



Committee on Professional Ethics

Opinion #482 - 4/10/78 (12-78)

Topic: Conflicting interests;
Town Attorney.

Digest: Member of law firm which represents client in litigation involving town may accept employment as part-time town attorney if town retains independent counsel with respect to matter in litigation or client consents to withdrawal of law firm and retains new counsel.

Code: Canons 5 and 9;
EC 5-14; 5-15; 8-8; 9-2;
9-6;
DR 5-105(A), (B), (C) and
(D).

QUESTION

May a lawyer accept an appointment as part-time town attorney while the law firm of which he is a member represents a client in litigation involving the town?

OPINION

In the opinion of the Committee, a lawyer tendered an appointment as a municipal attorney should be guided by ethical considerations which are different in some respects from those which have been held to apply to incumbent municipal attorneys.

Questions relating to the latter have been the subject of previous opinions, including N.Y. State 143 (1970), N.Y. State 257 (1972), N.Y. State 444 (1976) and N.Y. State 450 (1976). In N.Y. State 450, the conditions under which a part-time town attorney may represent private clients were discussed. It was stressed that a public attorney must be alert to the possibility of a subsequent conflict with the municipality by which he is employed if he were to accept the proffered private employment. He does not have available to him the exception contained in DR 5-105(C), which permits representation of multiple clients if each client can be adequately represented and gives consent after full disclosure. N.Y. State 143, supra, and the opinions cited in N.Y. State 450, supra. A public attorney must also take particular care to avoid the appearance of impropriety. See N.Y. State 392 (1975).

In contrast to the constraints respecting proffered employment which are placed upon an incumbent municipal attorney as well as a private lawyer by DR 5-105(A), the propriety of accepting public office although an existing client may have conflicting interests has been recognized. See, ABA 136 (1935) and Drinker, Legal Ethics

119 (1953); see also, Mich. Op. 73 (1941); indexed at 1247 Maru, Digest of Bar Association Ethics Opinions (1970). This implicit exception to DR 5-105(A) derives from the public's prevailing interest in being served by qualified public officers. See EC 8-8.

Once a lawyer accepts a position as part-time town attorney, he must be careful to avoid the possibility of conflicting interests and any appearance of impropriety. See, EC 8-8, EC 9-2, EC 9-6, DR 5-105(A) and (B); see also, Canons 5 and 9. All members and associates of the lawyer's firm are subject to and share the same ethical constraints. DR 5-105(D).

Although at a particular point in litigation, the interests of the town and those of the client may appear to, or do in fact, coincide, the possibility that the interests will diverge subsequently cannot be disregarded. Representation of multiple clients in litigation is seldom justified. See EC 5-14 and 5-15. As between a present client and a prospective client, it is the lawyer's duty not to allow the interests of the former to be adversely affected by those of the latter. DR 5-105(A).

These considerations lead inevitably to the conclusion that, if either the town engages independent counsel to represent its interests in the matter in litigation or the client voluntarily assents to withdrawal of the law firm and retains new counsel, there will be no ethical obstacle to acceptance by the inquiring lawyer of employment as town attorney. In either circumstances, the interests of the private client will have been adequately protected and any appearance of impropriety will have been avoided.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.
