The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following question:

"Can a law firm which has a member that is a county attorney have other members of the firm represent persons before the Area Plan Commission or the County Board of Zoning Appeals?"

Specifically this becomes a question due to the fact that County Commissioners are the final authority as to all zoning matters in the county if and when it is decided that a change of the zoning ordinances may be appropriate.

As stated before in previous opinions of the Committee, questions involving conflict of interest are always very difficult. The difficulty sometimes arises because the conflict is difficult to perceive and sometimes because the recognition of the conflict requires the attorney to decline employment.

Canon 4 of the Code of Professional Responsibility reads as follows:

"A lawyer should preserve the confidences and secrets of a client."

Disciplinary Rule 4-101 requires the same thing and goes on to explain this in more detail.

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client.

Lastly, Canon 9 requires that a lawyer should avoid even the appearance of professional impropriety.

These Canons impose a strict course of conduct and in our opinion require that if there is any doubt as to whether or not there is a conflict the problem should be resolved by the attorney declining to accept the employment. (Legal Ethics Opinion No. 5 of 1975)

In the case at hand, we have members of a firm who represent parties before two forums, the Board of Zoning Appeals and the Zoning Commission or Planning Commission.

There is a potential area of conflict.

For instance, if a party would fail with the Zoning Commission and the Board
of Zoning Appeals, assuming there is no legal recourse in the courts, the last alternative would be to attempt to change the Zoning Ordinance.

This is where the conflict becomes obvious: the attorney is bound to do the best for his client and it might very well require that he attempt to change the ordinance.

Thus we would then have an attorney in the unenviable position of having his firm represent two different sides of the question. The County Attorney in his attempt to advise the County Commissioners should and must be impartial with his advice and input. This would be impossible if a member of his firm were representing the party who was a client of his firm in an attempt to change the zoning ordinance. We feel this would be an obvious conflict of interest.

Lastly, there would be an appearance of impropriety because the general public might very well imply that this law firm had special influence upon the Zoning Appeals Board or the Planning Commission by virtue of having a member representing the County Commissioners.

The County Attorney does exert influence upon the County Commissioners. He does have input to the County Commissioners on legal questions and it is obvious that if this firm would be representing a client's interest that it could be implied that a County Attorney would color his thinking to the advantage of the client. Thus there would be the appearance of impropriety also in this situation.

Accordingly, we take the position that applying the above standards to the factual situation before us, it would be improper for the law firm to represent clients before the Planning Commission or the Board of Zoning Appeals so long as a member of that firm is the County Attorney. It could easily be implied that the County Attorney is in a position to influence the Board of Zoning Appeals, the Planning Commission, and the County Commissioners.
The Committee has been asked whether an improper conflict exists when a lawyer who has filed a tort lawsuit against a city on behalf of a client is elected to the office of city councilman.

Disciplinary Rule 9-101(B) states that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee" (emphasis added). The facts stated in the inquiry indicate that the lawyer will have substantial responsibility for the matter as a public employee, namely, a city councilman, when the lawyer takes office. The Committee infers from the inquiry that the lawyer as city councilman may be required to vote whether to compromise the claim, appeal from a judgment, and the like. Certainly this is a "substantial responsibility" within the meaning of this Disciplinary Rule.

The reason for that Rule is stated in Ethical Consideration 9-3 which provides "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." In the opinion of the Committee the reason for the rule applies to the facts stated in the inquiry even though the lawyer has not yet had substantial responsibility in the matter but instead will have such responsibility when the lawyer takes office.

Even if this Rule does not apply to the facts stated in the inquiry, Ethical Consideration 9-2 states that "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." This Ethical Consideration is one of the bases of Canon 9 which states "A lawyer should avoid even the appearance of professional impropriety."

It is the opinion of the Committee that the lawyer should either withdraw from the prosecution of the tort claim or refuse to take office as city councilman.
The Legal Ethics Committee has been supplied the following inquiry, viz:

"Our firm hereby requests an informal opinion from the Legal Ethics Committee concerning a booklet being considered for use by our firm. We are considering publishing a booklet, in a format similar to the booklet enclosed herewith, which will identify the members of the firm, give a brief biographical description of each member, and will generally describe the areas of practice of the firm. We have found that even long-standing clients lack a full understanding of the nature of our practice and feel the booklet would help remedy that situation.

"The firm contemplates such a booklet would be distributed to existing major clients of the firm, new clients of the firm, and potential clients of the firm who have contacted us regarding representation or are considering retaining us as their counsel. Such a booklet would not be distributed to the general public, but would be placed in our reception area.

"We request your opinion as to whether the use of such a booklet in the manner above described would be consistent with the existing ethical standards of our profession."

The submission of an eight-page, black-and-white brochure describing a CPA firm contains 7 photographs and one map. The text notes:

"... The partners' experience with National CPA firms and our qualified staff enable us to provide professional service that goes beyond the typical auditing and preparation of financial statements and income tax returns... In addition to our experience in auditing, we have experience in servicing new businesses and advising them on important tax elections and decisions affecting their future... Our experience in managerial accounting is useful in offering advice to clients and assisting them with long-range planning..."

The following questions arise from the inquiry, viz:

1) Is the present suggested format of the proposed booklet proper?
2) Is the proposed distribution method for the booklet proper?

With respect to the first question, the Committee feels that the decision of the N. Y. State Bar Association, Committee on Professional Ethics, Opinion No. 316 (Dec. 18, 1973) adequately explains the reason for the rejection of such a booklet in the following language:

"A brochure describing the activities of a law firm and the qualifications and experience of its members tend to unduly emphasize the importance of the firm and the competence of its partners, including very possibly their expertise in various branches of the law. Distributions by lawyers of such material to clients and prospective clients would constitute a form of advertising clearly proscribed by the Code. DR 2-101(A) and (B); DR 2-105(A); cf. DR 2-102 (A)(2).

"The apparent purpose of the brochure would be the indirect solicitation of legal business in violation of the traditional ban against such conduct. EC 2-9. The mere appearance of such impropriety should be avoided. Canon 9.

"For these reasons the issuance of the brochure is disapproved. See Matter of Connelly, 18 A.D. 2d 466, 479, 240 N.Y.S. 2d 126, 139 (1st Dept. 1963); ABA Inf. 530 (1962); N.Y. City 615 (1942).

"This opinion does not prohibit appropriate answers to unsolicited inquiries concerning the firm."

The authorities have reached a similar conclusion with respect to written brochures; e.g. ABA Informal Opinion 1436 (Aug. 12, 1979) - commercial collection; ABA Informal Opinion 1365 (June 4, 1976) - Virgin Island Divorce Law; ABA Informal Opinion 998 (August 26, 1967) - written material furnished clients indicating that client "bring his future problems to this office"; ABA Formal Opinion 213 (March 15, 1941) "Patent Law News Bulletin," ABA Formal Opinion 120 (Dec. 14, 1934) - Mexican Divorce Law; ABA Formal Opinion 73 (May 5, 1932) - Liberal Divorce Law; N. J. Supreme Court Advisory Committee on Professional Ethics Opinion No. 134 - 100 Questions & Answers on Workmen's Compensation Laws; N. J. Supreme Court Advisory Committee on Professional Ethics Opinion No. 245 - client book for negligence cases; The Association of the Bar of the City of New York, Opinion No. 330 (April 2, 1935) - collections.

In addition the submitted example unduly utilizes the word "experienced." Inasmuch as neither our Supreme Court nor Bar Association has adopted a specialization certification, the reasoning set forth by Illinois State Bar Association Opinion No. 669 (1/23/80) would appear to be applicable - that a:
"... lawyer clearly cannot advertise that he is an 'expert' in a given field. It would constitute a 'representation' ... regarding the quality of legal services' in violation of DR 2-101(B)(8) and a suggestion of speciality in violation of DR 2-105.

"Even a representation that the lawyer is 'experienced' in a given field raises the same kind of problems as a statement of expertise. The term 'experienced' has no recognized or common meaning in the context of lawyer advertising, and if it has any connotation at all, that connotation is an implication that lawyers 'experienced' (here experienced in real estate closings) are novel or superior to most. Absent a system of specialization which would give some content to terms such as 'experienced' or 'expert,' such representations are inherently inconsistent with the Code."

Additionally the submitted example is improper because DR 2-101(B) permits publication of specified information in print media distributed in certain geographic areas if the material contains no photographs or other pictorial matter.

With respect to the second question, the Committee feels that the proposed distribution of self-laudatory statements and claims is contrary to DR 2-101(A). The fact that said booklets are portable and designed to travel outside the law office indicates that people with whom the attorney has no established professional relations could be solicited by the said distribution procedure.


It should further be noted State Bar Association or similar published pamphlets on popular legal subjects, which do not bear the name or address of the lawyer, are not affected by this opinion. See DR 2-104; ABA Informal Opinion 1365 (June 4, 1976); ABA Informal Opinion 846 (May 31, 1965); ABA Informal Opinion 631 (Feb. 6, 1963); ABA Informal Opinion 539 (May 31, 1962); ABA Informal Opinion 503 (March 22, 1962). The Committee also wishes to note that the principles stated in Opinion No. 3 of 1979 are still applicable to attorneys' advertisements in all media permitted by DR 2-101, et seq. The purpose for these rules is to give the public factual information concerning a lawyer and rendering of legal services relevant to the thoroughful selection of a lawyer, and is not to advance the economic interest of the
lawyer or to appeal to the emotions of the public. Accordingly any public communication or advertisement must support and maintain the ethics of our profession in order to promote and preserve justice and the clients' interest.

Although the submitted booklet fails to meet the requirements of the Code for the reasons stated above, it may be that different booklets could comply under DR 2-101.
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1980

The Committee has been asked about the propriety of a lawyer's conduct under these facts:

The lawyer is "of counsel" to the "X Law Firm." The sole function of X is to advertise for the lawyer and other lawyers throughout the country who are also "of counsel" to X. X advertises through various media, including a television advertisement originating outside the state which goes into the state containing the lawyer's name and telephone number. X performs no legal services or other services for the client at all. The fee generated as a result of an employment brought about by the advertising is split twenty percent to X and eighty percent to the lawyer.

This arrangement violates several provisions of the Code of Professional Responsibility. First, any advertising using the name "X Law Firm" is misleading contrary to DR 2-101(A) because X Law Firm is in fact not a law firm and does not render legal services to the client. Second, although the television advertisement may or may not be ethically proper in the state where it originates, it is not permitted by DR 2-101(B) adopted by the Supreme Court of Indiana. Third, "X Law Firm" is a trade name contrary to DR 2-102(B). Fourth, by virtue of the advertising, X implies that the lawyer is a partner in X contrary to DR 2-102(C). Fifth, the division of the fee between X and the lawyer is contrary to DR 2-103(B). If X were a law firm, the fee division would be contrary to DR 2-107(A)(2). See ABA Informal Opinion 1392.

Criminal Defense Attorney Conflicts

I. THE ISSUE

The Legal Ethics Committee of the Indiana State Bar Association has been requested to issue an opinion as to whether or not a lawyer can represent both a criminal defendant and a police officer in each of the following two situations:

First Fact Situation:

Defendant A was arrested by Police Officer B. Lawyer C was retained by A to represent him with respect to the criminal charges arising out of the arrest. Lawyer C had previously been a Deputy Prosecuting Attorney and while in this capacity had successfully prosecuted A on other charges. The result of which was that A served a term in prison. Lawyer C also has in the past and presently represents Police Officer B in several civil matters. Lawyer C is no longer a Deputy Prosecuting Attorney.

Second Fact Situation:

Defendant X was arrested by Police Officer Y. Lawyer Z was appointed to defend X, and after his appointment, learned that Y was the arresting officer. Z has, in the past, represented Y in civil matters.

The issue presented by both situations is whether it is ethical under the Indiana Code of Professional Responsibility for an attorney to represent a criminal defendant in a criminal proceeding in which the arresting officer, who will be a witness at trial, is represented in other civil matters, by the attorney?

II. PRELIMINARY DISCUSSION

The fact that Lawyer C was at one time a Deputy Prosecuting Attorney who, in fact, prosecuted A on earlier charges is of no consequence. The conviction and the arrest are two totally different situations. The fact that Lawyer Z was appointed rather than hired by the criminal defendant is also of no consequence. Finally, the fact that both C and X were at one time Deputy Prosecuting Attorneys does not in and of itself preclude either of them from representing A and X, respectively. None of these facts are relevant to the ethical issue presented.
III. DISCUSSION OF THE ISSUE

The most relevant Canon to the above-stated issue is Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client"), and the most applicable Disciplinary Rule is DR 5-105, which provides:

**DR 5-105: Refusing to Accept or Continue Employment If The Interests Of Another Client May Impair The Independent Professional Judgment of the Lawyer.**

(A) A lawyer shall decline proffered employment if his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

The Committee is of the opinion that in both fact situations the representation of the criminal defendants A and X by Lawyers C and Z would violate DR 5-105 (A) or (B)¹. The police officer is at least a witness on behalf of the State of Indiana, and in some situations could be said to represent the State of Indiana², in the criminal prosecution of the defendant. Clearly, the police officer and the criminal defendants have adverse interests.

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1. DR 5-105(A) relates to the refusal or acceptance of proffered employment. DR 5-105(B) relates to the continuation or termination of ongoing representation. Both subsections utilize the same standard to measure the attorney's conduct. Namely, whether the exercise of an attorney's independent professional judgment in behalf of a client will be or is likely to be adversely affected by his accepting the proffered employment or continuing employment.

2. This is especially true if the police officer participates in or conducts the plea bargaining activities.
In addition to the existence of adverse interests, the Committee recognizes that the lawyer receives or has received monies from the police officer for legal services in the future. The lawyers have a real interest in maintaining a good relationship with the police officers due to the existence pending legal work and/or the anticipation of future legal work. It is a fact of life that this relationship between the police officer could be either adversely or advantageously affected by the lawyer's representation of the criminal defendant. In light of these considerations, the Committee believes that the lawyer's "independent professional judgment in behalf of a client will be or is likely to be adversely affected" by either the acceptance of employment by or the continued representation of the criminal defendant in the two situations above. Thus, on its face, DR 5-105 (A) or (B) appear to be violated.

However, DR 5-105 provides an "escape valve" in subsection (C) thereof. In order for subsection (C) to apply, it must be "obvious" that the lawyer can "adequately represent the interest of" both clients, and that each client "consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of" each client.

Assuming there is no connection between the civil matters of police officers B and Y and the crime allegedly committed by A and X, there is no doubt that the police officer and defendant can consent to such representation in both situations. However, in the opinion of the Committee, if it is "obvious" that the attorney can "adequately represent the interest of each" client, it is the opinion of the Committee that the lawyer in both situations may represent the defendant if meaningful consent is obtained from the defendants A and X after a "full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of" the defendant is made without being violative of DR 5-105. Consent need not be obtained from the police officer as in the opinion of the Committee there appears to be no way that the representation of the police officers C and Y in civil matters could be affected by the representation of criminal defendants A and X by Lawyers C and Z.

IV. CONCLUSION

The conclusion reached by the Legal Ethics Committee is that while it is unethical under the Indiana Code of Professional Responsibility for a lawyer to represent a criminal defendant in a criminal proceeding in which the arresting officer, who will be a witness at trial, is represented in other civil matters by the same lawyer, such representation would be ethical provided the lawyer made a full disclosure to the criminal defendant "of the possible effect of such representation on the exercise of his independent professional judgment on behalf of" the defendant and obtained his meaningful "consent" under DR 5-105(C).
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 6 OF 1980

It is now, and has been for some time, apparent that attorneys in this state are routinely breaching DR 7-107 relating to Trial Publicity. Since we may assume that attorneys would not deliberately breach this significant provision of the Indiana Code of Professional Responsibility, we can only conclude that they must be unaware of the provisions. The purpose of this opinion is to alert the Bar to its requirements so that in the future a violation which prior hereto might have been regarded as unintended will in the future be regarded as intentional and treated as such.

Recently an attorney called a press conference in his office attended by representatives of the print, broadcast and television media to announce that they would seek a federal investigation of a local arrest charging that deliberate acts of perjury were committed when a detective swore out a probable cause affidavit for the arrest.

The attorney also announced that his clients would file suits against those responsible for the arrests seeking civil damages. The attorney stated his client had taken and passed a polygraph test clearing her of any wrongdoing and that the prosecutor refused to allow an investigating police officer to take a similar test implying thereby that he lacked veracity. The attorney concluded that his client was therefore not guilty.

All of the above were in clear violation of DR 7-107(G) which provides as follows:

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
(5) Any other matter reasonably likely to interfere with a fair trial of the action.

It is hoped that the dissemination of the opinion will cause all attorneys to consider the requirements of the Disciplinary Rules before engaging in these prohibited forms of publicity which demean the profession, interfere with the administration of justice, and tend to pre-dispose possible jurors toward their client's side of a legal controversy to be solely decided upon the basis of the facts proved in court, rather than seen or heard in the media.
The Legal Ethics Committee of the Indiana State Bar Association has been asked to render its opinion on whether or not DR 7-107(G) is violated when extrajudicial statements are made after a trial, jury verdict, and judgment but while a case is pending on appeal.

Canon 7 states that a lawyer should represent a client zealously within the bounds of the law. The accompanying disciplinary rule, that being DR 7-101, et seq., amplifies on the meaning of "bounds of the law." More specifically, DR 7-107(G) states:

"A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making extrajudicial statements, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action."

In only one reported case has an attorney been held to have violated DR 7-107(G), and in that case, the attorney made the extrajudicial statement while the case was on appeal. This was In The Matter of Crumpacker, (1978) Ind. 383 N.E. 2d 36. This matter involved several violations of disciplinary rules, which violations had arisen during Crumpacker's representation of a client in a civil action who wanted some land rezoned for a mobile home park. During litigation with some property owners, Crumpacker's client filed a Motion to Strike his appearance. After the case was up on appeal, Crumpacker filed a one-hundred-page brief in support of his objection to the Motion to Strike,
and he sent copies of the brief to over eighty attorneys who were not involved in the case. In the brief, Crumpacker alleged a conspiracy by one of his former law partners and by his former client to defraud the Court and the public.

The Court stated:

"It appears that Respondent's intent was to have much matter communicated generally among the Bench and Bar. Sending such a document to over 80 individuals reasonably suggests an intent for public dissemination, and we conclude that these extrajudicial statements were made in such a manner that a reasonable person would expect them to be disseminated by means of public communication.

"Accordingly, this Court holds that Respondent made extrajudicial statements in a pending civil case concerning evidence regarding the occurrence or transaction involved, the character or credibility of the parties, witnesses and prospective witnesses, his opinion as to the merits of claims and concerning matters reasonably likely to interfere with a fair trial. In so doing, Respondent violated the Disciplinary Rules 7-107(G)(1), (2), (4), and (5); 1-102(A)(1), (5), and (6)."

Crumpacker was held to have violated DR 7-107 even though his comments were made after judgment had been rendered in the original lawsuit.

The case does not speak to the issue of whether a judgment resulting from a jury trial and verdict would result in a different rule from a judgment at a bench trial. However, the reason for the rule would not suggest a different standard.

This right ought not vary between jury trials and bench trials as there is no reason to impose a less stringent standard on extrajudicial statements following a jury trial than a Court trial.

In conclusion, the fact that a judgment has been rendered and that the case is on appeal does not relieve an attorney from his responsibility to refrain from making extrajudicial statements.
Lawyers A, B, C, and D have shared office space in the past but have never been partners. They have held themselves out as partners on their letterhead, the telephone directory, and the like. Lawyer A is now retired. They inquire whether they can continue to practice law under the name of A, B, C, and D if the legend "Not a Partnership" appears whenever the firm name is used.

Disciplinary Rule 2-102(C) clearly states that:

A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

A, B, C, and D have been violating this Disciplinary Rule in the past. If the legend "Not a Partnership" appears wherever the name A, B, C, and D is used, that is, on letterheads, the door to the office, professional cards, professional announcements, and the like, it is the opinion of the Committee that there would be no violation of this Rule if the legend is printed in type size adequate to avoid misleading the public.

Disciplinary Rule 2-102(B) states in part that:

A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such a name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that ... if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more ... retired members of the firm ... .

Because A, B, C, and D have never been a law firm, lawyer A is not a "retired member of the firm"; therefore, his name may not be used even in connection with the legend "Not a Partnership."
The Committee has been asked whether a deputy prosecutor for misdemeanors in one city court may properly also serve as a salaried legal advisor to the judge of another city court and may work "in a special capacity doing legal and non-legal work for the latter judge."

For the attorney to serve as deputy prosecutor in one city court and also as salaried legal advisor or working in a special capacity doing legal work for the judge of another city court would violate Canon 9 of the Code of Professional Responsibility which states that "a lawyer should avoid even the appearance of professional impropriety."

The Committee is unable to express an opinion concerning whether the lawyer may do non-legal work for the judge of the other city court because the Committee does not know the nature of that work.
The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following question:

Whether it is unethical for an Indiana attorney who practices criminal defense law to serve as a Judge Pro-Tem or Special Judge in criminal cases in the Court or Courts where he serves as defense counsel.

The question presented has not been the subject of a previous opinion by this Committee. There is a long line of Indiana Ethical Opinions which limits the conduct of prosecuting attorneys. For example, a prosecuting attorney may not appear as defense counsel in criminal cases even in the Courts where he never appears as prosecuting attorney (Opinion No. 12 of 1963).

There is an ethical prohibition against an associate or office sharing attorney from appearing on the opposite side of a criminal case from his office sharing associate who is a prosecuting attorney (Opinion No. 2 rendered in 1972).

A partner or an associate of a prosecuting attorney or a deputy prosecuting attorney cannot ethically represent a person accused of a crime even though the prosecutor or deputy prosecutor with whom he shared office space was not involved in the particular case.

Likewise, judges, part-time judges and their associates are ethically limited.

Opinion No. 1 of 1974 determined that a part-time city judge and his law partner who was a referee could not practice criminal law in other courts.

It has also been held that partners and associates of a part-time city judge may not practice in that city court even when their partner or associate disqualifies himself in every instance and makes no docket entries in their cases. In such a situation, there is a conflict of interest so compelling that the part-time city judge's partners and associates should not appear in the judge's court before the Judges Pro-Tem or Special Judges. This rationale suggests that a Judge Pro-Tem or Special Judge is an extension of the regular Judge.

From this line of cases, it is clear that there are special considerations which restrict the conduct of prosecuting attorneys and judicial officers. The special considerations clearly stem from the fact that prosecuting attorneys are an arm of the State of Indiana and judicial officers must be unquestionably impartial. Defense attorneys, on the other hand, are not subject to the same
limitations. Defense attorneys represent a multitude of separate clients and are no more the subject of special ethical considerations than corporate, personal injury or bankruptcy attorneys.

Serving as a Judge Pro-Tem or Special Judge has long been viewed by Indiana attorneys as a public service. The token remuneration received by a Judge Pro-Tem or Special Judge is insufficient for him or her to preside with regularity. Eliminating "defense attorneys" categorically from serving as Judges Pro-Tem or Special Judges in criminal cases would subject the prosecution and defense, not to mention the Defendant, to a forum of uncertainty and inexperience.

Some guidance is afforded by Formal Opinion 161 of the Committee on Professional Ethics of the American Bar Association. That Opinion is summarized in *Opinions on Professional Ethics* in this language:

"It is not unethical for a special judge or a judge pro tem to practice law in the court over which he temporarily presides, in matters not connected with his service as special judge, where such is contemplated by the judicial system of his state."

This Committee adopts that statement.

What recourse then is available if a Judge Pro-Tem or Special Judge evidences conduct which is biased? The Code of Judicial Conduct and Ethics promulgated by the Indiana Supreme Court and adopted on March 8, 1971, since entitled "The Indiana Code of Judicial Conduct" sets forth numerous canons for Judges. In paragraph B of the section entitled "Compliance with the Code of Judicial Conduct" is found the following pertinent language:

B. Judge pro tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

By inference, all other sections of the "Indiana Code of Judicial Conduct" apply to Judges Pro Tempore.

Canon 1 states "A judge should uphold the integrity and independence of the judiciary."

Canon 2 states "A judge should avoid impropriety and the appearance of
impropriety in all his activities."

Canon 3 states "A judge should perform the duties of his office impartially and diligently."

In the event a Judge Pro-Tern or Special Judge fails to carry out the duties of the office consistent with the Indiana Code of Judicial Conduct, strict disciplinary action, including disbarment, may follow. See In Re Tabak, 226 Ind. 271, 57 Ind. Dec. 350, 362 N.E. 2d 475 (1977) and In Re Wireman, Ind. 59 Ind. Dec. 317, 367 N.E. 2d 1368 (1977), cert. denied, 436 U.S. 904, 98 S. Ct. 2234, 56 L. Ed. 2d 402 (1978). Both cases illustrate the fact that the Indiana Code of Judicial Conduct is more than an aspirational code written merely for public consumption. The above disciplinary actions demonstrate that the Indiana Code of Judicial Conduct and the Code of Professional Responsibility apply simultaneously when a Judge Pro-Tern or Special Judge is guilty of improper conduct which touches on his judicial conduct and his practice as an attorney. Where a Judge Pro-Tern or Special Judge conducts himself on the bench in a manner having no connection with his practice as an attorney, the Indiana Code of Judicial Conduct controls exclusively.

Other controlling sections of the Code are:

Section A "Adjudicative Responsibilities":

1. A Judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

3. A Judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, Court officials, and others subject to his discretion and control.

Section B "Administrative Responsibilities":

3. A Judge should take or initiate appropriate disciplinary measures against a Judge or a lawyer for unprofessional conduct of which the Judge may become aware.

4. A Judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.
Section C "Disqualification":

(1) A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

In the event a Judge Pro-Tern or Special Judge acts in any manner inconsistent with the Indiana Code of Judicial Conduct, direct action should be taken against that person based on the Indiana Code of Judicial Conduct and the Code of Professional Responsibility. In the event a Judge Pro-Tern or Special Judge is repeatedly appointed after such misconduct is evident to the appointing judge, it is clear from language defining "Administrative Responsibilities" that the appointing judge is not without responsibility for the continued misconduct.

The inquiry presenting the question comes from a prosecuting attorney. His letter states in part "We are faced with situations where defense lawyers sitting as judges acknowledge that they are turning people free regardless of the law." This Committee is prohibited by the Indiana State Bar Association Bylaws from conducting investigations and giving opinions on disputed facts; therefore, the Committee is not authorized to determine the accuracy of the prosecutor's statement. If his statement is true, then those judges have violated DR 1-102(A)(5) which states that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." If the prosecutor's statement is true, then DR 1-103(A) is invoked requiring that "a lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." The Disciplinary Commission of the Supreme Court of Indiana is of course empowered to investigate or act upon such violation.

In summary, there is no ethical prohibition against a defense attorney serving as a Judge Pro-Tern or Special Judge in the courts where he or she practices as defense counsel. If, however, misconduct is evident in the Judge's performance, he or she is subject to disciplinary action to enforce the Canons set forth in the Code of Professional Responsibility and the Indiana Code of Judicial Conduct.