ISBA Advisory Opinion on Professional Conduct

This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(b) and 1.7. 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. 92-18
January 22, 1993

Topic: Conflict of Interest; law firm representing assistant state's attorneys in civil litigation while opposing them as criminal defense attorneys.

Digest: An attorney whose firm represents prosecutors in civil matters is not disqualified per se from opposing those prosecutors in criminal cases.

Ref.: Illinois Rules of Professional Conduct, Rules 1.4(b) and 1.7(b)
       ISBA Opinions 477, 783 and 822

FACTS
A law firm represents two assistant state's attorneys in a civil case which does not involve any aspect of their official duties. One of the firm's associates is an assistant public defender who is frequently required to oppose the client-prosecutors in criminal cases. We are asked whether the associate may continue to act as a public defender.

QUESTION
Where a law firm represents prosecutors in private civil litigation, may an associate of that firm defend criminal cases in the same county in which the prosecutors are employed?

OPINION

The expressed inquiry whether the associate may continue to act as a public defender may reflect an overly narrow view of the implications of the circumstances in which the parties find themselves. There is no basis upon which to distinguish between a public defender and any other attorney in respect to disqualification from the defense of criminal cases. The issue is not whether a member of the firm may act as a public defender, but whether any person associated with that firm may oppose the client-prosecutors or the office by which they are employed.

Opinion No. 822 (1983) addressed the situation in which an attorney represents another attorney while each has clients adverse to the clients of the other. The opinion found no impropriety if proper disclosures are made and client consents obtained.

Neither the official status nor the official duties of the client-prosecutors are implicated by the civil suit. ISBA Opinion No. 477 (1976), which found impropriety where a criminal defense attorney represented the members of a police association in matters related to their official duties, is inapplicable to this situation.

A partner or associate of the firm may undertake criminal defense in opposition to the client-prosecutors and other members of that prosecution office, provided that the requirements of Rule 1.7(b) are met. That Rule requires that:

> (1) the attorney reasonably believes the representation [of the criminal client] will
> not be adversely affected [by the prosecutors' client status]; and
> (2) the [criminal] client consents after disclosure.

Rule 1.7(a) is inapplicable because criminal defense is not representation "directly adverse" to the prosecutor. For that reason, the consent of the prosecutor-clients is not required.

Rule 1.4(b), taken in tandem with Rule 1.7(b)(2), requires that all clients of the firm in matters adverse to the state's attorney must be informed that the firm represents the two prosecutors. The disclosure must extend to the implications of that representation, in sufficient breadth to permit the client to appreciate the significance of the firm's relationship with the prosecutors.

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