ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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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 1.6, 1.7, 5.3, and 8.4(d). 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. 91-17
January, 1992

Topic: Conflict of Interest: Public defenders with a common office and support staff representing adverse interests in a single proceeding.

Digest: It is improper for assistant public defenders sharing defense of delinquency cases from a common office, with shared secretarial and investigatory services, severally to represent both parent and child in a neglect/dependence proceeding.

Ref.: Illinois Rules of Professional Conduct, Rules 1.6, 1.7, 5.3, 8.4(a)(5)
ISBA Opinion on Professional Conduct, No. 85-14
Illinois Revised Statutes, Ch. 37, ¶ 801-5
Ferri v. Ackerman, 444 U.S. 193 (1979)
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)
Tower v. Glover, 467 U.S. 914 (1984)
People v. Coates, 109 Ill.2d 431, 439 (1985)
People v. Lackey, 79 Ill.2d 466, 468 (1980)
People v. Nelson, 82 Ill.2d 67, 72 (1980).
People v. Robinson, 79 Ill.2d 147, 158-59 (1980)
People v. Spreitzer, 123 Ill.2d 1, 21 (1988)
People v. Chriswell, 133 Ill.App.3d 458, 471 (2nd Dist. 1985)
People v. Larry, 196 Ill.App.3d 231 (2nd Dist. 1990)

FACTS

The Committee has been asked to express an opinion concerning a procedure prescribed by an Illinois county for litigation involving claims of parental neglect and abuse.

Pursuant to statute (Ill.Rev.Stat., ch. 37, ¶801-5), an assistant public defender is appointed to represent indigent parents in such cases. County officials also have directed that the public defender provide counsel for the children.

All such cases are heard in juvenile court. Two assistant public defenders are assigned to that court. They represent all indigent parents and children in neglect and abuse cases. They also defend all juvenile delinquency charges brought in that court. They share a single secretary who handles all their filing, typing and telephone messages. They share the same three investigators, who also conduct investigations for all public defender traffic, misdemeanor and felony cases. A senior assistant supervises their work, but also handles a full case load of felony defenses.

Concern has been expressed that this arrangement may amount to a conflict of interest involving an unacceptable compromise of client confidentiality.

QUESTION

Whether two assistant public defenders who share secretarial, investigatory and office resources and who routinely cooperate in the performance of other duties, may be required severally to represent parents and children in cases involving allegations of child abuse and neglect.

OPINION

The procedure here described seriously compromises confidentiality in violation of Rule 1.6. It involves the attorneys in conflicts of interest contrary to Rule 1.7. It prevents the discharge of the attorneys' responsibility to supervise non-attorney assistants, as required by Rule 5.3 It also violates Rule 8.4(a)(5) by undermining the right to counsel.

The Parents' Right to Counsel

Appointment of counsel for parents in cases of this type raises both statutory and constitutional implications. An Illinois statute (Ill.Rev.Stat., Ch. 37, ¶801-5) confers a parental right to counsel. The question whether such appointment is mandated constitutionally must be resolved on a case-by-case basis, balancing the "extremely important" interest of the parent against the state's "relatively weak" interest in avoiding unnecessary expense. Lassiter v. Department of Social Services (1981), 452 U.S. 18, 31.[1] Whether counsel is provided pursuant to constitutional or statutory entitlement,

[1] Lassiter was an action seeking permanent termination of parental rights. The distinction between such a case and a neglect or dependency proceeding seems relatively unimportant in respect to the parental right to counsel. As the Lassiter court held, "Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well." 452 U.S. at 33-34.

however, the professional standards for such representation are the same. See, eg., People v. Lackey (1980), 79 Ill.2d 466, 468.

Conflict of Interest

Where allegations of parental neglect and abuse are made, the interest of the parent is opposed to that of the child as a matter of law. The parent presumably denies the charge, while the protection of the child may well require introduction of evidence tending to contradict such denial. In all cases, the parent's interest requires minimization of the evidence supporting the charge. The child's interest, on the other hand, is served by a thorough inquiry designed to elicit all available proof that abuse or neglect has occurred.

An association between opposing counsel of the type presented here obviously would be unacceptable if the attorneys were in private practice. In that context, a question whether two attorneys sharing a common case load, supervisor, office, secretary and investigator, may represent directly conflicting interests in the same case, would not merit a serious response. See Illinois Rules of Professional Conduct, Rules 1.7, 1.10, 5.3.

ISBA Opinion 85-14 considered a situation in which part-time public defenders who shared an office, but who maintained separate individual law practices within that office, properly could be appointed to represent criminal defendants with conflicting interests. We concluded that such appointment was not improper, conditioned upon compliance with the requirements of full disclosure and client consent. We cautioned, however:

> No disclosure justifies the use in any manner of a common secretary. Such an arrangement would be ethically improper...because of the possibility of a disclosure of confidential information....

Opinion 85-14 clearly establishes the impropriety of the defenders' use of a shared secretary. In other respects, however, the present situation presents a far greater likelihood of conflict and unintended misconduct that did the facts of Opinion 85-14. The attorneys here do not conduct separate practices; both are full-time employees of the public defender, with joint responsibilities in all cases other than those involving neglect and abuse. Even if client consent were solicited, the voluntariness of such consent would be questionable with respect to the parents and legally impossible for the children. Opinion 85-14 cannot be interpreted as tolerance toward this arrangement.

The Illinois Supreme Court has ruled that a public defender office is not a law firm for purposes of intra-organizational conflicts. People v. Robinson (1980), 79 Ill.2d 147, 158-59. Robinson frequently has been cited as controlling on that question. For example, People v. Coates (1988), 109 Ill.2d 431, 439; People v. Chriswell (2nd Dist. 1985), 133 Ill.App.3d 458, 471.

Robinson was a consolidated appeal involving three cases. In none of those cases had assistant public defenders opposed each other at trial. The Robinson appellants urged that passive imputed disqualification should prevent such conflicts, just as would be true of a private law firm. The court rejected that analogy, and adopted a different test:

> Because...a conflict of interest on the part of one lawyer on the public defender's staff does not per se serve to disqualify other lawyers associated with that office, it must be determined from the record whether a conflict, in fact, existed. Robinson, 79 Ill.2d at 168.

The applicability of Robinson to the present situation is questionable. The issue here does not relate to mere imputed disqualification. Instead, the present facts demonstrate a close relationship between two attorneys which creates, at the very least, a serious potential for conflict of interest when they are ordered to oppose one another. The circumstances could neither inspire client confidence nor protect the image of the profession.

Appellate decisions applying Robinson have involved criminal cases in which separate assistant public defenders have represented co-defendants. In such cases, courts "have trusted to the naturally adversarial instinct of a public defender to put his client's interests first". People v. Spreitzer (1988), 123 Ill.2d 1, 21. With one exception, however, People v. Larry (2d Dist. 1990), 196 Ill.App.3d 231[2], Robinson has not been applied to cases involving conflicting representations at the same trial.

The rule that emerges from those cases is that representation by members of the same public defender office is proper, provided no actual conflict of interest arises. Where a conflict appears, however, the defendant is not required to show specific prejudice. People v. Nelson (1980), 82 Ill.2d 67, 72. The present situation fails that test.

In Lackey, supra, although no constitutional violation was found, the court reversed an adoption judgment where the parents were represented by an assistant public defender whose supervisor acted as guardian ad litem for the child and recommended termination of parental rights. The court stated:

> Where a conflict of interest between multiple parties clearly appears and separate members of a public defender's staff cannot effectively represent all, other counsel must be appointed. 79 Ill.2d at 468.

We believe that the quoted statement from Lackey is applicable to the facts presented here. Lackey is a post-Robinson decisions which recognizes that a conflict of interest exists where circumstances prevent members of a public defender staff, severally representing opposing parties, from freely and effectively opposing each other.

No Illinois or federal authority can fairly be interpreted as holding that the present situation may be

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[2] In Larry, the Appellate Court held that if counsel brings a potential conflict to the trial court's attention for action and the trial court fails to review or act upon the matter, a conviction will be reversed without a showing the attorney's performance was affected; if the trial judge is not informed a conviction will only be reversed upon a showing of actual conflict affecting counsel's performance.

viewed as proper.

CONCLUSION

The requirement imposed upon these two attorneys by the county authorities forces them to violate the Rules related to conflicts of interest and confidentiality.

There can be no reliance upon a "natural adversarial instinct" where attorneys are required routinely to cooperate with each other in the defense of delinquency cases before the same court in which they must oppose each other whenever so directed.

Neither can there be meaningful confidentiality where opposing attorneys having the same employer, share their principal responsibilities, and use the same office, facilities, secretary and investigators.

The arrangement is unfair not only to the clients but to the attorneys themselves. Public defenders have no immunity from malpractice actions, Ferri v. Ackerman (1979), 444 U.S. 193. They also probably are vulnerable to federal civil rights actions (42 U.S.C. §1983) where, as here, their actions are performed pursuant to county policy. Tower v. Glover (1984), 467 U.S. 914.

The attorneys in this case are forced to undertake conflicting representation without the consent of the affected clients. They are required, at their peril, to assume the near-impossible burden of compliance with Rule 5.3 by enforcing confidentiality upon non-attorney assistants who render services for mutually adverse parties.

The arrangement violates Rules 1.6, 1.7, 5.3, and 8.4(a)(5).

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