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PROSECUTING ATTORNEY AND ASSOCIATES

FORMAL OPINION 76-3

Reference is made to your letter asking for the opinion of this Committee as to whether your associates, Messrs. B and C, may engage in criminal defense in adjacent counties of this state and in the federal courts after you have been elected as prosecuting attorney.

You state in your letter that you and your associates share office expenses and secretaries, as well as a library, office space, and other equipment. From time to time you either share in the case load, work jointly on cases, or, in emergencies, stand in and represent each other. After your election you plan to move into offices in the X County Courthouse. At the same time you plan to maintain your connection with your present office and engage in civil practice from that office. You further state there will be a complete physical separation of the prosecutor's office and your private office. Furthermore, neither of your associates will have access to or use the prosecutor's office.

Although you did not so state, we assume from your letter that you and your associates have a common telephone number and that the telephone is answered by identifying the office as A, B & C. We further assume that your office sign identifies you as A, B & C, Attorneys at Law.

While you may not have a partnership arrangement among yourselves whereby you share responsibility and liability, it is very likely that your arrangement would in fact be so regarded. Your private arrangements as to sharing responsibility and liability would not alter your liability to third persons if in fact you have been holding yourself out as partners. It seems to the Committee that you may very well be regarded as holding yourselves out as partners. Certainly, your letterhead and office arrangements give that impression. DR 2-102(B) and (C) proscribe the use of a partnership name unless the lawyers are in fact partners. Where there is no sharing of financial responsibility, the joining of two or more names of persons practicing together into a title for a firm is misleading. Where there is no sharing of liability and responsibility, each lawyer should use separate stationery, with his own name and not that of a firm on it. He should not join his name with others on cards, letterheads, in law lists, or in telephone directories. The door to the common offices may contain the names of the persons practicing therein no more closely connected than the following example:

LAW OFFICES

- A.
- B.
- C.

You are referred to Formal Opinion 310 of the American Bar Association's Committee on Professional Ethics.

However, whether you be regarded as partners has very little to do with the question you have posed. See DR 5-105(B).

Your attention is directed to Rule IV(c) of Trial Court Rules for trial courts of record, as amended, which provides:

(c) Neither the prosecuting attorney, nor the assistant prosecuting attorney of this county, nor the office associate or partner of either the prosecuting attorney or assistant prosecuting attorney of this county shall appear as counsel for the defendant in any criminal case pending in this court, nor shall the prosecuting attorney or assistant prosecuting attorney of any other county appear for the defendant in a criminal case pending in this court.

Clearly, the partner or office associate of the prosecuting attorney cannot appear as defense counsel in X County. The prosecutor is prohibited from appearing as defense counsel in any other court of this state.

DR 5-105(D) of the Code of Professional Responsibility provides as follows:

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

In Opinion 30 the Committee on Ethics and Professional Responsibility of the American Bar Association held that a public prosecutor in one state may not ethically defend a person accused of a crime in another state, even though the case is to be tried in another state.

In Opinion 262 the Committee stated that a prosecuting attorney may not represent criminal defendants in federal courts.

In Opinion 922 the Committee held that it was not proper for the associates of the prosecuting attorney or his assistants to represent criminal defendants or to try criminal cases in criminal courts.

In view of DR 5-105(D), we conclude that it would be improper for Messrs. B and C, whether they be your partners or simply associated with you, to represent criminal defendants in any courts of this state or in federal courts.

Canon 9 of the Code of Professional Responsibility states that a lawyer should avoid even the appearance of impropriety. For the partners or associates of a prosecuting attorney or his assistants to represent criminal defendants in other state courts or in federal courts gives the appearance of impropriety.