



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 Rule of Professional Conduct 1.7. See also ISBA Ethics Advisory Opinion 91-1 and 91-22. 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 729
April 30, 1981

Topic: Conflict of Interest

Digest: A partner of a law firm can represent a defendant in a criminal prosecution if another partner in that same firm is a Special Assistant State's Attorney responsible for civil matters only, and the client is fully advised and grants a waiver.

Ref: Canon 5, Rules 5-101(a), 5-105(d)
People v. Fife, 76 Ill.2d 418
ISBA Opinions 374, 364, 335 and 572

FACTS

A partner in a law firm is employed by the County as a Special Assistant State's Attorney to represent that County in tax matters or other civil litigation. He has no responsibility for nor will he accept responsibility for any criminal prosecution.

QUESTION

Can another member or partner of the same firm represent clients charged with the commission of a crime in that county?

OPINION

Rule 5-105(d) provides that if one member of a law firm is disqualified from representing a client by reason of a conflict of interest, then all members or partners of that firm are likewise disqualified. Therefore, it must be determined if the partner acting as Special Assistant State's Attorney for civil matters is disqualified from defending criminal cases.

In People v. Fife, 76 Ill.2d 418, a defendant in a criminal case was represented by an attorney who was a Special Assistant Attorney General employed to handle non-criminal matters only.

The client was not informed of the attorney's Special Assistant status. The court held that the failure to inform the client of the affiliation with the Attorney General and failure to effect a knowing and intelligent waiver created a conflict of interest and that no actual prejudice to the client by reason of that conflict need be shown. However, the opinion recognized that the client, can, if adequately informed of the situation, waive any objection.

ISBA Opinion 335 held that acceptance of private employment by a Special Assistant Attorney General (or a member of his firm) is proper where the matter is in an area wholly unrelated to those in which he might or could have duties or responsibilities. This opinion expressed the same concern as the court did in the Fife case over the possibility of influence and the fact that there is not necessarily a conflict but that there may be. ISBA Opinion 374 reaffirmed Opinion No. 335 on the facts of a Special Assistant Attorney General handling only Illinois paternity act cases and public aid liens accepting private employment defending persons charged with crimes because the private employment is wholly unrelated to the attorney's duties as Special Assistant Attorney General. ISBA Opinion No 364, concerned itself with an Assistant Attorney General who was also corporation counsel for a village and the Committee in that Opinion reached the conclusion that no member of the firm should defend traffic cases in the village or criminal cases based on alleged offenses occurring within the village but if the Assistant Attorney General does not have and could not have duties in the criminal field, members of the firm may defend criminal cases not within the restriction outlined. These opinions are reaffirmed by ISBA Opinion No. 572.

The Committee in Opinion No. 364 differentiated between the duties and responsibilities of corporation counsel from that of an Assistant Attorney General, pointing out that the Assistant Attorney General is usually appointed to act in a particular limited field and corporation counsel of a city has the duty to act as the legal advisor to the city and to the officers, boards and departments of the city with the duty to appear for and protect the rights and interest of the city in all actions, suits, and proceedings brought by or against it.

The facts presented to the Committee state that the member of the law firm acting as Special

Assistant State's Attorney will be handling civil matters only in the limited area of taxation and, therefore, will not be acting in a general advisory capacity to the county or handling the prosecution of criminal cases. Therefore, the Committee finds that the position of Special Assistant State's Attorney is analogous to the position of Special Assistant Attorney General.

Canon 5 states "a lawyer should exercise independent professional judgment on behalf of a client" but Rule 5-101(a) provides that a client may waive any potential or possible conflict after full disclosure to that client by the lawyer.

The Committee feels that it is important to remember that these cases deal with a person's right to defense counsel in criminal cases and within certain limits, counsel of his own choosing.

Within the guidelines of People v. Fife, and following the reasoning of ISBA Opinions 374, 364 and 335, the Committee feels that provided the duties of the attorney acting as Special Assistant State's Attorney remains limited to tax matters only, so long as a potential client in a criminal case is informed of the affiliation with the State's Attorney's office and that the client intelligently and knowingly waives any potential conflict of interest and that no actual prejudice to the client arises, a partner in the law firm can represent a defendant in a criminal prosecution and, therefore, the Committee restricts its opinion to that specific question.

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