

LEGAL ETHICS INQUIRY 81-3

**PROPRIETY OF ACCEPTANCE OF APPOINTMENT BY
CITY ATTORNEY IN CERTAIN JUVENILE CASES**

A member of the Bar has requested the opinion of the Ethics Committee concerning the propriety of a city attorney's acceptance of appointments to represent juveniles.

In response to an inquiry by the Committee, the attorney requesting the advisory opinion has informed the Committee that he is responsible, under city ordinance, to prosecute all trials in the mayor's court for violation of city ordinances and that he is responsible for prosecuting juvenile cases in circuit court when the arrest of the juvenile was made by police personnel of the city he represents.

The Committee has previously held that it is inappropriate for a person to appear as both prosecutor and defense counsel in the same court. In its Advisory Opinion 23, November 22, 1958, this Committee reviewed a situation such as is involved in this inquiry. There, a public official's loyalty to the public while representing the public in civil and criminal matters was held to conflict with his duty of zealous defense of an accused in a criminal prosecution. The Committee held that such an apparent conflict should not exist and specifically stated that a city attorney may not defend felony cases arising within his municipality in any court.

The ethics inquiry now being considered by the Committee does not materially differ from the facts which resulted in Advisory Opinion 23. In the present inquiry, the city attorney is faced

with the potential embarrassment of prosecuting and defending juveniles in the same court and on the same day. This reasonably raises questions of propriety under EC 5-14, EC 5-15, DR 5-101(A) and DR 5-105(A) in Canon 5 and EC 9-2 and DR 9-101(C) in Canon 9 of the West Virginia Code of Professional Responsibility.

Public policy regarding this apparent conflict in loyalty has also been expressed in Rule IV(C), Trial Court Rules (T.C.R.) for Trial Courts of Record, which disqualifies prosecuting attorneys and assistant prosecuting attorneys from appearing as defense counsel in any state court of record.

As those authorities clearly illustrate, the duty of the city attorney as prosecutor and his duty as defense counsel in any state court of record are clearly conflicting. Additionally, the possibility that public confidence in the city attorney might be diminished or his vigor as prosecutor questioned as a result of his defense of an indigent juvenile requires that he avoid such representation.

In its very recent opinion, State ex rel. Sowa v. Sommerville, ___ W. Va. ___, 280 S.E.2d 85 (No. 15110, July 7, 1981), the Supreme Court of Appeals has expressed its opinion concerning prosecutors' conflicts in loyalty and its effect upon their partners and associates. The opinion confirms that those acting as prosecutors and their assistants may not defend criminals in any county of the state and goes a step further in stating that assistant prosecutors and members of a prosecutor's law firm may not accept private retainers to defend alleged criminals. While

the opinion in State ex rel. Sowa v. Sommerville clearly recognized an "appointed counsel" exception to an otherwise complete ban on the activities of partners of prosecutors, the Committee believes that the opinion confirms that a prosecutor may not act as defense counsel, as retained or appointed counsel, in a court in which he acts as prosecutor.

Accordingly, it is the opinion of the Legal Ethics Committee that avoidance of conflicting loyalties on the part of a city attorney, protection of public confidence in our legal system and public policy dictate that a city attorney with the duty of prosecution of juvenile cases should not defend juveniles, for a retainer or on an appointed basis, in a state court of record.