INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1983

The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following question:

> May an attorney on his own behalf file an application for a building permit with the City Building Commissioner and a variance with the Board of Zoning Appeals (BZA) of his community and then personally appear before the BZA for the hearing for the variance when that attorney is an associate in a firm whose members include the City Attorney and the Assistant City Attorney who is the regular counsel for the BZA?

The Committee is aware that hundreds of variances are granted each year to individuals who represent themselves before BZA's. The attorney requesting the variance is in the best position to know his own request and to describe it to the BZA at the variance hearing.

The right of self-representation is inherent in our legal system. Although a Board of Zoning Appeals is an administrative body operating under strict administrative guidelines, this committee has neither the authority or the desire to deny the attorney seeking the variance the opportunity to represent himself.

However, Canon 9 is unyielding in its requirement of avoiding even the appearance of impropriety. Therefore to fulfill Canon 9's requirement, this Committee feels that it is incumbent that the requesting attorney's associate, the Assistant City Attorney, be under a duty to make a full disclosure of the relationship which exists between the two attorneys and then to disqualify himself for the purposes of that matter before the BZA.

However, there is no guarantee that every variance requested will be approved by the BZA. If the request fails and relief cannot be found in the Courts, the final step may be to try to change the zoning ordinance. Such an attempt would result in two members of the same firm being on opposite sides of the controversy. This would result in a conflict of interest which this Committee cannot and will not condone in light of Canon 9's requirement of avoiding even the appearance of impropriety.

As such, the Committee feels it necessary to extend the aforementioned disclosure/disqualification requirement to all proceedings which follow a denial of a variance by the BZA. Placing a disclosure/disqualification requirement upon BZA attorneys fulfills the requirements of Canon 9 while protecting the right of self-representation.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1983

The Committee has been asked whether the spouse of a county court judge may accept an appointment as a deputy prosecutor if the spouse does not work on cases pending in the judge's court and the spouse's responsibilities will be limited to support, paternity and juvenile matters.

In dealing with the issue of conflicts involving spouses who practice law with different law firms in the same community, ABA Formal Opinion 340 (September 23, 1975) stated that although it cannot be assumed that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, married partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by reason of the marital relationship. For the same reason, we do not believe that the lawyer-spouse is prohibited by the Code of Professional Responsibility from serving as a deputy prosecutor provided the lawyer does not work on matters pending in the judge's court. However, a lawyer who is the spouse of a judge or in an equivalent position should scrupulously avoid any appearance of violation of the Code of Professional Responsibility, particularly DR 7-110 which would forbid the lawyer from communicating with the judge as to the merits of a cause involving the state pending in the judge's court and DR 9-101(C) which would prohibit the lawyer from stating or implying that the lawyer is able to influence improperly any tribunal.

Canon 2 of the Code of Judicial Conduct provides that a judge should not allow his family relationships to influence his judicial conduct or judgment. If it is clear that the judge's conduct and judgment in a matter pending in his court involving the state will not be affected by the spouse's position, we do not think the judge should be disqualified. Canon 3(C)(1)(c) disqualifies a judge when his spouse has a financial interest in the subject matter of a proceeding or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceeding. This provision should not apply because, as was pointed out in State ex rel. Goldsmith v. Superior Court of Hancock Co. (Ind. 1979), 386 N.E. 2d 942, 945, the relationship of deputies in a prosecutor's office, rather than being pecuniary, is no more than sharing the same statutory duty to represent the state in criminal matters. Canon 3(C)(1)(d)(ii) disqualifies a judge when his spouse is acting as a lawyer in the proceeding. In State ex rel. Meyers v. Tippecanoe County Court (Ind. 1982), 432 N.E. 2d 1377, 1379, it was held:

> Where a lawyer who has represented a criminal defendant on prior occasions is one of the deputy prosecutors, disqualification of the entire office is not necessarily appropriate. Individual rather than vicarious dis-

qualification may be the appropriate action, depending upon the specific facts involved.

We believe the same type of analysis should apply to the interpretation of Canon 3(C)(1)(d)(ii). Under the circumstances presented, the lawyer-spouse would not be acting as a lawyer in the proceeding within the scope of that Canon.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1983

This Committee has been presented with a two-part question. The first question presented is whether or not two members of the same law firm can continue representing two clients with present differing interest as to future matters.

The facts presented are that one member of the firm advises the City Zoning Appeals Board and City Planning Commission, and the other member is the City Attorney of this third class city. In addition, these attorneys also maintain a private practice with this law firm, which happens to represent on a continuing basis, a corporate client that at this time desires a variance from the City Zoning Code, which would require an appeal to the Zoning Appeals Board.

The question specifically raised is whether or not these two attorneys, having both disqualified themselves from representing either client in the present instance, have to terminate any future dealings with the Zoning Appeals Board or the corporate client.

It must be said at the outset that whenever an attorney represents a public body on a part-time basis and also carries on a private practice that there is an obvious potential conflict of interest at all times as to all of his clients.

It is also essential, however, that we have part-time city attorneys, county attorneys, deputy prosecutors, etc., in order to maintain our system in its present form. To attempt to place all attorneys who advised public bodies on a full-time status would create an undue burden upon the tax-paying citizens of the State of Indiana.

Therefore, we feel that since there is an obvious potential conflict at all times when one holds himself out as a practitioner and also represents a public board or commission, each and every case must be examined strictly on its own merits.

Therefore, in answering the question before us, we take the position that we are only to decide as to whether or not in this instance, without any more information being furnished, it is a per se ethical violation to continue representation of these two different clients in the future as to non-related matters.

In our Opinion No. 1 of 1982, we stated that a city attorney of a third class city, could not represent corporate clients who appeared before city boards and commissions.

handling the matter, provided that the client makes the actual selection.

The final question asked is whether or not the lawyer representing the corporation may continue to prepare deeds, abstracts and title opinions involving the real estate, which is the subject of the request for a variance from the Zoning Appeals Board. For the same reasons set forth above, we feel that the second part of the question must also be answered in the negative. We do not feel that the lawyer who represents the city and also the law firm can ethically continue with the preparation of abstracts, title opinions or deeds concerning the property that is the subject of the variance petition. We are of the opinion that this conduct should cease and the attorney completely divorce himself from any part of this problem in all respects.