



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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.

This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.5(e). 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 89-2
July 17, 1989

NOTE: **Effective December 1, 2000, no state's attorney may engage in the private practice of law. Please see 55 ILCS 5/4-2001(b)**

Topic: Conflicts of Interest -- State's Attorney Private Practice

Digest: A State's Attorney may not accept a referral fee in a wrongful death case where a violation of a city or county ordinance is in question.

Ref: Rule 2-107
 ISBA Advisory Opinion No. 263

FACTS

In a county with a population of approximately 15,000, the State's Attorney is permitted to engage in the private practice of law. The Committee presumes the action arises involving the same state of facts as a matter considered by his office.

QUESTION

Within the confines of ISBA Advisory Ethics Opinion No. 263, is it professionally improper for a State's Attorney to refer a death case to another law firm and accept a referral fee which is based upon the amount of the ultimate recovery?

OPINION

The inquirer states that this question is "within the confines of ISBA Opinion No. 263." In that Opinion, this Committee considered the question of whether it was proper for a State's Attorney in Illinois to represent a plaintiff in a civil suit where the defendant had received a traffic ticket in connection with the occurrence giving rise to the suit. The occurrence happened in the county served by the State's Attorney. The Committee also considered the question of whether it was proper conduct for the State's Attorney to handle the civil case if the suit charged the defendant with violating a state statute during an occurrence in the county in which the State's Attorney served. In finding that the conduct of the State's Attorney would be improper, this Committee referred to Illinois Revised Statutes, Chapter 14, Section 7 (1963) which stated:

The state's attorney shall not receive any fee or award 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.

This statutory provision remains unchanged.

The present inquiry poses a fact situation in which the violation of a city or county ordinance is part of the wrongful death case. When a violation of a statute and the discretion to prosecute or not prosecute that violation is within the jurisdiction of the State's Attorney, it would be professionally improper for him/her to accept a referral fee in the wrongful death case involving the alleged violation of the city or county ordinance which he has the discretion to prosecute. Illinois Code of Professional Responsibility Rule 2-107(a)(2)(b) requires an attorney referring a case for a fee to retain "...the same legal responsibility for the performance of the services in question as if he were a partner of the receiving lawyer..."

This Committee's prior opinion clarifies that it is immaterial whether the State's Attorney in his official capacity or otherwise had investigated or passed upon the incidence giving rise to the traffic violation or to the statute allegedly violated. Where the State's Attorney has a positive statutory proscription to exercise his discretion in prosecuting or declining to prosecute a city or county ordinance, he may not act in conflict with that duty. Consequently, acceptance of a referral fee as a referring lawyer is, for ethical purposes, no different than were the attorney to accept the case outright. The same standard for determining whether a conflict exists would apply.

* * *