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Committee on Professional Ethics

NYSBA

Opinion #544 - 6/8/82 (10-82)

Modifies N.Y. State 184 (1971), 234 (1972), 257 (1972), 315 (1973), 367 (1974), 427 (1976).

Clarified by 564 (1984)

Topic: Conflict of interest; disqualification; criminal practice; part-time public official or employee (prosecuting attorney).

Digest: Guidelines for acceptance of criminal defense matters by part-time local government attorneys. Attorney may in specified situations undertake criminal defense work.

Code: EC 5-14, 9-2, 9-6; DR 5-105, 9-101.

QUESTION

May a part-time attorney for a local governmental unit practice criminal law?

OPINION

It has been the opinion of this Committee that an attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state. N.Y. State 184 (1971), citing: N.Y. State 171 (1970), 152 (1970), 130 (1970), 99 (1968), 82 (1968), 52 (1968), 40 (1966), 149 (1970); ABA 16 (1929), 30 (1931), 34 (1931), 77 (1932), 118 (1934), 142 (1935); ABA Inf. 1045 (1960); Drinker, "Legal Ethics" p. 118; see also N.Y. State 367 (1974), 257 (1972). In addition, we have held that even if such an attorney has no statutory or other responsibility to prosecute criminal proceedings on behalf of his locality, he may not act as defense counsel in cases which require an appearance before an official of the locality or involve a violation or construction of a local ordinance. N.Y. State 234 (1972), N.Y. State 315 (1973), N.Y. State 427 (1976).

Our opinions in this area cite, and no doubt were heavily influenced by, ABA 34 (1931). It was there stated:

> "If the duties of the City Attorney or of his assistants include the prosecution in any court of offenders against criminal statutes or municipal ordinances, which is the case in some states, this duty would make it improper for any of them to defend any person accused of crime, during their tenure of an office which makes any of them a prosecutor. This would extend to the defense of all criminal cases whether within the scope of his prosecution duties or not . . . .
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> "If the City Attorney's duties and those of his assistants

> are entirely of a civil character as advisors to the municipality, including the conduct of civil litigation to which the city is a party, and if he is not required to defend the accused in any court in which a city official performs the duties of judge or magistrate, we find no objection to his conducting the defense of criminal cases."

Code support for this prohibition is based on DR 5-105, DR 9-101, EC 5-14, EC 9-2 and EC 9-6. The theory is that "since a prosecutor represents the people of the state, it is improper for him to represent individual clients charged with criminal violations." And, "[a]cting as prosecutor on one case on one day, and appearing the next day even in a different court representing a private citizen who had been charged with a criminal act or violation of law would give rise to an appearance of improper conflict of interest." N.Y. State 184 (1971).

Part-time local attorneys charged with the responsibility of prosecuting violations of local ordinances in local courts do not agree that they represent "the people of the state," at least in the sense that that term is ordinarily used to describe the district attorney, and question the existence or appearance of a conflict when they simultaneously represent a defendant charged with a felony in the Supreme Court. They are supported in this view by ABA Inf. 1045 (1968) which, drawing a distinction between "crimes in the commonly understood sense" and ordinance violations "such as parking tickets violations and violations of the city's housing and building codes and zoning and similar ordinances," explains that the American Bar Association committee did not intend the prohibition in ABA 34, supra, to apply if:

> "(1) the ordinance violations as to which the city attorney acts as prosecutor are of an entirely different character from the criminal charges to which he acts as defense counsel, (2) the criminal charges as to which he acts as defense counsel do not involve the city or its ordinances or officials, (3) the types of investigating officers (city officials, law enforcement officers) involved in the prosecution and defense matters are entirely different, (4) the city attorney does not represent city residents as defense counsel in criminal matters, and (5) the city attorney's conduct in that capacity has no impact outside of the city's own limited jurisdiction." Accord: ABA Inf. 1285 (1974)

In New York, there is statutory support for the proposition that

a part-time local attorney, insofar as he prosecutes violations of local law, acts on behalf of the people of the state. To commence a criminal action, an accusatory instrument must be filed with a criminal court (CPL, §100.05); village, town and city courts qualify as criminal courts (CPL, §10.10[3]); and an accusatory instrument, regardless of the person designated therein as accuser, constitutes an accusation on behalf of the state as plaintiff and therefore must be entitled "the people of the state of New York" against a designated person, known as the defendant (CPL, §1.20[1]). Thus, even local prosecutions, if initiated by the filing of an accusatory instrument, must be brought in the name of the people of the state. This relationship between the local prosecutor and the people of the state has added meaning for village attorneys in less densely populated areas of the state; by statute, they may not presume to prosecute local offenses unless authorized by resolution of the village board and "designated as an assistant district attorney, as provided by law, to prosecute in the name of the people of the state of New York" (Village Law, §20-2006[2]). (Village attorneys of villages within a county having a population of more than one million inhabitants and adjacent to a city having a population of more than one million inhabitants are treated somewhat differently. They too may prosecute only if authorized by resolution of the village board, but once authorized, may prosecute in the name of the people of the state without being designated as an assistant district attorney (Village Law, §20-2006[2-a]).)

Nevertheless, notwithstanding even a designation as an assistant district attorney, part-time local prosecutors do not regard themselves as an arm of the district attorney's office. Nor in our opinion should they if the designation is a mere formality as it is, no doubt, in most instances. This is a fact recognized in the cases which have considered the extent of the district attorney's duty to prosecute. By statute, it is the "duty" of every district attorney to prosecute all "crimes and offenses" cognizable by the courts of the county in which he serves (County Law, §700[1]). But the word "duty" is construed not so much to require action as to preserve the right to act when sound discretion dictates (Matter of Johnson v. Boldman, 24 Misc. 2d 592, 594 (1960)). The Legislature did not intend "that every time a rabbit be snared or a frog speared after dark that the heavy artillery of the offices of the Attorney-General or the district attorney be wheeled into action" (People v. Black, 156 Misc. 516, 519 (1935)). This construction of the district attorney's "duty" to prosecute is made in deference to a long-established and accepted procedure and practice, which today has the force of law, to have the prosecution of offenses in the lower courts conducted by local authorities, such as the police, State troopers, regulatory investigators, and

even counsel for complaining witnesses as well as local attorneys (People v. Wyner, 207 Misc. 673, 675, 677 (1955); Matter of Johnson v. Boldman, supra, at 594).

It is therefore recognized that, as a matter of custom, many district attorneys routinely refuse to appear in proceedings involving violations of local law. As they assert no interest in such matters, we perceive no conflict when they are opposed by attorneys who do. The conflict, if such it be, is neither real nor apparent, but, arising as it does entirely by reason of a statutory requirement that even local prosecutions be brought in the name of the people of the state, is one in name only. We do not see why an ethical rule should be derived from a statutory requirement which is at odds with a prevailing custom which itself has the force of law.

There is no reason to suppose, however, that the custom is uniform throughout the state. There are some localities where the district attorney can be expected to prosecute at least some violations of local law. Should such a district attorney depart from his usual practice and exercise his discretion to decline prosecution of a particular local matter, the local attorney who is then called upon by concerned local authorities to take up the prosecution would be performing the duties normally expected of the district attorney. An argument can be made that, under these circumstances, the local attorney's designation as an assistant district attorney is more than a mere formality, and he should not therefore be permitted to appear as defense counsel in a case prosecuted by the district attorney.

Nevertheless we are of the opinion that it would be unfair to permit the private practice of criminal law by part-time local attorneys who regularly prosecute violations of local law while prohibiting it by those who prosecute such violations only occasionally and sporadically. For purposes of setting forth guidelines as to when such a practice is permissible, a more certain standard is required than the variable customs and habits of the numerous district attorneys throughout the state. Line drawing is necessary.

We perceive that line to be the laws of the state itself. The local prosecutor cannot be regarded as local when his responsibilities, statutory or customary, include prosecution of any offenses designated as such by the Penal Law or other statute of the State of New York. These offenses are truly against the welfare of the people of the state as a whole as distinguished from the "municipal welfare" (Matter of Coleman v. Lee, 1 Misc. 2d 685, 686-87 (1956)). Given the responsibility to prosecute any such offense, it is our

opinion that a part-time local attorney should not engage in the private practice of criminal law even if it is the custom of the district attorney to decline prosecution of that very offense. For example, part-time local attorneys responsible for prosecuting offenses designated as such by the Vehicle and Traffic Law may not act as defense counsel in cases prosecuted by the district attorney even if the latter customarily declines to prosecute offenses thereunder.

Further, being a representative of his locality, the local prosecutor should not permit himself to be seen as representing an interest adverse to that locality. He should therefore not undertake a matter which would require him to appear before a judicial or other official of the locality, or which involves the locality or a violation or a construction of one of its ordinances. N.Y. State 234, N.Y. State 315, N.Y. State 427, supra. Nor should he put himself in a position where it would be his duty, on behalf of one of his private clients, to contend for something which his duty to the locality would require him to oppose; thus, he should not undertake in another locality defense of matters similar to those which it is his responsibility to prosecute in his own locality. ABA Inf. 1045, supra; see N.Y. State 99 (1969). Finally, the investigating officers and law enforcement officers involved in the prosecution and defense matters must be entirely different. ABA Inf. 1045, supra.

We would state the rule as follows:

> A part-time local attorney may undertake a criminal defense without conflict of interest or appearance of impropriety if (1) his statutory or other responsibility to prosecute criminal proceedings on behalf of the locality does not require him, in any case, to prosecute any crimes or offenses designated as such by the Penal Law or any other law enacted by the Legislature of the State of New York, (2) the defense does not require him to appear before a judicial or other official of the locality he publicly represents, (3) the local government unit by which he is employed, or a violation or a construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor.

For the foregoing reasons the question posed is answered in the affirmative, to the extent indicated.
