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 *Miller v. Norfolk & Western RY.Co.,* 183 Ill.App.3d 261, 131 Ill.Dec. 737, 538 N.E.2d 1293 (Ill.App. 4th Dist. 1989). See also ISBA Ethics Advisory Opinion 91-22. 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. 86-4
August 29, 1986

Topic: Conflicts; consent after disclosure; consent by public entity.

Digest: Lawyers of a law firm may act as criminal defense counsel where other lawyers of firm act as Special Assistant State's Attorneys in the same county where the nature of the latters' work is unrelated to that of the former and if both clients consent after full disclosure. A public entity may grant consent to partners or associates of a part-time public lawyer to work on unrelated matters.

Ref.: Rules 5-105(a), (c) and (d)
People v. Fife, 76 Ill.2d 418
In re LaPinska, 72 Ill.2d 461
In re A & B, 209 A.2d 101 (N.J. 1965)
ISBA Opinion Nos. 86-2, 852, 823, 791, 748, 729, 522, 455, 374, 364, 335

FACTS

The inquiring attorney's firm includes partners and associates employed by the county as Special Assistant State's Attorneys whose work is limited to juvenile cases involving abuse and neglect proceedings.

QUESTION

The attorney asks whether other lawyers of the firm may represent clients charged with the commission of crimes in that county, in non-juvenile cases, after obtaining the informed consent of such clients.

OPINION

Rule 5-105 provides in part as follows:

> (a) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under Rule 5-105(c).
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> (c) In the situations covered by Rules 5-105(a) and (b), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

This Committee has issued many opinions concerning the presence or absence of potential conflicts in the work of lawyers who act as part-time public attorneys and also have private criminal defense practices. These opinions have usually found no conflict where the public and private practices are in different jurisdictions or geographical areas (Opinions 852, 823, 522), or where the public work is civil in nature and unrelated to the scope of the attorney's criminal defense practice (Opinions 374 and 335). However, this Committee has generally found a conflict to exist where a private criminal defense practice is combined in the same jurisdiction with public work which includes criminal law enforcement (Opinions 791, 748, 455 and 364).

In 1979, the Illinois Supreme Court, in People v. Fife, 76 Ill.2d 418, held that a conflict existed even where the defense attorney's public work as special assistant Attorney General was civil and unrelated, at least in the absence of an informed waiver by the client charged with the criminal offense.

ISBA Opinion 729 followed Fife in holding that an attorney who was a special assistant State's Attorney acting in civil tax litigation only could act as defense counsel, but only if the potential client was "informed of the affiliation with the State's Attorney's office and that the client intelligently and knowingly waives any potential conflict of interest and that no actual prejudice to the client arises."

Thus it appears that in the present case, lawyers from the firm may act as criminal defense counsel only with the consents required by Rule 5-105(c). This Committee has, however, previously stated that Rule 5-105(c) requires the consent of each client, and further, that a public entity client cannot grant such consent (Opinions 791 and 522). The Committee believes that this inquiry presents an appropriate opportunity to review the "rule" that a public entity cannot grant the consent

contemplated by Rule 5-105(c).

The issue of public consent to a conflict of interest was first discussed in 1929 by the ABA Committee on Professional Ethics and Grievances in Formal Opinion 16. In that opinion, the committee held that one member of a law firm could not represent defendants in criminal cases which were being prosecuted by another member of the firm in the latter's capacity as prosecuting attorney. The Committee determined that there was a clear conflict of interest which could not be cured by the consent of all parties. "No question of consent can be involved as the public is concerned and it cannot consent."

In his book on legal ethics, Henry S. Drinker cited Formal Opinion 16 in a discussion on the effect of consent to a conflict of interest. Drinker restated the general rule that an attorney may not represent conflicting interests unless all parties consent after full disclosure, and he argued that this rule did not sanction representation of clients with conflicting interests in every case where consent is given. Drinker then stated that "the American Bar Association was acquiesced in the numerous decisions of its Ethics committee construing the as not exclusive, and consent as unavailable where the public interest is involved." H. Drinker, Legal Ethic p. 120 (1953). This statement by Drinker has been cited in numerous cases and ethics opinions as the basis for
the rule that consent cannot be given by a governmental unit on behalf of the public.

For example, the Supreme Court of New Jersey relied on Drinker in determining that where the public interest is involved an attorney may not represent conflicting interests in the same matter because consent cannot be obtained. In re A & B, 44 N.J. 331, 209 A.2d 101 (N.J. 1965). In that case, the court held that the evidence was insufficient to demonstrate that the defendants, while serving as municipal attorneys, were also representing land and building developers in their transactions with the municipality. The court was especially concerned with the appearance of impropriety which might exist where an attorney representing the governmental authority also represented developers who must obtain municipal approval for their projects. The court quoted a number of New Jersey authorities for the proposition that, where the public interest is concerned, an attorney may not represent conflicting interests with respect to the same matter even when disclosure is made and consent is obtained. All the authorities cited relied on ABA Formal Opinion 16 and Drinker. The opinion and the authorities quoted emphasized that the prohibition concerned dual representation in the same matter.

The only relevant Illinois decision appears to be In re LaPinska, 72 Ill.2d 461, 381 N.E.2d 700 (Ill. 1978), which involved a city attorney who also maintained a private practice. Purchasers of real estate in the city signed a formal complaint charging the seller with a quasi-criminal violation of a zoning ordinance. The city attorney also retained by the purchasers to commence a civil action against the seller while representing the city in zoning proceedings with respect to the property. No disclosure of the dual representation was made to the city. The court determined that this was an impermissible conflict of interest and suspended the respondent from the practice of law for one year. Although the respondent did not claim consent, the court quoted the New Jersey court in In re A & B, that "an attorney may not represent both a governmental body and a private client even if disclosure is made and the parties agree to such dual representation." 381 N.E. 2d at 704.

Both decisions described above involved sole practitioners. No cases were found that discussed

whether consent of a public entity could be given in vicarious conflict situations or to possible conflicts arising out of representation in unrelated matters. However, the Supreme Court's decision in Fife may be read to imply that the state could have consented to the dual representation presented in that case.

The Committee believes that a per se "rule" that a public entity may never grant consent within the meaning of Rule 5-105(c) is neither compelled by the relevant case law nor required to achieve the purposes of the Code of Professional Responsibility. For that reason, the Committee concludes that such consent may be appropriate where partners or associates of a part-time public lawyer seek to represent clients adverse to the public entity in unrelated matters. In all such situations, of course, the representation must be otherwise consistent with the code, including Canon 7 and Canon 9.

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