



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**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.**

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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 1.4, 1.6, 1.7, and 1.13. 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.**

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**Opinion No. 95-15  
May 17, 1996**

Topic: Conflict of Interest; Corporate Affiliations

Digest: A lawyer's representation of a corporate client does not necessarily prohibit the lawyer from accepting another representation adverse to a subsidiary or other affiliate of the corporate client in an unrelated matter; but such representation may not be undertaken without appropriate disclosure and consent where the particular circumstances require that the affiliate should also be considered the lawyer's client or where the representation of either the corporate client or the prospective client will be materially limited by the representation of the other.

Ref.: Illinois Rules of Professional Conduct, Rules 1.4, 1.6, 1.7 and 1.13.  
ISBA Opinion Nos. 95-1 (1995) and 88-5 (1989).  
ABA formal Opinion No. 95-390 (1995).  
California State Bar formal Opinion No. 1989-113 (1990).  
Bobbitt v. Victorian House, Inc., 545 F.Supp. 1124 (N.D. Ill. 1982).  
ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc., 90 Ill.App.3d 817, 413 N.E.2d 1299 (1st Dist. 1980).

## **FACTS**

The inquiring lawyer currently represents a large, publicly-held corporation. The corporation has a wholly-owned subsidiary that the lawyer has never represented. A prospective new client has requested the lawyer file an action against the subsidiary concerning a matter unrelated to the present representation of the parent corporation. If the action is successful, there could be a financial impact on the subsidiary and indirectly on the sole shareholder, i.e., the parent corporation. There is no prospect that the parent corporation would be made a party to the litigation if an action is filed against the subsidiary.

## **QUESTION**

The inquiring lawyer asks whether it is permissible to undertake a representation adverse to the subsidiary of a corporate client in an unrelated matter without the corporate client's consent.

## **OPINION**

This inquiry presents a conflict of interest issue that often arises in the course of representing corporate clients that are or become affiliated with other entities. Ideally, lawyers and their corporate clients should agree at the start of each representation, in defining the scope of the particular engagement, as to those affiliates that will be included in the corporate client group. This opinion considers situations where the lawyer and the corporate client have not agreed in advance as to the extent of the client group for purposes of the representation.

The general rule governing conflict of interest is Illinois Rule 1.7, which provides in relevant part:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after disclosure.
  
- (b) 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 interests, unless:
  - (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after disclosure.

In applying Rule 1.7 to the present inquiry, we must first determine whether affiliates of corporate clients are to be considered clients for purposes of Rule 1.7(a) simply because of the affiliation. If not, it must still be determined whether a representation adverse to the subsidiary of a corporate client is nevertheless "directly adverse" to the corporation itself. Finally, even if the representation is not directly adverse to the corporate client, contrary to Rule 1.7(a), a lawyer must consider

whether the representation of either the corporate client or the proposed new client will be materially limited as a result of the proposed representation, contrary to Rule 1.7(b).

The initial issue to be considered is the scope of the lawyer's current representation. As a general matter, a lawyer's duty of loyalty runs only to the lawyer's client. The Committee must therefore determine "who is the client" when a lawyer represents a corporation.

The representation of an organization as client is governed by Illinois Rule 1.13. Rule 1.13 does not expressly address the issue of whether a subsidiary or other affiliate of a corporate client must also be considered a client. However, Rule 1.13(a) provides that a lawyer retained by an organization "represents the organization acting through its duly authorized constituents." Illinois case law also suggests that an entity's lawyer is not necessarily the lawyer for the entity's constituents. "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." Bobbitt v. Victorian House, Inc., 545 F.Supp. 1124 (N.D. Ill. 1982). See also, ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc., 90 Ill.App.3d 817, 413 N.E.2d 1299 (1st Dist. 1980).

In its Opinion No. 95-1 (July 14, 1995), the Committee concluded that because the loyalty of a lawyer for a corporation must run to the corporation itself rather than any individual officer, director, or shareholder, the fact that the lawyer was related to an officer and principal shareholder did not, standing alone, create a conflict of interest. The language of Rule 1.13, the case law, and Opinion No. 95-1 all suggest that a client corporation's subsidiaries and other affiliates are not also the lawyer's clients simply because of the relationship to the client.

The Committee therefore concludes that a corporate affiliation, including a majority or even sole ownership of a subsidiary, without more, does not make a client corporation's affiliate an additional client of the lawyer. Because a corporate client's affiliate is not deemed to be a client of the corporation's lawyer merely because of the affiliation, then a representation adverse to the affiliate will not be directly adverse to "another client" within the meaning of Rule 1.7(a). This conclusion is consistent with the positions taken by the California State Bar ("California Bar") in its Formal Opinion No. 1989-113 (1990) and by the American Bar Association ("ABA") in its Formal Opinion No. 95-390 (January 25, 1995).

The Committee notes, as do the ABA and the California Bar, that there may well be particular circumstances that would require the lawyer to consider a subsidiary or other constituent of a corporate client to be a client of the lawyer as well. Such instances could include, for example, situations where the lawyer's work for a corporate parent involves direct contact with its subsidiaries and the receipt of information concerning the subsidiaries protected by Rule 1.6 or situations where the client corporation and the subsidiary in question have the same management group. Another situation that would require the lawyer to treat a corporate affiliate as a client is where one entity could be considered the alter ego of the other. In these kinds of circumstances, the lawyer would be required to seek the corporate client's consent, with appropriate disclosure, before accepting a representation adverse to the affiliate.

Even if the subsidiary of the client corporation is not a client of the lawyer, it may be argued that the proposed representation is nevertheless "directly adverse" to the corporate client because any economic loss by the subsidiary could ultimately harm the parent corporation that is the lawyer's client. Of course, the factual basis for this argument depends upon the particular financial circumstances of each corporate "family" group. For conflicts purposes, the issue is whether a potential indirect or derivative impact upon an existing client makes the proposed representation adverse to the subsidiary "directly adverse" to the existing client within the meaning of Rule 1.7(a).

This Committee has not expressly addressed this issue in any prior opinion. In its Opinion No. 88-5 (February 9, 1989), the Committee concluded that it was professionally proper for a lawyer to represent two competing businesses in the same industry in the same community so long as the matters of each representation were not substantially related. Presumably, the activities of one competitor in that situation could have some indirect impact on the fortunes of the other, but the Committee concluded that two concurrent representations did not constitute a conflict of interest. A similar result seems appropriate in the present inquiry, where any impact on the parent corporation would be indirect and subject to numerous factors totally unrelated to the lawyer's work for the proposed new client.

The Committee also believes that the choice of the modifier "directly" in Rule 1.7(a) to define adversity should be interpreted to exclude indirect, derivative and other speculative impacts of the lawyer's activity from an analysis under the Rule. Otherwise, any conceivable impact on a client, however slight or implausible, would have to be taken as impermissible, direct adversity. For these reasons, the Committee agrees with the ABA in its Opinion No. 95-390 that any adverseness in such circumstances is, as a general matter, indirect rather than direct and therefore not prohibited by Rule 1.7(a). Again, unique facts or circumstances might suggest a different result in a particular matter, but the general rule should be that an indirect or speculative impact on an existing client would not render a representation "directly adverse" under Rule 1.7(a).

Finally, if the lawyer has determined that the proposed representation would be permissible under Rule 1.7(a), the lawyer should also consider whether representation of either the proposed new client or the corporate client would be materially limited by the lawyer's duties to the other and thereby prohibited by Rule 1.7(b). For example, if the lawyer wished to refrain from seeking appropriate discovery from the client parent corporation in the contemplated litigation for fear of further offending the existing client, that fear may well constitute a material limitation on the representation of the new client seeking to sue the subsidiary.

In order to proceed in that situation, the lawyer must first reasonably conclude that any potential limitation will not adversely affect the representation of the potential client and then seek consent of the affected client after disclosure of the relevant circumstances. In any event, the Committee believes that Rule 1.4(b) requires a lawyer accepting a representation adverse to a subsidiary or other affiliate of an existing corporate client to advise the potential new client of the existing client relationship and explain the consequences of that relationship on the proposed new representation. Where appropriate, the explanation of consequences should include the possibility that the

subsidiary will attempt to disqualify the lawyer from the contemplated litigation.

In conclusion, the Committee believes that the Rules of Professional Conduct generally permit a lawyer to accept a proposed representation adverse to a subsidiary or other affiliate of an existing corporate client entity. As noted above, however, this general proposition may be altered by the specific facts and circumstances of any particular situation. As also noted above, the better solution to the issue addressed in this opinion is the agreement of lawyers and corporate clients, in defining the scope of an engagement, as to those affiliates that will be included in the corporate client group.

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