



Committee on Professional Ethics

Opinion #430 - 4/21/76 (23-76) Topic: Conflict of interest; Appearance of impropriety; Part-time County Attorney

Digest: Part-time county prosecuting attorney may not represent private client in civil litigation against county.

Code: DR 5-101(A),(B); 5-105(A); 8-101;
9-101
EC 5-14, 15; 7-13; 8-8; 9-1
Canon 9.

QUESTION

May a part-time County District Attorney, whose duties relate to criminal matters only, act as trial counsel for a private client in a civil action for damages against the county when there is a County Attorney who advises and assists the county in all civil matters, and the action will be defended by an attorney for the county's insurance carrier?

OPINION

It would not be proper for a part-time county prosecutor to represent a private client in a civil action for damages against the county. DR 5-105(A); EC 5-14; EC 5-15. The duty of a lawyer who occupies public office transcends that of the lawyer in private practice, for his special position not only may afford him access to confidential information in governmental files, but it also exposes him to the suspicion that he may be able to influence other representatives of the government. Even more important, however, is the impact such duality of representation would have upon the faith of the public that justice can be obtained through our legal system, confidence in which it is a lawyer's duty to promote. DR 8-101, 9-101; EC 9-1; EC 8-8; Canon 9.

The guiding principles are set forth in N.Y. State 392 (1975):

"Lawyers whose public employment is part-time find themselves in a position of special sensitivity. They should take particular care not to engage in activities or accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system, or which would give an 'appearance of impropriety even if none exists'. Cf. EC 9-3. Thus they must avoid private employment which might involve or give rise to suspicion that unfair influence may be involved either in the securing of private clients or in representing them against the state agency by which they are employed."

The fact that the prosecuting attorney has no civil authority and that there is a county attorney who handles civil matters does not militate against the applicability of these principles. As stated in N.Y. State 218 (1971), where it was held that a part-time prosecuting attorney employed by a city could not properly represent a private

litigant in a certiorari proceeding against the city:

"The crucial fact is that the prosecuting attorney's client is the city. It is improper for an attorney, at the same time that he represents a client, to sue that client in an unrelated matter on behalf of another. EC 5-15; DR 5-105(A), (B) and (C). Consent would generally be unavailing in such a situation; and, in addition, unavailing in this case since the city cannot give consent. N.Y.State 143 (1970)."

In N.Y. State 143 (1970), cited above, representation by a town attorney of a private client before an administrative agency of the town was held to be improper, because

"(h)is association with the municipality may make him privy to some information which could influence the outcome of the matter and correspondingly raise a question of confidence and trust."

See also, N.Y. State 292 (1973); N.Y. State 111 (1969); N.Y. State 110 (1969). Cf. N.Y. State 257 (1972).

The loyalty owed the county by its prosecuting attorney is no less because the county is represented in the civil action by an attorney for the insurance company. The client in the litigation is the county, not the insurance carrier. N.Y. State 73 (1968).

It has been held in a number of opinions that a municipality's attorney, who has no authority with respect to criminal matters, may defend private clients in criminal proceedings under certain circumstances. N.Y. State 315 (1973); N.Y. State 234 (1972); N.Y. State 149 (1970); ABA 34 (1931); ABA Inf. 1045 (1968). Cf. N.Y. State 278 (1973). But cf. ABA 186 (1938) contra. However, the defense of an individual charged with a crime can be distinguished from the representation of a claimant in an action for damages against a municipality. Although the criminal proceeding may be instituted in the name of the people, it is the duty of the prosecuting attorney to seek justice, not merely to convict. EC 7-13. Accordingly, the defense by a municipal attorney who has no prosecutorial jurisdiction is not detrimental to the interests of the municipality. On the other hand, a part-time county prosecutor, who represents a private client in an action for damages against the county, would act contrary to the county's interest and would be in violation of the principles enunciated in N.Y. State 392 (1975).
