

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

JANUARY 23, 1989

FORMAL OPINION NO. 453

REPRESENTATION OF CRIMINAL DEFENDANT BY MEMBER OF FIRM ACTING AS CITY PROSECUTOR -- A firm may not represent criminal defendants in misdemeanor or felony environmental cases when the firm prosecutes municipal code violations on behalf of a city.

AUTHORITIES CITED:

LACBA Op. Nos. 242, 276.
LACBA Inf. Op. No. 1975-4.
ABA Op. No. 30.
ABA Inf. Op. Nos. 1045, 1285.
Colorado Bar Inf. Op. No. 10/11/72.
Florida Bar Op. No. 63-24.
Illinois Bar Op. No. 364.
Montgomery v. Superior Court, 46 Cal. App. 3d 657, 121 Cal. Rptr. 44 (1975).
People v. Pendleton, 25 Cal. 3d 371, 158 Cal. Rptr. 343, 599 P.2d 649 (1979).
People v. Rhodes, 12 Cal. 3d 180, 115 Cal. Rptr. 235, 524 P.2d 363 (1974).
Cal. Gov. Code § 41805.

The question presented is as follows:

May a lawyer in a firm undertake to defend a client charged with misdemeanor or felony violations of air pollution or other environmental statutes or regulations at a

time when other lawyers in the same firm are prosecuting municipal code violations for various cities on a contract basis, where (a) the agencies for whom the firm prosecutes such actions and the agencies against whom the firm defends such actions are entirely independent and unrelated; (b) the prosecutions are pending in different courts; (c) the prosecutions rely on entirely separate and independent enforcement authorities; (d) the prosecutions arise from entirely separate provisions of law and (e) the representation of a defendant in an environmental case will have no effect on the ability of another lawyer in the same firm vigorously to prosecute municipal code violations arising in other courts?

This Committee and the California courts for many years have criticized the representation of criminal defendants in circumstances similar to these. We decline the invitation to alter this longstanding rule.¹

1. The California Supreme Court has promulgated new Rules of Professional Conduct, which take effect May 27, 1989. From

This Committee first addressed the issue thirty years ago in Opinion No. 242. An attorney whose partner was a city attorney inquired whether the former could properly defend criminal defendants who were arrested by the police of the same city his partner represented but who were prosecuted by the district attorney's office. The opinion stated that the representation would pose an impermissible conflict of interest. It relied in part on American Bar Association Opinion 30, which forbade a prosecuting officer of one state from defending persons accused of crime in another state. A prosecutor's criminal representation in another jurisdiction, the ABA opinion held, might jeopardize the future cooperation and courtesy of police and prosecutors there. The Los Angeles County Bar concluded that "neither the City Attorney, his assistant nor their respective partners nor office associates can ethically undertake to defend persons in criminal actions, whether the arresting officers are city policeme[n] or not."

Six years later, this Committee opined that a city prosecutor could not ethically represent defendants in criminal

now until the new rules take effect, this Committee will respond to inquiries under both the old and new rules. In the present case, the result is the same under either set of rules.

cases that arose in the district, but not in the city, in which he served as prosecutor. LACBA Opinion No. 276. The Opinion stated that "[t]he positions of prosecutor and defense attorney are inherently antagonistic."

The California Supreme Court addressed the issue in People v. Rhodes, 12 Cal. 3d 180, 115 Cal. Rptr. 235, 524 P.2d 363 (1974). A city attorney was appointed to represent a criminal defendant arrested by the police of a city different from the attorney's employer but within the same county. The defendant was charged by the district attorney with a violation of state law. The city attorney was not then authorized by the district attorney to prosecute violations of state law, but could be so authorized in the future. Relying in part on LACBA Opinion No. 276, the court declared that, "as a judicially declared rule of criminal procedure, a city attorney with prosecutorial responsibilities may not defend or assist in the defense of persons accused of crime." 12 Cal. 3d at 186-87 (citations and footnote omitted).

The Court relied on two rationales. First, the court found that there were "considerations of a practical nature which have a potentially debilitating effect on both the quality of the legal assistance rendered by a city attorney to criminal defendants and the ability of a city attorney to properly

discharge his prosecutorial responsibilities." Id. at 183. In defending a criminal matter, a city attorney might be reluctant to subject to criticism or harsh cross-examination the police officers of his own or neighboring jurisdictions, whose cooperation he might later require. Id. at 183-84. On the other hand, if he overcame his reluctance, a vigorous defense could threaten the helpful cooperation of local law enforcement agencies and thereby hinder the public's interest in the successful prosecution of crime. Id. at 184-85.

Second, the court found it "essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice" that is not undermined by even the "appearance of impropriety." Id. at 185 (emphasis in original). The public might fear "that a public prosecutor who was representing criminal defendants would use his influence and position to extract favorable treatment for such defendants in order to further the success of his private professional career." Id. at 186.

This Committee reaffirmed these prior holdings in Informal Opinion No. 1975-4. It stated that, when one attorney handled misdemeanor prosecutions as city attorney, another attorney in his firm could not properly defend a criminal action brought by a different "prosecutorial agency." Indeed, it found

that the criminal representation would be improper if the defendant were arrested by the police of a different city from the city attorney's, and if all criminal prosecutions for the city were handled by the district attorney or by independent private counsel.

Taken together, these precedents do not permit the conduct contemplated by the inquiry. They provide that an ethical violation is not avoided simply because (1) the criminal representation is contemplated by a partner or associate of the city attorney, rather than the city attorney himself (LACBA Op. No. 242; Inf. Op. 1975-4); (2) the criminal action to be defended is brought by an entity other than the city attorney's office employing the attorney (Rhodes; LACBA Op. Nos. 242 & 276; Inf. Op. No. 1975-4); (3) the police or other enforcing entity for the criminal action to be defended differs from that for the city attorney (Rhodes; LACBA Op. Nos. 242 & 276; Inf. Op. No. 1975-4); and (4) the criminal action is brought under a provision of law the city attorney does not prosecute (Rhodes; LACBA Op. No. 242; Inf. Op. No. 1975-4).

Although the opinions do not directly address the fourth caveat in the inquiry, the actual and apparent conflicts of interest identified in the Rhodes case are not avoided simply because the criminal case to be defended is pending in a

different court from that in which the city attorney prosecutes. Nor does the inquiry's final assertion -- that the criminal defense representation "will have no effect" on the zeal of the prosecutor -- compel a different result. The very aim of conflict of interest rules is to identify situations in which conflicting loyalties may prevent or appear to prevent a lawyer from fulfilling his duties to his clients. Whether a particular situation may have an "effect" on the attorneys' representation is therefore a matter for the profession to decide, not one for the inquirers to assume.²

Recognizing the effect of these precedents, the inquiring attorneys ask that we reconsider them, arguing that several significant developments have intervened since the Rhodes decision in 1974. First, they note that in 1975 the Legislature added Government Code § 41805, which provides:

(a) No city attorney who does not, in fact exercise prosecutorial responsibilities on behalf of the city or cities by which he is employed shall be precluded from defending or assisting in the defense of, or acting as counsel for, any

2. In Rhodes, for example, the Court found the representation of the criminal defendant to be improper even though the defense appeared to be competent. 12 Cal. 3d at 183 n.4.

person accused of any crime except for violation of any ordinance of the city or cities by which he is employed, provided that:

(1) The city or cities by which he is employed expressly relieve him of any and all prosecutorial responsibilities on its or their behalf; and

(2) The accused has been informed of and expressly waives any rights created as a result of any potential conflict created by his attorney's position as a city attorney.

Cal. Gov. Code § 41805(a) (emphasis added). This statute, however, would not authorize the representation in the inquiry, for it applies only when the city attorney has been expressly relieved of all prosecutorial responsibilities.

Second, the inquiring attorneys suggest that two later cases have restricted the scope of Rhodes. Neither, however, is relevant to the question posed. In Montgomery v. Superior Court, 46 Cal. App. 3d 657, 121 Cal. Rptr. 44 (1975), the court held that the partner of a city attorney who had formally been divested of all prosecutorial responsibilities could defend a criminal defendant, with his consent, when the case did not involve personnel of the partner's city. Again, this is

irrelevant to the inquiry, which concerns a firm that continues to act as city prosecutor. In People v. Pendleton, 25 Cal. 3d 371, 158 Cal. Rptr. 343, 599 P.2d 649 (1979), the court held that, although criminal defense work by a city attorney himself in violation of Rhodes was reversible error per se, criminal defense work by a city attorney's partner in violation of Rhodes was harmless error under that facts of that case. Far from holding that the criminal defense by a city attorney's partner was proper, the court assumed that it was a violation of Rhodes and thus an "error," albeit not one sufficient to reverse a criminal conviction.

The inquiring attorneys finally direct our attention to certain opinions by the ABA and bar associations in other states that they contend would authorize their contemplated conduct. See ABA Inf. Op. Nos. 1045 and 1285; Colorado Bar Inf. Op. No. 10/11/72; Florida Bar Op. No. 63-24; Illinois Bar Op. No. 364. This Committee, however, is not bound by the opinions of the ABA or other state bars. Moreover, unlike the ABA or the bars of other states, we are bound by the California Supreme Court's decision in Rhodes. For that reason, we are not at liberty to deviate from the Supreme Court's plain pronouncement in that case. Accordingly, we find that the representation contemplated by the inquiry would be improper.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinions are based only on such facts as are set forth in the questions submitted.