When corporations and their officers are jointly sued, they often turn to their existing corporate litigation counsel for representation. But clients and attorneys alike should carefully consider whether a conflict of interest precludes joint representation.

When Can You Defend Both a Corporation and Its Officers?

By Richard L. Miller II and Joshua E. Liebman

Late on Friday afternoon, attorney Sandra Solicitor received an unexpected phone call from Buzz Armstrong, the founder and president of her firm's long-standing client, Moonshot, Inc. Although Sandra had never represented Buzz personally, he and Sandra had become close friends over the years. Now, Buzz was incensed: he was being sued by a few of the younger Moonshot shareholders.

He said the "upstarts" were claiming that he was guilty of fraud and self-dealing. In addition, Moonshot had been named as a defendant and was being accused of negligent supervision for its failure to stop Buzz's purported misconduct.

Buzz emphatically denied the allegations and assured Sandra, who had no prior knowledge of the matters, that the suit was baseless. He instructed her to enter an appearance on behalf of "my company and me" and to launch attacks on the plaintiffs immediately. "Spare no expense," he said.

As Sandra hung up the phone, it occurred to her that she could face ethical impediments to representing both Buzz and "his corporation," Moonshot. She wondered whether she could represent Buzz when he is being sued for abusing a client she had represented for years.

Defending both a corporation and its officers

Sandra's concern is well founded. In Illinois, "an attorney for a corporate client owes his duty [of loyalty]

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to the corporate entity rather than a particular officer, director, or shareholder."[1] This well-established principle is codified by the Illinois Rules of Professional Conduct ("RPC"): "A lawyer employed or retained by an organization represents the *organization* acting through its duly authorized constituents."[2] As a result, Sandra must consider her duties to Moonshot – not just her friend and referral source, Buzz. But what does such consideration entail?

Before representing both parties, you must be reasonably certain no conflict exists and none will arise during the litigation.

Sandra was not hired to represent the shareholders who brought the suit and, at this point, she has no reason to believe Buzz has acted wrongfully. Yet if Buzz is guilty of what the "upstarts" allege, he has taken advantage of Sandra's long-standing client. Can Sandra represent both Buzz and the entity he controls?

The rule on paper is clear – her utmost loyalty is owed to Moonshot. But, like so much else in the law, the application of that rule can be problematic.

The first step an attorney asked to represent both a corporation and its officers must take is to determine whether there is a conflict of interest between the two parties.[3] Under the Illinois RPC, if there is no conflict of interest, a lawyer representing a corporation may also represent that corporation's officers. Thus, Sandra could represent both Buzz and Moonshot if their interests are aligned. As in this hypothetical, however, it is often difficult to determine if they share the same goals at such an early stage.

If Buzz is innocent, the company will likely want the case resolved as quickly and cost-effectively as possible – meaning Sandra's representing both parties is logical and appropriate. However, if Buzz is guilty, the company may wish to seek relief from him, meaning Sandra would have a conflict.

The relevant rules, with regard to dual representation, are RPC 1.13 and 1.7. On January 1, 2010, the Illinois Rules of Professional Conduct 2010 ("RPC 2010") take effect. RPC 2010 Rules 1.13 and 1.7 are substantially similar – but not identical – to their expiring RPC counterparts.

RFC 2010 Rule 1.13(g) (formerly Rule 1.13(e)), which is entitled "Organization as Client," authorizes the dual representation of an organization and its directors in certain circumstances. It states as follows, in relevant part: "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7."[4] RPC 2010 Rule 1.7 sets forth the "general rule" regarding conflicts of interest, stating as follows:

> a. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person by a personal interest of the lawyer.
>
> b. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consents.[5]

Based on the plain language of these rules, Sandra may represent both Buzz and Moonshot as long as there is not a "concurrent conflict of interest." If there is a concurrent conflict, however, dual representation may be prohibited unless Sandra (1) believes she will be able to provide competent and diligent representation to both Buzz and Moonshot, (2) the representation is not prohibited by law, (3) Buzz and Moonshot do not have claims against each other, and (4) Sandra obtains the informed consent of both Buzz and Moonshot.

There are no cases interpreting RPC 2010, of course, and there are few interpreting RPC Rule 1.13 and its interplay with RPC Rule 1.7. However, one Northern District of Illinois opinion has stated "a conflict occurs *only* if [the attorney] could not have adequately counseled the two parties because the interests of the parties diverged."[6] A Northern District of Illinois Bankruptcy Court opinion warned that a law firm involved in dual representation "risks becoming a defendant in a legal malpractice action" if the interests of the individual defendants are advanced to the detriment of the corporation.[7]

Sandra, therefore, must first determine whether the interests of Buzz and Moonshot are the same. At first blush, it seems that Buzz and Moonshot's inter-

1. *ABC Trans Natl Transport, Inc v Aeronautics Forwarders, Inc,* 90 Ill App 3d 817, 831, 413 NE2d 1299, 1310 (1st D 1980); *Kopka v Kamensky and Rubenstein*, 354 Ill App 3d 930, 939, 821 NE2d 719, 727 (1st D 2004) (citing *Hager-Freeman v Spircoff*, 229 Ill App 3d 262, 278, 593 NE2d 821, 831 (1st D 1992) ("the attorney for a corporation, even a closely held one, does not have a specific fiduciary duty toward the individual shareholders")); *Heim v Signcraft Screenprint Inc*, No 01C50014, 2001 WL 1018228, at *2 (ND Ill) ("a corporate attorney represents the *corporation*, not the individual directors or officers").

2. Illinois RPC 1.13(a) (emphasis added); see also ND Ill R 83.51.13(a). Although the Illinois Rules of Professional Conduct of 2010 (referred to herein as "RPC 2010") are effective as of January 1, 2010, RPC 1.13(a) and RPC 2010 1.13(a) are identical.

3. For ease of reference, this article repeatedly refers to "officers" rather than both "directors and officers." Unless otherwise noted, the guidelines described herein apply to both.

4. RPC 2010 1.13(g). The language of RPC 2010 1.13(g) is identical to the language of former RPC 1.13(e).

5. RPC 2010 1.7; see also ND Ill R 83.51.7. For the purposes of this article, the content of RPC 2010 1.7 is substantially the same as the content of RPC 1.7. The only differences are that RPC 2010 1.7(a) defines "concurrent conflict of interest" as representations that are either "directly adverse" or "materially limited" and, under RPC 2010 1.7(b), four requirements must be met for dual representation. RPC 2010 1.7(a) and (b). By contrast, RPC 1.7(a) addresses "directly adverse" representation and RPC 1.7(b) addresses representation that may be "materially limited." RPC 1.7(a) and (b). Under both sections, dual representation is allowed if two requirements are met. Id. Other than the addition of two requirements for dual representation – (a) the representation is not prohibited by law and (b) the representation does not involve the assertion of a claim by one client against the other client – RPC 2010 1.7 is simply a rearranged version of RPC 1.7. As such, analysis of RPC 1.7 should apply to RPC 2010 1.7.

6. *Seyfarth, Shaw, Fairweather & Geraldson v Wintz*, No 99 C 1536, 1999 WL 1129609 at *9 (ND Ill) (emphasis added).

7. *In re J. S. II, LLC*, 371 BR 311, 323 FN8 (Bankr ND Ill 2007).

ests coincide and that Sandra may represent both. Still, if Sandra later learns that a conflict exists, she may be disqualified from representing both parties (see discussion below).[8]

Given the possibility of disqualification and the appearance of impropriety, the most prudent option for Sandra is to tell Buzz at the outset that she represents Moonshot and suggest that he hire another competent attorney to represent him personally. If the lawsuit against Buzz and Moonshot were a *derivative* action, however, Sandra's choices would be more limited.

Derivative actions

A derivative action is a suit to enforce a corporate cause of action against its own officers, directors, and even third parties that had damaged the corporation but that corporate managers refused to pursue.[9]

For instance, a corporation's minority shareholder might bring a suit on behalf of the corporation alleging that the company's president had seized a corporate *opportunity*, such as the chance to buy valuable real estate at a low price, for his own benefit when it rightfully belonged to the corporation. If the corporation does nothing to protect its interests, a minority shareholder could, after following the proper procedures, file a derivative action.

As a general rule, in a derivative suit, the corporation cannot have the same counsel as an accused officer. In *Cannon v U. S. Acoustics Corp*, the Northern District of Illinois relied upon the American Bar Association's Code of Professional Responsibility (the "ABA Code"), which is the predecessor to the Illinois RPC, when it stated that it is "clear that multiple representation is improper when the client's interests are adverse."[10]

In that derivative case, the court held that the plaintiffs' complaint established a conflict that could not be ignored.[11] Further, the court warned that dual representation could result in confidences obtained from one client during the course of representation being used to the detriment of the other.[12] Illinois courts, as well as other state and federal tribunals, have followed the principles expressed in *Cannon*.[13]

In fact, in a derivative suit, even if no conflict exists at the time the complaint is filed, the risk of a conflict arising later in the litigation requires that the parties seek separate counsel. Consistent with *Cannon*, in *Lower v Lanark Mut Fire Ins Co*, the court explained as follows: "[T]he potential conflict cannot be ignored, and we must consider the serious hardship to the court and the parties that would ensue if new counsel is made necessary later because a conflict does arise in the course of trial."[14]

Similarly, in *Wittenborn v Pauly*, the Northern District stated as follows: "[W]here the court faced a disqualification motion in the context of a shareholder derivative suit, the potential for conflict was enough to justify requiring the corporate defendant to retain independent counsel."[15]

Therefore, if the "upstarts" had filed a derivative action on behalf of Moonshot, Inc., this general rule would probably preclude Sandra from representing both Moonshot and Buzz. Thus, Sandra would not be permitted to represent Buzz unless, of course, an exception to the general rule applies.

Exceptions to the rule against dual representation

Courts have recognized exceptions to the prohibition of dual representation in derivative lawsuits when (1) the derivative action is patently frivolous; (2) the allegations against the individual defendants involve mismanagement rather than fraud, intentional misconduct, or self-dealing; or (3) the degree of participation of the corporation in defending the action is low.[16]

Reliance on any of these three exceptions is not without risk. None has been applied by an Illinois court, and even courts that recognize one or more of the exceptions often do so only in dicta.

The "patently frivolous" exception: The first exception arises when a "patently frivolous" derivative lawsuit is filed.[17] Although there apparently is no published opinion in which a court invoked this exception, its rationale was explained in *Schwartz v Guterman*: "[I] f the derivative action has merit, there will generally be a conflict of interest between the corporation and the insider defendants....But, if the suit is baseless, the true interests of the business entity will be adverse to plaintiff's and aligned with the insider defendants' interests."[18]

Reliance on the patently frivolous exception by Sandra Solicitor would pose risks. No Illinois court has endorsed this exception, and courts are reluctant to allow dual representation at the outset of a case because "it is difficult to evaluate the merits of an action in the early stages of litigation."[19]

In a derivative suit, the lawyer is probably disqualified from representing both parties or either party separately.

8. See *Guillen v City of Chicago*, 956 F Supp 1416, 1421 (ND Ill 1997) (applying a two-step analysis when a motion to disqualify was filed).
9. *Ross v Bernhard*, 396 US 531, 534 (1970).
10. 398 F Supp 209, 220 (ND Ill 1975), rev'd on other grounds, 532 F 2d 1118 (7th Cir 1976).
11. Id.
12. Id.
13. *Lower v Lanark Mut Fire Ins Co*, 114 Ill App 3d 462, 469, 448 NE2d 940, 946 (2d D 1983); see also *Heim,* 2001 WL 1018228 at *2 FN 3; *Musheno v Gensemer*, 897 F Supp 833, 838 (MD PA 1995); *Baytree Capital Assoc, LLC v Quan*, No CV 08-2822 CAS (AJWx), 2008 WL 3891226 at *8 (CD Cal 2008); *Messing v FDI, Inc*, 439 F Supp 776, 782 (D NJ 1977); but see *Clark v Lomas & Nettleton Financial Corp*, 79 FRD 658, 660-61 (ND Tex 1978) (holding that there is no conflict of interest requiring disqualification where a law firm represents both a derivatively sued corporation and its directors and the law firm moves to dismiss on behalf of its clients, does not otherwise participate in the lawsuit, and withdraws from all representation when either the motion is denied or when it becomes necessary to actively participate in the defense of either client).
14. *Lower* at 469, 448 NE2d at 946.
15. 1988 WL 33723 at *4 (ND Ill), relying on *Cannon* and *Lower*.
16. See *Campellone v Cragan*, 910 So2d 363, 365 (Fla App 5th D 2005) ("[T]he disqualification of corporate counsel from representing individual defendants may be avoided if the derivative action is patently frivolous, the degree of participation of the corporation in defending the action is very low, or if the allegations against the individual defendants involve mismanagement rather than fraud, intentional misconduct or self-dealing.")
17. *Baytree Capital*, 2008 WL 3891226 at *8; *Campellone*, 910 So2d at 365; *Rogers v Virgin Land, Inc*, No 1996-13M, 1996 WL 493174 at *3 (D VI 1996); *Musheno*, 897 F Supp at 836; *Bell Atlantic Corp v Bolger*, 2 F 3d 1304, 1317 (3d Cir 1993); *In re Conduct of Kinsey*, 294 Or 544, 561, 660 P2d 660, 669 (OR 1983); *Schwartz v Guterman*, 109 Misc 2d 1004, 1006, 1008, 441 NYS2d 597, 598 (NY Spec Term 1981); *Rowen v LeMars Mut Ins Co of Iowa*, 230 NW2d 905, 915 (Sup Ct Iowa) ("If the action is without merit, the expense of independent counsel for the corporation is unjustified").
18. *Schwartz* at 1005, 441 NYS2d at 598.
19. *Rogers,* 1996 WL 493174 at *3 (prohibiting dual representation because, among other reasons, it was too early in the action to assess whether the complaint was patently frivolous).

Indeed, courts have disqualified attorneys from dual representation who sought to invoke the "patently frivolous" exception.[20] They have held that the risk of a conflict is too great to allow the dual representation to persist while the parties argued and developed facts regarding the merits to determine whether the claims are legitimate or frivolous.[21] Hence, reliance on this exception to represent both Buzz and Moonshot, if a derivative action had been brought, would probably be unwise.[22]

The mismanagement exception: The second exception actually modifies the general rule. In *Bell Atlantic Corp v Bolger*, the third circuit held that "allegations of [a] director's fraud, intentional misconduct, or self-dealing require separate counsel," but, allegations of "only mismanagement" do not.[23] In so holding, the court explained that corporate law has long recognized a distinction between a breach of the duty of care and the duty of loyalty.

The court further relied on the commentary to Rule 1.13 of the Model Rules of Professional Conduct, which states as follows in part:

> Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board.[24]

Consequently, if only mismanagement is alleged, this exception will probably apply and allow the same lawyer to represent the corporation and its officers. Again, although no Illinois state court has cited *Bell Atlantic*, other jurisdictions recognize the mismanagement exception.[25]

If Sandra's case did involve a derivative action, Sandra still could *not* rely on the mismanagement exception because Buzz was accused of fraud and self-dealing. In cases in which the allegations are not clear and the line is blurred between the duties of care and loyalty, it is generally recognized that "the better practice is to obtain separate counsel for individual and corporate defendants."[26] Thus, if mismanagement is all that is alleged, this exception might permit dual representation of a corporation and its officer in a derivative suit.

The "low participation" exception: The third exception applies in derivative actions where the corporation is nothing more than a nominal party with little to no involvement. In such cases, independent counsel for the parties is not required.[27] However, where the corporation takes an active role in the litigation, the modern view is that independent counsel must be obtained.[28]

Once again, no Illinois case law discusses this exception. In Sandra's case, Moonshot is a key defendant and will be actively involved in its defense. Thus, even if the "upstarts" had filed a derivative action, this exception would not apply.[29]

Can the corporation and officer waive a conflict?

Even when a case is not a derivative action, a conflict of interest can exist at the outset or arise during the litigation. When one is discovered, the lawyer may wonder whether the corporation and its officers may consent to dual representation. Several authorities address the question.

Under Rule 1.7 of the RPC 2010, even with consent, waiver is not always permitted. Specifically, the new Rule 1.7 requires, in addition to consent, that (1) the attorney reasonably believe he or she will be able to provide competent and diligent representation, (2) the representation is not prohibited by law, and (3) the representation does not involve a claim by one client against the other client.[30] Further, the client's consent must be "informed."[31]

Section 131 of the Restatement (Third) of The Law Governing Lawyers (the "Restatement"), states as follows in relevant part:

> Unless all affected clients *consent*...a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.[32]

However, this section does not state that the lawyer *can* represent both parties in every case where he or she obtains consent.

Although the RPC and the Restatement provide a mechanism for obtaining a consent waiver, doing so is made more complicated when both a corporation and its director are defendants. Who consents on behalf of the corporation? Typically, courts will *not* allow a defendant director to consent to dual representation on behalf of his co-defendant corporation.[33]

Moreover, even if consent is obtained – where, perhaps, other directors who are not named defendants may consent on behalf of the corporation – one client's view of the appropriateness of dual representation could later change if the dispute becomes acrimonious. In such a scenario, an attorney representing adverse parties may find it difficult to justify the dual representation, particularly when it has already proven to be a bad decision.

In Sandra's case, it would appear there is no conflict at the outset of her representation, since Buzz is denying the upstart's allegations and Sandra has no reason to believe he is being dishonest. As a result, no waiver is necessary.

But, if Sandra were to agree to represent both Buzz and Moonshot and later discovered a conflict, she would have a problem. She could only continue to represent both if (1) she reasonably believes she can represent both clients effectively,

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20. Id ; see also *Musheno*, 897 F Supp at 837.
21. *Rogers*, 1996 WL 493174 at *3.
22. The patently frivolous exception has been recognized by at least eight different courts and analyzed by at least four. In each of the four opinions in which the court analyzed whether the patently frivolous exception applied, the court held that it did not. *Campellone*, 910 So2d at 365 ("the allegations in the verified complaint were sufficient for purposes of the disqualification motion"); *Rogers*, 1996 WL 493174 at *3 ("While Shumway's affidavit and report are by no means conclusive proof of plaintiff's allegations, they do support a conclusion that plaintiff's suit is not 'patently frivolous'"); *Musheno*, 897 F Supp at 837 ("there is no evidence that the plaintiff's claims are 'patently frivolous'"); *Schwartz* at 1008, 441 NYS 2d at 598 ("an examination of the pleadings and motion papers reveals sharply disputed facts and genuine issues").
23. *Bell Atlantic*, 2 F3d at 1317.
24. Id at 1316 (quoting Model Rules of Prof Conduct R 1.13 cmt (1992)).
25. See *Forrest v Baeza*, 58 Cal App 4th 65, 74, 67 Cal Rptr 2d 857, 863 (1st D 1997); see also *Campellone*, 910 So2d at 365; *Musheno*, 897 F Supp at 838; and *Messing*, 439 F Supp at 782; but see *Lower* at 469, 448 NE2d at 946 (prohibiting dual representation despite plaintiff's argument that the company's directors did not achieve personal gain from the alleged wrongdoing).
26. *Bell Atlantic*, 2 F3d at 1317.
27. *Scott v New Drug Serv, Inc*, No CIV A No 11336, 1990 WL 135932 at *4 (Del Ch 1990) (declining to grant motion to disqualify because it did not appear that the corporation would take an active role in the litigation).
28. See *Baytree Capital*, 2008 WL 3891226 at *8.
29. See *Messing*, 439 F Supp at 782.
30. RPC 2010 Rule 1.7(b).
31. RPC 2010 Rule 1.7(b)(4); see also *Horizon Fed Sav Bank v Selden Fox & Asso*, No 85 C 9506, 1987 WL 13569 at *3 (ND Ill 1987) (court reviewed affidavit of client to determine whether disclosure and subsequent conflict waiver was adequate); Model Code of Prof Responsibility EC 5-16.
32. Restatement (Third) of the Law Governing Lawyers §131 (2000).
33. See e.g., *Forrest* at 76, 67 Cal Rptr2d at 864; *Campellone*, 910 So2d at 365.

(2) Buzz and Moonshot are fully advised of the implications of dual representation, (3) Buzz and Moonshot both consent to dual representation, *and* (4) the court does not prohibit Buzz or any non-defendant directors from consenting on behalf of Moonshot.

Can a corporation pay its officers' legal fees?

If an attorney determines that he or she can adequately represent both parties, the lawyer often faces yet another ethical quandary: deciding who can pay the attorneys' fees for representing the accused officer.

In Illinois, the corporation generally may pay for legal services rendered to its officer.[34] Section 8.75 of the Illinois Business Corporation Act (the "BCA") states that a corporation may indemnify anyone named in an action by reason of his or her being a director or officer of a corporation "other than [in] an action by or in the right of the corporation."[35] In other words, the BCA *prohibits* indemnification when an action is brought derivatively (even if one of the three exceptions to the general rule prohibiting dual-representation applies).

In *Stanley v Brassfield, Cowan & Howard*, a minority shareholder of a closely held corporation sought to have the individual directors reimburse the corporation for the cost of legal services rendered to them in an underlying lawsuit.[36] There, the shareholder had sued both the corporation and its directors alleging that, among other things, a loan he had made to the corporation was never repaid and tools he loaned to the corporation had not been returned.[37]

The same attorneys represented both the defendant-corporation and the individually named defendant-directors.[38] The shareholder argued that the attorneys in the case had a conflict and, as a matter of law, attorneys are not entitled to fees for representing conflicting interests in the same litigation.[39] The court held, however, that because the claims in the underlying suit were brought against *both* the corporation *and* the individual board members as opposed to being brought against the board members but *on behalf of* the corporation, it was not a derivative action.[40]

Therefore, the court held, there was no conflict of interest that would disqualify the attorneys from representing both parties.[41] As a result, the corporation was allowed to indemnify the defendant-directors.[42] In Sandra's case, because the suit is not a derivative action, she could accept payment of her fees for representing both Buzz and Moonshot from Moonshot, assuming she could and did represent both of them.

If a conflict exists, should the attorney represent the corporation or the officer?

If a conflict exists and the attorney cannot represent both the officer and the corporation, may he or she represent either the officer or the corporation? As noted earlier, "an attorney for a corporate client owes his duty [of loyalty] to the corporate entity rather than a particular officer, director, or shareholder."[43] This straightforward answer, however, is turned on its head in the context of a derivative action.

It is well settled that in a derivative action, when an attorney cannot represent both the corporation and its officers the corporation is entitled to new counsel.[44] In *Cannon*, the court held that although counsel offered to withdraw its representation of the individual defendants, the appropriate course was for the corporation to retain independent counsel.[45]

The court explained that within the unique confines of a derivative action, where the defendant corporation stands to benefit from the plaintiff's success and is only a nominal defendant, the corporation, rather than the individual, is required to obtain new, independent counsel. This is necessary to protect both parties by (1) allowing the independent attorneys to determine the role the corporation will play in the litigation without any influence from their representation of the individual defendants and (2) eliminating the possibility that confidences disclosed by the individual defendants could be used adversely to their interests.[46]

In a derivative action in Illinois, selection of the corporation's new and independent attorney is left to the corporation.[47] In *Lower*, the court denied the plaintiff's request that the court appoint counsel to represent the corporation and held that "[t]he defendant corporation may select its own counsel even though some or all of the defendant directors may make the selection."[48]

In reaching its conclusion, the second district cited *Cannon*, in which the court was confident that "new counsel will recognize their duty to represent solely the interests of the corporate entities."[49] By contrast, in some jurisdictions, courts require that only non-defendant officers be involved in selecting independent counsel.[50] And at least one court selected the new attorneys for the corporation.[51]

As a result, if our hypothetical case was a derivative action, Sandra would likely be disqualified because Moonshot is entitled to new, independent counsel and Sandra cannot represent Buzz if his interests are adverse to her long-time client Moonshot. Under such a scenario, Buzz may ultimately have to select two new attorneys: one for himself and another for Moonshot.

Conclusion

When Sandra was asked to defend Buzz in a suit naming both him and the company he controls, her first concern was whether she could do so without breaching her duties to Moonshot. She was wise to be concerned. Although an attorney may sometimes represent both the corporation and its officers, dual representation is risky.

Before deciding to represent both parties, an attorney must be reasonably certain that there is no conflict of interest and none will arise during the litigation. Of course, conflicts often develop between parties during litigation. Thus, by representing both clients, the attorney is placing herself at greater risk of being disqualified later.

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34. See 805 ILCS 5/8.75; see also *Stanley v Brassfield, Cowan & Howard,* 152 Ill App 3d 378, 381, 504 NE2d 542, 544 (3d D 1987).
35. 805 ILCS 5/8.75.
36. *Stanley* at 378, 504 NE2d at 542.
37. Id at 379, 504 NE2d at 543.
38. Id.
39. Id at 380, 504 NE2d at 543.
40. Id at 380, 504 NE2d at 543-44.
41. Id at 381, 504 NE2d at 544.
42. Id.
43. *ABC* at 831, 413 NE2d at 1310. See also RPC 1.13(a)
44. *Cannon,* 308 F Supp at 220; see also *Lower* at 469, 448 NE2d at 946 (ordering attorneys to withdraw as counsel for the corporate defendant).
45. *Cannon,* 208 F Supp at 220.
46. Id.
47. *Lower* at 470, 448 NE2d at 946 .
48. Id.
49. *Cannon,* 308 F Supp at 220.
50. See *Messing*, 439 F Supp at 783 (holding that independent corporate counsel should be selected by disinterested members of the board of directors); and *Musheno*, 897 F Supp at 839 (holding that the defendant corporation should select independent counsel in the manner it would act in any other circumstance where a conflict of interest exists).
51. *Rowen,* 230 NW2d at 916 (holding that the interests of the shareholders will be better served if independent counsel for the corporations is selected by the court); but see *Tydings v Berk Enterprises*, 80 Md App 634, 645, 565 A2d 390, 395-96 (1989) (rejecting *Rowen* and holding that the choice of independent counsel rests with the corporation).

Ultimately, it is probably far better for Sandra to err on the side of caution with regard to her ethical obligations to Moonshot. Otherwise, she risks disqualification, damaging her reputation, and perhaps losing a client by appearing on behalf of both a friend and her existing corporate client.

In sum, assuming she knows nothing of the new suit and it is not a derivative action, she should either (1) not represent either client in the new matter or (2) refer Buzz to a reliable colleague and continue to represent Moonshot.[52] If the new suit is a derivative suit, Sandra is probably disqualified from representing *either* party. ■

52. See *Stopka v Alliance of American Insurers*, No 95 C 7487, 1996 WL 204324, at *4 (ND Ill 1996) (denying motion to disqualify defense counsel in employment dispute where defense counsel had interacted with the plaintiff - employee while the plaintiff was an officer of the defendant-employer).