



**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 and 1.11. 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. 94-16  
March, 1995**

Topic: Conflict of Interest; Special Prosecutor

Digest: A lawyer who represents criminal and traffic defendants may accept individual juvenile cases on behalf of the State's Attorney's Office as Special Prosecutor, but only with full disclosure and consent of any affected clients.

Ref.: Illinois Rules of Professional Conduct, Rules 1.7(a) & (b), and 1.11.  
ISBA Opinions on Professional Conduct, Nos. 708, 729, 791, 90-29, 90-30, 91-17, 91-22, 91-26, 92-18, 92-19  
ABA Model Rules, Rule 1.7(a) & (b).  
55 ILCS 5/3-9008, 9009  
Miller v. Norfolk & Western Ry. Co., 131 Ill.Dec. 737, 183 Ill.App.3d 261, 538 N.E.2d 1293 (1989)  
People v. Bowman, 51 Ill.Dec. 574, 96 Ill.App.3d 136, 420 N.E.2d 1132 (1981).

## **FACTS**

The incoming state's attorney for X county has requested that lawyer A act as special prosecutor, for juvenile cases only, in those instances when a conflict of interest arises due to the state's attorney's former employment by the office of the X county public defender. The public defender represents

minors in juvenile proceedings in X county. Lawyer A currently represents five adults in juvenile proceedings and periodically represents criminal or traffic defendants, all in X county.

### **QUESTION**

Does the proposed representation, as outlined above, constitute a conflict of interest for lawyer A, his clients, or the state's attorney's office?

### **OPINION**

We must first assume that when lawyer A refers to the proposed "special prosecutor" arrangement, that he would be appointed on a case-by-case basis to handle juvenile matters in which the former public defender, now state's attorney, was involved; i.e., that lawyer A would not become an employee of the state's attorney's office. Authority for this appointment arises under 55 ILCS 5/3-9008.

Secondly, we assume that lawyer A would not be appointed to be a special prosecutor for those cases in which lawyer A is already representing parties or has previously represented parties. That would create obvious conflicts which would prohibit lawyer A from participating further in those cases as in Miller v. Norfolk & Western Ry. Co., 131 Ill.Dec. 737, 183 Ill.App.3d 261, 538 N.E.2d 1293 (1989).

The Illinois Rules of Professional Conduct, Rule 1.7 states:

- (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.

ABA Model Rule 1.7(a), (b) states virtually identical language.

This would not appear to be a situation which calls for analysis under Rule 1.11 of the Rules of Professional Conduct in that Rule 1.11 deals with public officers or employees and the conflicts which may arise when they leave such office or employment. In the instant case, we have assumed that lawyer A is not going to be a "public officer" or an "employee" in that sense.

The commentary to ABA Model Rule 1.7 states the basic proposition that,

...a possible conflict does not itself preclude the representation. The critical questions are

the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose causes of action that reasonably should be pursued on behalf of the client.

In this case, lawyer A would be in direct conflict with his current juvenile clients should he become the special prosecutor for those particular cases. This would be such a direct conflict, with serious dual representation problems, that consent would not cure the situation and such representation would be a conflict.

However, just because lawyer A might represent the state in some juvenile cases and then represent defendants in some traffic cases, lawyer A could reasonably believe, as Rule 1.7(b) provides, that his representation would not be adversely affected. As again noted in the commentary to ABA Model Rule 1.7, the propriety of such representation can depend on the nature of the litigation, and there are numerous examples where lawyers have represented a party in one type of litigation and opposed that same party in another type of litigation, all without an irreconcilable conflict. For example, in ISBA Opinion 92-18 (January, 1993), we found no obvious disqualification for conflict where a law firm represented two assistant state's attorneys in a civil case and also opposed those assistant state's attorneys when defending clients in criminal court. See, ISBA Opinions 708, 729 and 791, similarly.

Again, in ISBA Opinion 91-26 (April, 1992), we found no apparent conflict where an attorney acted on behalf of certain insurance company clients in some cases and against them in others. The true emphasis in these line of opinions is not that there might be a conflict, but rather is the conflict such that it might affect the lawyer's ability to perform; is the client fully informed of the nature of the possible problem; and does the client consent to continued representation? In People v. Bowman, 51 Ill.Dec. 574, 96 Ill.App.3d 136, 420 N.E.2d 1132 (1981), the defendant gave an intelligent and knowing waiver of conflict of interest where his lawyer of choice had a law partner who was a former state's attorney and a participant in the early stages of the criminal proceeding.

Lawyer A may be directed to review other ISBA Opinions regarding conflicts in this area such as 90-29 (lawyer in public office), 90-30 (lawyer/client conflict), 91-17 (public defender conflict), or 91-22 (assistant state's attorney). Please note that the issue of state's attorneys and public defenders and their practice conflicts is a complex one outside the norm of private practice and often guided by legislative intervention. For example, Opinion 92-19 dealt with an assistant state's attorney who contemplated prosecuting traffic or criminal cases for the state, and then representing related parties in subsequent civil proceedings arising out of the same facts as the traffic or criminal matters. That opinion pointed out statutory prohibition of this proposal in 55 ILCS 5/3-9009, which states:

The State's Attorney shall not receive any fee or reward from or in behalf of any private person for any services within his official duties and shall not be retained or employed, except for the public, in a civil case depending upon the same state of facts on which a criminal prosecution shall depend.

Attorneys contemplating service in these areas are encouraged to address their conflict of interest questions to the Attorney General for additional guidance. Lawyer A must also protect his "professional independence" and continuously analyze his practice to prevent any financial

dependence upon the county in the performance of his duties as a special prosecutor from interfering with his obligations to private clients.

Given the facts as we know them, it would appear that lawyer A may undertake the representation as proposed without the treat of any obvious conflict. Care must be taken, however, to analyze, on a case-by-case basis, the current and future representations of lawyer A for possible conflicts. If those conflicts arise, then lawyer A must determine if further representation is possible, and, if so, make full disclosure and obtain consent as outlined in the Rules. We assume, for example, that the process by which the county retained lawyer A as special prosecutor, in and of itself, implies consent by the state to lawyer A's continued representation of private clients; but, perhaps, this might not be true in every case. It is difficult to determine on these facts if Rule 1.7(a) or Rule 1.7(b) is more applicable to the resolution of lawyer A's inquiry, but it is clear that disclosure and consent must be a part of that resolution.

Therefore, it is not professionally improper for a lawyer who represents criminal and traffic defendants to accept individual juvenile cases on behalf of the state's attorney's office as a special prosecutor, but only after full disclosure and consent of affected clients, if any.

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