



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7. See also ISBA Ethics Advisory Opinion 90-22 and 55 ILCS 5/4-2001(b). 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 No. 90-29
March 9, 1991**

Topic: Conflict of Interest; Lawyer in Public Office

Digest: Lawyer who is a part time Assistant State's Attorney, engaged in felony work, should not represent prisoners in civil rights actions against law enforcement officials of an adjacent county.

Ref.: 1990 Illinois Rules of Professional Conduct, Rule 1.7(a)
ISBA Opinion Nos. 260, 791, 84-11, 91-01
ABA Opinion Nos. 30 and 278
Ill.Rev.Stat. 1989 Chapter 34, Sec. 3-9005

FACTS

A part time Assistant State's Attorney, who handles felony matters, has inquired whether or not there is a conflict of interest for him to represent a prisoner in a civil rights action against law enforcement officials in an adjacent county. The State's Attorney of the adjacent county has refused to waive any actual or potential conflict of interest and the prisoner has indicated to the Federal Court that he does not wish the Assistant State's Attorney to represent him since he does not feel that the Assistant State's Attorney can represent his interests adequately.

QUESTION

Does the representation of a prisoner in a civil rights action by an acting Assistant State's Attorney who handles felony cases constitute a conflict of interest when the defendants in the civil rights action are law enforcement officials of an adjacent county?

OPINION

In Opinion No. 260 this Committee held that it was a conflict of interest for a State's Attorney or Assistant State's Attorney to represent a defendant in a criminal matter in another county. The Committee's reasoning was that the attorney's first obligation was to represent the public with undivided fidelity. The Committee followed the reasoning in ABA Opinion 30. In that opinion a conflict was found to exist where a public prosecutor attempted to represent a criminal defendant in another state. Clearly the fact situation presently before us is not directly on point since the part time Assistant State's Attorney is attempting to represent an inmate in a civil action.

The Committee has in several other opinions addressed the questions involving private practice of a lawyer who is also a public official. Cases that deal with this subject matter are reviewed in Opinion Nos. 84-11 and 91-01. Opinion No. 791 held that a partner of a Special Assistant Attorney General for the Department of Law Enforcement could not act as a defense counsel in criminal proceedings even with the consent of the defendant and full disclosure. (It is important to note that in Opinion No. 791 the Committee held that the consents required by the old Rule 5-105 were "unavailable where the public interest is involved"; see subsequent Opinion Nos. 86-4 and 91-01, and Rule 1.11(a) which reverse this position.)

New Rule 1.7(a) of the Illinois Rules of Professional Conduct provides: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client". As did the old Rule 5-105(a) the Rule goes on to provide that if the lawyer reasonably believes that the representation will not adversely affect his relationship with the other client he can continue the representation if each client consents after disclosure.

Under the fact situation as it has been presented the part time Assistant State's Attorney if he takes on the representation of the prisoner in the civil rights action would have two existing clients. Not only would he be representing the prisoner in the civil rights action, but he would also, as long as he continues in office, be representing the people of the state. The statutes that set out the duties of State's Attorneys make it clear that a part time Assistant State's Attorney, who is assigned to felony cases, has a duty to prosecute criminal actions in the Circuit Court for his county in which the people of the State of Illinois or his county may be concerned. (Ill.Rev.Stat. 1989, Chap. 34, Sec. 3-9005)

The issue of what types of civil cases could be handled by a prosecuting attorney was addressed by the American Bar Association in its Opinion No. 278. In that Opinion it was held that it was possible for an Assistant United States Attorney to practice on the civil side of the Federal Court unless there were other reasons than his official position for disqualification. In its Opinion the American Bar Association Committee set out the following three tests to determine whether or not the nature of the civil practice was proper:

would the (civil) practice

- (1) Lessen the confidence of the public in the integrity and impartiality of the administration of justice,
- (2) Would it be a reflection on members of the legal profession?
- (3) Would it interfere with cooperation between State and Federal prosecuting attorneys?

In order to determine whether or not a conflict exists the Committee must determine whether or not the Assistant State's Attorney's handling of a civil rights case against law enforcement officials of an adjacent county would be contrary to the public interest which he is required to represent. We conclude that it is obvious that such a representation would be detrimental to the cooperation required between the two counties for future prosecutions. Not only is it foreseeable that the cooperation from the law enforcement officials would be impaired, but also the cooperation between the State's Attorneys. This would be due to the fact that the adjacent county's State's Attorney is required by statute to defend the officials of his county. (Ill.Rev.Stat. 1989, Chap. 34, Sec. 3-9005, Para. 4) We would conclude that since the Assistant State's Attorney's participation in the civil rights case would result in an interference between the cooperation of the prosecuting authorities in the two counties that this would be detrimental to the interests of the public and a conflict of interest in violation of Rule 1.7(a) of the Illinois Rules of Professional Conduct.

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