

IT IS IMPROPER FOR A COUNTY ATTORNEY, A DEPUTY COUNTY ATTORNEY, OR A PARTNER OR ASSOCIATE OF EITHER, TO REPRESENT A DEFENDANT IN A CRIMINAL CASE INVOLVING A VIOLATION OF THE CRIMINAL STATUTES OF THE STATE OF NEBRASKA.

The duties of the county attorney are prescribed generally in 23-1201, R.R.S. Nebr. 1943, and directs that his statutory duties are, among others, "to prosecute or defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the State in which the state or the county is a party or interested".

It will be seen from the foregoing duties prescribed by statute devolving upon a county attorney, that he represents not only the county and the state in criminal matters, but that he also represents both the county and the state in civil matters, in which the state or the county is a party or interested. A county attorney, therefore, has three clients; the county, the state, and the public. His first duty is to them and it takes precedence over all other commitments to which a county attorney may become engaged either at the time or subsequently thereto. The prohibition against the representation of conflicting interests as defined in Canon No. 6, applies not only to the practicing attorney who is county attorney, but likewise to all members of his firm.

Canon 5 reads as follows:

"A lawyer should exercise independent professional judgment on behalf of a client."

EC 5-1 provides the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

DR 5-101, Refusing employment when the interests of the lawyer may impair his independent professional judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-101 replaced in part former Canon No. 6 which made it unprofessional to represent conflicting interests, and which was interpreted in ABA Formal Opinion No. 128 with reference to public officers:

"Cognate matters, as far as public officers were concerned, were considered by this committee in opinions 30, 34, 37, 39, 71, 77 and 118 and in each instance the conduct of the public officer was held to have been professionally improper.

In Opinion 30, it was held that a public prosecutor in one state could not properly defend a person accused of crime in another state; in Opinion 34, that a prosecuting city attorney, or any of his assistants, could not properly defend criminal cases whether within the scope of their official duties or not; in Opinion 37, that it was professionally improper for a lawyer to be employed, if as a public official, the lawyer had made a report in favor of the client's contention; in Opinion 39, that a prosecuting attorney could not privately handle any matter that he had investigated, or was investigating, in his official capacity; in Opinion 71, that a lawyer could not attack the validity of a municipal bond issue which he had drawn himself; in Opinion 77, that a lawyer could not properly accept employment from one whom it is his duty, as a public officer, to prosecute; and in Opinion 118, that a prosecuting county attorney might not undertake to obtain a pardon or parole of one convicted of a crime in another county of the same state.

It may be urged that the foregoing Opinions apply to lawyers in public employ and that a lawyer retained by a Code Authority, or any of the lesser bodies, is not in the public employ. There are, however, many Opinions of this committee wherein the conduct of lawyers not in public employ is, on account of the implication of adverse influences and conflicting interests, held to be professionally improper.

In Opinions 33, 49, 50, 72 and 103, we held in substance that a partnership could not undertake any professional relationships which any one of the partners because of

adverse influences and conflicting interests, could not ethically undertake."

In ABA Formal Opinion No. 142 the Committee on Professional Ethics and Grievances of the American Bar Association states:

"A public prosecutor has as his client the state. It is obvious, therefore, that he cannot appear for any defendant in cases in which the state is an adverse party. The second paragraph of Canon 6 provides in substance that a lawyer cannot represent conflicting interests, 'except by express consent of all concerned given after a full disclosure of the facts.' In Opinion 16, it was held that the prosecutor could not represent both the public and the defendant, and that a law firm cannot serve two masters, because, the positions are inherently antagonistic and this would be so irrespective of Canon 6. No question of consent can be involved as the public is concerned and it cannot consent."

This Advisory Committee has heretofore on June 10, 1964, March 29, 1966, and October 11, 1971, rendered the unqualified opinion that Canon No. 6 of the Canons of Professional Ethics prohibits a county attorney from representing persons charged with a crime either in his own or in any other county of the state, but has not issued any opinions with reference to deputy county attorneys, or partners or associates of either.

With reference to deputy county attorneys, ABA Formal Opinion No. 142 held:

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

On several occasions this committee has held that neither a law firm nor a partner thereof can properly accept employment which any member of the firm cannot properly accept. See Opinions 49, 50, 72, 103, and 104.

The committee is therefore of the opinion that it is improper for a partner of a Judge pro tem to practice in the court over which he presides, and that it is likewise

improper for the partner of an Assistant Prosecutor to defend any client in a criminal case."

We believe this to be a correct interpretation, and that the deputy county attorney, having all of the power and authority of the county attorney so far as prosecutions are concerned, should also stand in the shoes of the county attorney where ethical considerations are involved.

What then is the status of partners or associates of county attorneys and their deputies? This Committee has previously ruled ([Advisory Opinion 71-2](#)) that a law firm of which a county attorney is a member may not ethically represent clients in divorce cases involving minor children. ABA Formal Opinions 72 and 49 held that the relations of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm cannot properly accept. Likewise, in Opinion 33, the ABA Committee on Ethics and Grievances held: The relations of partners in a law firm are so close that the firm, and all members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking.

It is the conclusion of this Committee that all parties above referred to should disassociate themselves from any participation in criminal proceedings on behalf of a defendant charged with violation of the criminal law. Having accepted the benefits and emoluments of public office, either directly or indirectly, the burdens and forbearance must likewise be assumed.

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