

MAINE STATE LEGISLATURE

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LEGAL MEMORANDUM

To: Attorney General Erwin
 From: Daniel G. Lilley
 Re: Possible conflict of interest of Assistant County Attorney.

QUESTION PRESENTED

Whether the partner of the Assistant County Attorney may represent clients at license revocation hearings before the Secretary of State or his deputy without a conflict of interest.

ANSWER

It appears that there is a conflict of interest by such representation.

DISCUSSION

Partnerships in general, are composed of two or more individuals for the purpose of placing their money, effects, labor, and skill in the firm, and to dividing the profits and bearing the losses. 68 C.J.S. Partnership §1. Sharing in the profits by partners is essential to partnership. "An agreement to share profits is an essential element of the partnership relationship." 68 C.J.S. Partnership §17. It seems that any plan to segregate monies in a law firm would destroy partnership status. Therefore, assuming that both partners participate in the profits of the law firm in which one of the partners is an Assistant County Attorney, it can be concluded that both partners have mutual or community interests in the outcome of cases, and especially of fees received for services. Keeping in mind the nature of the law partnership

association the issue of conflict of interests in cases can be more clearly determined.

Maine Statutes define the duties of a County Attorney and Assistant County Attorney. First, the Assistant County Attorney is paid by the State of Maine. 30 M.R.S.A. §2. Secondly, his duties include the prosecution of criminal matters for the State in his county (30 M.R.S.A. §502), and he represents the State in all civil matters in which the State of Maine is a party in his county. 30 M.R.S.A. §501. His duties therefore include both civil and criminal matters.

The conflict of interests posed in this question takes place where the partner of the Assistant County Attorney represents individuals before the Secretary of State in license revocation cases. It is more than likely that some of these licensees will have been formerly criminally prosecuted by the Assistant County Attorney in his county for one or more traffic violations. Hence the situation is presented where one partner prosecutes, the other partner defends, in a hearing arising out of the same matter, and involving the same client. Efforts by attorneys in this predicament to keep these conflicting interests separate seems too onerous a burden to require of them; furthermore this relationship of the partners may create temptation, on the part of individuals looking around for an attorney to represent them in license hearings, to seek the Assistant County Attorney's partner in the hopes of a more favorable disposition of his case. Lawyers in the community and the general public may not look at this situation with favor. See A.B.A. Op. 192.

Moreover, since 29 M.R.S.A. §2242 provides for appeal to the superior court from the decision of the Secretary of State in a license revocation hearing, the partner of the Assistant County Attorney could find himself representing a client against the Attorney General's office for the State of Maine, or even conceivably against his own partner if the action were brought in a superior court of his home county. The undesirability of this situation is obvious.*

Finally as regards the ethics of the representation in question by such a partnership, several sources have been researched. The 1954 Maine State Bar Association Proceedings, Appendix p.1, contains the "Cannons of Professional Ethics" (as proposed by Honorable George B. Barnes and adopted at meeting of January 25, 1951). Cannon 6 (Appendix p. 4) states in part as follows:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts....

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

This cannon is identical with cannon 6 of the American Bar Association, Cannons of Professional and Judicial Ethics 3 (2nd ed. 1957). This latter source includes annotations and opinions

* It should be noted that the inquiry does not indicate that any of the above situations have happened or are imminent, however, while they are now just hypothetical circumstances, it is believed that there is a good probability that they may occur in the future.

of each cannon. No opinion directly in point on the question presented was found, but related opinions present a good deal of enlightenment. Opinion 16 presents the question of whether or not one member of a law firm may represent defendants in criminal cases which are being prosecuted by another member who holds public office. Citing cannon 6 as covering the issue, the opinion concludes:

"So long as the partnership relation continues between the county prosecutor and his professional associate, it is clearly unethical for one member of the firm to oppose the interests of the state while the other member represents those interests. The positions are inherently antagonistic and this would be so irrespective of cannon 6. No question of consent can be involved as the public is concerned and it cannot consent.

"In many communities it is the privilege of a prosecutor to continue in the private practice of law during his term of office, but this in no way alters the foregoing conclusions. The prosecutor himself cannot represent both public and the defendant and neither can a law firm serve two masters. It follows that a partner in such a firm must forego the representation of defendants whose prosecution is the duty of another member who represents the public." (emphasis supplied)
A.B.A. Op. 16.

The final word on construction of cannon 6 is found in Opinion 262. It states in part: "The [Ethics] Committee holds that the statutory permission to a State Attorney to practice law while in office must have intended to be limited to matters in which the State is not a party." A.B.A. Op. 262. It can hardly be contended that the State is not a party to a license revocation hearing, particularly if the decision of that hearing can be appealed to superior court.

Henry S. Drinker, reputed to be one of the foremost authorities on legal ethics, briefly discusses this general area in a section entitled "Public Prosecutors and Other Public Servants" in his book LEGAL ETHICS (1953). He does not address himself to the specific question presented in this memorandum, but does state that "[t]he partner of a prosecuting attorney may not defend one accused of crime in another county." Citing canon 6 and the above cited opinions (A.B.A. Ops. 16, 262) for authority. Drinker, LEGAL ETHICS 118, 119, notes 47 10 (1953).

CONCLUSION

It is therefore concluded that the relationships presented by a two man partnership where one of the partners is an Assistant County Attorney results in a conflict of interest when the private partner represents clients in license revocation hearings before the Secretary of State and possibly in the superior Court. The fiduciary status of the partners in their mutual interests in the firm makes separation of interests in this situation awkward at best. Even if certain fees received by each partner are segregated there still exists a conflict between official and private duties (and if funds are segregated it may destroy an essential element of partnership). It is entirely possible, if not probable, that the partners may find themselves on opposite sides of a case, with one of them representing the State of Maine. Furthermore prospective clients may be inclined to take advantage of such a relationship, and in the eyes of the public this situation does little to enhance the stature of the law, no matter how honorable the intentions of the partners are.

Finally, the treatises on legal ethics and the opinions on the Canon of Ethics of The American Bar Association seem to discourage any relationship that poses this type of public duty against private duty of attorneys. It's opinions indicate that while a prosecuting attorney is allowed to practice privately in some states, the price for serving two masters is complete withdrawal from any case in which private interests conflict with public duty.