



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.**

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**This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2, 1.7 with its Comment 24, and 1.11(a) 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.**

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**Opinion No. 91-1  
September 14, 1991**

Topic: Conflict of Interest: Criminal Defense Attorney and Public Defender representing the People through the State's Attorney's Appellate Prosecutor.

Digest: It is not professionally improper for a part-time public defender and criminal defense lawyer in County A to accept individual cases from the State's Attorneys Appellate Prosecutor's Office to write briefs on behalf of the state involving criminal or civil matters, but only with full disclosure and consent of affected clients.

Ref: 1990 Illinois Rules of Professional Conduct, Rules 1.2, 1.7, and 1.11(a)  
ISBA Advisory Opinions 260, 543, 729, 784, 871, 85-13, 86-2, 86-4 and 87-4.  
Ill.Rev.Stat., Ch. 14, Sec. 201, et seq.  
People v. Fife, 76 Ill.2d 418, 392 N.E.2d 1345, 30 Ill.Dec. 300 (1979).

## **FACTS**

A part-time public defender and criminal defense lawyer in County A requests an opinion on the propriety of accepting employment with the State's Attorneys Appellate Prosecutor's Office on a contract basis to write briefs in Appellate District Courts other than the judicial district encompassing County A. Further, the attorney

requests an opinion as to whether he should take any steps, including disclosure, regarding his brief-writing activity in all of his criminal defense cases pending in County A, whether court appointed or private.

### **QUESTION**

Whether a part-time public defender and criminal defense lawyer has a conflict of interest accepting on a case-by-case basis individual contracts within the State's Attorneys Appellate Prosecutor's Office to write briefs in different appellate judicial districts, other than his own, which would prevent him from undertaking the second employment or would require disclosure to his criminal clients.

### **OPINION**

The Committee has repeatedly had the opportunity to review potential conflict of interest fact situations where public officials, such as full or part-time city or village prosecutors, municipal attorneys, public defenders, assistant state's attorneys or assistant attorneys general, seek to represent private clients in various civil or criminal cases. The Committee has rendered many opinions which have dealt with these situations at length and from which a matrix of general rules and exceptions have evolved. The spectrum of professional conduct within that multiple representation framework ranges from impropriety at one end to propriety on the other with permissible waiver of a conflict of interest situation by full disclosure to, and consent of, the client occupying the middle ground.

Rule 1.7 provides:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:
  - 1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - 2) each client consents after disclosure.
  
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
  - 1) the lawyer reasonably believes the representation will not be adversely affected; and
  - 2) the client consents after disclosure.

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The instant inquiry involves a "quasi-official" position not previously or directly addressed, namely, part-time, contract-basis employment by the State's Attorneys Appellate Prosecutor's Office to write appellate briefs. The inquirer wishes to accept cases on a case-by-case contract basis from the State's Attorneys Appellate Prosecutor's Office. Ill.Rev.Stat., Ch. 14, Sec. 201, et seq., sets forth the laws governing that office. It is clear that the State's Attorneys Appellate Prosecutor's Office is created as an agency of state government (Sec. 203). The Director and all attorneys employed by

the Office of the State's Attorneys Appellate Prosecutor shall take the oath of office in like manner as assistant state's attorneys (Sec. 205). The Director of the Office may, with the concurrence of the board, hire such employees, including part-time employees, as are necessary to carry out office duties. All such attorneys hired as part-time employees who devote 50 percent or more of their time to office duties are prohibited from the private practice of law (Sec. 207.02). The State's Attorneys Appellate Prosecutor's Office receives cases solely upon referral from state's attorneys across the state.

It is the Committee's understanding that the representation of the attorney's various criminal defense clients would occur at the same time as a contemplated brief-writing would occur. The fact that the brief-writing for the state and the representation of criminal defense clients is in different appellate districts is irrelevant.

From prior opinions, a general standard emerges. First, where ongoing attorney-client obligations arise from the public office, the attorney is generally prohibited from accepting cases against the public body client. However, second, when the scope of the representation of the public is limited by subject matter, geography or some other basis, the conflict is mitigated or eliminated.

For example, in ISBA Opinion 260, issued in 1965, the Committee held that it would be professionally improper for a state's attorney in County A to represent a client accused of a crime in County B. The Committee recognized that a state's attorney owed an ongoing professional duty to all people within the State of Illinois and that his representation of one accused of a crime occurring in a different county would lead to a conflict of interest with his duty to the general public. (See also ISBA Opinion 543.) Opinion No. 871 determined that an Assistant State's Attorney responsible for all family matters could not represent private clients in dissolution in the same county.

Opinion 85-13 stated that a state's attorney could represent a school district in the same county so long as the retainer agreement provided that "priority" be given to state's attorney's official duties and the school district work did not conflict with those responsibilities. In ISBA Opinion 86-2, the Committee determined that a part-time assistant state's attorney responsible for civil matters may represent defendants charged with criminal violations where the criminal violations occurred in counties other than the county where the attorney was an assistant state's attorney. Although not specified in the Opinion, full disclosure, consent and waiver of the client would be necessary in order to represent that client in the defense of criminal matters.

In ISBA Opinion 86-4, the Committee was presented with the question of whether a lawyer or his partners could represent clients charged with commission of crimes in their county where one of the members of the firm acted as a special assistant state's attorney in that county. The special assistant state's attorney's duties were limited to juvenile cases involving abuse and neglect proceedings. The Committee's opinion allowed the lawyers of the firm to act as criminal defense counsel if both clients, the private client and the public entity client, consented after full disclosure. An issue was raised at that time whether a public agency could grant such consent. The new Rules of

Professional Conduct envision that state agencies may grant such consent after disclosure (see Rule 1.11(a)).

Related to the topic of state's attorneys is the issue of special assistant attorneys general. In People v. Fife, 76 Ill.2d 418, the defendant in a criminal case was represented by an attorney who was also a special assistant attorney general employed to handle non-criminal cases only. The client had not been informed of that attorney's special assistant status. The Supreme Court held that the failure to inform the client of the affiliation with the attorney general and failure to obtain a knowing and intelligent waiver created a conflict of interest. The opinion did recognize, however, that the client could, if adequately informed of the situation, waive any objection.

Following the above opinion, the Committee in ISBA Opinion 729 ruled that the partner of a law firm could represent a defendant in a criminal prosecution if another partner in that same firm was a special assistant state's attorney responsible for civil matters only, and the client was fully advised and granted a waiver.

Thus, an attorney representing the state may not take private cases opposing the state when the other private case directly conflicts with the attorney's public responsibilities in the same area of law and/or the same jurisdiction or geographic area. When the private case is outside the area of responsibility, either geographically or on the subject matter, the attorney may accept the case with the appropriate disclosure to and consent by the clients. In essence, this is the same result as would be achieved under Rule 1.7.

In contrast to the state's attorney and special assistant attorney general, a public defender's professional obligations, like those of a private criminal defense attorney, flow solely to the individual client. ISBA Opinion 87-4 determined that a part-time public defender may represent a private client against the county where the attorney serves as public defender after disclosure of the attorney's relationship with the county to, and consent by, the private client. Similarly, Opinion 784 determined that it was not improper for a part-time public defender to refer cases involving misconduct of police officers to another counsel and receive a referral fee as authorized under then Rule 2-107.

Returning to the inquiry posed--the facts indicate that the scope of the attorney's responsibilities to, and representation of, the state is intended to be very limited. See Rule 1.2(c). The attorney will have no ongoing responsibilities to the state beyond the preparation of an individual brief in an individual case.

In other words, the limitation on the scope of the representation to an individual brief does not place the attorney in the position of representing the state qua state--only the state in that case. By retaining that attorney, the state, through the State's Attorneys Appellate Prosecutor, may properly waive any potential conflict that might arise by the attorney's criminal defense activities under Rule 1.7. Depending upon facts in individual cases, the representation of the state in appellate matters on a case by case basis would not per se be materially limited by the attorney's responsibilities to individual criminal defense clients. However, where the attorney is taking contrary legal positions

in the representation of the state and the criminal defense clients that may materially limit the representation of either, under Rule 1.7(b) and the U.S. and Illinois Constitutions, both clients must consent after disclosure. Neither is the attorney, in representing the state on appeals, taking a case adverse to another client, i.e., while it is the state who is prosecuting the criminal defendant, the attorney's preparation of briefs for the state is not directly adverse to the criminal defendants the attorney simultaneously represents. Such limited representation of the state is far less likely to result in a conflict than are situations where an attorney or his firm may accept criminal defense cases where the attorney is employed on a full or part-time basis as an assistant state's attorney or special assistant attorney general in a particular area of law. To do otherwise would require one to view the state as a whole in all its activities as one monolithic client. Such a view is rejected by Rule 1.11.

In all cases, however, under People v. Fife, the attorney will be obliged to disclose to and receive consent from both the state and the individual criminal defense clients.

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