

FORMAL OPINION NO. 32 *

The following inquiry has been received by the Committee:

"A is a Deputy Prosecuting Attorney for an Idaho County. G is arrested in said County for the crime of burglary, the case set for trial and dismissed the day prior to trial, all before A's appointment as a Deputy Prosecutor. A accepts the appointment. G then sues the Sheriff of the County for libel on newspaper releases published concerning a number of burglaries including the one on the dismissed crime. A, uninfluenced by private parties, refiles the criminal burglary charge on G and proceeds with prosecution which is not yet concluded. A determines that the Sheriff of the County was acting in the scope of his duties and enters an appearance on the Sheriff's behalf in the civil suit for libel. Has A acted properly in this respect or is there a conflict of interest which would bar civil defense of the Sheriff?"

The question of ethics propounded by this inquiry is whether or not a prosecuting attorney may represent a sheriff in a civil action for libel based upon substantially the same facts involved in a criminal action being handled by the same prosecuting attorney.

The duties of a prosecuting attorney are defined by statute (Section 31-2604, Idaho Code) and include the duty "to prosecute and defend all actions . . . civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested," and "to give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers."

Whether or not, under the facts presented, the foregoing statute requires the prosecuting attorney to represent the sheriff in the libel action is not within the scope of this Committee's function, the question being one properly for the Courts. However, it is proper for the Committee to decide whether the representation is ethical or not, irrespective of any statute.

It must be assumed the truth or falsity of the sheriff's alleged libel is dependent upon substantially the same set of facts which the prosecuting attorney or his predecessor in the same office was required to investigate in his official capacity for the purpose of determining criminal responsibility and, further, that the interests of the county and the sheriff are the same and do not conflict.

By the same token it must be assumed the sheriff is being sued individually, otherwise the county would be a party and the prosecuting attorney would be appearing in his official capacity on behalf of the county.

In Idaho a prosecuting attorney may maintain a private practice subject to certain limitations including a prohibition against 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. I.S.B. Opinions 18 and 31; A.B.A. Op. 135.

A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids. Aldridge v. Capps, 56 Okla. 678, 156 P. 624.

A prosecutor cannot represent a criminal defendant in another county. I.S.B. Op. 10.

Canon 36 prohibits a lawyer, who has once been in public employ, after retirement, accepting employment in connection with any matters which he has investigated or passed upon while in such office or employ. It follows, of course, that in a similar situation he cannot accept such employment before retirement.

The Committee is of the opinion it is improper for the prosecuting attorney or his deputies to represent the sheriff of his county in his individual capacity in a civil case involving substantially the same facts which the prosecuting attorney's office was required to investigate in its official capacity.

To permit such a practice would place the prosecuting attorney in a position of being able to use his office for undue advantage on behalf of a private client and would subject the prosecutor to public criticism--well-deserved.

DATED this 7th day of December, 1961.

*See, DR 9-101(B), Idaho Code of Professional Responsibility.