
**E-65-1 District attorney conflict in land
condemnation case**

Question

May a full-time or part-time district attorney properly represent a citizen whose land is being taken in condemnation proceedings brought by the State Highway Commission?

Opinion

Section 59.47(1) of the Wisconsin Statutes succinctly states the district attorney's duties. He is to "Prosecute and defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; . . ."

In our state, it is the custom in many areas for the district attorney to continue his private practice while holding that office, since his public duties do not require all of his professional time; there is no statutory prohibition in so doing, and the income from the office is not large. This situation, plus the fact that the state quite often selects special counsel for condemnation cases, no doubt has given rise to the consideration by district attorneys of condemnation cases as a possible means of augmenting their income.

In considering the propriety of this conduct, however, there is no difference between a full-time and a part-time district attorney or his duties. Although a district attorney may only work part-time, he still, however, represents the county and state as its attorney even when he is doing other legal work in his part-time. He does not represent the county and state for three days and not for the other two days of the week. He represents the county and state for five days of the week although he does work for them on only a portion of this period of time. The answer must therefore be the same, regardless of whether the district attorney involved is a full-time district attorney or a part-time district attorney. The problem would seem unlikely to arise in the case of a full-time district attorney would no doubt be expected to refrain from any private practice of law. Considerations of the financial aspects of the situation are not involved. In Opinion 30 of the ABA Ethics Committee, which will be discussed more in detail herein, it

was stated that a prosecutor should, even at a personal financial sacrifice, be and remain above suspicion. In Opinion 242 of the ABA Ethics Committee it was stated that the amount of the salary allocated to the office has no bearing upon the ethical questions under consideration since, “with every benefit, there is a corresponding burden. If one is not willing to undertake the burden, he should not accept the benefit of the office.”

By Section 59.47(3) of the Wisconsin Statutes, the duties of the district attorney are to “Give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers;. . . .” Section 59.47(8) also states that the duties of the district attorney are to “Serve as legal adviser to the county highway commissioner and draw all papers required in the performance of the commissioner’s duties and attend to all legal matters in or out of court when such commissioner shall be a part.” The relationship between the county highway commissioner and the state highway commission is close, and particularly so in condemnation matters. The two are in effect one and the same, in that the county highway commissioner and the county highway committee must by law cooperate with the state highway commission in selecting road systems, in the allocation of aids, in the maintenance of state trunk highways under contract and other similar matters. See for example Sections 83.01, 83.126, 83.10, and 84.07 of the Wisconsin Statutes. Section 32.05 of the Wisconsin Statutes provides that the state highway commission, or the county highway commission when authorized by the county board of supervisors, may institute condemnation proceedings. In practice the county highway commissioner and his committee are usually active in planning, laying out, advising and assisting in state highway projects, including necessary condemnation proceedings.

The general principles which prevent attorneys from representing adverse interests are applicable, but superimposed upon this is the fact that the district attorney’s duties are quasi-judicial in their nature.

There is an annotation at A.L.R. 1918 F 832 on the “Right of Prosecuting Attorney to represent individuals having an interest adverse to or disassociated from the public interest.” This annotation cites, at page 835, *Loew v. Gillespie*, 90 Misc. 616, 153 N.Y. supp. 830, *aff’d*, 173 App. Div. 889, 157 N.Y. Supp. 1133 (1915), holding that public policy forbids an attorney in the employment of a city from accepting a retainer to bring an action, in which the judgment

recovered would be payable by the city even if the acceptance does not call for the performance of acts directly interfering with his duties as a municipal employee.

At 5 Am. Jur. 296-297, Sec. 64, it is stated that

An attorney owes to his client an undivided allegiance, and he cannot, without . . . consent of his client . . . act both for his client and for one whose interest is adverse to or conflicting with that of his client. . . . The rule is particularly applicable to prosecuting attorneys or city counsel, precluding them from representing individuals having an interest adverse to, or disassociated from, the public interest, or undertaking the defense of one whom they are charged by their public office with prosecuting upon a criminal charge.

Where the public is concerned in a matter of conflicting interests, consent is not involved. In Henry S. Drinker, *Legal Ethics*, Page 120, cases are cited to this effect. In Opinion 296 of the ABA Ethics Committee, holding that a law firm may not accept employment to appear before a legislative committee while a member of the firm is serving in the legislature, it is stated, "The positions are inherently antagonistic and no question of consent could be involved as the public is concerned and it cannot consent."

A case in point is *Coon v. Metzler*, 154 N.W. 377, 161 Wis. 328 (1915), where the court said:

We cannot close this opinion without remarking on the inadvisability, almost amounting to impropriety, of the district attorney acting as attorney to recover civil damages arising from a supposed criminal act.

In such matters the prosecuting attorney of the state cannot serve two masters. Justice is his sole client, and any private retainer which in any way tends to sway his judgment or distort his vision as to the character of the act should be sedulously avoided.

The distinction between civil and criminal liability is apt to be much confused in the lay mind, as well as the distinction between an attorney's acts in his capacity as a public prosecutor of crime, and his acts as a private attorney. The code of ethics of the district attorney in all such matters cannot too closely follow the ethics of the bench; indeed, his duties are quasi-judicial in their nature.

Opinion 30 of the ABA Ethics Committee involved an opinion that it was improper for a prosecuting attorney of a county in one state to defend, in the courts of an adjoining state, a resident of his own state who had been indicted in

the adjoining state. The opinion notes the preamble of the Canons of Professional Ethics to the effect that where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration, that the future of the Republic depends upon the maintenance of justice pure and unsullied, and that justice cannot be so maintained unless the conduct and motives of members of the legal profession are such as to merit the approval of all just men. The court then refers to Canon 6 which is applicable to this case as follows:

The opinion also quotes Canon 29 that: "He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." The court then quotes from Canon 31 of the Judicial Ethics regarding the practice of law by judges where a judge is not required to give his entire time to his judicial duties as follows: "In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success." Concluding, the opinion states that, "We believe this statement can properly be said to apply to prosecutors also. . . ."

Opinion 186 of the ABA Ethics Committee holds that it is improper for a county attorney to defend a person charged with a crime in the county in which he is an officer. It is stated in the opinion as follows:

"The county attorney should not accept employment where his duties to his private client and his public duties may conflict either directly or indirectly. Furthermore, for the county attorney charged with public duties to accept employment adverse to this public employer puts the county attorney in an unseemly situation likely to destroy public confidence in him as a public officer, and bring reproach to his profession."

In Opinion 118 of the ABA Ethics Committee it was held that a county attorney really represents the state, even if his jurisdiction is limited to a particular county, and manifestly he could not ethically undertake to obtain a pardon or parole for one convicted in another county, as in doing so he would be nullifying, in the hope of personal gain, the results of the performance of duty by another county attorney likewise representing the state. The opinion holds

that the statutory permission to a state attorney to practice law while in office must have been intended to be limited to matters in which the state is not a party.

There are opinions of the Attorney General which enunciate the philosophy that there should be no conflict, or even apparent conflict, of interests, involving a district attorney. A district attorney cannot bring an action for a plaintiff when the county is a proper necessary party to such action, where the county has adverse interest to the plaintiff. 3 Op. Att'y Gen. 702 (1914). In 25 Op. Att'y Gen. 550 (1936), it is stated that the district attorney is to represent the county and state in all courts of the county, including the Circuit Court and he is not only the criminal prosecutor for the state and the county, but he is also the representative of the state in civil matters in which either is interested or is a party. A district attorney cannot appear for any party other than the state or county in any matter based on the same state of facts upon which a criminal matter was commenced. 1906 Op. Att'y Gen. 271. Similarly at 11 Op. Att'y Gen. 473 it was held that an attorney who is a mayor could not defend a person charged with the violation of a city ordinance or a state criminal law, and if he did so he would be liable to disbarment.

It is our opinion therefore that a full-time or part-time district attorney may not ethically represent a citizen whose land is being taken in condemnation proceedings brought by the state highway commission. If he takes a condemnation case in which the state or county is involved as a part of his private practice, then he is representing both sides of the controversy and there would be conflicting interests. For his personal client, he would have a duty to recover a high award, recoverable from his public employer and the public generally, as to whom he has a duty as district attorney to protect with respect to the amount of the award or judgment. In conclusion we note that the effect of such a practice clearly would be harmful to the interests of the public, whose service is the district attorney's first and foremost duty.