



**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 Rules of Professional Conduct 1.7, and 1.11(a). See also ISBA Ethics Advisory Opinion 90-29 and 55 ILCS 5/40-2001(b) (2010). 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. 91-22
April 3, 1992**

Topic: Conflict of Interest; Lawyer in Public Office

Digest: Lawyer who is a part time Assistant State's Attorney engaged in criminal work, may not represent defendants in criminal matters in a contiguous county absent appropriate consent if a conflict of interest exists.

Ref.: Illinois Rules of Professional Conduct, Rules 1.7 (a) and (b), 1.11(a)
ISBA Opinions 117, 260, 86-4, 90-29, 91-1
ABA Opinion 30
Illinois Constitution of 1970, Art. V, Sec. 15 and Art VI, Sec. 19
Ill. Rev. Stat., 1989, Ch. 34, para 3-9000 et seg. and 4-2001 et seg.

FACTS

An attorney is a part-time Assistant State's Attorney in County A, working two to three days a week primarily prosecuting criminal defendants in traffic, misdemeanor and felony cases. The attorney also appears occasionally as defense counsel in traffic and criminal matters in County B, which is contiguous with County A. The counties are in the same judicial district and include a metropolitan area which overlaps the county line.

QUESTION

Does the representation of an accused in a criminal action in County B by a part-time Assistant State's Attorney who prosecutes criminal cases in County A, constitute a conflict of interest when the two Counties are contiguous and/or in the same judicial circuit?

OPINION

In Opinion 260 (1965), this Committee held that it was a conflict of interest for a State's Attorney or Assistant State's Attorney who has been elected or appointed in County A, to continue to represent a defendant in a criminal matter in County B. 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.

Rule 1.7(a) and (b) state:

(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.

The question becomes: who is the Assistant State's Attorney's client in his position as Assistant State's Attorney in County A? For example, the Attorney General constitutionally is "the legal officer of the State" and, implicitly therefore, represents all the people of the state. Illinois Constitution of 1970, Art. V, Sec. 15. In contrast, the State's Attorney is found in the Constitution's judicial rather than executive article. Further, the state's attorney is elected by the people of a single county, but may be elected state's attorney "to serve two or more counties if the governing boards of such counties so provide and a majority of the electors of each county voting on the issue approve."

Illinois Constitution of 1970, Art. VI, Sec. 19. Thus, while he is the "State's" attorney, it is unclear whether the client is the people of the entire state of Illinois or the people of the county or counties from which he was elected. As the authority of an Assistant State's Attorney flows through the State's Attorney, the Assistant State's Attorney's client is the same.

It is thus unclear as to whether accepting representation of a criminally accused in the adjacent county would be "directly adverse to another client" under 1.7(a) or whether the initial analysis requires the Assistant State's Attorney to determine if the representation of the accused "may be materially limited by the lawyer's responsibilities to another client or to a third person."

In either case, the conflict could be waived under Rule 1.7 if the Assistant State's Attorney "reasonably believes the representation will not be adversely affected." Given such a subjective standard, hypotheticals on both sides can easily be constructed--a part-time Assistant State's Attorney from Alexander County may reasonably believe that his representations as Assistant State's Attorney will not be adversely affected by his representation of an accused traffic offender in Cook County; the Assistant State's Attorney described in the facts of this inquiry may reasonably conclude the "adversely affected" issue differently if the contiguous counties are Cook and DuPage than if they are Hancock and Henderson.

And, in order to complete the waiver of the conflict, if conflict there be, under 1.7(a)(2) "each" client must consent while under 1.7(b)(2) "the" new, potential client alone must consent. This brings the issue back full circle to the question of who is the client of Assistant State's Attorney?

If the client is the people of the entire state, then some legal representative of all the people, e.g., the Attorney General, the State's Attorney of County A and/or the State's Attorney of County B, would be required to consent. If the client is only the people of County A, then the criminally accused in County B alone would be required to consent after disclosure.

If it is Rule 1.7(a) that is applicable, consent by a public body to waive a conflict of interest is contemplated, see ISBA Opinions 86-4 and 91-1 and Rule 1.11(a).

The problem herein, however, is determining who has the authority. As noted above, there are several alternatives. As that decision is one involving constitutional and statutory authority, the Committee declines to attempt to make a determination as to who has the authority to waive a conflict of interest on behalf of the state/county/people in this fact situation.

In conclusion, as long as ISBA has been issuing advisory opinions on professional conduct, the Committee has been confronted with numerous inquiries on the scope of private practice by State's Attorneys and Assistant State's Attorneys ranging from Opinion 117 (1956), which opined that a lawyer may not hold the posts of city attorney and State's attorney in the same county, through to Opinion 90-29, which held that a part-time Assistant State's Attorney engaged in felony prosecutions should not represent prisoners in federal civil rights claims against law enforcement officials of an adjacent county. While Opinion 90-29, when read together with 91-1, would appear to be directly relevant to resolution of this inquiry, because of the inherent incompatibilities between the Rules of Professional Conduct, the Illinois Constitution of 1970 and the Illinois Revised Statutes relating to State's Attorneys (ch. 34, pars. 3-9000 et seq and 4-2001 et seq), and this Committee's continuing frustration in attempting to resolve these inquiries, the Committee urges state's attorneys and assistant state's attorneys to address the question of conflict of interest and the private practice of law to the Attorney General, the General Assembly and/or the Supreme Court for a systemic and authoritative resolution either by opinion, Legislation or rule.

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