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FILE NO. S-604

OFFICERS:
Conflict of interest
Illinois Liquor Commission

Mr. George M. Burditt
Chairman Designate
Liquor Control Commission
Springfield, Illinois 62706

Dear Mr. Burditt:

Your letters of June 15, 1973 and June 26, 1973 were transmitted to me by Governor Walker's office on June 27, 1973. In your letter of June 15, 1973, you state:

> "I respectfully request an Attorney General's opinion on the following matter:
>
> Governor Walker has recently designated me as Chairman of the Illinois Liquor Control Commission, a part-time position subject to Senate confirmation.
>
> Our firm represents the following clients in matters which do not relate to subjects under the jurisdiction of the Illinois Liquor Control Commission:

1. Licensees under the Illinois Liquor Control Act, for which we perform miscellaneous legal services, primarily in the food and drug, environmental and corporate law fields.

2. Elected state legislators for whom we perform miscellaneous legal services relating to their official duties and for which payment is received from the general revenue of the state.

3. Several clients whom we represent in legislative matters in Illinois, and for whom we have registered as legislative representative.

4. At least one quasi governmental body appointed by the Governor for which one of our partners is Executive Director and General Counsel.

5. Numerous clients whom we represent before Illinois state administrative agencies.

We are prepared not to represent any client on any matter before the Illinois Liquor Control Commission, and I am prepared to disqualify myself as Chairman of the Commission from consideration of any matter involving any of our clients.

To the best of my knowledge no corporation in which I own stock or any other ownership interest is a licensee under the Act.

I would appreciate your official opinion as to whether it is legal for Burditt and Calkins and me to continue to represent our clients in the matters set forth in paragraph 1 through

5 above, under the conditions set forth in this letter.

I would also appreciate your official opinion as to whether it is legal for our clients to continue to retain our firm and me in the said matters and under the said conditions.

I am sure this is not the most important and pressing matter in your office, but unfortunately the Commission is currently considering a matter of fairly substantial significance, and the Illinois Senate is planning to recess on June 30th. Therefore, if it is at all possible, I would greatly appreciate receiving your opinion within the next ten days."

In your letter of June 26, 1973, you state:

"This will supplement my letter of June 15, requesting an Attorney General's opinion as to whether it is legal for Burditt and Calkins and me to continue to represent our clients in the matters set forth in paragraphs 1 through 5 of that letter under the conditions described therein.

First, I have never represented any client on any matter before the Illinois Liquor Control Commission, and I am prepared not to represent any client on any matter before the Commission during my tenure as Chairman, and for any period thereafter which you may deem reasonable. The work which I have performed for licensees in the past has nothing whatsoever to do with Illinois Liquor Control Commission matters; it relates solely to

miscellaneous legal services, primarily in the food and drug, environmental and corporate law fields, and was in fact performed primarily for subsidiaries of a licensee.

Second, I am prepared to disqualify myself as Chairman of the Commission from consideration of any matter involving any client for whom we do legal work of any nature whatsoever, regardless of who represents the client in the matter before the Commission.

Third, since your opinion is extremely important not only to me personally but to other citizens who are serving in part time governmental capacities, I would greatly appreciate an official opinion.

As you know, I accepted Governor Walker's offer to appoint me as Chairman of the Illinois Liquor Control Commission on condition that our firm would not be required to give up any of our existing clients. One of my main reasons for accepting the Governor's offer was my sincere personal desire to do whatever I could, however insignificant, to help restore public confidence in government, governmental officials and governmental bodies. If in your opinion any of the services for clients described in my letter of June 15th results in a conflict my acceptance of the Chairmanship of the Commission and simultaneous retention of those clients would at least in part defeat one of my main purposes. I sincerely hope that your official opinion will be that by disclosure I am resolving any possible question of conflict, but, if your opinion is to the contrary I know you will answer my questions forthrightly."

It is my further understanding that one of the licensees your law firm represents is a major manufacturer of beer in the United States and that payment for your services comes directly from that company.

The Illinois Liquor Control Commission is created by section 1 of article III of "AN ACT relating to alcoholic liquors" (Ill. Rev. Stat., 1971, ch. 43, par. 97), which act is hereinafter referred to as The Act. Said section 1 reads as follows:

> "There is hereby created an Illinois Liquor Control Commission consisting of three (3) members to be appointed by the Governor with the advice and consent of the Senate, no more than two (2) of whom shall be members of the same political party."

The Commission consists of three Commissioners appointed by the Governor with the advice and consent of the Senate. The Governor has the power to fill vacancies (Ill. Rev. Stat., 1971, ch. 43, par. 98). Section 2 of said Act reads as follows:

> "Immediately, or soon as may be after the effective date of this Act, the Governor shall appoint three (3) members of the

> commission, one of whom shall be designated as 'Chairman', one to hold office for a period of two (2) years, one to hold office for a period of four (4) years, one to hold office for a period of six (6) years, and at the expiration of the term of any such commissioner the Governor shall reappoint said commissioner or appoint a successor of said commissioner for a period of six (6) years. The Governor shall have power to fill vacancies in the office of any commissioner."

The qualifications of a Commissioner are delineated at section 6 of article III of The Act which forbids a Commissioner from having any direct or indirect interest in the manufacture, sale or distribution of alcoholic liquor. Said section 6 provides, in part, as follows:

> "* * * No commissioner, inspector or other employee, may, directly or indirectly, individually or as a member of a partnership, or as a shareholder of a corporation, have any interest whatsoever in the manufacture, sale or distribution of alcoholic liquor, nor receive any compensation or profit therefrom, nor have any interest whatsoever in the purchases or sales made by the persons authorized by this Act, or to purchase or to sell alcoholic liquor. * * *" (Emphasis added)
>
> Ill. Rev. Stat., 1971, ch. 43, par. 102.

Section 7 of article III of The Act (Ill. Rev. Stat., 1973 Supp., ch. 43, par. 103) forbids a Commissioner from accepting any gift, gratuity, emolument or employment from any persons subject to the provisions of the Act. Said section 7 provides as follows:

> "No commissioner, secretary, or person appointed or employed by the commission, shall solicit or accept any gift, gratuity, emolument or employment from any person subject to the provisions of this Act, or from any officer, agent or employee thereof, nor solicit, request from or recommend, directly or indirectly, to any such person or to any officer, agent or employee thereof, the appointment of any person to any place or position, and every such person, and every officer, agent or employee thereof, is hereby forbidden to offer to any commissioner, secretary, or to any person appointed or employed by the commission, any gift, gratuity, emolument or employment. If any commissioner, secretary or any person appointed or employed by the commission, shall violate any of the provisions of this Section, he shall be removed from the office or employment held by him. Every person violating the provisions of this Section shall be guilty of a Class A misdemeanor." (Emphasis added)

Section 2(14) of article VI of The Act (Ill. Rev. Stat., 1971, ch. 43, par. 120(14)) prohibits a law enforcing public official from being interested in any way, directly or

indirectly, in the manufacture, distribution or sale of alcoholic liquors. Said section 2(14) reads as follows:

> "(14) Any law enforcing public official, any mayor, alderman, or member of the city council or commission, any president of the village board of trustees, any member of a village board of trustees, or any president or member of a county board; and no such official shall be interested in any way, either directly or indirectly, in the manufacture, sale or distribution of alcoholic liquor;"

I am of the opinion that your position and the position of that of your law firm as attorney and legal advisor to licensees, particularly a manufacturer of alcoholic liquor, places you in violation of said sections 6 and 7 of article III and section 2(14) of article VI.

"An Act relating to alcoholic liquors" is an exercise of the police power of the state, having a substantial relation to the public health, morals, safety and welfare. It is settled law that the police power of the state is superior to any person's privilege to sell alcoholic beverages. (Daley v. Berzanskis, 47 Ill. 2d 395, cert. den. 91S S. Ct. 2173, 402 U.S. 999, 20 L.Ed. 2d 166).

The Illinois Supreme Court in the case of A. & P. Tea Co. v. Mayor of Danville, 367 Ill. 310 stated, at page 317:

> "The right to engage in the liquor traffic is not an inalienable right guarded by the organic law. It is not a right of citizenship nor one of the privileges and immunities of citizens of the United States. It involves no constitutional right which is violated by the mere curtailment or termination of its exercise. The regulation and restriction of the right to sell alcoholic beverages is referable to the police power which has resided in the States since the beginning of the present system of government. The policy of the State has long been to consider the right to traffic therein as permissive, only. This is based upon the theory that the unbridled use is inimical to the welfare of the people, and also upon its revenue producing potentialities. There is, therefore, no inherent right to sell alcoholic beverages in any such sense as to remove the traffic from the legitimate sphere of legislative control. People v. Harrison, supra; Crowley v. Christensen, 137 U.S. 86, 91; Sawyer v. Gallagher, 151 Iowa, 64; 33 Corpus Juris, 499."

Section 1 of article I of The Act (Ill. Rev. Stat., 1971, ch. 43, par. 94) reads as follows:

> "This Act shall be liberally construed, to the end that the health, safety and welfare

> of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." (Emphasis added)

It is clear that the manufacture, distribution and sale of alcoholic liquor may be subject to more stringent regulation than other businesses. (Daley v. Berzanskis, supra). This point was emphasized by Chief Justice Simpson in Weisberg v. Taylor, 409 Ill. 384, 387:

> "The plaintiff concedes, and, indeed, it is now well recognized, that the State may, in curbing intended evils, impose regulations on the liquor traffic more stringent than would be permitted or allowable in other businesses. (Baim v. Fleck, 406 Ill. 193; The Great Atlantic and Pacific Tea Co. v. Mayor of Danville, 367 Ill. 310; Weksler v. Collins, 317 Ill. 132; Davis v. Mass. 167 U.S. 43; Packard v. Banton, 264 U.S. 140.)
> * * * *"

Generally speaking, sections 6 and 7 of article III, and section 2(14) of article VI of The Act may be referred to as "conflict of interest" statutes. The Illinois Supreme Court in construing similar statutes has declared that it is the

object and purpose of "conflict of interest" statutes to prohibit a public official from holding "interests" that prevent or tend to prevent a public official from giving to the public the impartial service which the public has every right to expect and which is the duty of the official to render.

In People v. Adduci, 412 Ill. 621, the court held that the defendant, who was a member of the Illinois House of Representatives, could not hold a financial interest in a contract between the State of Illinois and an Illinois corporation. The court said at pages 626 and 627:

> "* * * The interest against which the prohibition is leveled is such an interest as prevents or tends to prevent the public official from giving to the public that impartial and faithful service which he is in duty bound to render and which the public has every right to demand and receive. Not every interest is a bad or corrupt interest. The desire of every public official to serve the public faithfully necessarily requires him to take a keen interest in the affairs of his office and the prohibition is manifestly not leveled against this interest. Whether or not the interest in any given case comes within the prohibition of the statute may well become a question of construction for the court in view of all the facts and circumstances shown in the particular case. (Taylor v. Comrs. of Highways

> of Town of Normal, 88 Ill. 526; School Directors v. Parks, 85 Ill. 338.) In the present case it is alleged that there was a personal financial interest, and, certainly, such an interest would come within the prohibition of the law. In the case of Lesieur v. Inhabitants of Rumford, 113 Main, 317, 93 Atl. 838, the court said the question really is whether the town officer by reason of his interest is placed 'in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official.' Nor is it necessary that the statute should enumerate the various kinds of interest which may come within its terms. (People v. Bertsche, 265 Ill. 272, 283.) The objectionable interest could consist of any one of numerous interests which would be inconsistent with and repugnant to the duty of the officer to render to the public faithful and impartial service."

"Conflict of interest" statutes are not aimed solely at preventing intentional misconduct. Their import represents a realization by the Legislature that public officials are human and that it is difficult for such officials to rule against their own interests or the interests of their partners or associates.

In the case of Druse v. Streamwood Utilities Corp., 34 Ill. App. 2d 100, 112, the court stated as follows:

> "* * * [T]he general rule is that in order to render void a contract with a municipality the interest which the public officer has in such contract must be pecuniary and that the question of the direct or indirect interest in the contract on the part of the municipal officers does not depend upon whether or not they receive a direct benefit from the contract itself. Nor are they relieved by the fact that there was no intentional bad faith, or that no injury resulted to the person alleging that the contract was void. The court points out that the city officers would be more than human if they could make as fair and impartial a contract with a contractor employing them as they could with another party with whom they had no relation by way of contract or otherwise."

The Supreme Court of Nebraska construed a statute, strikingly similar to said section 7, which prohibited a Liquor Control Commissioner from accepting any gifts, gratuities, emoluments or employment from any person subject to the provisions of Nebraska's Liquor Control Act. (State v. Young, 48 N.W. 2d 677 (Neb. 1951)). The court at page 681 stated the object and purpose of this statute to be as follows:

> "* * * The purpose of the statute is to remove the temptation on the part of a commissioner to use his influence with those under the regulation and control of the commission for private gain. Experience

> shows that to permit such dealings has a tendency to create partiality and discrimination on the part of the officer in administering the functions of his office. * * *"

Said sections 6, 7 and 2(14) of The Act relate to the same subject; they are in pari materia and should be construed together. (Petterson v. City of Naperville, 9 Ill. 2d 233; People v. Hppe, 2 Ill. 2d 434; People v. Boreman, 401 Ill. 566). I am of the opinion that these statutes evidence an intent of the Legislature to prevent a member of the Illinois Liquor Control Commission from being so interested in a manufacturer, distributor or seller of alcoholic liquor that the Commissioner cannot give to the public the impartial and faithful service which he is duty bound to render and which the public has every right to demand and receive. These sections indicate a determination to protect the welfare of the people and to insure that the Commissioners will not only render absolutely impartial service but also to prevent any appearance or aura of a conflict of interest or impropriety. Blanck v. Mayor and Borough Council of Magnolia, 185 A. 2d 862, 867 (S.Ct. N.J. 1962).

It is of particular importance that a Commissioner not be interested in the manufacturer of alcoholic liquors. Obviously, the manufacturer may be before the Commission on some matter pertaining to its license alone; but, additionally, wholesalers and retailers who deal with the manufacturer or market its product may come before the Commission, as may competitors of the manufacturer. In such instances, no matter how objective your decisions may be on contested issues, there is a continuing possibility, if not probability, that the appearance to the public generated by your participation may be that of impropriety.

As heretofore stated, you do have interests which are prohibited. Section 6 of The Act prohibits a Commissioner from having "any interest whatsoever" directly or indirectly, individually or as a member of a partnership, in the manufacture, distribution or sale of alcoholic liquors. This provision is very broad and sweeping in its import. It prohibits "any interest whatsoever." It prohibits not only direct interests but indirect interests as well. It prohibits interests a Commissioner may have through a partnership. You have

indicated that the law firm in which you are a partner, represents clients who are licensees under "An Act relating to alcoholic liquors." They may either be manufacturers, distributors or sellers of alcoholic liquors. I am of the opinion that an attorney whose law office partnership is the legal advisor to a manufacturer, distributor or seller of alcoholic liquors is indirectly interested in his client and may not serve on the Liquor Control Commission.

In People ex rel. Pearsall v. Sperry, 314 Ill. 205, the Illinois Supreme Court had occasion to construe the phrase "* * * interested, directly or indirectly * * * in any contract." This phrase appeared in section 3 of "An Act to prevent fraudulent and corrupt practices in the making or accepting of official appointment and contracts by public officers." (Ill. Rev. Stat., 1971, ch. 102, par. 3). Section 3 prohibited public officials from being either directly or indirectly in any contract or the performance of any work in the making or letting of which the public official may be called upon to act or vote. The facts of People ex rel. Pearsall v. Sperry were that nine out of eleven city council

members were employees of the company that contracted with the city. The Court held that employees were indirectly interested in the contracts of their employer. Thus, the employment situation inheres in the phrase "indirect interest."

The Court in Sperry explained its rationale at pages 209-210 as follows:

> "* * * If we attach any significance to the words used by the statute, 'directly or indirectly interested in the contract,' we think the conclusion cannot be escaped that the officers of the city who are also employees of the contractor must be considered as indirectly interested in the contract, without regard to the fact that they derived no direct benefits from the contract itself. They would be more than human if they could make the same fair and impartial contract with the contractor as they could with another party with whom they had no relation, by way of employment or otherwise. We have no doubt that the officers who signed and participated in making the contract did so without any intentional bad faith, and that the same is true of the contractor; still, we are clearly of the opinion that the court properly held that the contract was void within the provisions of the statute. The three city officers who signed on the part of the city had such an interest in the business and welfare of the contractor in this case as would naturally tend to affect their judgment in their determination to let the contract and to pass upon the question

whether or not the same was completed in full accord with the terms thereof, * * *."

I am of the opinion that an attorney-client relationship is such an employment situation. Since the object and purpose of the statute is to prevent a Commissioner from having any such interest whatsoever, to hold that only technical employer-employee relationships are covered and relationships which may technically be classified as independent contractor situations are not covered would be hyper-technical and contrary to the legislative mandate that the Act be liberally construed to protect the welfare of the People of the State of Illinois.

I am also of the opinion that the attorney-client relationship you have with licensees subject to the provisions of the Act constitutes "an employment" in violation of section 7.

In State v. Young, 48 N.W. 2d 677 (Neb. 1951), the Governor of Nebraska removed a Commissioner for violating a similar Act. The Commissioner sold insurance to persons subject to that Act before being appointed to the Commission.

The Commissioner was then appointed to the Commission but continued to receive commissions on the insurance he had sold to persons subject to the Act. In a quo warranto action brought to question the Commissioner's right to occupy the office of Commissioner, the Court held that accepting these commissions was tantamount to "accepting a gift, gratuity, emolument or employment from any person subject to this Act."

In State v. Sorrell, 117 N.W. 2d 872 (Neb. 1962) again the Governor of Nebraska removed a Commissioner for violating the statute and again a quo warranto action was brought. In this case, a Commissioner was also a real estate broker and advertised a tavern for sale. The Court held that this was an "employment" even though the Commissioner received no actual fee or pay for what he had done.

In the case of Kravis v. Hock, 59 A. 2d 657, at page 658, the Supreme Court of New Jersey broadly defined the term "employ" as meaning:

> "'To use; to have in service; to cause to be engaged in doing something; to make use of as an instrument, a means, a material, etc., for a specific purpose.' The Commissioner,

> since the adoption of this regulation in November, 1940, has consistently construed the word 'employed' as used in said regulation to embrace 'all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship.'"

See, also, Smith v. Herrick, 238 P. 2d 557, 559, S. Ct. Kans. 1951.

Following the logic of these cases, I am of the opinion that your attorney-client relationship is an employment within the meaning of the prohibition in section 7.

Your situation also falls within the prohibition contained in said section 2(14). Even a cursory examination of the Act and the powers of the Commission make it clear that a Commissioner is a law enforcing public official. The question is then whether you as such an official have an interest in the manufacture, sale or distribution of alcoholic liquor. This provision of the statute must also be liberally construed to effectuate the purpose of the Act. While the language varies somewhat from the terminology employed in sections 6 and 7, the import of section 2(14) is substantially

the same in that it prohibits a Commissioner from being "interested in any way, either directly or indirectly, in the manufacture, sale or distribution of alcoholic liquor." The case of Bock v. Long, 3 Ill. App. 3d 691 is an example of the remoteness of an interest which is held to be "indirect" within the meaning of section 2(14). In that case the Court held that a non-proprietary pecuniary interest was sufficient where a police captain whose wife was a retail licensee had such an interest even though his only connection with the tavern, in addition to the marital relationship, was the fact that he performed janitorial services and acted as a bartender without compensation.

It is my opinion that the existence of these conflicts cannot be cured by your disqualifying yourself in particular instances as suggested in your letters. The statutes forbid the Commissioner from holding such interests. Your voluntary withdrawal from particular cases would in no way eliminate the conflict prohibited by the statute. Nowhere in the statute is it provided that such conflicts may be cured by withdrawal, and as previously indicated, your

participation in matters involving other licensees who do business with, or against, your client licensees can result in the appearance of impropriety no matter how objective you may be in making your determinations.

In view of my opinion that conflicts exist with reference to your representation of licensees under the Act, there appears to be no reason to examine the remaining questions posed in your letter. If, however, your law firm severs all relationships with such licensee-clients, I will then give you my opinion on the other questions if you so desire.

Very truly yours,

A T T O R N E Y G E N E R A L