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OPINION	:	No. 79-714
	:	
of	:	<u>September 18, 1979</u>
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Paul H. Dobson	:	
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SUBJECT: REPRESENTATION BY COUNTY SUPERVISOR—A county supervisor who is an attorney may not represent criminal defendants in cases prosecuted by the county’s district attorney.

The Honorable Milton Goldinger, County Counsel, County of Solano, has requested an opinion on the following question:

May a county supervisor who is an attorney represent criminal defendants in cases prosecuted by the county’s district attorney?

CONCLUSION

A county supervisor who is an attorney may not represent criminal defendants in cases prosecuted by the county’s district attorney.

ANALYSIS

In *People v. Rhodes* (1974) 12 Cal. 3d 180, 185, the State Supreme Court in reversing a criminal conviction held as a judicially created rule of criminal procedure that it was against public policy for a city attorney with prosecutorial responsibilities to represent criminal defendants¹ and stated:

“It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the *appearance* of impropriety.”

Government Code² section 1126, subdivision (a) provides in pertinent part, that:

“(a) A local agency officer . . . shall not engage in any employment, activity, or enterprise *for compensation* which is inconsistent, incompatible, in conflict with, or inimical to his duties as a local agency officer or with the duties, functions or responsibilities of . . . the agency by which he is employed.” (Emphasis added.)

A member of the county board of supervisors is a “local agency officer” within the meaning of the foregoing provision. (§§ 1125, 24000, subd. (o).) Primarily on the basis of the

¹ Subsequent to the decision in *Rhodes*, Government Code section 41805 was enacted. It 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 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.

“(b) Where the above provisions are met, no partner or associate of a city attorney shall be prevented from defending or assisting in the defense of, or acting as counsel for, any person accused of any crime except for violations of any ordinance of the city or cities by which his partner or associate is employed as a city attorney.

“This section shall not preclude any city from limiting or prohibiting the private practice of any attorney it retains or employs.”

² All section references are to the Government Code unless otherwise specified.

Rhodes decision, we concluded, in an unpublished opinion (IL. 74–172), dated October 2, 1974, that:

“The defense of an individual in a criminal action is an activity ‘incompatible’ with the county supervisor’s public position under Government Code section 1126 when the criminal action is being prosecuted by a district attorney over whom the supervisor has jurisdiction.”

We stated in that opinion:

“Being a county officer, the district attorney, to a certain extent, is subject to supervision by the county board of supervisors. Section 25303. Moreover, the board of supervisors determines the salary of the district attorney as well as the salary and size of the district attorney’s staff. Cal. Const. art. [XI], § 1 (b). See, Stats. 1970, ch. 233, § 1, p. 489. As the foregoing indicates, a county supervisor, by virtue of his official position, possesses considerable discretionary powers in regard to his county’s district attorney’s office. Thus, we believe an unhealthy situation is created when a district attorney is opposed by an attorney who, in his own capacity, possesses considerable authority over the district attorney’s very salary and staff size.

In *People v. Municipal Court (Wolfe)* (1977) 69 Cal. App. 3d 714, the court of appeal affirmed the order of the superior court which granted the People’s petitions for writs of mandate and prohibition commanding the municipal court to disqualify an attorney who was a city councilman from serving as defense counsel in a criminal action prosecuted by the city attorney in municipal court. The court of appeal cited Government Code section 1126, subdivision (a), *People v. Rhodes, supra*, and the above-mentioned unpublished opinion of this office in apparent support of its conclusion that “it is better practice in general for city councilmen to avoid representing defendants in criminal actions who are prosecuted by the city attorney and/or which involve San Diego police officers as witnesses.” (At p. 719.) The court noted that the city councilman was representing the defendant (a son of a client and friend) without charging a fee. The municipal court had found Government Code section 1126 inapplicable because of the lack of compensation, but the superior court, in issuing the writs, found the representation was not necessarily without compensation despite the no-fee arrangement. The superior court also found that the *possibility* of actual prejudice to the *judicial system* in permitting the city councilman to represent the defendant outweighed the interests of the defendant in choosing his own counsel. (At p. 717.)

The court of appeal, in affirming the judgment of the superior court in this respect, pointed out that the right of an accused to retain counsel of his choice was not absolute and that there were other values of substantial importance which must be recognized. The court stated:

“One such value is the preservation of public confidence in the integrity and impartiality of our criminal justice system, and here it should prevail.” (*People v. Municipal Court (Wolfe)*, *supra*, 69 Cal. App. 3d at p. 720.)

While the court of appeal upheld the superior court’s judgment as an exercise of *discretion* on particular facts, it refused to sustain the portion of the judgment which purported to restrain the municipal court from generally allowing city councilmen (who are attorneys) from representing criminal defendants in cases in which city police officers were to be witnesses for the prosecution. However, the court stated in this regard:

“Now that the issue has been decided by higher courts, there is nothing to indicate the municipal court will permit city councilmen attorneys to represent criminal defendants under the proscribed circumstances.” (*People v. Municipal Court (Wolfe)*, *supra*, 69 Cal. App. 3d at p. 720.)

Thus, it would appear that the court in *People v. Municipal Court (Wolfe)*, *supra*, 69 Cal. App. 3d 714, held that invariably it would be an abuse of discretion for a court to permit a city councilman to represent a criminal defendant where municipal law enforcement employees are witnesses for the prosecution. In view of the decision in *People v. Municipal Court (Wolfe)*, it is still our opinion that a county supervisor may not represent for compensation a criminal defendant in cases prosecuted by the county’s district attorney because such activity is incompatible with the supervisor’s public position within the meaning of section 1126. However, section 1126 by its terms is applicable to incompatible activity *for compensation*. There still remains the question of whether, regardless of compensation, a county supervisor may represent a criminal defendant in cases prosecuted by the district attorney. We conclude he may not.

In *People v. Rhodes*, *supra*, 12 Cal. 3d at p. 186, the Supreme Court stated that “. . . the nature and duties of a public prosecutor are inherently incompatible with the obligations of a criminal defense counsel.” In *People v. Superior Court (Greer)* (1977) 19 Cal. 3d 255, the Supreme Court upheld a refusal of a district attorney from the prosecution of a case on the ground the mother of the victim was a clerical employee of the district attorney and a conflict of interest therefore existed. The court in that case stated that: “. . . both the accused and the public have a legitimate expectation that [the district attorney’s]

zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case.” (At p. 267.) Citing *Rhodes*, the court in *People v. Superior Court (Greer)*, *supra*, 19 Cal. 3d at p. 268, concluded that besides the individual accused, “[s]ociety also has an interest in both the reality and appearance of impartiality by its prosecuting officials. . . .” The holdings of both *People v. Rhodes* and *People v. Superior Court (Greer)*, are in no way based upon section 1126. We believe rules of criminal procedure established by these cases as well as the decision in *People v. Municipal Court (Wolfe)*, *supra*, 69 Cal. App. 3d 714, would preclude a county supervisor from representing a criminal defendant in a case prosecuted by the district attorney.

The Committee on Professional Ethics of the State Bar of California has concluded in Formal Opinion No. 1977–46 (54 State Bar J. 60 (1979)) that it would be improper for an attorney who is a member of a city council to represent a client being prosecuted in a criminal matter by the city. The committee’s opinion, which is not limited to cases of representation for compensation, in part states:

“Upon examination the areas of potential (if not actual) conflict and impropriety are obvious and substantial. In defending a criminal action, the attorney may be reluctant to engage in complete or abrasive cross-examination of city police officers who repeatedly serve as key prosecution witnesses for the city. The attorney may be tempted to soften or avoid criticism of local police conduct which would properly be stressed in the case he or she was defending. Proper defense of the case might call for an attack on the validity of an ordinance previously enacted by council action in which the attorney participated. There would be temptation to exercise influence of public office in negotiating or otherwise dealing with the city attorney who may serve at the pleasure of the council, for the benefit of his or her client and himself or herself. In prosecuting violations of city law, the city stands to benefit to the extent of fines imposed and the deterrent value of convictions obtained—all directly contrary to the interest which the attorney is bound to protect in defending his client. Finally, police officers or other material witnesses employed by the city and subject to control or influence by the council, may be tempted to slant their testimony in favor of the council member’s client.

“In view of such considerations, and being of the belief that an attorney-public official must exercise the highest degree of care to avoid giving the public the impression that he or she has improperly used the influence of his or her public office, it is our conclusion that representation by an attorney of a defendant in a criminal action being prosecuted by the city in which the attorney serves as a council member, would be unethical

and should be declined at all stages.”

As we have already discussed, because the board of supervisors has certain financial and staffing control over the district attorney, an “unhealthy situation” is presented when a supervisor opposes the district attorney in a criminal case. Moreover, the board of supervisors, to a certain extent, supervises the activities of the sheriff, coroner, and county fish and game warden (§§ 24000, 25303). Often those officials or their deputies provide testimony for the prosecution in criminal cases. Again, an unhealthy situation is created when such officers must be cross-examined and their testimony challenged by a defense attorney who is a member of the board of supervisors. We believe that the relationship between the board of supervisors and the district attorney is sufficiently analogous to the relationship between the city council and the city attorney that a potential of not actual conflict of interest would exist in the situation of a supervisor representing a criminal defendant in a case prosecuted by the district attorney.

Thus, we conclude that under pertinent judicially created rules of criminal procedure, and as a matter of legal ethics, a county supervisor would be precluded from representing, with or without compensation, a defendant in a criminal case prosecuted by the district attorney.
