



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and 1.10. See also *People v. Robinson*, 79 Ill.2d 147, 402 N.E.2d 157, 37 Ill.Dec. 267 (1980). 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 Number 698
August 11, 1980

Topic: Conflict; representation
of two co-defendants in criminal case.

Digest: Attorneys from a public defender's office may not ethically represent co-defendants in a criminal case where an actual conflict of interest exists, and a court order in the nature of a "gag order" against the public defender not to discuss the cases with his assistants will not relieve the public defender of ethical and professional responsibility under the Code.

Ref: Rule 5-105; ISBA Opinion No. 620

FACTS

A public defender and his four assistants, who are all full-time employees, work out of the same office. The assistants are supervised by the public defender, with a free interchange of duties on particular cases amongst all of the lawyers.

QUESTIONS

The questions are:

- (1) Can separate attorneys in the public defender's office ethically represent co-defendants in criminal cases where an actual conflict of interest exists between the co-defendants?
- (2) Is the public defender relieved of ethical and professional responsibility for the actions of the assistants in cases where a judge orders the public defender not to discuss said cases with the assistants?

OPINION

This Committee has previously determined that a conflict of interest exists when a county public defender's office represented co-defendants involved in the same action if one defendant desired to enter a negotiated plea of guilty and the other co-defendant refused to do so, and that the conflict should be resolved by withdrawal of representation of one of the co-defendants. ISBA Opinion 620, dated May 20, 1978.

In the first question here presented, it is assumed that a conflict does, in fact, exist.

ISBA Opinion No. 620 was issued under the Illinois Code of Professional Responsibility as adopted and approved by the Illinois State Bar Association. The Illinois Code of Professional Responsibility as adopted by the Supreme Court of Illinois, effective July 1, 1980, is substantially identical to the ISBA Code. The only change is in Rule 5-105(d) of the new code which now provides:

"(d) If a lawyer is required to decline employment or to withdraw from employment under Rule 5-105, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

The underlined portion of the above section has been added by the Code as adopted by the Supreme Court of Illinois effective July 1, 1980. This, in effect, strengthens ISBA Opinion No. 620 insofar as its applicability to a public defender's office.

We, thus, conclude that separate attorneys in the public defender's office cannot ethically represent co-defendants in criminal cases where an actual conflict of interest exists between the co-defendants unless it is obvious that the public defender's office can adequately represent the interest of each co-defendant and if each consent to the representation after full disclosure of the possible effect of such representation on the exercise of the independent professional judgment of the public defender on behalf of each, as provided for in Rule 5-105(c).

We also conclude that an order of court in the nature of a "gag order" as stated in Question No. 2, will not relieve the public defender or his assistant of their ethical responsibility under Rule 5-105. The Illinois Code of Professional Responsibility has now been adopted by the Illinois Supreme Court as Rules of Court and, of course, take precedence over any other rule or order of an inferior court. In addition, it is the Committee's opinion that the "gag order" would not

eliminate the evil of appearance of impropriety encompassed in Canon 9 and Rule 9-101 of the new Code.

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