

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinions

"So long as the attorney, although a part-time state legislator, does not use his legislative position to try to change, amend, modify, repeal or alter the existing laws for the benefit of his clients, it would

not appear that he would be acting improperly in defending persons accused of violating criminal laws of his state. But, should he feel that his representation of persons accused of crime does not permit him to have a free, impartial and unbiased attitude toward the enactment of criminal laws for the benefit of the public as a whole, then this should dictate that he not endeavor to serve both as a legislator and represent those accused of crime."

Opinion #227 - 1/26/72 (1-72)

Topic: Confidences of a Client.
Prosecuting Attorney.
Former Client.

Clarified by 492

Digest: District Attorney may not normally prosecute defendant represented by Assistant District Attorney at Arraignment.

Code*: EC 4-6; EC 9-6; DR 5-105(D)

QUESTION

Does the appointment of an Assistant District Attorney, who represented a defendant at his arraignment, disqualify the entire District Attorney's staff from prosecuting the defendant?

OPINION

This Committee has previously held that an attorney may not properly defend a client against a charge which was under investigation by the District Attorney's Office while the attorney was a part-time Assistant in such office. N.Y. State 52 (1967). We also held that a former School Board Attorney could not represent a citizens group to question matters for which he had had a substantial responsibility while the Board's attorney. N.Y. State 176 (1971). The Committee also held that an attorney, who has changed law firms, may not represent the adverse party in a transaction handled by his former firm while he was there even though he was unaware of the details of the transaction. N.Y. State 180 (1971).

It appears clearly improper for a lawyer to switch sides in litigation. He must preserve the confidences of his client even after termination of employment. EC 4-6.

This Committee has held that, if it is improper for one member or associate of a firm to represent a client in a particular matter, then all members and associates of that firm are also subject to the same prohibition. DR 5-105(D); N.Y. State 40 (1966); N.Y. State 82 (1968); N.Y. State 118 (1969); N.Y. State 203 (1971); N.Y. State 214 (1971). A District Attorney's office is comparable to a legal partnership. N.Y. State 118 (1969).

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In the absence of waiver by the defendant, the newly appointed Assistant District Attorney would be prohibited from prosecuting the case because of his former representation of the defendant. Thus, it would be normally improper for any member of the staff, including the District Attorney himself, to prosecute the defendant. This, of course, does not prohibit the employment of special counsel or the use of a member of the staff of the District Attorney from an adjoining county.

However, in addition to being a matter of professional conduct, the disqualification of a public prosecuting agency is a matter of law to be determined by the courts, United States v. Standard Oil Co., 139 F Supp. 345 (SDNY 1955); cf. People v. Wilkins, 28 N.Y. 2d 53 (1971), upon which this Committee does not pass.

Even if the District Attorney's staff is not disqualified as a matter of law, the District Attorney has a minimal ethical duty to promptly notify the defendant and the court of the facts so that they may take what action they are advised.