



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7. See also ISBA Ethics Advisory Opinion 91-1. 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 Number 871
April 27, 1984

Topic: Conflict of Interest

Digest: An Assistant State's Attorney who is responsible for all family court matters in the county may not represent private clients in marriage dissolution cases in the same county.

Ref: Rules 5-101(a), 5-105
ISBA Opinions 729, 572, 503, 277
EC 8-6

FACTS

An Assistant State's Attorney who is responsible for all family court matters in a county also maintains a private practice in which the attorney represents clients in marriage dissolution cases in the same county. The attorney does not accept cases where custody of minor children is contested, but does handle cases either where the parties have no minor children or where the issues of child custody and child support are not disputed. In the latter instances, the attorney places the following limitations on representation: (a) will only represent the spouse who is to have child custody; (b) will advise clients of the inability to later file a criminal non-support case in the event of non-compliance with a support order; (c) when a non-compliance does arise, files without charge a civil Rule to Show Cause under the dissolution order; and (d) discontinues the

representation if the opposing spouse seeks a change in child custody.

QUESTION

We are asked (a) whether the Assistant State's Attorney in question may ethically represent parties to dissolution of marriage actions involving children under the above circumstances; and (b) whether the same person may handle dissolution of marriage actions not involving children.

OPINION

It is our view that the attorney's private representation of parties in marriage dissolution actions in the same county where the attorney is responsible for all family court matters on behalf of the State's Attorney's office is inappropriate. This is true regardless of whether any children are involved, and despite the aforesaid limitations on representation.

Prior opinions of this Committee, issued both before and since adoption of the current Code of Professional Responsibility, have recognized that acceptance of private employment by an Assistant State's Attorney or Assistant Attorney General is proper only where the matter is in an area wholly unrelated to the areas in which such person might or could have duties or responsibilities for the public. (ISBA Opinions 503, 572, 729). In this regard, the relevant inquiry is not whether a conflict necessarily exists, but rather whether a conflict may exist. (Opinion No. 729). The rationale of these opinions is consistent with the mandates of Rules 5-101(a) and 5-105 of the Code of Professional Responsibility, which similarly prohibit an attorney from accepting employment when his independent professional judgment might be adversely influenced by his own financial or business interests, or the interests of another client. Also relevant in this regard is EC 8-6, which recites in part that "[a] lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with the attorney's official duties."

The foregoing considerations clearly prohibit an Assistant State's Attorney from representing private clients in dissolutions involving custody or child support. Such issues, although resolved by agreement at the time of the dissolution proceeding, may nonetheless become the subject of later non-compliance proceedings in which the office of the State's Attorney would be called upon to participate. As much was recognized in our prior Opinion No. 503, which held that a State's Attorney may not ethically represent a party to a divorce action if the action involves issues of either support or custody. In the present instance, the Assistant State's Attorney involved, being responsible for family court matters in the county, would be the very person responsible for prosecuting issues of custody or support. Although the attorney has attempted to accept only those matters least likely to ultimately result in criminal proceedings, it is impossible to envision whether such proceedings might eventually be warranted in any particular case. Moreover, the limitations which the attorney has placed on representation of private clients not only do not negate the possibility of conflict, but additionally are in some respects, most notably with regard to the foreclosure of the avenue of criminal non-support proceedings in the event of non-compliance, inconsistent with the obligation to the public. In light of the above considerations, we believe it inappropriate for the Assistant State's Attorney in question to handle cases within the same county where issues of child support or custody are involved.

We believe that similar considerations preclude the attorney from privately handling marriage dissolution cases not involving children. While the likelihood of conflict in such situations is less prominent than in situations involving children, the potential for conflict exists here as well because the Assistant

State's Attorney may have the responsibility for prosecuting either spouse at some future time on facts related to the dissolution. One such set of circumstances might arise when the office of the State's Attorney is called upon, during the dissolution proceedings or thereafter, to enforce the provisions of the Illinois Domestic Violence Act against one of the spouses. (See Ill. Rev. Stat. 1983, Ch. 40, par. 2301, et. seq.). Such circumstances in fact arose in a different statutory framework in our prior Opinion No. 277, where we recognized that a State's Attorney may not represent a respondent in a divorce case where allegations made against the respondent constitute crimes for which the State's Attorney may have a duty to prosecute. A State's Attorney might also be called upon to enforce the maintenance provisions of a dissolution order when the party receiving maintenance becomes a recipient of welfare from the state. As evidenced by these examples, issues arising from dissolution actions, even absent questions of custody or child support, are sufficiently related to the areas of responsibility of the Assistant State's Attorney in question as to preclude the handling of such actions in the county of the attorney's public employment.

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