



ISBA Professional Conduct Advisory Opinion

Opinion No. 14-05
October 2014

Subject: Conflict of Interest; Conflict of Interest – Personal Interest; Government Representation; Prosecutors

Digest: A State’s Attorney may represent his county in union negotiations while simultaneously calling law enforcement personnel as witnesses in criminal cases provided the attorney has completed an analysis of any conflicts of interest pursuant to Rule 1.7 of the Illinois Rules of Professional Conduct.

Ref.: Illinois Rules of Professional Conduct, Rules 1.0(e), 1.7, and 1.11

55 ILCS 5/3-9005 through 5/3-9008

FACTS

The State’s Attorney seeks to represent his county in union negotiations between the county and law enforcement personnel. The State’s Attorney also calls county law enforcement personnel as witnesses in criminal cases.

QUESTIONS

1. Is it proper for a State’s Attorney to represent his county in union negotiations with county law enforcement personnel while simultaneously calling the law enforcement personnel as witnesses in criminal cases?
2. Does it make a difference if the State’s Attorney is not negotiating directly with the law enforcement personnel, but rather with union officials acting on behalf of law enforcement personnel?

OPINION

A lawyer who is serving as a State’s Attorney is subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest. *See*, Rule 1.11, Comment 1.

The basic rule addressing concurrent conflicts of interest is Rule 1.7, which states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Resolution of a conflict of interest question begins with an identification of the client or clients involved. *See*, Rule 1.7, Comment 2. Generally, in a criminal prosecution, the State's Attorney represents the People of the State of Illinois; in a civil matter, the State's Attorney represents the County. Section 3-9005 of the Counties Code, which governs the powers and duties of the State's Attorney, provides that the State's Attorney shall "commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned." 55 ILCS 5/3-9005(a)(1).

Therefore, when prosecuting a defendant in a criminal matter, the State's Attorney does not represent the law enforcement personnel the State's Attorney may call as witnesses. In representing the County in union negotiations, the representation of the County does not appear to be directly adverse to the representation of the People of Illinois in the criminal matters.

The Committee believes that generally the lawyer's representation of the County in civil matters will not be materially limited by the State's Attorney's personal interests in regards to the witnesses the attorney calls in criminal matters, but each attorney must analyze this rule on a case by case basis. Pursuant to Rule 1.7(a)(2), the State's Attorney must then analyze whether the representation of the County in union negotiations will be materially limited by the lawyer's responsibilities to another client, to a former client, to a third person, or by the Lawyer's own personal interests.

For example, if the State's Attorney has developed a personal friendship or a close working relationship with a law enforcement officer (such as in counties with a small number of law enforcement officers), the State's Attorney may reach a determination that he or she will be

materially limited in the ability to effectively represent the County in labor negotiations involving that law enforcement officer. In such a case, the State's Attorney would have to then determine if he or she could continue the representation with the consent of the County pursuant to Rule 1.7 (b). *See*, Rule 1.0 (e) for the definition of informed consent. The same analysis applies if the State's Attorney is not negotiating directly with the law enforcement personnel, but is negotiating with union officials who are not law enforcement personnel.

Finally, the State's Attorney should determine whether any additional statutes or government regulations regarding conflicts of interest and the use of confidential information govern the State's Attorney's representations.

CONCLUSION

Each matter an attorney handles must be independently evaluated to determine if the lawyer has a conflict of interest. The Committee concludes that a State's Attorney may represent his or her county in union negotiations while simultaneously calling law enforcement personnel as witnesses in criminal cases, if he or she will not be materially limited in the ability to effectively represent the county.

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