

FORMAL OPINION NO. 60*

You have requested an opinion on the following two questions:

1. May an attorney receive a retainer fee or be appointed as counsel both as prosecuting attorney of a county and as attorney for any city or other governmental agency within the county?
2. If an individual, that is, the member of a firm, is the prosecuting attorney for a county, may any other member of the firm serve as counsel for other governmental units?

"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." Canon 6 of Professional Ethics, adopted by the American Bar Association.

The lawyer in public office has, in addition to his duties to the canon of professional ethics, an

additional set of duties which relate to his public office. The substance of such additional duty is that no public officer, lawyer, or otherwise, should accept other employment which would impair his independence of judgment in the exercise of his official duties. Hence, prosecutors may not properly defend persons accused of crimes or otherwise, in the traditional sense, represent persons with conflicting interests. At the same time, it has been held that a state prosecutor may take cases before federal administrative bodies and that U.S. attorneys may engage in a civil practice in both state and federal courts. A.B.A. Opinion 262.

In the strictest sense, the principle involving adverse or conflicting interests turns not on whether the interests do not necessarily conflict, but that they may conflict. A reasonable interpretation of this principle, in light of the above examples, does not necessarily preempt a prosecuting attorney from representing a city or other government agency within his county. It seems to us that this would be especially true in smaller communities. That is to say, as the likelihood of conflict of interest might increase with the magnitude of the duties to be discharged, the lawyer comes closer to the line dividing proper conduct with (sic) improper conduct. It is possible that in the larger populated counties, the allegiance owed by the lawyer to public employers would come into conflict in enough instances to make such representation improper per se. This is not to say that small breaches of ethics are acceptable, while large ones are not. Rather, the attorney must, at all times, be prepared to disassociate his representation whenever a conflict does appear, large or small, and that such conflicts are perhaps more easily recognized when the number of transactions being handled by the attorney are fewer. Drinker, Legal Ethics, Columbia Press, 1973.

It is, therefore, our opinion that an attorney may act as counsel both as prosecuting attorney and as attorney for a city or governmental agency within the county. In the event a conflict of interest arises, an attorney must stand ready to withdraw his representation in such case from both clients involved therein. Should the duties of both offices be of such moment as

to require withdrawal in such number of matters that the proper administration of the office be materially affected, the dual representation would become improper under Canon 6.

The first question having been answered in the affirmative renders unnecessary further explanation as to the second question.

DATED February, 1973.

*See, DR 5-105 and DR 8-103, Idaho Code of Professional Responsibility.