



**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 1.7, 1.10(a), and 8.4(k). 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. 91-9  
October 25, 1991**

Topic: Lawyer in Public Office

Digest: Lawyer who serves as volunteer, unpaid village commissioner does not hold "public office" within the meaning of the Rules of Professional Conduct.

Ref.: Illinois Rules of Professional Conduct 1.7(b), 1.10(a) and 8.4(b)  
ISBA Opinion Nos. 84-11, 90-17  
In re Vrdolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990).  
Midwest Television, Inc. v. Champaign-Urbana Communications, Inc., 37 Ill.App.3d 926,  
347 N.E.2d 34 (1976).  
Ill.Rev.Stat., Ch. 38, ¶2-18  
Ill.Rev.Stat., Ch. 38, ¶12-9  
Ill.Rev.Stat., Ch. 102, ¶3

## **FACTS**

The inquiring attorney serves on the transportation commission of a village. This is a volunteer, unpaid appointed position whose function is to keep abreast of mass transportation issues within the general area and make general recommendations to the village board of trustees on transit issues. The transportation commission may also make recommendations to the village plan commission

and village board of trustees as to locations of bus stops and the timing of bus routes.

The inquiring attorney's partner is a member of the village plan commission, which is also a volunteer, unpaid appointed position that reviews petitions for annexations, zoning modifications and plans. The plan commission has no authority to approve annexations, zoning modifications or plans, but rather acts solely as an advisory body to the board of trustees.

Neither the transportation commission nor the plan commission has any direct or indirect control over village staff personnel, including the village attorney and prosecutor. Commission appointments are made by the village president with the consent of the village board of trustees.

The Committee will assume for purposes of this opinion that commission members have no information concerning village transportation and plan matters that is not also available to the general public.

### **QUESTIONS**

The attorney asks:

- 1) Whether the volunteer, unpaid appointed commission member whose function is solely to make recommendations to the village board of trustees is precluded from representing clients before the village board of trustees or other village entities such as the zoning board of appeals; and,
- 2) Whether such a person is prohibited from representing clients in criminal or traffic matters in the circuit court prosecuted by the village attorney or the village prosecutor on behalf of the village.

### **OPINION**

Several recent ISBA advisory opinions have involved actual or potential conflict of interest issues arising out of the practice of law by attorneys who also hold elective or appointive public offices. See, e.g., Nos. 699, 84-8, 84-11, 86-5, 86-13, 87-4, 87-14, 88-6, 88-7 and 90-17. In Opinion No. 84-11, the Committee observed that in such matters, it was not possible to suggest a comprehensive rule applicable in all situations faced by the attorney in "public office" because each situation typically depends on its specific facts. There are, however, applicable provisions of the Rules of Professional Conduct which guide the conduct of the attorney and the law firm with which the attorney is affiliated. As indicated in Opinion No. 90-17, these provisions are found in Rule 1.7(b), Rule 1.10(a) and Rule 8.4(b).

Rule 1.7(b) provides that a lawyer shall not represent a client if the representation may be materially limited by the attorney's responsibility to another client or to a third person or by the attorney's own interests. Rule 1.10(a) provides that no attorney associated with a firm shall represent a client that another attorney associated with that firm would be prohibited from doing so by Rule 1.7, with exceptions not relevant here. Rule 8.4(b)(1) provides that an attorney who holds "public office" shall not use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the attorney knows or reasonably should know that such action is not in the public interest; and Rule 8.4(b)(3) provides that a lawyer who holds "public office" shall not represent any client in the promotion or defeat of legislative or other proposals pending before the public body of which the lawyer is a member.

Also potentially relevant is the recent Illinois Supreme Court opinion In re Vrdolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990). In that case, the Court held that the respondent, an alderman, engaged in a conflict of interest contrary to Rule 5-101(a) of the former Code of Professional Responsibility when he represented city employees in their workers' compensation cases against the city, even though respondent had abstained from any council votes relating to claims against the city. In this situation, the Court found that the respondent alderman owed his undivided loyalty and a fiduciary duty to the city. "By representing clients against the City, the competing fiduciary duties collided, and respondent became embroiled in a conflict of 'diverging interests' and divided loyalties, which even full disclosure could not avoid." 137 Ill.2d at 422.

In Vrdolyak and Opinion No. 90-17, it was obvious that the attorneys in question held a "public office". The key issue in the present inquiry is whether volunteer, unpaid appointed commissioners hold "public office" in the Vrdolyak sense or within the meaning of Rule 8.4(b). If so, then the limitations on the lawyer's practice stated in Opinion No. 90-17 and the Vrdolyak decision would prohibit the lawyer from accepting any representation before the village's deliberative bodies as well as representing clients in litigation adverse to the village. If not, then a lawyer could accept such representations with appropriate disclosure of the relationship with the village to and consent from the private client as contemplated by Rule 1.7(b).

The term "public office" is not defined in the Rules of Professional Conduct. Nor has the Committee found a definition of "public office" in the Illinois Revised Statutes. The Criminal Code, at Section 2-18, defines a "public officer" as a person "who is elected to office pursuant to statute, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by statute, to discharge a public duty for the State or any of its political subdivisions." Ill.Rev.Stat., ch. 38, ¶ 2-18. Section 12-9 of the Criminal Code, which prohibits the threatening of a public official, defines the term "public official" to include the state's constitutional officers and judges as well as "mayor, village president, alderman, city council member, village trustee, city commissioner or any person who has filed the required documents for nomination or election to such office." Ill.Rev.Stat., ch. 38, ¶ 12-9(b).

The Committee also notes that persons holding public office in Illinois, including lawyers, are subject to the provisions of the Corrupt Practices Act, Ill.Rev.Stat., ch. 102, ¶ 3, even though the Act does not expressly define "public office". In Midwest Television, Inc. v. Champaign-Urbana Communications, Inc., 37 Ill.App. 3d 926, 347 N.E.2d 34 (1976), the Appellate Court considered the characteristics of "public office" for purposes of this Act to include: 1) creation by statute or constitution; 2) exercise of some portion of the sovereign power; 3) a continuing position not occasional or contractual; 4) fixed tenure; 5) the swearing of an oath; 6) liability for misfeasance or nonfeasance; and 7) independence beyond that of employee. 37 Ill.App.3d at 931.

Persons who serve as volunteer, unpaid commissioners do not fit any of the statutory definitions relating to public officers and officials or the definition of public office adopted by Midwest Television.

The Committee believes there is no reason to deem volunteer advisory positions to constitute "public office" for purposes of the Rules of Professional Conduct. Because persons in such positions exercise no public authority, there is not concomitant fiduciary duty to the public entity as

found in Vrdolyak. Barring lawyers who hold volunteer advisory positions from representing private clients before the village board or adverse to the village would effectively preclude lawyers from serving in such positions in many communities. Where a lawyer reasonably believes that the representation of a private client would not be adversely affected by the lawyer's relationship with the village and the private client consents after disclosure, the lawyer could represent a private client in matters relating to the village.

For the reasons discussed above, the Committee concludes that volunteer, unpaid appointed commissioners should not be considered to hold "public office" for conflicts purposes and that Rule 1.7(b) is sufficient to protect the public.

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