

FORMAL OPINION NO. 85\*

The Committee on Professional Ethics has received a number of inquiries relating to criminal law and the representation of the public and individual clients in different counties or jurisdictions. For example, a request for an opinion has been made by an attorney who wishes a comment on the ethical propriety of acting as the City Attorney and prosecuting misdemeanor complaints while defending individuals against felony complaints without the City.

Another request asks whether a City Attorney, also acting as City Prosecuting Attorney, can have his partner act as defense counsel for the accused in criminal matters on a fee basis or on a public defender's arrangement.

Initially, attention is directed to Formal Opinions No. 10 and 41. Each of these opinions indicates that, generally, an attorney cannot both prosecute and defend in criminal matters even though different jurisdictions or courts are involved.

Although the formal opinions stem from the old canons of ethics the Code of Professional Responsibility does not seem to have changed this time-honored precept. One who prosecutes does so in the name of the people; one who defends defends only his client. It has been the opinion of this Committee in the past that the general rules as to conflicts of interest and the independent exercise of judgment militate against an individual attorney or his firm playing the role of prosecutor and counsel for the defense. The possible compromise of the faith of the public in the legal system and the appearance of impropriety is too great. The American Bar Association seems to be in accord on this point. The Committee, therefore, sees no reason to deviate from past opinions and takes the position that, absent a court appointment after full disclosure of possible conflicts, an attorney or his firm cannot ethically prosecute criminal cases and, at the same time act as the attorney for the defendant in criminal matters.

DATED January, 1975.

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\*This opinion is superceded by I.S.B. Opinion No. 105 (August 14, 1981).