



Committee on Professional Ethics

Opinion #315 - 12/18/73 (41-73)

Modified by 544

Topic: Town attorney holding
position as public defender

Digest: Part-time town attorney may hold position as part-time public defender if he has no duties of prosecution, does not represent clients in court of the town he represents, and no violation or construction of town ordinance is involved

Code: DR 5-105(A)
Canon 9

QUESTION

Is it proper for a lawyer to hold both the position of Town Attorney and County Public Defender?

OPINION

Since this Committee does not pass on questions of law, it is assumed for the purpose of this opinion that both positions are part-time and that there is no legal obstacle to a lawyer holding the positions of County Public Defender and Town Attorney. See, 68 Op. Atty. Gen. 35; Op. State Compt. 69-100.

It has been held a number of times that a part-time town attorney may practice criminal law without conflict of interest or appearance of impropriety if (1) he has no statutory or other responsibility for prosecution of criminal proceedings on behalf of the town or duties closely related thereto, (2) he does not represent private clients before a town justice in the town he represents, and (3) a violation or construction of an ordinance of that town is not involved. N.Y. State 234 (1972); ABA Inf. 1045 (1968); ABA Inf. 1111 (1969); ABA 34 (1931).

The same rule is applicable to the practice of law as a public defender. It would not be proper for the same individual to serve both as village attorney and as public defender if his employment includes the duty of prosecuting. N.Y. State 23 (1965). If, in the present case, the town attorney by statute, ordinance, or resolution does not have any duties as a prosecutor or those closely related thereto, there would be no inherent conflict in the duties of the two positions, and it would not be improper for him also to hold the position of public defender.

But such practice would be subject to the same limitations as the private practice of criminal law, i.e., the public defender should not represent criminal clients before a town justice of the town he represents or when the violation or construction of an ordinance of

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that town is involved. Such a representation would constitute a conflict of interest and create an appearance of impropriety.

It is not the function of this Committee to advise how a part-time public defender shall meet his obligations in this or any other case where a conflict of interest may arise. The problem should be resolved by such arrangement, in the light of the high responsibility resting on the Bar to defend indigent persons, that there shall be no impropriety or appearance of impropriety in such a situation. See, N.Y. State 33 (1966); DR 5-105(A); Canon 9; Edelman v. Levy, 42 A.D. 2d 758, 346 N.Y.S. 2d 347 (2nd Dept. 1973).
