
**E-79-8 Part-time district attorney's firm taking
defense cases**

Facts

An attorney was elected district attorney for _____ County, a position designated by the county board as part-time. He is also a partner in a law firm and your firm employs an associate. Prior to his election in the fall of 1978, his firm had been engaged, through both private retainer and court-appointment, in criminal defense work in Chippewa County as well as other Wisconsin counties. In addition to the criminal defense work, his firm also defended state traffic cases, Department of Natural Resources forfeiture actions, and county, village, and town ordinance violations.

Question

If a partner in a firm is a part-time district attorney, are the other members of the firm disqualified from undertaking criminal defense work outside of _____ County, or ordinance and forfeiture cases in or out of _____ County so long as those actions do not involve the _____ County District Attorney's office in any fashion?

Opinion

In order to respond to your request, we have examined the Code of Professional Responsibility, pertinent State Bar and American Bar Association opinions, and provisions of Wisconsin Statutes.

Three principles emerge which have direct application to this situation. First, the district attorney is the representative of the county and the state at all times, whether he or she is a full-time or part-time district attorney, and is thereby precluded from representing criminal defendants in *any* county. Sec. 59.47, Stats., and State Bar Ethics Opinions E-65-1 and E-76-11.

Second, the district attorney is the representative of the county and state in all civil matters in which either is interested as a party. Sec. 59.47, Stats.

Therefore, he or she is precluded from representing defendants in civil actions to which either the state or county is a party.

Third, if one member of a firm is precluded from accepting certain employment, all members of the firm, be they partners or associates, are similarly disqualified. Code of Professional Responsibility, DR 5-105(D).

Applying these principles to the fact situation you present, we reach the following conclusions. By virtue of your position as district attorney, your partner and associate are disqualified from representing any criminal defendants in any county. Additional support for this conclusion is found in State Bar Opinion E-76-11, wherein it states: "The public impression of a firm representing a criminal defendant when such firm had a partner in the district attorney's office would lead to the appearance of a conflict of interest and not be in the best interests of a proper public impression, DR 9-101."

Insofar as representation in civil actions is concerned, we consider the parties to the action to be determinative. In a state traffic, DNR forfeiture, or county ordinance case, it is clear that the state and the county are parties in interest. Consequently, your position as district attorney would disqualify you and members of your firm from representing such defendants. In a Memorandum Opinion of 6/11/70, the State Bar Ethics Committee held that "a part-time district attorney may not represent defendants in . . . traffic cases brought by the state or county in an adjacent jurisdiction," citing Canon 5 of the Code of Professional Responsibility.

The final area of inquiry concerns representation of civil defendants in village and town ordinance violation cases which do not involve the Chippewa County District Attorney's office. The authorities appear to be split on this issue. In State Bar Opinion E-76-12, the committee held that a city attorney whose ordinary duties were handling traffic and other ordinance violations, could represent defendant in criminal actions or motor vehicle violations brought by the state. Similarly, the committee issued a Memorandum Opinion on 2/6/70 in which it refused to hold that part-time district attorneys could not accept divorce actions.

On the other hand, State Bar Opinion E-65-1 offers the guiding philosophy for the district attorney that as representative of the state, he or she violates the Codes of Professional Responsibility in defending anyone with an interest adverse to the public interest.

Among the considerations brought to bear are the following: In defense of certain municipal ordinance violators, the defense counsel may be required to challenge the validity of the ordinance. Many local ordinances are based on state statute, and such a challenge would necessarily involve an indirect if not a direct attack on the state statute. Clearly the district attorney cannot be in the position of attacking the statute in his or her private counsel capacity which he or she is sworn to defend in the public capacity. The use of law enforcement personnel and the access to discoverable police records are also issues of concern. The need to impeach or attack a police officer's testimony when acting as private defense counsel may encumber the working relationship which the district attorney must have as the county prosecutor. The district attorney may have the practical ability to discover records not otherwise available to defense counsel because of his or her established working relationships.

Nonetheless, we are inclined to the less restrictive view subject to pertinent cautions. In all instances where a local ordinance is similar to or incorporates by reference a state statute, neither the district attorney nor any partner should defend such ordinance violation. We believe that the district attorney or members of the firm may defend persons charged with violations of other municipal ordinances so long as each case is assessed individually to assure that no actual conflict or position will arise and no improper advantage will accrue to the defendant by virtue of the district attorney relationship.