



## Committee on Professional Ethics

Opinion #450 - 12/13/76 (104-76)

Topic: Part-time town attorney;  
Conflict of interest.

Digest: Conditions under which  
part-time town attorney  
may represent clients in  
private matters which may  
potentially involve con-  
flict with municipality.

Code: Canons 4, 5 and 9  
DR 5-101; 5-105(C) and (D);  
7-101(A)(1) and (2);  
8-101(A)(1)  
EC 5-14; 6-1; 6-4; 7-1; 7-9;  
8-8; 9-2.

### QUESTION

May a part-time town attorney or his firm represent private clients in matters relating to the purchase and sale of real property within the town in which he holds public office, when the clients may be required to obtain building permits, zoning variances or other similar licenses or certificates from the town?

### OPINION

In N.Y. State 143 (1970) this Committee held that it would be improper for a part-time town attorney to represent private clients in matters before administrative agencies of the town. The opinion was premised on the possibility that the attorney's obligations to his private clients might conflict with his duty to protect the interests of the municipality and could also raise questions of confidence and trust if the attorney had acquired information in the course of his official responsibilities which could influence the outcome of the matter. Canons 4 and 5.

Although DR 5-105(C) permits an attorney to serve multiple clients having potentially differing interests with the informed consent of the parties, this exception is not available when a public body is involved. See N.Y. State 143, supra; N.Y. State 247 (1972); N.Y. State 322 (1973).

The instant inquiry involves a more remote possibility of conflict in that the part-time town attorney seeks to represent clients in private real estate matters, which typically will involve collateral proceedings with the municipality.

The fact that the attorney's clients may often be able to process applications for these licenses and variances by themselves may not be a sufficient solution to the potential ethical problems which could arise. It is foreseeable that some clients may encounter legal difficulties in securing necessary municipal permits and licenses. The best interests of a client may therefore require the assistance of counsel in dealing directly with the municipality.

DR 7-101(A)(1) states that "a lawyer shall not intentionally fail to seek the lawful objectives of his clients through reasonable available means permitted by law . . . ." Also see, EC 7-1, and 7-9. In such instances, the attorney's obligation under Canon 7 to represent his client may be impaired by his inability as a public official to represent his clients in municipal proceedings. Thus, an attorney may be faced with an ethical dilemma, resulting in part from the sensitive nature of his public employment.

In N.Y. State 392 (1975), this Committee made the following comments with respect to the role of part-time public officials:

"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."

Also see, EC 8-8; N.Y. State 435 (1976) and N.Y. State 111 (1969).

In determining whether or not to handle certain types of private matters, public officials should carefully consider the likelihood of a subsequent conflict with the municipality.

An attorney should not accept employment where his professional judgment and responsibilities to his client may be subject to conflicting influences and loyalties. EC 5-14. Recognizing in advance that consent will not be available if a conflict with the municipality should arise, a public attorney should carefully consider before accepting such representation whether he will be able to represent private clients competently or prudently under the circumstances. See, EC 6-1; EC 6-4, EC 7-1, EC 7-9 and DR 7-101(A)(1) and (2).

It may be possible for the attorney to negotiate a limited retainer with the client, wherein the client agrees that the attorney's representation will be limited to the private real estate contract and that outside counsel will have to be obtained by the client if representation before the municipality becomes necessary. If the client consents to this limited retainer upon full disclosure of all relevant facts, including the ethical constraints imposed upon the attorney, some of the problems hereinabove discussed, may be avoided. See, N.Y. State 333 (1974).

Public attorneys should also avoid situations where their professional services appear to be or are being secured as a means to influence municipal authorities or to obtain special consideration. See, N.Y. State 392, *supra*; N.Y. State 435 (1976); N.Y. State 292 (1973); N.Y. State 257 (1972); N.Y. State 430 (1976); Canon 9; EC 9-2. An attorney should not foster or condone conduct by his private clients which is designed to obtain special consideration in securing permits based on

the attorney's public office.

If the town attorney is unable to represent private clients by reason of the foregoing considerations, his partners and associates would similarly be disqualified. DR 5-105(D); N.Y. State 257 (1972).

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