

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 657 (48-93)

Topic: Conflict of interest; disqualification; criminal or civil practice by part-time municipal lawyer

Digest: Part-time attorneys for municipalities, regardless of title or actual responsibilities, may not undertake criminal defense work before courts of same locality; there is no per se prohibition on the representation of private clients in civil matters.

Code: EC 5-1, 5-14; DR 5-105(C)

QUESTIONS

(1) May an attorney retained by a township for particular matters, whose duties do not include representation of the Town in connection with local code enforcement (i.e., prosecution involving local codes, laws and/or ordinances) represent defendants in criminal cases before the local Town Justice Court?

(2) May such an attorney represent either plaintiffs or defendants in civil actions in the local Town Justice Court?

(3) May a lawyer who has contracted with a Town to serve as Deputy Counsel to the Town to prosecute (for purposes of plea negotiation) all infractions in violation of the New York State Vehicle and Traffic Law venued in the Town represent criminal defendants outside the Town?

OPINION

In N.Y. State 544 (1982), this Committee held that a part-time municipal attorney "should not permit himself to be seen as representing an interest adverse to that locality. He should therefore not undertake the 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 construction of one of its ordinances." That opinion enumerated five criteria which if met would permit a part-time local attorney to undertake a criminal defense matters.

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 or 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.

N.Y. State 544, at 5. The second of these five criteria, that "the defense does not require him to appear before a judicial or other official of the locality he publicly represents," is applicable to the first question above which must be answered in the negative. The prohibition on the lawyer/part-time public official's appearance in the courts of the locality engaging the lawyer, flows from representation of the "locality," not from the particular type of representation undertaken on behalf of the locality. EC 5-1. Status as an "independent contractor," for example, is nevertheless professional employment within the meaning of the Code, which creates the attorney-client relationship. *Cf.*, N.Y. State 580, at 4-5 (1987) (ad hoc relationship of counsel with municipality creates lawyer-client relationship even if non-litigious). Thus, local part-time attorneys for municipalities, regardless of their title or actual responsibilities, may not undertake criminal defense cases pending before judicial officers of the same locality, notwithstanding their ability to handle such matters in other courts of the State. N.Y. State 234 (1972) (as modified by N.Y. State 544).

The second question, with respect to civil representation, turns upon identifying a real or reasonably apparent conflict with the inquirer's status as a part-time public official. For example, the lawyer cannot represent private clients in civil cases where the town is a party or in cases involving the interpretation or validity of town ordinances. *See, e.g.*, N.Y. State 580 (1987); N.Y. State 470 (1977); N.Y. State 218 (1971). There is, however, no blanket prohibition on the representation of private clients in civil cases in the Town Court.

The third question also is governed by N.Y. State 544. We interpreted the first of the five criteria imposed in N.Y. State 544 as follows: "[P]art-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." Thus, if the lawyer's responsibilities as Deputy Counsel include prosecuting violations of the New York State Vehicle and Traffic Laws, the lawyer is precluded from representing, in criminal cases, a defendant in any court of the State. The fact that the lawyer only negotiates settlements and is not permitted to do trial work does not avoid the prohibition, because the lawyer is acting as a prosecutor of a "case" which is "before" the court.

New York State 564 (1984) is not to the contrary. That opinion exempted, under certain circumstances, Special District Attorneys from compliance with the guidelines set forth in New York State 544. Unlike a position as Deputy Counsel to a town, however, the position of Special District Attorney is usually created for a single case, is created only under circumstances where the regular district attorney cannot serve because of a disqualifying conflict of interest, N.Y. County Law §701, and is subject to careful scrutiny by the courts. See, e.g., *Matter of Shumer v. Holtzman*, 60 N.Y.2d 46, 53, 55-56 (1983), discussed in N.Y. State 638, at 8-9 (1992) . We have since described N.Y. State 564 as a *sui generis* exception. N.Y. State 580, at 4 (1987). Thus, New York State 564 does not apply in the case of a Deputy Town Counsel, who operates under an agreement of the kind specified above.

DR 5-105(C) permits a lawyer to represent multiple clients with differing interests only if each consents to the representation after full disclosure of the possible effect of the representation on the exercise of the lawyer's independent professional judgment and if it is obvious that the lawyer can adequately represent the interests of each client. Because the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public, consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client.

CONCLUSION

Subject to the qualifications stated above, the first question is answered in the negative, the second question is answered in the affirmative, and the third question is answered in the negative.

