



## Committee on Professional Ethics

Opinion #518 - 3/20/80 (9-80)

Topic: Public defender; private practice.

Digest: Part-time county public defender may represent private clients in litigation against county.

Code: EC 5-1, 8-8, 9-6;  
DR 4-101(B), 5-105(A).

### QUESTION

May a part-time county public defender represent private clients in civil litigation directed against the county by which he is employed?

### OPINION

We have recently received several inquiries relating to the question posed. Because there is no authority in this State which clearly answers the question, we have decided to issue a formal opinion.

The central concern of those who question the propriety of a public defender undertaking the proposed representation revolves about what they perceive to be a conflicting interest arising from the acceptance of a retainer for the purpose of suing one's own employer. See DR 5-105(A).

Whatever may be the rule in other contexts, however, we believe that the limited nature of the lawyer's public office does not require that he be disqualified from undertaking any litigation adverse to the county.

Thus, for example, in somewhat analogous circumstances, we held that while a lawyer retained by a county department of social services should be disqualified from representing private clients in matters relating to that department, he was not necessarily disqualified from accepting private retainers with respect to other matters involving the county. N.Y. State 447 (1976); see also, EC 5-1.

Similarly, in N.Y. State 484 (1976), we held that lawyer-members of a town's zoning board of appeals could practice before other agencies of the town, explaining:

"[W]e can find no basis upon which to apply a per se rule of disqualification to lawyer-members of municipal boards which would serve to preclude them from representing private clients before other agencies in matters unrelated to their public office. Indeed, there is much that would seem to compel a different rule. The Code, for example, reminds us that it is 'highly desirable' for lawyers to hold public office. EC 8-8. In this light, to disqualify lawyer-members of municipal boards from handling all matters involving agencies of the municipality in which they serve, without reference to the nature of their public office or private employment, would seem unduly restrictive and almost certain to discourage that which the Code expressly seeks to promote."

The ABA Committee on Ethics and Professional Responsibility likewise has recognized the limited basis of disqualification under similar circumstances, deciding that a lawyer who held an appointive public office within city government could "make claims against the city in fields which are not related to his office" provided there was no "violation of confidence." ABA Inf. 855 (1965).

Although analogies abound, the only published ethics opinion specifically on point is that of the Idaho State Bar Association which held that a county public defender may represent private clients in civil actions against the county. Idaho Op. 485 (1974) indexed at 8372, O. Maru, Digest of Bar Association Ethics Opinions (1975 Supp.). That opinion reasoned because the public defender's clients are indigents accused of crime, rather than the county, no conflict exists between the lawyer's public employment on the one hand and his private retainers on the other.

We agree with the reasoning of the Idaho opinion. Nevertheless, we would add that before it can be determined that there is no conflict between the two roles, it should also be demonstrated that the lawyer's public position provides him with no access to confidential information relevant to his private retainers. See DR 4-101(B); cf., EC 8-8 and EC 9-6. We are satisfied that, under normal circumstances, such is the case with part-time county public defenders.

For the reasons stated, the question posed is answered in the affirmative.

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