

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1988

The Legal Ethics Committee of the Indiana State Bar Association has been asked to give its opinion as to whether a partner in a law firm may take a position with the County Prosecutor's Office limited to handling Uniform Reciprocal Enforcement of Child Support Act cases in front of the Circuit Court where his father and law partner is also the part-time judge of a City Court located in the same county.

Since a city court judge has jurisdiction over traffic and misdemeanor cases prosecuted by the county prosecutor, our answer is "no" because the county prosecutor is the employer of the judge's law partner and son.

We believe, if the son should take the position, the city judge might be in conflict with Canon 2 of the Code of Judicial Conduct requiring a Judge to "Avoid Impropriety and the Appearance of Impropriety in All His Activities" and Canon 3(C) (1) of the Code of Judicial Conduct requiring him to disqualify himself in proceedings in which his impartiality might reasonably be questioned.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1988

The Legal Ethics Committee has been asked to give an opinion on the ethical propriety of a pamphlet advertising the services of a lawyer who handles adoption matters. The pamphlet is printed in handwritten lettering, with child-like line drawings accompanying the text. The significant portions of the text of the pamphlet are as follows:

Ask me about adoption.

Sensitive to the concerns of all involved, A.B. is committed to the health and emotional needs of birthmothers as well as the long term happiness of the child and its adoptive parents.

If you find you're pregnant...give yourself a second chance.

To some women the words "You're pregnant" may be the beginning of emotional turmoil for family and friends.

An unplanned pregnancy can become a gift of life for a childless couple who want children but cannot have them.

The adoptive couple will pay for:

- Medical expenses for you and your baby;
- Legal fees;
- Counseling fees.

Decisions are too often made alone and without accurate information. Know your choices and legal rights.

Please call, day or night, for free legal information:
(telephone number appears here).

Your questions are important and should be answered. Your conversations will be completely confidential. It is not necessary to give your name.

Give your gift of life to a loving couple.

There are many couples who want to share their love and home with a child. You can take part in choosing the adoptive couple for your child. Your unselfish and loving decision can be a comfort for all concerned.

Save a life for someone to love.

Make use of A.B.'s deep personal commitment to children, birthparents and adoptive couples.

Elsewhere on the pamphlet the name, address and telephone number of the attorney appear. The opinion request does not disclose how the pamphlet will be distributed. See Rule 7.3(d).

Rule 7.1(c) of the Rules of Professional Conduct requires that lawyer advertising not contain "a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." These terms are defined to include a statement or claim which:

- (1) contains a material misrepresentation of fact;
- (2) omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
- (3) is intended or is likely to create an unjustified expectation;
- (4) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;
- (5) is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
- (6) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation of implication not deceptive.

The topic of this advertising pamphlet--adoptions--relates to an area of the law that is inherently fraught with grave ethical concerns, not the least of which concern the representation of clients with adverse interests. The target audience for this pamphlet is obvious--women who are pregnant with unwanted children. Thus, the intended audience is a class of people who in most cases will be in emotionally fragile states.

The pamphlet, while clearly addressed to the pregnant woman, is equivocal about just who the lawyer will consider to be his client or clients, the birthmother or the adoptive couple. The committee considers it to be an irresolvable conflict of interest for a lawyer to simultaneously represent both the birthparent(s) and the adopting parents in an adoption proceeding.

If the lawyer will be representing the adoptive parents as his clients,

and this pamphlet is simply a method of soliciting adoptable babies through pregnant women who are considering placing their children for adoption, it is misleading and deceptive. It fails to meet ethical standards because it induces the reader (the pregnant woman) to believe that the lawyer will be exclusively representing her legal interests, when in fact his primary loyalty will be to the adoptive couple.

If the lawyer will be representing only the interests of the pregnant woman who wishes to place her child for adoption, our concerns are not as great. Yet even under these circumstances, we suggest that the pamphlet state clearly that the lawyer will exclusively represent the interests of the pregnant woman.

Further, the lawyer should be aware that if he represents the pregnant woman, accepting his fee payment from the adopting couple must meet with requirements of Rule 1.8(f) of the Rules of Professional Conduct.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1988

A request has been made of the Ethics Committee to render an opinion upon the following facts:

An attorney represents the Fraternal Order of Police; in addition thereto, he also represents defendants in criminal actions.

The issues raised by this inquiry are hereinafter set out.

The first issue raised is that of whether or not representation of the F.O.P. in and of itself constitutes a conflict of interest.

In addition, does representation of the F.O.P. jeopardize the attorney's ability to represent criminal defendants in the future, especially in those matters where officers of F.O.P. will be testifying.

Rule 1.7(b) appears to be the relevant rule in this issue. Rule 1.7(b) requires that a lawyer not represent a client if such representation would be materially limited by his responsibility to another client.

A lawyer must reasonably believe that such representation will not be adversely affected. Lastly, the consent of all clients after full disclosure is necessary.

Taking the above rule into consideration, it would appear that representation of the F.O.P. and those charged with a crime is not inherently a violation of 1.7(b). Each individual case does appear to be very fact sensitive.

At the very minimum, the attorney should make full disclosure of the fact that he represents the F.O.P. The client should have full assurance that such representation will not be to his detriment. Nor should the defendant, under any circumstances, be led to believe by inuendo or otherwise that such representation could be to his advantage.

It would go without saying, that in this instance the attorney could be facing allegations of improprieties at either side at any time.

This case would appear to be an analogy to those instances where city attorneys are prevented from representing clients where the city police officers are to be witnesses or where a county attorney is prohibited from representing clients when the county police are involved, due to the fact that those attorneys do act as advisors to those departments.

In conclusion, the committee is of the opinion that, while it is not inherently impermissible to represent the F.O.P. and a criminal defendant, each case will have to stand on its own factual background. The attorney should carefully read Rule 1.7(b) and the annotations set out thereunder of the rules approved by the Indiana Supreme Court.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1988

I. FACTS

Attorney represents major company in collection cases. Most such cases are filed in Small Claims Court.

Attorney and another attorney maintain offices in a building in which each have one-half interest. Attorneys maintain totally separate law practices within the building including separate staffs and secretaries.

The recently elected Small Claims Court Judge is a son-in-law of the other attorney and intends to sublet space from his father-in-law.

II. ISSUES

Whether the subletting of space for the Small Claims Court Judge is proper.

In the event the Judge sublets the space, must the attorney withdraw from pending cases in Small Claims Court?

III. ANALYSIS AND CONCLUSIONS

Assuming that there is no sharing of space by any parties in this fact situation, it would seem that the rental of space does not represent a prohibited transaction. This Committee has sanctioned common ownership of office real estate in prior opinions. Opinion No. 2 of 1982 approved a mutual non-legal business interest pursuit by a prosecuting attorney and another practicing attorney in the same community who represented criminal defendants within the same jurisdiction and whose partners and associates also represented criminal defendants.

There appears no requirement for the attorney to withdraw from representation of clients in the Small Claims Court.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 5 OF 1988

I. FACTS

An attorney represents a criminal defendant, and one of the police officers involved in his case is the husband of an associate in his law firm. The Legal Ethics Committee assumes that the involvement makes the police officer at least a potential witness at trial, and there is no question under Rule 1.6. The local prosecutor has raised the question whether this constitutes a conflict of interest.

II. DISCUSSION

The above facts are analogous to those presented in the Committee's Opinion No. 5 of 1980 and Unpublished Opinion No. U2 of 1983 wherein a lawyer represented, in unrelated matters, a criminal defendant and a police officer involved in the criminal case. In those prior opinions decided under the former Disciplinary Rule DR 5-105, the Legal Ethics Committee concluded that, while a conflict of interest would exist, the attorney could represent the criminal defendant if complete disclosure was made to the criminal defendant "of the possible effect of such representation on the exercise of his professional judgment" and obtained from the defendant his meaningful consent under DR 5-105(C). In order to vigorously represent a criminal defendant, it is at times necessary to "attack" the memory, veracity, or competency of a police officer involved in the case. As a practical matter, such a defense strategy may have an adverse effect on the interpersonal relationships within the attorney's law firm where the police officer involved is the husband of a lawyer associated with the firm. It is the opinion of the Legal Ethics Committee that the potential conflict between the requirement of zealously representing the criminal defendant and the attorney's desire to maintain harmony within his law firm constitutes a situation under Rule 1.7(b). Rule 1.7(b) states:

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall

include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.7(b) is similar to the former rule under DR 5-105 in that it contains an "escape valve." If the attorney reasonably believes that his representation of the criminal defendant will not be adversely affected by the fact that the police officer involved in the case is the husband of his associate, and if his client consents to the representation after consultation and full disclosure of the potential conflict, then the attorney may represent the criminal defendant without violating the Rules of Professional Conduct.

III. CONCLUSION

The Legal Ethics Committee is of the opinion that it would be unethical under the Rules of Professional Conduct for an attorney to represent a criminal defendant in a criminal proceeding in which one of the police officers involved in the case is the husband of an associate in his law firm, unless the lawyer reasonably believes that his representation of the criminal defendant will not be adversely affected and the criminal defendant consents after consultation and full disclosure of all potential conflicts.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 6 OF 1988

The Committee has received an inquiry based on the following facts:

Lawyer A entered into a written Retainer Agreement to render legal services to M in connection with a malpractice action against a local hospital. Several days after the execution of the Agreement, M retained another lawyer, B, and dismissed A.

QUESTION

Under the Rules of Professional Conduct, may A specifically enforce the Retainer Agreement and continue to represent M?

DISCUSSION

A's dispute with M is governed by Rule 1.16 of the Indiana Rules of Professional Conduct. That Rule states, in pertinent part:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

The Comment to Rule 1.16 offers further guidance on the question:

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances. (Emphasis added.)

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Clearly, A has no right to force M to retain him as her counsel, notwithstanding the Retainer Agreement. A may be entitled to compensation for the value of the services already rendered by him to M in pursuit of her claim. The amount of such compensation, however, is a matter of fact and law, both of which are beyond the scope of an opinion of the Committee.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 7 OF 1988

The Committee has been asked to respond to the following questions:

- (1) Is it permissible for a lawyer to advertise, or to state on the lawyer's letterhead, that he or she has been certified as a "Civil Trial Advocate" by the National Board of Trial Advocacy (NBTA)?
- (2) Is it permissible for a lawyer or a law firm to advertise that the lawyer or law firm "represents individuals and businesses who have been injured or damaged in trials or appeals" or that the lawyer or law firm "specializes in representing individuals and businesses who have been injured or damaged in trials or appeals"?

DISCUSSION

The matters raised are expressly covered in Rules 7.1 through 7.4 of the Indiana Rules of Professional Conduct (the "Indiana Rules"). Indiana Rule 7.1 provides, in pertinent part:

- (b) A lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication (i.e. -- advertising) containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim. . . .
- (c) Without limitation a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim includes a statement or claim which:
 - (4) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4.

Indiana Rule 7.2 states, in pertinent part:

- (a) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or a similar professional

notice or device if it includes a statement or claim that is false, fraudulent, misleading, deceptive, self-laudatory or unfair within the meaning of or that violates the regulations contained in Rule 7.1.

Finally, Indiana Rule 7.4 provides, in pertinent part:

- (a) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist, except as follows:
 - (1) (Patent, Trademark and Admiralty Lawyers permitted to hold themselves out to the public as same.)
 - (2) A lawyer who practices in certain areas of law may hold himself out as practicing in those areas of law, but may not hold himself out as a specialist. (Emphasis supplied.)

CONCLUSION

Indiana Rules 7.1 and 7.4 expressly prohibit a lawyer from holding himself or herself out as "certified" in any area of practice; hence, the proposed advertisement described in question (1) is impermissible (note, however, that an advertisement describing a lawyer as being a "member" of the NBTA is permissible. Indiana Rule 7.1(b) (10).

As to the proposed advertisement described in question (2), Indiana Rule 7.4 prohibits the use of the term "specializes," but would permit the lawyer or firm to state that it "represents" clients involved in the types of matters described, or that the lawyer's or the firm's practice was "limited to" certain types of matters.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 8 OF 1988

I. FACTS

Attorney "A" is one of three Administrative Law Judges in a state administrative agency. "A" is the spouse of Attorney "B", a Deputy Attorney General in a Section of the Attorney General's Office that handles matters arising in the administrative agency for which "A" works. The Section, with over ten Deputies assigned to it, represents as well six other administrative agencies and their subgroups. "A's" agency and the Attorney General's Office agree that "B" will never be assigned to a case in which "A" has been appointed Administrative Law Judge. The two agencies are aware of the potential for conflicts of interest and resolve to take every step possible to avoid conflicts.

Before becoming an Administrative Law Judge, "A" was an attorney for the same administrative agency. While an attorney, "A" verbally recommended "B" to the Section Chief for a position in the Attorney General's Office in the Section that handles matters arising in "A's" spouse. The Attorney General later received a written recommendation on "B" from the Corporation Counsel for the City. "B" was notified by letter from the Section Chief that there were no current openings in the Section.

"A" later accepts employment as Administrative Law Judge with the same agency. The week "A" begins work as an Administrative Law Judge, "B" received a call from the Attorney General for an interview by the Attorney General for an opening in the Section that handles matters arising in "A's" agency. Upon disclosure of the marital relationship between "A" and "B", the Attorney General determines the situation could be handled by proper management practices without necessitating "B's" transfer to another Section.

II. ISSUES

Do ethical considerations require that either "A" step down as Administrative Law Judge or "B" be transferred to another Section in the Attorney General's Office?

Do ethical considerations prohibit "B" from representing "A's" agency before the other two Administrative Law Judges?

Did ethical considerations require that "A" identify "B" as spouse at the time of "A's" recommendation of "B" to the Section Chief of the Attorney General's Office, which was prior to "A's" employment as Administrative Law Judge?

III. ANALYSIS AND CONCLUSIONS

The Committee believes that the Administrative Law Judge may continue to serve and Attorney "B", spouse of the Judge, may continue to serve within the respective section of the office of the Attorney General. Attorney "B" is absolutely prohibited from appearing before the Administrative Law Judge spouse. Rule 1.6, Confidentiality of Information, must be strictly adhered to with reference to all agency matters pending before the remaining administrative law judges. Rule 1.8, Conflict of Interest: Prohibited transactions (i) applies to related lawyers who are in different firms. Comment to the rule indicates that the disqualification is personal and not imputed to members of the firm with whom the lawyers are associated. Opinion No. 2 of 1984 approved appearance by a practicing attorney spouse before other Superior Court Judges in a unified system, excluding appearance before the Superior Court Judge spouse of the attorney. Additionally, this Committee in that opinion approved appearance of partners and associates of the practicing attorney before all such Superior Court Judges including the Judge spouse.

The Committee elects not to comment on the non-disclosure of the marital relationship during the pre-employment period. Conflict of interest issues arise only with the employment event.

