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**Committee on Professional Ethics**



Opinion 616 - 1/29/91 (31-90)

Topic: Part-time assistant district attorney; police officer.

Digest: Police officer should not also serve as part-time prosecutor.

Code: DR 5-101(A), 9-101(C);  
EC 5-2, 7-13, 8-8, 9-1.

**QUESTION**

May a lawyer be employed as a part-time district attorney while simultaneously serving as a full-time police officer in another county?

**OPINION**

As a public officer and representative of government vested with special powers and privileges, *see Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor has a special, quasi-judicial role. The Supreme Court described that role in *Berger v. United States*, 295 U.S. 78, 88 (1935):

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

The precept that a prosecutor's duty is "to seek justice, not merely to convict," is embodied in EC 7-13 of the Code.<sup>1</sup> *See also Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

The public's perception and assessment of the prosecuting attorney must therefore be maintained at the highest possible level. Correspondingly: "Police officers enjoy unique positions in their communities and should not undertake any outside work which might detract from their public image and that of the police department as a whole." 1985 Op. Atty. Gen. (Inf.) 85-45, at 1081. If the

<sup>1</sup> Analogous provisions can be found in the Commentary to Rule 3.8 of the ABA's Model Rules of Professional Conduct and in Canon 5 of the 1908 Canons of Ethics.

roles are combined, there is a significant risk that the public will assume that the lawyer is able to, and does, use the power and prestige of one public position, and the personal and political contacts and other relationships developed in that position, to obtain an unfair advantage in the performance of the lawyer's duties in the other public post.

These deleterious effects on the public perception of the integrity of the law enforcement system should not be countenanced. In our view, the interests in maintaining public confidence in the impartiality and objectivity of law enforcement agencies, and in minimizing the appearance of exploitation of the prestige of public offices, would be disserved by the proposed dual employment. *Cf.* DR 9-101(C); EC 8-8, 9-1. *See generally* N.Y.State 526 (1980) (part-time assistant district attorney may not also serve as probation officer); Illinois Op. 119 (1955) (police officer should not also serve as part-time prosecutor); Arizona Op. 74-25 (1974) (prosecutor should not also serve as private security officer).

An additional objection to the proposed dual employment is that it would impair the lawyer-prosecutor's exercise of professional judgment in violation of DR 5-101(A). The likelihood that the two roles will overlap and create conflicts of interest is substantial, and is not attenuated by the fact that different counties are involved. For example, the lawyer may be called upon to assist as police officer in an investigation or arrest of a suspect who is ultimately tried by the district attorney who employs him, or to participate in the prosecution of a matter involving assistance or testimony by members of his own police department.<sup>2</sup>

These conflicts cannot, as a practical matter, be averted by the implementation of prophylactic procedures such as those discussed in Virginia Op. 1213 (1989). That opinion held that a part-time prosecutor could represent criminal defendants in another county provided the defendant and the witnesses involved in the defense case had no connection or prior relationship with either the lawyer-prosecutor or the county in which the lawyer served.

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<sup>2</sup> Such multi-jurisdictional cases -- involving joint or cooperative investigations in both counties, or police work in one county and prosecution in another -- could arise in a variety of situations, including (i) where elements of a crime have been committed in both counties, (ii) where a conspiracy is formed in one county and an overt act in furtherance of that conspiracy is committed in the other, (iii) where a criminal act in one county has effects in the other, (iv) where the offense committed in one county was an attempt to commit a crime in the other, or (v) where police officers in one county are called upon to assist in the pursuit or arrest of a suspect to be charged with criminal activity in the other. *See* N.Y. Crim. Proc. L. § 20.40.

Unlike the criminal defense situation discussed in Virginia Op. 1213,<sup>3</sup> the police officer will not be able to assess in advance the identity of the defendant or potential witnesses in a particular case. It will ordinarily be impossible for the lawyer to know whether the person arrested has ties to the county in which the lawyer serves as prosecutor, or whether the witnesses in the case are persons with whom the lawyer had contact as a prosecutor, such as other law enforcement officials. This significant and unavoidable risk of conflict of interest requires that the lawyer avoid serving simultaneously as a prosecutor and a police officer. See EC 5-2.

This Committee is authorized only to consider questions of professional ethics, and does not render opinions on questions of law. We reach the conclusions set forth here irrespective of whether a police officer would be permitted, as a matter of law, to accept outside employment as a prosecutor.<sup>4</sup>

### CONCLUSION

The question posed is answered in the negative. A lawyer may not ethically combine the duties of prosecutor and police officer.

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<sup>3</sup> It should be noted that this Committee disagrees with the premise on which Virginia Op. 1213 is based, and fully adheres to its prior opinions stating that it would be unethical for a police officer to defend criminal cases in any jurisdiction. See N.Y. State 615 (1991); N.Y. State 435 (1976); N.Y. State 397 (1975); see also Kentucky Op. E-137 (1976). We nevertheless believe that the conditions discussed in Virginia Op. 1213 provide useful guidance here, and lend further support to our conclusion that the proposed dual employment would be improper.

<sup>4</sup> See generally *Flood v. Kennedy*, 12 N.Y.2d 345 (1963); *Matter of Geberth v. Augustine*, 143 A.D.2d 910 (2d Dep't 1988), leave to appeal denied, 74 N.Y.2d 601 (1989); N.Y. Gen. Mun. L. §§ 208-d et seq.; 1985 Op. Atty. Gen. (Inf.) 85-45.