

## Opinion No. 125.

County Attorney—City Attorney—  
Cities and Towns—Counties—Offices  
and Officers.

Held: (1) A city attorney or county attorney may not defend a prosecution commenced by the other in the name of the State of Montana.

(2) No broad rule is herein promulgated regarding a county attorney's defending, in his private capacity as a lawyer, a prosecution commenced by a city attorney in the name of a city or town. Each such case must be judged on its own facts; and each county attorney confronted with such a problem must weigh his responsibility as a lawyer and public prosecutor in the light of the facts of the case, his oaths as an attorney and as a public officer, and the code of ethics of the legal profession.

February 18, 1946.

Mr. Edison W. Kent  
County Attorney  
Granite County  
Philipsburg, Montana

Dear Mr. Kent:

You have inquired whether it is lawful for the county attorney to defend criminal prosecution brought by the city attorney upon alleged violation of city ordinances and whether the city attorney is qualified to defend alleged violations under the laws of the state of Montana.

The office of county attorney is one of constitutional origin; and Section 19 of Article VIII provides the county attorney "shall have a salary to be fixed by law, one-half of which shall be paid by the state, and the other half by the county from which he is elected and he shall perform such duties as may be required by law." The duties of the county attorney are generally enumerated in Section 4819, Revised Codes of Montana, 1935. I invite your attention particularly to paragraphs one, two and three of Section 4819:

"The county attorney is the public prosecutor, and must:

"1. Attend the district court and conduct, on behalf of the state, all prosecutions for public offenses and represent the state in all matters and proceedings to which it is a party, or in which it may be beneficially interested, at all times and in all places within the limits of his county;

"2. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed, and for that purpose, whenever not otherwise officially engaged, must attend upon the magistrate in cases of arrest, and attend before and give advice to the grand jury, whenever cases are presented to them for their consideration;

"3. Draw all indictments and informations, defend all suits brought against the state or his county, prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county . . ."

Although the county attorney is a county officer, he is the representative of the state within the limits of his county.

The police power of a municipality is derived from the state. Our court has asserted "a city is but a political subdivision of the state for governmental purposes, owing its very existence to the legislative will, and capable of exercising only such powers as are granted, either directly or by necessary implication." (*State ex rel Gebhardt v. City Council*, 102 Mont. 27, 33, 55 Pac. (2d) 671, 673.)

Section 5038, Revised Codes of Montana, 1935, sets forth the qualifications and duties of the city attorney; and, among other things, declares it shall be his duty "to attend before the police court and other courts of the city and the district court, and prosecute on behalf of the city." The jurisdiction of police courts is set out in Section 5088, Revised Codes of Montana, 1935:

"The police court has concurrent jurisdiction with the justice of the peace of the following public offenses committed within the county:

"1. Petit larceny.

"2. Assault and battery, not charged to have been committed upon a public officer in the discharge of his official duty, or with intent to kill.

"3. Breaches of the peace, riots, affrays, committing wilful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both fine and imprisonment.

"4. Proceedings respecting vagrants, lewd, or disorderly persons. **Such offenses must be prosecuted in the name of the state of Montana...**" (Emphasis mine.)

The words which I have emphasized above have been held to apply to all of the offenses enumerated in the section, and not merely to paragraph four of the section. (State ex rel City of Butte v. District Court et al, 37 Mont. 202, 206, 95 Pac. 841, 842.)

Section 5089, Revised Codes of Montana, 1935, provides in part:

"The police court also has exclusive jurisdiction:

"1. Of all proceedings for the violation of any ordinance of the city or town, both civil and criminal, which must be prosecuted in the name of the city or town . . ."

It seems to me the legislative expression is clear in those cases wherein the city attorney must prosecute in the name of the state. When he prosecutes in the name of the State of Montana, he is acting on behalf of the state—although he is officially city attorney. In such cases, it is obvious a county attorney who acted as defense counsel would be performing a function incompatible with his official position as county attorney.

But in those proceedings for the violation of city ordinances, "both civil and criminal, which must be prosecuted in the name of the city or town," the solution is not quite so obvious. In State ex rel. Streit v. Justice Court et al, 45 Mont. 375, 381, 123 Pac. 405, 406, our court observed:

"... in the section conferring upon police courts exclusive jurisdiction of ordinance cases, they are referred to as both civil and criminal . . . The

same act may be a violation of an ordinance and at the same time of a public law. (State ex rel. City of Butte v. District Court, supra; Dillon on Municipal Corporations, sec. 633.) It may therefore be punishable both under the state law and under the ordinance. Again, there is attached to the violation of an ordinance a penalty in the form of a fine, imprisonment, or both. Nevertheless, whether such offense be classified as civil or criminal, or quasi criminal, the prosecution to enforce the penalty does not rise to the dignity of a criminal prosecution in the sense in which that expression is commonly used." (Emphasis by the court.)

In City of Helena v. Kent, 32 Mont. 279, 289, 290, 80 Pac. 258, 261, our court held:

"... it seems manifest that the constitutional requirement, 'all prosecutions shall be conducted in the name and by the authority of "the State of Montana,"' contemplates such criminal actions as shall be instituted and prosecuted before the tribunals provided for in that Article of the Constitution for violations of the statutes of the state, and, as stated in Davenport v. Bird, 34 Iowa 524: 'It is fitting and appropriate that prosecutions for violations of the criminals laws of the state should be carried on in the name of the government. But there is no fitness or propriety in requiring the state to be a party to every petty prosecution under the police regulations of a municipal corporation.' Such a construction of this Article of the Constitution would be unwarranted, as not intended by its framers . . .

"Infractions of local police regulations . . . are not, in their essence, 'crimes' or 'misdemeanors' as those terms are employed in our criminal jurisprudence, and are therefore not criminal prosecutions . . . Such actions need not be prosecuted in the name of the state, but should be prosecuted in the name of the city."

In those proceedings for the violation of city ordinances—"criminal" in nature—I am unwilling to promulgate a blanket, all-inclusive rule. In many—perhaps even in most—prosecutions

commenced in the name of the city or town, the county attorney might defend in his private capacity as a lawyer without prejudice to his official function and obligations as a county attorney; but it is not inconceivable a prosecution in the name of a city or town could be of such nature the defense would be incompatible to the county attorney's function. Hence, each case must be judged on its own facts; and each county attorney confronted with such a problem must weigh his responsibility as a lawyer and public prosecutor in the light of the facts of the case, his oaths both as an attorney and as a public officer, and the code of ethics of the legal profession.

However, it is definitely my opinion a city or county attorney may not defend a prosecution commenced by the other in the name of the State of Montana.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General