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June 20, 1975

FILE NO. S-921

OFFICERS:
Duties of State's
Attorney

Honorable Gerry L. Dondanville
State's Attorney of Kane County
404 Kane County Courthouse
Geneva, Illinois 60134

Dear Mr. Dondanville:

This responds to your request for an opinion as to whether you are required under section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 5) to draft a resolution requested by the county board. Section 5 provides in pertinent part as follows:

"§ 5. The duty of each State's Attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

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(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

* * *

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

* * *

You have drawn my attention to subdivision 7 and have informed me that "it is customary in Kane County for the State's Attorney to provide the service of drafting Resolutions and Ordinances for the Kane County Board". With regard to the particular proposed resolution requested by the Board, it is your opinion that "the action contemplated by the proposed Resolution would be clearly unlawful and discriminatory and would, if adopted, result in a lawsuit in which [you] would have a duty to act on behalf of the plaintiffs". You have further informed me that the plaintiffs would be county officers, possibly including yourself.

As can be seen from the provision quoted above, a

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state's attorney has three statutory clients: the people, the county board and the county officers. The interests of these clients could often be in conflict and disputes could arise among them. The People ex rel. Courtney v. Ashton, 358 Ill. 146, was a case in which the state's attorney brought an action against county officers to restrain them from paying out funds belonging to the county and to the people. One of the points discussed in the court's opinion was whether a state's attorney who has the duty to defend the county and its officers, could bring a suit against the officers. The court pointed to numerous cases where the state's attorney has represented the people against officers or the county board. (p. 152.) It went on to state at page 153 that:

" * * *

It would be an unreasonable construction of section 5 of the State's Attorneys act to say that the State's Attorney in the discharge of his duties has no choice in such a situation as arises here. A strict construction would require the State's Attorney in any suit against a county officer by the county to appear on both sides of the case. * * * "

In the opinion of my predecessor No. 313 dated October 5, 1956, (1956 Ill. Att'y. Gen. Op. 165) my predecessor discussed that opinion and at page 168 stated:

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" * * *

Courtney v. Ashton, supra, held, in effect, that in a case involving a possible conflict between the people's interest and a county officer's exercise of his power, the state's attorney must determine which position is correct and represent that party. This implies that his office is not required to act in a dual capacity and provide counsel for the opposing party.

* * *

It is a logical extention that the state's attorney, when the interests of the county board and county officers conflict, must determine which position is correct and represent the party with such position or interest.

As an attorney you cannot represent conflicting interests or undertake to discharge inconsistent duties. Once an attorney is retained and has received the confidence of a client, he cannot enter the services of those who are adverse to his clients, no matter how honest his motives or intentions. (The People v. Hanson, 290 Ill. 370, 372.) Once you have drafted the resolution, you may well have committed yourself to defend such resolution in a court proceeding.

I, therefore, am of the opinion that you have fulfilled your duties under subparagraph 7 of section 5, supra, in advising the Board in regard to the proposed resolution

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and that you are not required to draft it.

You have stated in your letter that you believe that the proper procedure for the Board would be to request formally the judge of the circuit court to appoint a special state's attorney for the limited purpose of drafting the resolution. I offer no opinion on this question. However, I point out that the appointment of a special state's attorney is in the discretion of the court. Hutchens v. Wade, 13 Ill. App. 3d 787.

Very truly yours,

A T T O R N E Y G E N E R A L