

FORMAL OPINION NO. 18*

PROSECUTING ATTORNEY--
REPRESENTATION OF PRIVATE LITIGANTS

The following question has been submitted to this committee for its opinion:

Is it ethical and proper for a prosecuting attorney or his deputies to represent a party plaintiff in a civil action to recover goods stolen in another county, assuming the prosecuting attorney's office was not involved in the criminal action based upon the same facts?

This question involves a consideration of Canon 6, relating to adverse influences and conflicting interests, and Canon 36, relating to retirement from public employment.

In Idaho, a prosecuting attorney and his deputies are not prohibited from accepting private employment except under the circumstances set forth in Section 31-2606, Idaho Code, which provides in part that:

"No prosecuting attorney must . . . be concerned as attorney or counsel for either party other than for the state, people or county, in any civil action depending upon the same state of facts, upon which any criminal prosecution commenced but not determined depends. . . ."

Canon 36 provides that:

"A lawyer, having once held public office or having been in the public employment, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

In Opinion No. 39 of the American Bar Association Committee on Professional Ethics and Grievances it was held that a public prosecutor may not properly accept private employment in connection with any matter he has investigated or is investigating in his official capacity; and, in Opinion No. 135, the Committee held that prosecuting

attorneys, both by specific provisions of the Canons and by public policy, are denied the privilege of engaging as counsel in a civil action based on substantially the same facts which he in his official capacity has investigated for the purpose of determining criminal responsibility.

In People ex rel. Hutchison v. Hickman, 294 Ill. 471, 120 N.E. 484, involving a statute almost identical to the above cited provision of the Idaho Code, it was held that the statute was substantially evaded in spirit where there was evidence that a prosecuting attorney of a county in which a murder prosecution originated participated in the prosecution thereof in another county after a change of venue, and after the successful termination of such prosecution accepted a retainer from the widow of the victim to prosecute a civil damage action for the latter's death in the homicide, against the convicted defendant, especially in view of evidence tending to show that the attorney had had some conversations pertaining to the civil action prior to the termination of the criminal proceeding.

It is the opinion of this committee that a prosecuting attorney or his deputies cannot properly represent a party in any civil action depending upon the same state of facts upon which a criminal prosecution depends where such prosecuting attorney or his deputies are or were involved in their official capacity. Retirement from office or termination of the criminal proceedings would not alter this conclusion.

The specific question propounded above is answered in the affirmative, assuming that the office of the prosecuting attorney was not involved in any way in the criminal proceeding referred to.

*This is an undated opinion. See, DR 9-101(B), Idaho Code of Professional Responsibility; I.S.B. Opinions No. 43 (May 20, 1964), 32 (December 7, 1961).