



## Committee on Professional Ethics

Opinion 874 (7/20/11)

**Topic:** Part-time prosecutor's representation of criminal defendants in town courts

**Digest:** An attorney who represents criminal defendants in a town court may not accept a position as a part-time prosecutor of vehicle and traffic offenses.

**Rules:** 1.7(a) and (b)

### QUESTION

1. May an attorney who represents criminal defendants in town courts accept a position as a part-time prosecutor with respect to vehicle and traffic matters in a local justice court in the same county?

### OPINION

2. The inquirer represents criminal defendants in town courts and asks whether he could accept a position as a part-time prosecutor with respect to vehicle and traffic matters in a local justice court in the same county. He notes that there are only a small number of traffic tickets (about five to seven a month) in the local justice court.

#### **A. Is there a conflict of interest?**

3. It has long 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. In N.Y. State 544 (1982), we observed that "a part-time local attorney, insofar as he prosecutes violations of local law, acts on behalf of the people of the state." Because a prosecutor represents the people of the state, it is improper for the attorney to represent any individual client whom the people of the state have charged with a criminal violation. "Acting 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).

4. In N.Y. State 544, at 5, we elaborated on 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.

5. Absent satisfaction of the foregoing five qualifications, the part-time prosecutor is forbidden to undertake a criminal defense case anywhere in the State of New York. N.Y. State 544 at 1.

6. In N.Y. State 544 and again in N.Y. State 657 (1993), we specifically considered whether the responsibility to prosecute vehicle and traffic infractions caused the attorney to fail to meet the first qualification (his “responsibility to prosecute criminal proceedings on behalf of the locality does not require him ... to prosecute any crimes or offenses designated as such by ... the Legislature of the State of New York”) – and in both opinions we opined that the prosecutor failed that condition. In N.Y. State 657, which interpreted N.Y. State 544, we said that “if the lawyer’s responsibilities ... 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.” This prohibition is absolute.

7. The number of cases prosecuted each month is irrelevant. In fact, it is irrelevant whether a part-time prosecuting attorney actually prosecutes any offenses during the period in which he represents a criminal defendant so long as he has the responsibility to do so. As we said in N.Y. State 657, “The fact that the lawyer only negotiates settlements and is not permitted to do trial work does not avoid the prohibition ....” We have also noted that an “independent contractor” and other “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 657, *citing* N.Y. State 234 (1972) (as modified by N.Y. State 544). Thus, neither the attorney’s job title nor the attorney’s part-time status can overcome the absolute prohibition.

8. Furthermore an attorney’s defense of the criminal defendant would require the attorney to appear in other town courts. Thus, the attorney would fail to satisfy the second qualification in N.Y. State 544 as well (“the defense does not require him to appear before a judicial or other official of the locality he publicly represents”) because

the attorney would be appearing before a judicial official of the locality the attorney publicly represents.

9. We recognize that the opinions we have discussed here were decided under DR 5-105 and DR 9-101 of the New York Lawyer's Code of Professional Responsibility, which was superseded by the New York Rules of Professional Conduct on April 1, 2009. Nevertheless, the result is the same today. Rule 1.7(a)(1) provides, in relevant part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that ...:

(1) the representation will involve the lawyer in representing differing interests. ...

10. Rule 1.0(f), in turn, defines differing interests as follows:

"Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

11. Representing the state as a prosecutor and at the same time representing a criminal defendant, even in a totally unrelated case, would involve the attorney in representing "differing interests." Thus, the attorney has a conflict under Rule 1.7 unless it can be waived.

## **B. Can the conflict be waived?**

12. Former DR 5-105(C) provided for a waiver of the conflict with the consent of the affected clients. Specifically, in 1993, it permitted a lawyer to represent multiple clients with "differing interests" if each consented 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 was obvious that the lawyer could adequately represent the interests of each client. In N.Y. State 657, we concluded that the conflict addressed there, which involved a lawyer who prosecuted violations of Vehicle and Traffic Laws, could not be waived. "Because the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public," we said, "consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client." That conclusion is also true under Rule 1.7(b), as we will now discuss.

13. Rule 1.7(b), like DR 5-105(C), provides for a waiver of a conflict. Rule 1.7(b) provides:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

14. Despite the differences in language between DR 5-105(C) and Rule 1.7(b), we continue to believe that the role of the prosecutor and the criminal defense lawyer are “inherently incompatible.” Therefore, a lawyer who is both a prosecutor and a criminal defense lawyer will not “be able to provide competent and diligent representation to each affected client” as required by Rule 1.7(b)(1). Since that condition cannot be satisfied, the conflict is non-consentable. Client consent will not cure the conflict.

### **CONCLUSION**

15. An attorney who represents criminal defendants in a town court may not accept a position as a part-time prosecutor of vehicle and traffic offenses.

(23-11)