



Committee on Professional Ethics

Opinion #526 - 11/24/80 (46-80)

Topic: Part-time assistant district attorney; probation officer

Digest: Part-time assistant district attorney should not also serve as probation officer in same jurisdiction.

Code: Canons 5, 8 and 9
EC 8-8 and 9-3
DR 5-105(A)

QUESTION

May a lawyer be employed simultaneously as a part-time assistant district attorney and a probation officer within the same county?

OPINION

Public confidence in the proper administration of justice requires that certain public offices remain independent of one another. Where such offices are intended to function as adversaries within the system or to represent incompatible interests, their independence must be maintained; and, that independence should be as apparent to the public as it must be in fact. See, e.g., Canons 5, 8 and 9; see also, EC 8-8, EC 9-3 and DR 5-105(A). If the purpose or function of such offices is essentially incompatible, we believe that their legal staff should be separate and that it would be improper for a lawyer to serve two such offices at the same time. Cf., N.Y. State 432 (1976), N.Y. State 389 (1975) and N.Y. State 378 (1975) with ABA 118 (1934) (county attorney may not accept employment to obtain pardon or parole of person convicted in another county).

The issue, then, is whether the function of a prosecutor is so incompatible with that of probation officer, that the same lawyer may not simultaneously serve the county in both capacities.

The function of a prosecutor requires little amplification: though enjoined to seek justice (EC 7-13), in the final analysis, his relationship to the accused is essentially antagonistic. A probation officer, however, is encouraged by the law of this State to develop a close relationship with the probationer so that, through "friendly advice and admonition," he may "bring about improvement in his conduct, condition and general attitude toward society."

Executive Law §257(4). The regulations of the Division of Probation, by maintaining the confidentiality of the probation officer's records and reports as against all prosecutorial authorities, further serve to emphasize the divergence of the two roles. Finally, we note that it frequently becomes the probation officer's duty to apply for a reduction in the term of sentence. This application for "early discharge" often requires that the officer testify on behalf of his probationer, thereby ultimately seeking to undo or mitigate the prosecutor's work.

We must therefore conclude that the function of a prosecutor is fundamentally incompatible with that of a probation officer; and, consistent with the foregoing authorities, we believe that it would be inappropriate for a lawyer simultaneously to serve the same jurisdiction in both capacities. The fact that the probation officer may not have personally prosecuted the particular individuals assigned to him cannot be determinative of the ethical issue because, as we have seen, disqualification attaches to the office.

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

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