



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6, 1.7, 1.9, 1.11, 3.7, and 8.4(b). 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. 88-7
March 15, 1989**

Topic: Confidences and Secrets, Independent Judgment

Digest: It is professionally improper for an attorney to file an annexation lawsuit against a Village Board when the attorney has obtained confidential information in his previous position as Village Board Attorney regardless of whether this information is disclosed to the general public.

Ref.: Rules 4-101(a) and (b), 5-101(b), 5-105(a)
ISBA Opinion Nos. 85-11, 810

FACTS

A lawyer, who previously represented a Village Board, later filed an annexation lawsuit against the same Board. While Village Attorney, the lawyer had discussed both procedural and substantive matters related to the annexation which was the subject of the lawyer's subsequent lawsuit. The lawyer asserted that he did not learn any secrets, strategy or privileged information other than those matters of public knowledge.

QUESTIONS

1. Is it professionally proper for a lawyer to prosecute an annexation claim against a Village Board, when the subject matter of the lawsuit was discussed with the lawyer in his previous position as attorney

for the same Village Board?

2. Is a client's disclosure of confidential information to the general public tantamount to a waiver of the privilege of confidentiality?

OPINION

1. An attorney should not accept employment where a confidence or secret of a previous client could be used for the advantage of a third person without the client's consent after full disclosure. Rule 4-101(a) and (b). This privilege of confidentiality assures that the client feels free to openly discuss problems without embarrassment or fear that the information would later be disclosed or used against the client. Rule 4-101(a). Likewise, this Committee previously asserted that it would be improper for a lawyer to prosecute a wrongful death claim arising out of an accident wherein the lawyer had formerly represented the defendant in a related traffic charge. ISBA Opinion 810. Thus, the rationale should be equally applicable to the circumstances of this case.

Second, the lawyer must refuse employment if he will be unable to exercise independent professional judgment. Rule 5-105(a). If the former representation interferes in any way with the lawyer's exercise of independent professional judgment, the proposed representation would be improper. ISBA Opinion 85-11, "A lawyer may accept employment in an unrelated matter against the spouse of a former client, provided that the representation will not require the use of confidential information gained in the former representation, and there is no interference with the lawyer's independent professional judgment."

Third, if the lawyer knows that he might be called as a witness concerning conversations he had with regard to the annexation, the lawyer must not accept employment. Rule 5-101(b) provides that a lawyer shall not accept employment in contemporaneous or pending litigation if he knows or it is obvious that he ought to be called as a witness.

2. Although the inquiring attorney asserts that the information he has obtained while Village Attorney was made public, until the client consents, after full disclosure, to any release of information, the lawyer should consider the subject matter confidential and secret.
