



**New York State Bar Association  
Committee on Professional Ethics**

**Opinion 1219 (03/17/2021)**

**Topic:** Part-time county attorney, parole violation hearings, conflicts.

**Digest:** A part-time assistant County Attorney whose office does not handle criminal prosecutions can generally represent defendants in State parole violation hearings. A conflict may arise in particular cases, such as where the defendant is adverse to the County Attorney's office in other proceedings or where County employees are involved in the parole violation, and those conflicts may sometimes be unwaivable.

**Rules:** 1.0(h), 1.7, 1.10(a).

**FACTS**

1. The inquirer is a part-time assistant County Attorney. The County Attorney is the legal advisor to the County Executive and other officers and employees acting in their official capacity and pursues and defends civil actions by and against the County. The County Attorney's Office does not prosecute criminal actions. The inquirer himself, among other things, advises the sheriff, County probation office and County Executive on administrative matters, represents the County in civil cases, and handles employment related hearings.

2. There are attorneys who report to the County Attorney who handle juvenile justice and Social Services matters, but the inquirer does not engage in that practice. Those attorneys work in a different building from the inquirer and do not save files to shared drives. The inquirer does not have access to those offices or files.

3. The County Attorney wishes to engage the inquirer as an independent contractor to provide assigned County-paid representation to defendants in State parole violation hearings and appeals from those hearings. The parole violation hearings and appeals are held before State administrative tribunals that are part of the State Department of Corrections and Community Supervision, not County judges or officials, and the County generally has no role in those hearings (beyond paying for assigned counsel). While it is conceivable that a violation of a County ordinance could lead to a parole violation, County laws are generally not at issue in those proceedings. The County probation office that the inquirer sometimes advises deals with probation and not parole for State law offenses that would be at issue in the parole violation hearings in which the inquirer would be acting.

**QUESTION**

4. May a part-time assistant County Attorney whose office does not handle criminal prosecutions represent defendants in State parole violation hearings?

## OPINION

5. This Committee has long opined that a part-time town or county attorney who has prosecutorial responsibility may not undertake criminal defense work in any court of the State if the attorney has the statutory responsibility to prosecute crimes or offenses under State law. N.Y. State 657 (1993), *citing* N.Y. State 544 (1982) and earlier opinions. Even in cases in which the part-time municipal attorney has responsibility to prosecute violations of local ordinances, but not State law, our opinions have found criminal defense work permissible only if:

(2) the defense does not require him to appear before a judicial or other official of the locality he represents, (3) the local government unit by which he is employed, or a violation or 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.

*Id.* See also N.Y. State 874 (2011) (*citing* N.Y. State 544 and 657 as still valid under current N.Y. Rules of Professional Conduct (the “Rules”). These prohibitions on prosecutors defending criminal cases are ordinarily imputed to the entire county or municipal law office under Rule 1.10(a). N.Y. State 788 (2005) (full-time prosecutor’s conflicts imputed to part-time prosecutor); N.Y. State 874 (part-time Social Services attorney cannot represent in a criminal proceeding a respondent in an unrelated Social Services child abuse and neglect proceeding being prosecuted by others in the Social Services office).

6. Where, as here, the part-time municipal attorney has no prosecutorial responsibilities, we have found a similar set of criteria to be applicable:

It has been held a number of times that a part-time town attorney may practice criminal law without conflict of interest or appearance of impropriety if (1) he has no statutory or other responsibility for prosecution of criminal proceedings on behalf of the town or duties closely related thereto, (2) he does not represent private clients before a town justice in the town he represents, and (3) a violation or construction of an ordinance of that town is not involved.

N.Y. State 315 (1973), *modified in* N.Y. State 544. See also ABA 34 (1931) (“If the City Attorney’s duties and those of his assistants are entirely of a civil character . . . , and he is not required to defend the accused in any court in which a city official performs the duties of judge or magistrate, we find no objection to his conducting the defense of criminal cases.”) (*quoted in* N.Y. State 544).

7. Parole violation hearings are not typical criminal proceedings like those that were at issue in these prior opinions, but we need not consider whether the guidance relating to criminal defense work developed in those opinions would otherwise prohibit parole violation defense work, because (1) the inquirer’s practice as a part-time county attorney is entirely civil, as is all

of the work of the County Attorney's office; (2) the inquirer would not appear before any County judges or officials in the contemplated parole work; and (3) a violation or construction of County law is not typically at issue in parole violation hearings or appeals. In these circumstances, there is no *per se* bar on the inquirer conducting State parole violation work.

8. There may be, however, particular cases in which the inquirer would have a conflict. For example, if the conduct of County employees is involved in the parole violation, or the parole violation defendant is a party to a civil case brought by the County Attorney's Office, the inquirer might have a conflict. See N.Y. State 1074 ¶ 8 (2015) (Department of Social Services attorney may accept assignments from county's Assigned Counsel Program except where "the Department is to play any meaningful role in the Family Court proceeding"); N.Y. State 800 ¶¶ 5-6 (2006) (part-time prosecutor may accept assignment to represent indigent persons in Family Court in adjacent county except, *inter alia*, where prosecutor had worked with law enforcement personnel involved).

9. Where the civil case brought by the County Attorney's Office is pursued by a different unit of the office, as is the case with the child neglect and abuse proceedings, the question would arise whether the conflicts of the County Attorney's Office lawyers who prosecute those proceedings would be imputed to the inquirer. The question of imputation in turn depends on whether the unit handling those proceedings is to be considered to be part of the same "law firm" as the unit in which the inquirer works. See Rules 1.10(a) (imputing conflicts under Rules 1.7 to all lawyers "associated in a firm"), 1.0(h) (definition of "firm" and "law firm" includes "a government law office"). This is "a fact-intensive inquiry" that focuses, among other things, on "(1) whether the group presents itself to the public in a way that suggests it is a single firm; . . . (2) whether the lawyers in the group have mutual access to information concerning the clients they serve," and (3) the independence of the lawyers from common supervision. N.Y. State 1210 ¶¶ 6-8 (2020).

10. If a conflict were to arise in a particular case, it may sometimes be waived with the consent, confirmed in writing, of both the individual parole hearing defendant and the County. See N.Y. State 1074 ¶ 10 (noting that where a conflict is consentable, "the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, is essential"). Our opinions have long recognized, however, that obtaining informed consent from a client who cannot afford counsel, and may not have effective choice of counsel, presents particular difficulties. See N.Y. State 1105 ¶ 18 (2016) ("when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given"); N.Y. State 490 (1978) (when seeking consent from client of legal aid office, "the staff should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and . . . the staff [must be] satisfied that their clients could refuse to consent without any sense of guilt or embarrassment").

11. In some circumstances, the conflict may be unwaivable. Our prior opinions in this area identify two paradigmatic situations that give rise to unwaivable conflicts. First, while it apparently is unlikely that County employees will appear as witnesses in parole violation hearings, where the relationship with a witness is such that defense counsel could not reasonably conclude he or she could examine the witness as effectively as an unconflicted counsel, no consent can be sought. Rule 1.7(b)(1); see, e.g., N.Y. State 859 ¶ 15 (2011) (citing as example of non-consentable conflict where part-time DSS attorney "might have to impeach the same law

enforcement personnel on whom Social Services relies in abuse and neglect proceedings”); N.Y. State 1074 ¶ 10 (same).

12. Second, where a parole violation client is a respondent in a quasi-prosecutorial proceeding—such as a child neglect or child abuse proceeding, if those conflicts are imputed to the inquirer as discussed above—we have held that a part-time prosecutor cannot serve as counsel to the respondent even in an unrelated matter because of the “risk of the public perceiving favoritism at the prosecutor’s office.” *See* N.Y. State 788 (2005) (such risk where part-time prosecutor serves as criminal defense counsel “precludes waiver of the conflict”); N.Y. State 859 ¶¶ 13, 16 (“[t]he role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the DA’s office in criminal prosecutions,” so part-time Social Services attorney may not represent respondent in an unrelated criminal matter even with consent).

## CONCLUSION

13. A part-time assistant County Attorney whose office does not handle criminal prosecutions can generally represent defendants in State parole violation hearings. A conflict may arise in particular cases, such as where the defendant is adverse to the County Attorney’s Office in other proceedings or where County employees are involved in the parole violation, and those conflicts may sometimes be unwaivable.

(05-21)