the loan is recommended by the Commission and approved by SBA, the Commission engages the lawyer's firm to represent it in the closing of the loan. The lawyer's fees are paid by the Commission to the law firm. However, there is a charge to the applicant by the

Commission payable out of the loan proceeds. The applicant may, if he chooses, engage his own lawyer for purposes of processing and closing the loan, but that would not reduce or otherwise affect the fee paid by the applicant to the Commission.

QUESTION

Is there a conflict existing on the part of the lawyer by virtue of his involvement in an official capacity as a member of the Commission and Chairman of the Loan Review Committee, and his engagement as a lawyer to represent the Commission in the closing of the loan?

OPINION

The question presented here is a novel one and we can find no previous opinions dealing with similar facts. There are, however, several opinions involving analogous situations which can be considered as guidelines.

The 1938 Formal Opinion No. 181 of the ABA dealt with Canon 6 adopted by the American Bar Association in 1908 and amended in 1933 and 1937. The Canons were supplanted by the ABA in 1959 and by the ISBA in 1970 with the Code of Professional Ethics and the old Canon 6 became DR5-101 of the Code. Now, it is Supreme Court Rule 5-101 of the Illinois Code of Responsibility (effective July 1, 1980). In ABA Opinion 181 the Committee dealt with the conflict question of whether a lawyer properly could act as a court appointed co-receiver and his law firm act as attorney for the receivers. The Committee concluded that a conflict did exist in the dual relationship because the lawyer would be interested in both the receiver's fee and the attorney's fee. The receivers should be concerned with keeping the attorneys' fees at a minimum and the law firm should be concerned with keeping the receivers' fees at a minimum. With the lawyer and his firm financially interested in both fees, a conflict of interest resulted.

In 1946 the ABA Committee in its Formal Opinion 272 reexamined the issue where the question was whether a lawyer who was a trustee in bankruptcy could employ his firm as attorneys for the trustee. The Committee overruled Opinion 181 on the grounds that allowance of fees to the attorney for the trustee was subject to the judicial discretion of the Court and there was opportunity for any interested party to question the amount of fees. The Committee also, in Opinion 272, applied the same principles to attorneys for other fiduciaries.

In 1966, the ABA issued its Informal Opinion 930 in response to an inquiry as to possible conflict in the dual roles of director and attorney for a bank. The Committee said "We find no Canon or Opinion of the Committee stating it to be unethical for a lawyer to serve as a member of the Board of Directors and also as solicitor of a banking institution. On the other hand, such is recognized as common practice which to our knowledge has not been criticized. Moreover, in serving as a director and also as the bank solicitor, the lawyer is not deemed to be representing conflicting interest." The above constitutes the entirety of the Committee's comments and there is no evidence that all aspects of the issue were explored.

The most recent ISBA Professional Ethics Opinion is No. 483 issued in 1975 which dealt with the possible conflict of a lawyer serving on the Board of Directors of a bank and, at the same time,

representing the banking corporation as its attorney. The Committee considered two aspects of the question, the first involving the possible loss by the corporation of its attorney-client privilege. The conclusion was that the decision of whether or not to risk that loss was one for the client and the lawyer to make jointly after full disclosure and consideration of all ramifications, and was not a decision to be resolved by the lawyer unilaterally. The second consideration was the conflict existing with respect to the duty of the lawyer owed to the corporate entity as contrasted to his duty as a director with primary responsibility only to the board and incidentally to the shareholders of the corporation. The Committee recognized that, arguably, a case could be made for an absolute prohibition preventing a lawyer from serving simultaneously as an attorney for a corporation and as one of its directors. The Committee commented that notwithstanding the fact that the custom was widespread when the Code of Professional Responsibility was adopted and drafters included no specific prohibition. Thus the Committee concluded that if the lawyer secured consent after disclosure to the corporation of the possible loss of the attorney-client privilege and if the lawyer exercised precaution to never allow any personal interest or compromising influences or loyalties, attributable to his services as director, to dilute his primary duty of loyalty to the corporate entity, the dual role would be permitted.

Another factor bearing upon the issue is the Illinois Officers Act, commonly referred to as the "Conflict of Interest Statute" (Ill. Rev. Stat., ch. 102, Sec. 3). Section 3(a) of the Act provides as follows:

"§3. (a) No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust or corporation, with respect to any application or bid for any contract or work in regard to which such officer maybe called upon to vote. Nor may any such officer take or receive, or offer to take or receive, value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void." (Emphasis added).

This section subject to certain exceptions, not applicable here. We find no opinions dealing with a lawyer's serving as a director of a "public" corporation or body and at the same time representing the body as its counsel. There would appear to be no question from the facts here presented that the Regional Planning Commission is a public or quasi-public body. The manner of its creation and authority for the composition of its members is not stated, but it is noted that "An Act to provide for regional planning and for the creation, organization and powers of regional planning commission, L. Laws, 1929, p.308, approved June 25, 1929, eff. July 1, 1929" (Ill. Rev. Stat., ch. 34, §3001 et seq.) authorizes the county board of any county by resolution to define the boundaries of such region and create a regional planning commission. The number of members of such commission, their method of appointment, and their power and authority in the making of a plan for development of the region are matters which are left to the county board as

it deems proper. The Act also authorizes the county board to appropriate tax money to the planning commission and provides that members of the planning commission shall serve without pay.

While it is not our function to interpret the statutes and laws applicable to a particular factual situation, it seems quite likely that the situation here presented would fall within the proscription of the conflict of interest statute of Illinois. In any event, even if the commission members are not subject to the conflict of interest statute, the Committee feels that the conflict that does exist is prohibited by Rule 5-101 of the Illinois Code of Professional Responsibility. The conflict arises because the lawyer is a voting member of the Commission which, by vote of its members, decides to employ the lawyer or his firm and then passes upon the validity and reasonableness of his fee bills.

Aside from the problem discussed in ISBA Opinion 483 dealing with the possible loss of attorney-client privilege, we are here dealing with a public officer and public body which eliminates the possibility, after full disclosure, of waiver since consent is unavailable where the public interest is involved. (See ISBA Opinion 791, ISBA ED 8-6 Drinker, Legal Ethics, p. 120).

We are convinced that a conflict exists and that neither a lawyer member of the Planning Commission nor any of his partners, associates or affiliates may represent the Commission as its attorney. The conflict is there when the lawyer is advising himself as a member of the Commission. It is present when his or his law firm's fee bills are approved for payment. It could be present when the lawyer is advising the Commission as a lawyer on its legal rights, duties and responsibilities and, on the other hand acting as a member of the Commission in protecting the rights of the public.

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