



Committee on Professional Ethics

Opinion #234 - 3/17/72 (3-72) Topic: Conflict of Interest.
Appearance of Impropriety.
Modified by 544

Digest: Part-time town attorney may practice criminal law privately if he or his assistants exercise no criminal responsibilities

Code*: EC 9-2; 9-6.
DR 5-105(D)

QUESTION

May a part-time town attorney represent private clients in criminal proceedings in courts other than the town court of the town for which he is town attorney?

OPINION

In the event a part-time town attorney or any member of his staff exercises responsibility with respect to criminal proceedings on behalf of the town, a part-time town attorney may not represent private clients in criminal matters in any court, as acting as a prosecutor one day and as defense counsel another gives rise to the appearance of professional impropriety. N.Y. State 184 (1971). The relationship between a town attorney and his assistants are such that neither the town attorney nor any assistant may accept professional employment which either of them cannot properly accept. N.Y. State 203 (1971); DR 5-105(D).

In the event a part-time town attorney has no statutory or other jurisdiction with respect to criminal proceedings on behalf of the town, a part-time town attorney would not give an appearance of impropriety, and may therefore, represent private clients in criminal matters, except before a town justice in the town he represents or where a violation or construction of an ordinance of such town is involved.

The more difficult question is the situation where by statute, ordinance or resolution a part-time town attorney is granted authority in criminal matters but by custom and long standing practice does not make use of such power. In such situation the opportunity of the appearance of conflict between prosecutorial responsibilities on behalf of the People and defense duties on behalf of defendants in a criminal proceeding are substantially reduced, if not entirely

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eliminated. Thus, if there is not even the appearance of professional impropriety, such conduct would not be prohibited. EC 9-2; EC 9-6.

However, whether a town attorney or any other town officer can waive duties imposed by statute, ordinance or resolution upon a town attorney and whether in the first instance statutes impose criminal duties upon the town attorney are questions of law upon which this Committee does not pass. E.g., Town Law Sec. 20(2)(a).

A town attorney practicing in accordance with this opinion should be cautious in any case he undertakes that there are no other elements of conflict of interest which might create the appearance of impropriety.
