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SPRINGFIELD

December 30, 1982

FILE NO. 82-060

GOVERNMENTAL ETHICS AND CONFLICT OF INTEREST:
County Board Member/Lawyer

Honorable Thomas J. Difanis
State's Attorney, Champaign County
Court House
Urbana, Illinois 61801

Dear Mr. Difanis:

I have your letter in which you inquire whether the relationship between the county board and the State's Attorney of a county would result in a conflict of interest disqualifying a county board member, who is a practicing attorney, or other members of his firm, from defending clients charged with the commission of criminal offenses. For the reasons hereinafter stated, it is my opinion that no conflict of interest would arise in the circumstances in question, and therefore,

that neither a county board member, who is a practicing attorney, nor his associates in the practice of law, would be disqualified from appearing and representing clients who are being prosecuted by the State's Attorney.

The Code of Professional Responsibility (Ill. Rev. Stat. 1981, ch. 110A, art. VIII) does not specifically address the situation which you have presented. However, the supreme court has held that a conflict of interest arises whenever an attorney's independent judgment on behalf of a client may be affected by loyalty to another party (In re LaPinska (1978), 72 Ill. 2d 461, 469.), and therefore, that it is improper for an attorney to undertake inconsistent duties. (In re Becker (1959), 16 Ill. 2d 488, 496.) Where one member of a law firm has a conflict of interest in a specific matter, the conflict is imputed to all members of the firm. (People v. Arreguin (1981), 92 Ill. App. 3d 899, 902.) Conflicts of interest have been found to exist in cases in which a former prosecutor assumes the representation of a defendant in a prosecution commenced during his tenure as a prosecutor (see People v. Kester (1977), 66 Ill. 2d 162), cases in which a single law firm represents both the defendant in a criminal prosecution and the victim of the crime (see People v. Stoval (1968), 40 Ill. 2d 109; see also People v. Arreguin (1981), 92 Ill. App. 3d 899, 902), and cases in which one member of a law firm is

currently employed by a prosecuting authority or a unit of government in a professional capacity, and either he or another member of the firm undertakes the representation of a defendant in a criminal prosecution or in a matter directly related to the duties of his public employment. (See People v. Fife (1979), 76 Ill. 2d 418; In re LaPinska (1978), 72 Ill. 2d 461; People v. Pendleton (1977), 52 Ill. App. 3d 241). I have found no case which specifically pertains to the circumstances you have described.

In In re Becker (1959), 16 Ill. 2d 488, however, the court addressed the propriety of an attorney's conduct in similar circumstances. In that case, the respondent attorney was charged with unethical conduct arising out of his representation of private interests in certain zoning matters concerning the city of Chicago, which occurred while the respondent was an alderman of that city. The court stated therein:

" * * *

> Amicus curiae contends that an alderman, as an elected member of a legislative body, represents conflicting interests when he accepts employment from private interests in cases before the courts where his municipality is a party. He makes a like assertion of conflict with respect to an alderman's appearance before administrative officers or bodies set up by the city. His theory is that the lawyer-member of a legislative body stands in a fiduciary relationship with it and any representation of private interests is unethical per se.

* * *

We are of the opinion that there is nothing unethical in a lawyer-member of a legislative body appearing in litigation wherein his governmental unit is a party, even in cases where acts of that body are sought to be held unconstitutional. The court has complete jurisdiction and its determination is made without reference to the actions or desires of the legislative body or any individual member thereof. There is no Illinois precedent to the contrary, nor is such practice prohibited by the Canons of Ethics. Canon 49 applies 'to the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member,' not to ordinances or statutes after their passage. To hold otherwise would cause able, ethical and distinguished legislative members of our bar to hesitate before accepting cases in fields of the law in which they have traditionally practiced. What we have here said is subject to later comment upon the propositions of disclosure of employment and a division of responsibility or services.

* * *

The next question is whether a lawyer-member of a legislative body may appear as counsel or co-counsel at hearings before a zoning board of appeals, or similar tribunal, created by the legislative group of which he is a member. We are of the opinion that he may practice before fact-finding officers, hearing bodies and commissioners, since under our views he may appear as counsel in the courts where his municipality is a party. Decisions made at such hearings are usually subject to administrative review by the courts upon the record there made. It would be inconsistent to say that a lawyer-member of a legislative body could not participate in a hearing at which the record is made, but could appear thereafter when the cause is heard by the courts on administrative review. This is subject to an important exception. He should not appear as counsel where the matter is subject to review by the legislative body of which he is a member. 'A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public.' (43 Am. Jur. 81, Public Officers,

> sec. 266.) We are of the opinion that where a lawyer does so appear there would be conflict of interests between his duty as an advocate for his client on the one hand and the obligation to his governmental unit on the other.
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> One other matter deserves comment. What we have heretofore approvingly said with respect to a lawyer-member of a legislative body practicing before the courts and administrative bodies should be subject to the restriction that where he is co-counsel public disclosure of his participation is essential. If he expects to participate in litigation and share a fee, the record should so show and the client should have knowledge of such fact. While disclosure would make representation no more ethical, failure to disclose would create temptation and foster suspicion. Furthermore, his activities would then be subject to the bright light of public opinion.
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> It was charged that in several instances respondent failed to appear of record as co-counsel, where he shared in a fee. In at least one count (XX Accurate Threaded Fasteners) we believe the record bears out the finding that the client was not informed of his participation in the case or the sharing of the fee. Respondent argues that lawyers are often retained as co-counsel without the knowledge of the client and that his position is no different from that of lawyers generally. We think this prohibition applies peculiarly to lawyer-members of legislative bodies because of their responsibility to the public. * * *
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> * * * "

(Emphasis added.) (In re Becker (1959), 16 Ill. 2d 488, 491-98.)

In the case of a county board member/lawyer who represents a defendant in a criminal case prosecuted by the State's Attorney, fewer potential conflicting interests are present than in the circumstances described in In re Becker. In such a

case, the governmental body of which the attorney is a member is not a party to the proceedings, nor are the actions of the governmental body at issue. Rather, the State's Attorney in a criminal prosecution represents all of the people of the State, not merely the interests of the people of the county. No division of loyalty is required when a county board member/lawyer represents a defendant in a criminal prosecution, since his duties and responsibilities to the county are not inconsistent with his duties and responsibilities to his client. Nor can the fact that a county board member/lawyer successfully defends a client against a criminal charge create an interest adverse to the State's Attorney and the people of the State, since it is the duty of the State's Attorney not merely to secure convictions, but to see that justice is done. See People v. Schoos (1948), 399 Ill. 527, 532.

Further, nothing in the relationship between the county board and the State's Attorney gives rise to a conflict of interest. The county board exercises certain duties and responsibilities with respect to the funding and operation of the office of the State's Attorney. (See, e.g., Ill. Rev. Stat. 1981, ch. 34, par. 432; ch. 53, pars. 7, 18, 19.) The State's Attorney is the attorney and legal advisor to the county board. (Ill. Rev. Stat. 1981, ch. 14, par. 5; Ashton v.

County of Cook (1943), 384 Ill. 287, 299-300.) The relationship between a county board member and the State's Attorney, and the duties incumbent on each, is not inconsistent with the duty of the State's Attorney to prosecute criminal cases, or the duty of a lawyer to zealously represent a client charged with the commission of a crime. Although a county board member is bound to represent the county with undivided fidelity, he may discharge his duty to a client in these circumstances without compromising the interests of the governmental body he also represents, without compromising his client's constitutional right to the effective assistance of counsel, and without impairing the relationship which exists between the county board and the State's Attorney. Certainly, there is no factor apparent in the relationship between a county board member and the State's Attorney, as compared to the relationship between an alderman and a city attorney or corporation counsel, which would require a conclusion different from that reached by the court in In re Becker.

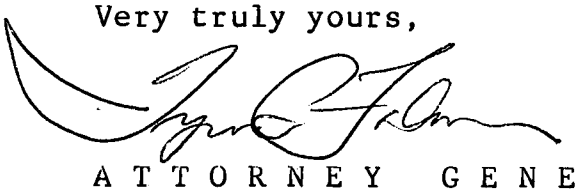
You have called my attention to opinion No. 699, issued by the Illinois State Bar Association's Committee on Professional Ethics on April 30, 1981, in which the Committee advised that it would be improper for a county board member/lawyer to represent persons charged with crimes by the State's Attorney of the county. While such advisory opinions

may be given great weight in questions of first impression, it is my opinion, as stated above, that the reasoning of In re Becker compels a contrary conclusion. Further, I would note that the conclusion expressed in Professional Ethics Opinion No. 699 is not supported by citations to cases of this or any other jurisdiction, and that one of the two earlier ethics opinions cited in support of the conclusion appears to advise to the contrary.

You also state in your letter that another member of the Champaign County Board is the spouse of an attorney who represents defendants prosecuted by the State's Attorney. You ask whether this would give rise to a conflict of interest. My answer to your first question clearly indicates that no conflict of interest would be present under these circumstances.

In conclusion, it is my opinion that a county board member, who is also an attorney, may represent defendants in criminal cases prosecuted by the State's Attorney of the county. No conflict of interest in these circumstances arises out of the relationship between the county board and the State's Attorney of a county, the duty of a county board member to represent the county with undivided loyalty, or the duty of the State's Attorney to represent the county board.

Very truly yours,



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