

FORMAL OPINION NO. 10*

PROPRIETY OF PROSECUTING ATTORNEY OF ONE COUNTY
DEFENDING A PERSON ACCUSED OF CRIME
IN ANOTHER COUNTY

The Committee has been requested to express its opinion with regard to the propriety of a prosecuting attorney of one county accepting court appointment to defend a man accused of a crime in the district court of another county.

Canon 6 of the Canons of Professional Ethics provides:

"Canon 6. Adverse Influences and Conflicting Interests.

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Although the precise question presented to this Committee has never been passed upon by the American Bar Association, the following authorities are helpful in reaching the conclusion hereinafter expressed.

In Opinion No. 142 of the American Bar Association's Committee on Ethics, is found the following language:

"In the case of In re Wakefield, 177 A. 319 (Vt., 1935) a county attorney was suspended for three months for representing a client when it was his duty to prosecute in his official capacity. The court said:

"It is a matter of common knowledge, of which we take judicial notice, that it has been the practice of some state's attorneys to appear in another county in the state and defend a respondent charged with committing a crime in such other county, or to appear in proceedings in which the state was an opposing party or had adverse interest. Such practice is unethical and improper and it should not be followed or countenanced. A state's attorney in this state is not merely a prosecuting officer in the county in which he is elected. He is also an officer of the state, in the general manner of the enforcement of the criminal law. It is the state, and not the county that pays his salary and official expenses.'

"The Committee is of the opinion that it is improper for an Assistant Prosecutor to defend any client in a criminal cause."

In A.B.A. Opinion No. 118, it was held that a county attorney, whose duty it is to prosecute crimes committed within the county, may not, while in office, properly undertake to obtain a pardon or parole of one convicted of a crime in another county. The committee observed that:

"For one county attorney to engage in undoing the work of another would present an appearance of confusion and pulling at cross purposes that would tend to diminish the public's confidence in and respect for law enforcement."

A.B.A. Opinion No. 30 held that a public prosecutor in one state may not properly defend a person accused of crime in another state. The committee said:

"It is a well-known fact that prosecutors are granted courtesies and assistance by the police departments, as well as the prosecuting authorities, of other cities and counties throughout the country. This practice is of great benefit to the administration of criminal justice. If prosecutors indulged

in the practice of defending criminals in states other than their own, this helpful cooperation might easily and quickly be withdrawn. Other evils, detrimental to the proper enforcement of criminal laws, are not difficult to conceive, were prosecutors also acting as defenders of those accused of crime. Subjectively, the effect of such a practice upon the prosecutor himself must, in our opinion, be harmful to the interest of the public, whose service is the prosecutor's first and foremost duty."

A.B.A. Opinion No. 16 held that one member of a law firm may not represent defendants in criminal cases which are being prosecuted by another member of wholds public office. Again, the committee observed:

"The prosecutor himself cannot represent both the public and the defendant, and neither can a law firm serve two masters."

Section 31-2606 of the Idaho Code expressly prohibits the law partner of a county attorney from engaging in the defense of any suit, action or proceeding, in which said prosecuting attorney appears on behalf of the people, state or county.

We conclude, therefore, that a county attorney may not defend a person accused of a crime, whether the prosecution be in the same county, another county or another state.

Dated this 27th day of October, 1958.

*See, DR 5-105, DR 8-103 and DR 9-101(C), Idaho Code of Professional Responsibility; I.S.B. Opinions No. 77 (September 20, 1974); 50 (July 20, 1971).