



Committee on Professional Ethics

Opinion #564 - 10/1/84 (25-84)

Topic: Conflict of interest; disqualification; criminal practice; part-time prosecutor; special district attorney.

Clarifies N.Y. State 544 (1982)

Digest: Special district attorney should be considered sui generis and not as "part-time" prosecutor for purpose of determining extent to which special district attorney may engage in private practice of criminal law.

Code: EC 5-14, 9-2, 9-6;
DR 5-105, 9-101.

QUESTION

Are special district attorneys subject to the same ethical limitations placed on "part-time" prosecutors with respect to the private practice of criminal law?

OPINION

This Committee recently issued guidelines with respect to the acceptance of criminal defense cases by "part-time" prosecutors. N.Y. State 544 (1982). After an extensive review of the authorities, including six of our prior opinions on the subject, we determined that a part-time prosecutor could "undertake a criminal defense without conflict of interest or appearance of impropriety" provided:

"(1) his statutory or other responsibility to prosecute criminal proceedings on behalf of the locality does not require him, in any case, to prosecute any crimes or offenses designated as such by the Penal Law or any other law enacted by the Legislature of the State of New York, (2) the defense does not require him to appear before a judicial [officer] or other official of the locality he publicly represents, (3) the local government unit by which he is employed, or a violation or a construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor."

Absent satisfaction of the foregoing five qualifications, the part-time

prosecutor is forbidden to undertake a criminal defense case anywhere in the State of New York.

We are now asked whether the same limitations on private practice prescribed by N.Y. State 544 apply to special district attorneys appointed pursuant to Section 701 of the County Law. For the reasons hereinafter set forth, we believe that a per se application of such limitations would be inappropriate to the office of special district attorney; and, even when some limitation on private practice may be appropriate, such limitation should not extend beyond matters pending in the district of his appointment.

We believe that a special district attorney should be viewed sui generis, and not as a "part-time" prosecutor, for purposes of determining the extent to which he may engage in the private practice of criminal law. A special district attorney, appointed pursuant to Section 701 of the County Law, does not present the same potential for public distrust and suspicion as a regularly employed prosecutor undertaking to represent criminal defendants in private practice. See EC 5-14 and DR 5-105; see also EC 9-2, 9-6 and DR 9-101. The appointment is usually for the purpose of a single case, made under circumstances where the regularly constituted district attorney cannot serve, and is subject to careful scrutiny by the court.

The special district attorney is -- by legislative intent and design -- one who should not be regarded as a part of the regularly constituted district attorney's office. His identification with the State is -- again, by legislative intent and design -- normally limited to the particular matter for which he has been appointed. Thus, for the appointee to undertake criminal defense work, absent special circumstances, should not create any appearance of impropriety or conflicting loyalties.

Moreover, application of the stringent standards applied to "part-time" prosecutors would inevitably curtail the availability of qualified attorneys to serve as special district attorneys: in practical effect, relegating the court to those who have no current criminal practice. This would produce a result which is both unfair to the bar and inconsistent with the purposes underlying the statutory authorization for special district attorneys. Cf. N.Y. State 502 (1979).

While we reject per se application of the standards relevant to part-time prosecutors regularly employed as such, the particular circumstances of any given appointment may militate against the private practice of criminal law by the appointee within the same district. Such circumstances include: (1) the reasons underlying disqualification of the district attorney; (2) the relationship (social, political and/or economic) of the appointee to the district attorney; (3) the nature of the other criminal matters which the appointee proposes to undertake; (4) the relationship of the

district attorney to those other matters; and (5) any other circumstances which might reasonably lead the public to believe that the professional judgment of the appointee would be influenced by factors de hors the intrinsic merit of the matters undertaken by him. Where the only relationship between the appointee and the district attorney derives from the fact that private criminal practice in the district, of necessity, will involve dealing with the district attorney's office, we do not believe that the mere possibility of public suspicion should preclude appointment of persons best qualified by their experience and training to serve.

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