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STATE OF ILLINOIS
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FILE NO. 92-009

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST:
County Board Member-Lawyer
Representing Criminal Defendant

Honorable Thomas Difanis
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Honorable James Ryan
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Gentlemen:

I have your letters wherein you inquire whether, in light of the Supreme Court's recent decision in In re Vrdolyak (1990), 137 Ill. 2d 407, a conflict of interest arises when a county board member, who is also a lawyer, represents a criminal defendant in a case which is prosecuted by the State's Attorney of the county in which the board member holds office. For the reasons hereinafter stated, it is my opinion that no

per se conflict of interest arises in the circumstances described.

In In re Vrdolyak (1990), 137 Ill. 2d 407, the Illinois Supreme Court concluded that the respondent attorney engaged in unethical conduct by representing city of Chicago employees in workers' compensation claims against the city while serving as an alderman. The court's decision was based upon Rule 5-101(a) of the Code of Professional Responsibility (see 79 Ill. 2d R. 5-101(a), now superseded by Rule 1.7(b) of the Rules of Professional Conduct (134 Ill. 2d. R. 1.7(b)))¹, which prohibited an attorney from accepting employment where his or her professional judgment may have been affected by competing financial, business, property or personal interests. In reaching its conclusion, the court stated:

" * * *

* * * if a lawyer-legislator undertakes the private representation of a client against his governmental unit either the client or the public must necessarily suffer; neither should. * * *

Therefore, we hold that a lawyer-legislator may engage in the private practice of law including representing governmental employees, unless the governmental unit of which he is a member is an adverse party--regardless of the forum.

¹Although the language of Rule 1.7(b) of the Rules of Professional Conduct differs from that of former Rule 5-101(a), the Rules are similar in substance and application. Both address the potential impairment of representation by a lawyer's personal or professional interests. Therefore, the reasoning of In re Vrdolyak would appear to be applicable to the interpretation of Rule 1.7(b).

[Citations omitted.] If another governmental unit is an adverse party, the lawyer-legislator must carefully examine the circumstances to determine whether a conflict of interest exists; if so, he should decline employment in that case.

* * *

In re Vrdolyak (1990), 137 Ill. 2d 407, 424-425.

In In re Vrdolyak, the court concluded that there is a per se conflict of interest if a lawyer-legislator represents a client in a case in which the governmental unit of which he is an officer is an adverse party. The court further held that it is not professionally improper per se for a lawyer-legislator to represent a client if another unit of government is the adverse party; rather, the court determined that if a unit of government, other than the one in which the lawyer-legislator serves, is an adverse party, then the lawyer-legislator must examine the circumstances to determine whether a conflict of interest exists. If an actual conflict of interest is found, then the lawyer-legislator should decline employment in that case.

It is noteworthy, however, that neither the county nor any other unit of government is ordinarily a party to a criminal prosecution. Crimes are considered to be offenses against the peace and dignity of the sovereign; in Illinois, the sovereign power is vested in the people of the State. (Field v. People ex rel. McClernand (1839), 3 Ill. 79, 81.) Therefore,

criminal prosecutions are brought in the name of the People of the State of Illinois, not the State of Illinois in its corporate capacity. Moreover, notwithstanding that State's Attorneys exercise prosecutorial authority only within the boundaries of a single county, they are State, rather than county, officers. Ingemunson v. Hedges (1990), 133 Ill. 2d 364.

As you are aware, the question you have posed has previously been addressed by this office. In opinion No. 82-060, issued December 30, 1982 (1982 Ill. Att'y Gen. 188), Attorney General Fahner concluded that a county board member-lawyer could represent criminal defendants in cases prosecuted by the State's Attorney of the county in which he or she held office without giving rise to a prohibited conflict of interest. In reaching his conclusion, my predecessor referred to In re Becker (1959), 16 Ill. 2d 488, a case in which the Illinois Supreme Court addressed the propriety of an attorney representing private interests in certain zoning matters concerning the city of Chicago, while serving as an alderman of that city. In discussing the potential of a conflict arising, my predecessor stated:

" * * *

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 the 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 relationships which exist between the county board and the State's Attorney. * * *

* * *

(Emphasis added.) 1982 Ill. Att'y Gen. Op. 188, 190-1.

In re Becker was cited in the discussion of the issues presented for determination as an example of conduct by a lawyer-legislator which had previously been addressed by the Illinois Supreme Court and found permissible. In In re Vrdolyak, the court noted that the adoption by the court of the Code of Professional Responsibility had, "sub silentio, overruled prior judicial decisions which conflict with its mandates and proscriptions", including, presumably, In re Becker, since the conduct it found unprofessional was very similar to that which the court had previously permitted in In re Becker. (In re Vrdolyak (1990), 137 Ill. 2d 407, 422.) My predecessor's conclusion, however, was fully supported by his review of areas in which a conflict of interest could potentially arise if a county board member-lawyer represented a defendant in a criminal case prosecuted by the State's Attorney, and his recognition of the fact that the county is not an adverse party to a criminal case, a fact that readily distinguishes the circumstances concerning which you inquire from those at issue in In re Becker and In re Vrdolyak.

It is my opinion that the reasoning of the court in In re Vrdolyak does not require a per se prohibition against a county board member-lawyer representing a criminal defendant in these circumstances. The county does not occupy the same position, in a criminal case, as the city did in the representation

undertaken in In re Vrdolyak. Therefore, that decision is inapposite. Moreover, my review of the attendant circumstances has failed to disclose any competing fiduciary duties, any divided loyalties or any personal interests in the relationship which would appear to create a per se conflict of interest under Rule 1.7(b) of the Rules of Professional Conduct. Therefore, it is my opinion that a county board member who is also a lawyer may, generally, represent a defendant in a criminal case prosecuted by the State's Attorney of the county in which he holds office unless there are particular factors present in that case which could cause the representation of his client to be materially limited. If there is any possibility that his or her professional judgment could be materially limited by responsibilities to another client or to a third party, or by the lawyer's own interests, Rule 1.7(b) of the Rules of Professional Conduct requires the county board member-lawyer to decline the proffered representation.

I would note, in this regard, that cases may be instituted in which the county is the victim of a criminal act, such as theft of county property, or is otherwise directly affected. In such a case, a county board member-lawyer would be subject to competing responsibilities if he or she was to undertake representation of a person accused of the crime, and would be required by Rule 1.7(b) of the Rules of Professional Responsibility to decline to represent the defendant.

You have also directed my attention to opinion No. 91-4, issued by the Illinois State Bar Association's Committee on Professional Ethics on September 14, 1991, in which the Committee advised that it would be improper for a county board member-lawyer to represent defendants in actions being prosecuted by the State's Attorney's office of the county in which he or she is an official. The Committee apparently assumed that the county was an adverse party in such cases, as was the city in the representation undertaken in In re Vrdolyak. That is not correct; although the city was an actual, adverse party in the latter, the county is not ordinarily an adverse party in the former. Therefore, I do not find the reasoning of the Committee on Professional Ethics persuasive.

Respectfully yours,

A handwritten signature in cursive script, reading "Roland W. Burris". The signature is written in black ink and is positioned above the typed name and title.

ROLAND W. BURRIS
ATTORNEY GENERAL