

L.E.I. 86-3

**PROSECUTING ATTORNEY MAY NOT SUBSEQUENTLY  
REPRESENT A CLIENT WHOM HE PREVIOUSLY  
INVESTIGATED FOR POSSIBLE CRIMINAL CHARGES  
WHEN SUBSEQUENT REPRESENTATION IS  
CONNECTED TO EARLIER INVESTIGATION**

The following inquiry has been presented to the Committee for its advisory opinion. Over a year ago, Attorney A represented Mr. X on federal drug charges. A plea was negotiated and, as part of that plea agreement, there was a guarantee that no charges would be filed against Mr. X by the local prosecuting attorney. This guarantee was obtained by the United States Attorney's Office at Attorney A's request. Subsequently, Mr. X declined to pay the balance of Attorney A's fees, and the attorney filed suit against Mr. X. Mr. X has retained the same prosecuting attorney referred to above to defend him. Attorney A inquires as to whether or not the prosecuting attorney may represent Mr. X in the fee collection suit.

DISCUSSION

DR 5-105(A) of the Code of Professional Responsibility mandates that an attorney should decline proffered employment if it would be likely to involve him in representing differing interests, with certain exceptions not applicable to this inquiry.

The following standards and considerations apply to conflict of interest questions involving prosecuting attorneys. The State and its agencies are the continuous and primary clients of a prosecuting attorney. Any private employment which is in any way

inconsistent with or antagonistic to the prosecuting attorney's statutorily imposed responsibility is improper and should be avoided. The attorney must avoid actual conflicts or those in which the interests may, with some reasonable degree of probability, become conflicting. L.E.I. 84-05 (Nov. 30, 1984). While a private attorney may obtain the consent of his clients to represent them even when their interests might conflict, an attorney representing the public cannot obtain similar consent. Therefore, the prosecuting attorney can proceed with his representation of Mr. X in the civil litigation only in the absence of any conflict of interest. L.E.I. 84-01 (May 11, 1984).

Several prior Committee opinions addressed the conflicts issue when a prosecutor's private representation and criminal prosecution are in some way connected. The Committee decided that a prosecuting attorney may prosecute a former client whom the attorney had previously represented on a criminal charge unrelated to the present prosecution. L.E.C. 84-01 (May 11, 1984). Under those circumstances, the Committee found no conflicts or potential conflicts between the private and public duties of the prosecutor. There was no danger that the attorney learned client confidences which would help him in the present prosecution. Nor was there the possibility that the prosecutor could obtain an advantage in a civil action by proceeding with the prosecution.

Advisory Opinion No. 20 (Nov. 5, 1955) stated that a prosecuting attorney could represent the administrator of an estate and prosecute the sole heir of that estate at the same time if, as a

matter of conscience, the attorney believes that he could maintain "undivided fidelity" to the State's interests in prosecuting the heir. However, the Committee later cited Advisory Opinion No. 20 for the proposition that a prosecutor may not represent a party in a civil action which directly affects the interest of a criminal defendant currently awaiting prosecution. See L.E.C. 84-01, supra.

The most analogous opinion is Advisory Opinion No. 2 (Nov. 25, 1952). A prosecutor had investigated an automobile accident to determine whether prosecution was warranted. Acting in good faith and without contemplation of employment in any subsequent civil action growing out of the accident, the prosecutor did not file criminal charges against anyone. The prosecutor subsequently participated in the personal injury and property damage action arising out of that accident.

In Advisory Opinion No. 2, the Committee adopted an American Bar Association opinion (ABA) which held that:

If the lawyer making the approach does so under sanction or color of official power, he thereby more certainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with the occurrence previously investigated as to its potential criminal aspects.

In particular, the ABA was concerned that a potential tortfeasor might disclose facts to the prosecutor in his official capacity helpful to the prosecutor as a private attorney in the subsequent lawsuit. Stated the ABA, "A prosecutor cannot profit by infor-

mation gained in the course of performance of his duties as a public official."

Applying the holding and reasoning of Advisory Opinion No. 2 to the facts posed in this Legal Ethics Inquiry, it is the opinion of this Committee that the prosecutor should not have accepted employment from Mr. X in his fee dispute with Attorney A because that "civil litigation has its basis in or [is] connected with the occurrence previously investigated as to its potential criminal aspects." Although the fee dispute is collateral to the focus of the prosecutor's previous investigation of Mr. X, and the analogy of Mr. X's position to the potential tortfeasor in Advisory Opinion No. 2 is not apt because the prosecutor is representing Mr. X, Attorney A may have divulged information to the prosecutor in order to negotiate the plea bargain with federal authorities which the latter could use against the attorney in the civil litigation.

The Committee also sees another potential conflict arising from the above-described situation. The prosecutor could be a witness to the fee dispute. It is possible that Attorney A would need to call the prosecutor to testify as to the favorable plea agreement Mr. X received as a result of the attorney's efforts.

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Erwin L. Conrad, Chairman  
Committee on Legal Ethics