



**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 1.7, 1.10(a), 8.4(k). 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. 90-17
January 29, 1991**

Topic: Conflict of Interest; Lawyer in Public Office

Digest: Lawyer who is a city council member and the lawyer's firm generally should not represent clients before city council, even if lawyer abstains from participation in matters handled by the firm.

Ref.: Rules 1.7(b), 1.10(a) and 8.4(b)
ISBA Opinion Nos. 699 and 84-11
In re Vrdolyak, 137 Ill.2d 407 (1990)
In re Becker, 16 Ill.2d 488, 158 N.E.2d 753 (1959)
Illinois Attorney General Opinion No. 82-060
Ill. Rev. Stat. ch. 102, paragraph 3
Higgins v. Advisory Committee on Professional Ethics, 73 N.J. 123, 373 A.2d 372 (1977)

FACTS

The inquiring lawyer is a city council member who has not actively practiced while on the council. The lawyer contemplates an affiliation with a local law firm under which the lawyer would be an associate with compensation based on a percentage of the legal fees that the lawyer bills and collects. It is anticipated that other lawyers affiliated with the firm will from time to time appear

before the city council on various matters, including representation of clients in zoning and liquor license matters as well as representation of persons and entities with which the city does business.

QUESTIONS

Assuming that the inquiring lawyer does not personally represent a client before the city council and abstains from any matter in which another lawyer affiliated with the firm is before the council, the lawyer asks whether such an arrangement will comply adequately with the Rules of Professional Conduct. The inquiring lawyer also asks what must be done to comply with the Rules of

Professional Conduct in a situation where a client whom the lawyer represents on an unrelated matter appears before the city council. Finally, the inquiring lawyers asks generally what precautions need to be taken by the firm in fulfilling the lawyer's responsibilities under the Rules of Professional Conduct.

OPINION

Several recent ISBA Advisory Opinions have involved actual or potential conflict situations arising out of the practice of law by lawyers who also hold public office. See, e.g., No. 699, No. 84-8, No. 84-11, No. 86-5, No. 86-13, No. 87-4, No. 87-14, No. 88-6 and No. 88-7. In No. 84-11, the Committee observed that in matters involving potential conflicts of interest with respect to lawyers in public office, it was not possible to suggest a comprehensive rule applicable in all situations faced by the lawyer in public office because each situation typically depends on its specific facts. Nevertheless, there are general guidelines that may be inferred from the Rules of Professional Conduct which should inform the conduct of the lawyer and the law firm with which the lawyer is affiliated. These guidelines are found in Rule 1.7(b), Rule 1.10(a) and Rule 8.4(b). Comparable guidelines were found in Rule 5-101(a), Rule 5-105(a), Rule 5-105(d), Rule 5-107(a) and Rule 8-101(a) of the former Code of Professional Responsibility.

Rule 1.7(b) provides that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibility to another client or to a third person or by the lawyer's own interests. Rule 1.10(a) provides that no lawyer associated with a firm shall represent a client that another lawyer associated with that firm would be prohibited from doing so by Rule 1.7, with exceptions not relevant here. Rule 8.4(b)(1) provides that a lawyer who holds public office shall not use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest; and Rule 8.4(b)(3) provides that a lawyer who holds public office shall not represent any client in the promotion or defeat of legislative or other proposals pending before the public body of which the lawyer is a member.

Additional guidance may be found in a recent Illinois Supreme Court opinion, In re Vrdolyak, 137 Ill.2d 407 (1990). In that case, the Court held that the respondent, who was a city alderman, engaged in a conflict of interest contrary to Rule 5-101(a) of the former Code when he represented city employees in their workers' compensation cases against the city, even though respondent had abstained from any city council votes relating to claims against the city. In this situation, the Court stated that as an alderman, "it is beyond dispute that respondent owed his undivided loyalty and a fiduciary duty to the City." 137 Ill.2d at 420. Furthermore, as a lawyer-legislator, the respondent was found "subject to the ethical standards of his profession, even though there is no attorney-client

relationship involved in the public office." 137 Ill.2d at 422, quoting Higgins v. Advisory Committee on Professional Ethics, 73 N.J. 123, 373 A.2d 372, 373 (1977). The Court concluded: "Respondent, as an alderman, owed his undivided fidelity and a fiduciary duty to the City. He also owed his undivided fidelity and a fiduciary duty to his clients. By representing clients against the City, the competing fiduciary duties collided, and respondent became embroiled in a conflict of 'diverging interests' and divided loyalties, which even full disclosure could not avoid." 137 Ill.2d at 422.

The Vrdolyak opinion is also instructive in its holding that the Code of Professional Responsibility, as an exercise of the Court's inherent power over the bar and as rules of court, operated with the force of law, has, sub silentio, overruled prior judicial decisions which conflict with its mandates and proscriptions." 137 Ill.2d at 422. One of the prior decisions held to have been overruled by the adoption of the Code was In re Becker, 16 Ill.2d 488, 158 N.E.2d 753 (1959), a pre-Code decision on which the respondent had based his defense. (The Vrdolyak opinion would also appear to overrule Illinois Attorney General's Opinion No. 82-060, which had criticized ISBA Opinion No. 699 on the grounds that the reasoning of Becker compelled a contrary conclusion.) Illinois lawyers should therefore conform their conduct to the 1990 Illinois Rules of Professional Conduct in any situation where the former Code or any prior judicial decisions are inconsistent with the 1990 Rules.

In view of the foregoing, the Committee believes that a lawyer who is also a member of a legislative body such as a city council generally would be prohibited by Rule 1.7(b) and Rule 8.4(b) from representing a client in a matter pending before the council because the interests of the city and the client would usually be adverse. Under Rule 1.10(a) relating to vicarious disqualifications, any lawyer affiliated with the council member's firm also would be precluded from such representation whenever the council member would be prohibited from doing so. Thus, the arrangement described in the inquiring lawyer's first question would not comply with the Rules of Professional Conduct in most situations. However, Rule 1.7(b) contemplates that there may be limited situations, where the lawyer reasonably believes the representation of the private client will not be adversely affected by the lawyer's duty to the city and the private client consents after disclosure, in which the lawyer or the firm could represent a private client with respect to the city if the representation is also consistent with Rule 8.4(b). Such situations would depend upon the particular facts in each case.

With respect to the inquiring lawyer's second question, a lawyer's duty under Rule 1.7(b) obtains even where the adverse or conflicting interests in question are wholly unrelated to the representation. Thus, the lawyer and the firm should not accept employment from a party that the lawyer or the firm knows will be appearing before the city council on any matter during the term of the contemplated employment, unless the exception to Rule 1.7(b) noted above would be applicable to the particular situation. If an existing client of the lawyer or the firm should appear before the city council, the Committee believes that the lawyer should abstain from any consideration of such a matter even though the lawyer or the firm represents that client only on matters unrelated to the issues before the city council.

With respect to the inquiring lawyer's third question concerning general precautions needed to comply with the Rules, the Committee is unable to offer specific advice in addition to the provisions of the Rules cited above for the reasons stated in Opinion No. 84-11.

Finally, the Committee notes that all public officers, including lawyers, are subject to the provisions of the Illinois Corrupt Practices Act, Ill Rev. Stat. ch. 102, Paragraph 3, which provides: "No person holding any office ... may be in any matter interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract ... in the making or letting of which such officer may be called upon to act or vote. No 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 may be called upon to vote. ... Any contract made in violation hereof is void." Any lawyer who is also a public officer must be guided by the Act as well as the provisions of the Rules.

* * *