



**ILLINOIS STATE
BAR ASSOCIATION**

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 1.7, 8.3(a), and 8.4(b) and (c). 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. 93-20
May, 1994**

Topic: Conflict of Interest. Mandatory report of attorney misconduct.

Digest: A conflict of interest does not normally rise to the level of misconduct which an attorney is mandated to report under Rules 8.3(a) and 8.4(a)(3) and (4).

Ref.: Illinois Rules of Professional Conduct, Rules 1.7(b), 8.3(a) and 8.4(a)(3) and (4)

FACTS

Attorney X works at Regulatory Agency as an enforcement attorney and was assigned an enforcement case against Company A. Her supervisor, Supervising Attorney Y, is a member of an investment club along with other supervising attorneys at the agency. While the enforcement action against Company A was pending, Supervising Attorney Y's investment club purchased shares of Company A (Supervising Attorney Y also has another enforcement case against Company A). Attorney X learns of this in February.

In April, during a meeting between Attorney X, Supervising Attorney Y and senior management of

Regulatory Agency to discuss Attorney X's enforcement recommendation against Company A, Supervising Attorney Y argued for a lower penalty for Company A and directed Attorney X to rewrite her report to justify a lower penalty.

After the meeting, Attorney X asked Supervising Attorney Y to recuse himself from the enforcement case against Company A because his financial interest in the company presented a conflict of interest. Supervising Attorney Y refused to do so because he only owned five shares and because other supervising attorneys felt there was no conflict.

During May, Attorney X discussed this situation with another attorney at Regulatory Agency who concluded that a conflict existed both under the Rules of Professional Conduct and under Regulatory Agency's own rules which prohibit working on an enforcement case against any company in which an attorney has a financial interest. That day, Attorney X brought the matter to senior management at Regulatory Agency and they ordered the recusal of Supervising Attorney Y.

QUESTION

Does Attorney X have a mandatory duty, pursuant to Rule 8.3(a) of the Illinois Rules of Professional Conduct, to report Supervising Attorney Y's conduct to a tribunal or other authority?

OPINION

Preliminarily, the Committee notes that it is within the Regulatory Agency discretion to determine whether the conduct of Supervising Attorney Y is improper. See ISBA Opinion No. 870. (It is professionally proper for an attorney to represent a client when the attorney has a financial interest in a client's competitor only if there is consent of the client.) Regardless of the Agency Rules, however, Rule 1.7(b) would be applicable.

We are of the opinion that Attorney X did not have a mandatory duty to report Supervising Attorney Y's conflict of interest.

Rule 8.3(a) provides that "a lawyer possessing knowledge not otherwise protected as a confidence by these Rules that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." A criminal act is not involved and thus Rule 8.4(a)(3) is not implicated. Thus, whether Attorney X had a mandatory duty to report turns upon whether, pursuant to Rule 8.4(a)(4), Supervising Attorney Y's conduct rises to the level of "dishonesty, fraud, deceit or misrepresentation."

The Rules do not define dishonesty, deceit or misrepresentation. Under identical language in the Code of Professional Responsibility, these terms were used interchangeably with fraud. (See, In re Yamaguchi (1987), 118 Ill.2d 417, 515 N.E.2d 1235, 1238, 113 Ill.Dec. 928, 931; see also, Creamer and Jacobson, "Revisiting Himmel Under the 1990 Rules of Professional Conduct," 78 Illinois Bar Journal 488 (1990).) The terminology section of the Rules defines fraud as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."

Because Supervising Attorney Y did not attempt to his conduct and, in fact, openly discussed it, Supervising Attorney Y cannot be said to have had a purpose to deceive. Supervising Attorney Y's conduct, thus, did not violate Rule 8.3(a)(4) and, therefore, Attorney A did not have a mandatory duty to report.

Any report of this matter to the disciplinary or other authority would be within the discretion of the attorney.

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