

PROSECUTING ATTORNEY: Assistant prosecuting attorney should not represent a defendant in a trial. The determination of the matter should be left to the trial court.

February 5, 1941

Mr. Ben F. Kesterson
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Dear Sir:

This department is in receipt of your letter of January 17th wherein you make the following request:

"I was appointed special prosecuting attorney to prosecute the case of State of Missouri vs. Delmar Petty, charged with murdering Eula Gipson on the 22nd day of February, 1940. This was one of the most gruesome murders ever committed in this county. The case was tried at the September term, 1940. Mr. Roy Coyne was prosecuting attorney at that time. The defendant was represented by Ralph Baird and Charles Walden. There was a hung jury. The case is coming up at this January term for trial.

Since the trial of this case, Mr. Ralph Baird has been elected prosecuting attorney and has appointed Mr. Charles Walden his chief assistant prosecuting attorney. Mr. Baird has disqualified himself as prosecutor in this case by reason of having defended the defendant in the first trial. Mr. Walden, his chief assistant says he will continue to represent the defendant while holding the office of assistant prosecuting attorney. I do not wish to do anything that is not perfectly fair and ethical in

February 5, 1941

this case but I do not believe it fair to the State to have the assistant prosecuting attorney represent the defendant. As special prosecuting attorney in this case, I would appreciate your opinion on the question. Can Mr. Walden continue to hold his office of assistant prosecuting attorney and still represent the defendant as his attorney?

A searching of the statute does not reveal that the precise question which you present is prohibited or sanctioned by any statute. However, there are a number of statutes which have an indirect bearing on Mr. Walden's position in defending the person mentioned in your letter. Section 11355 R. S. Mo. 1929 prohibits any licensed attorney, who is a co-partner with a prosecuting attorney or assistant prosecuting attorney, from appearing and defending in the courts. Section 11338 contains the proviso "that he shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney." However, the above proviso relates to the power of a prosecuting attorney in any county in the state not specifically designated by certain population. We assume that the prosecuting attorney of Jasper County is entitled to appoint an assistant under Section 11339.

Section 3648 does not refer to a prosecuting attorney, but prohibits a circuit judge when he shall have been counsel in a cause from hearing a case. We cite you to the above mentioned statutes for their probative effect, and as stated in the beginning they do not prohibit Mr. Walden from assisting in the defense, but can be used in arriving at a conclusion whether there is any conflict in Mr. Walden's different positions. 7 C. J. S. page 960 bears on the question:

"Any transaction by which an attorney

has taken a position, or acquired an interest, antagonistic to that of his client will be closely scrutinized by the courts; and may in many instances be avoided or invalidated irrespective of its merits, fairness, or good faith or whether or not it is in fact injurious to the client; and even where the existence of good faith and lack of injury to the client, or other facts, will exonerate him it is always incumbent upon the attorney to show such facts to the satisfaction of the court."

We think that the cannon of ethics relating to the legal profession in Special Rule 6 entitled Adverse Influence and Conflicting Interests should be considered in so far as ethics of the profession may enter the question:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client

February 7, 1941

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 interests of the client with respect to which confidence has been reposed."

In view of the facts and the situation which you have presented, we think Mr. Walden's position in the matter should be determined by the trial court.

Respectfully submitted,

OLLIVER W. NÖLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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