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June 20, 1975

FILE NO. S-919

OFFICERS:

Duty of State's Attorney to
Represent County Officials in
Election Contest

Honorable A. Randolph Comba
State's Attorney
Bureau County
Room 200 - Court House
Princeton, Illinois 61356

Dear Mr. Comba:

I have your letter wherein you state in part:

" * * *

In recent weeks there was filed in the Circuit Court of our county an election contest challenging the election and seating of certain members of the County Board. These members had been duly seated and were acting as County Board officials. The election contest was filed by a loser in the particular district in which the above mentioned seated members live.

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* * *

The above members who were challenged retained private counsel on my advice, and the bill remains unpaid.

For future reference, I would like an official opinion from you as to whether or not I must represent other county officials in an election contest of this nature, and in the alternative I would like your official opinion as to whether or not the County of Bureau, or any other like county, is responsible for payment of their attorneys' fees, if I choose not to represent them in my discretion."

It is my opinion that a state's attorney should not represent individuals whose right to hold county office is challenged in an election contest.

Section 5 of "AN ACT in regard to attorneys general and State's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 5) sets forth the duties of each state's attorney. Sub-section (4) provides that the state's attorney shall, "* * * defend all actions and proceedings brought against his county, or against any county officer, in his official capacity, within his county." In question is whether an election contest is an action brought against a county officer in his official capacity.

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The scope of an election contest proceeding is limited to a determination of the result of the election. (People ex rel. Meyer v. Kerner, 35 Ill. 2d 33; Waupoose v. Kusper, 8 Ill. App. 3d 668.) The purpose of permitting the contest of an election is to prevent the will of the electors from being thwarted either by fraud committed during the election or by a mistake honestly made, but by reason of which injustice is done to a contestant. (Smiley v. Lenane, 363 Ill. 66.) The principals in an election contest, i.e., the challenger and the challenged, are not acting in an official capacity but in their own personal interests. Officers act in an official capacity when they act for and in behalf of the body they represent. (cf. U.S. v. Waylan Corporation, 130 F. Supp. 783, (D.C. Puerto Rico, 1955).) Action taken by an official in his official capacity consists of action taken either under color of office or by virtue of office. (Greenberg v. People, 225 Ill. 174; People ex rel. Woll v. Graber, 394 Ill. 362.) Candidates seeking election or incumbents seeking re-election

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do not do so in an official capacity. Therefore, the state's attorney does not represent parties to an election contest, who are either the challengers or the challenged.

You have also inquired as to whether the County of Bureau is responsible for payment of attorney's fees for the persons involved in the election contest. The answer to this question is in the negative. A county, in addition to its constitutional powers, possesses only those powers expressly granted by statute (Ill. Const., art. VII, sec. 1) and those that arise by necessary implication from those powers granted. (Heidenreich v. Ronske, 26 Ill. 2d 360; Crumpler v. Logan County, 38 Ill. 2d 146.) No statute either expressly or impliedly authorizes a county to expend public funds to employ private counsel or to reimburse an individual who employs private counsel for a matter unrelated to his official duties. See generally, opinion NP-760, May 24, 1974.

I am, therefore, of the opinion that the nature of an election contest is such that the state's attorney may

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not represent the party whose election is challenged; nor
can the county reimburse the challenged individuals for
their expenditures of legal fees.

Very truly yours,

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