



Committee on Professional Ethics

Opinion #444 - 11/10/76 (73-76)

Topic: Conflict of interest;
town attorney's partner suing
town

Digest: It is improper for a town
attorney to continue to
represent the town when
his partner brings a personal
action against the town

Code: EC 5-3
DR 5-101(A), 5-105(D)

QUESTION

May a lawyer who is town attorney continue to serve in this position if his partner brings a personal certiorari proceeding against the town in which both the town and his partner are represented by outside counsel?

OPINION

The town attorney is appointed for a statutory term of office (Town Law §24) and thus acts in a continuing capacity. This Committee has held that a part-time town attorney may not represent private clients before administrative agencies of the town because of possible conflicts of interest which cannot be waived by a municipality and because he may be privy to confidential information which could influence the outcome of the matter, N.Y. State 143 (1970); that a part-time prosecuting attorney may not represent a private client in a judicial proceeding against the municipality which employs him, N.Y. State 218 (1971); and that a member of a school board may not represent a property owner seeking re-assessment even though the interests of the school district are handled by the city assessor, N.Y. State 364 (1974).

The gravamen of these cases is that it is improper for an attorney, at the same time that he represents a client, to sue that client in behalf of another. This principle is no less applicable to the case of an attorney suing his own client in his own right. See EC 5-3 and DR 5-101(A).

Even if other counsel were to handle the certiorari proceeding, both the inherent conflict of interest as well as the appearance of impropriety would remain. Indeed, the apparent impropriety is sufficiently substantial to prevent the municipality from consenting to the proposed representation and no such consent could serve to render it ethically permissible. See N.Y. State 143, supra.

Since the town attorney may not simultaneously represent the municipality and sue it, his partners are similarly precluded by virtue of the provisions of DR 5-105(D). Thus, until the inquirer and his partners have ceased to represent the municipality, he must forego causing suit to be instituted against it.
