



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

Opinion 1263 (02/05/2024)

Topic: Part-time town attorney's representation of criminal defendants in centralized arraignment part.

Digest: A part-time town attorney who has no prosecutorial responsibilities may, in his role as a part-time county public defender, represent criminal defendants at arraignments before a justice of the same town's court even if that justice sometimes sits on rotation in a centralized arraignment part.

Rules: 1.7(a)(1), (b)

FACTS:

1. County X recently established a centralized arraignment part (CAP). A CAP is an off-hours arraignment part held in local criminal courts (including town courts) on a rotating basis. The purpose of the CAP is to conduct arraignments and other preliminary proceedings incident to those arraignments. See New York Judiciary Law § 212(1)(w). Judges and justices of local criminal courts in the county are periodically assigned to the CAP. Town Z has only one town justice, and that town justice sits on the CAP on a rotating basis.

2. The Inquirer is an Assistant Public Defender in County X. The Chief of the county public defender's office (Chief PD) works part time in the public defender's office and also works part time as a town attorney in Town Z. The Chief PD has no criminal prosecutorial responsibilities for Town Z but nevertheless does not appear on behalf of criminal defendants in the town court in Town Z. The Inquirer wants to know whether the Chief PD/part time town attorney may represent criminal defendants at arraignments in the CAP even though a justice in Town Z sits on the CAP on rotation.

QUESTION:

3. May a part-time town attorney who has no prosecutorial responsibilities and who is also a part-time public defender represent criminal defendants at arraignment in a county's centralized arraignment part even though a justice of the same town's court sometimes sits on rotation in the centralized arraignment part?

OPINION:

4. In N.Y. State 184 (1971) the Committee stated that a part-time attorney for a local government is disqualified from the private practice of criminal law if the part-time attorney has prosecutorial responsibilities for the local government. This per se disqualification from practicing criminal law extends not only to the local courts where the attorney is employed but also to all courts throughout the state.

5. The basis for this per se disqualification from the private practice of criminal law in all state courts was that, because a local prosecutor represents the people of the state, a prosecutor who also represents criminal defendants in a state court would simultaneously be representing the people in some matters and opposing the people in other matters, thus giving rise to an appearance of professional impropriety.

6. In N.Y. State 234 (1972) the Committee addressed a variation on this question. A part-time town attorney who had no prosecutorial responsibilities asked whether he could represent private clients in criminal proceedings in state courts other than the court of the town he represented. The Committee began by reiterating the per se rule applicable to part-time town attorneys with prosecutorial responsibilities, explaining that “acting as a prosecutor one day and as defense counsel another gives rise to an appearance of professional impropriety.” As to the specific issue raised in Opinion 234, the Committee stated that the attorney’s representation of a criminal defendant would not create an appearance of impropriety if the attorney had no responsibilities with respect to criminal proceedings on behalf of the town, and the attorney “may therefore, represent clients in criminal matters, except before a town justice in the town he represents”

7. Ten years later, in N.Y. State 544 (1982) (which interpreted the former Code of Professional Responsibility), the Committee modified the per se rule applicable to part-time municipal attorneys with prosecutorial responsibilities. The modified rule articulated in Opinion 544 stated that if the attorney’s prosecutorial responsibilities related solely to violations of local ordinances, then the attorney could ethically represent criminal defendants provided that the attorney also met certain other criteria. One of those other criteria was that “the defense does not require him to appear before a judicial or public officer of the locality the attorney publicly represents.” The Committee explained that, because the prosecutor is a representative of the locality, appearing before a judicial officer of the locality on behalf of a criminal defendant would be seen as “representing an interest adverse to that locality.”

8. In N.Y. State 657 (1993) the Committee adhered to the criteria stated in N.Y. State 544 (1982), reiterating that even if part-time municipal attorneys have no prosecutorial responsibilities, they nevertheless “may not undertake criminal defense cases pending before judicial officers of the *same locality*, notwithstanding their ability to handle such matters in other courts of the state.” (Emphasis added.) The Committee explained in Opinion 657 that “[t]he prohibition on the lawyer/part-time public official’s appearance in the courts of the locality engaging the lawyer, flows from representation of the ‘locality,’ not from the particular type of representation undertaken on behalf of the locality.”

9. Similarly, in N.Y. State 874 (2011) the Committee extended this principal to independent contractors. Quoting N.Y. State 657, the Committee in Opinion 874 stated that “an ‘independent contractor’ or other ‘local part-time attorneys for municipalities, regardless of their title or actual responsibilities, may not undertake criminal defense cases pending before judicial officers of the same locality, notwithstanding their ability to handle such matters in other courts of the State.’”

10. As explained above, the Committee's prior opinions have concluded that even part-time municipal attorneys who have no prosecutorial responsibilities may not appear on behalf of criminal defendants in the court of the municipality in which they are employed. This consistent conclusion was based on the view that, in so appearing, the attorney would be representing an interest adverse to the locality and would thus be representing “differing interests.” Today, the Rules of Professional Conduct include the same definition of “differing interests” that was construed in N.Y. State 544. See Rule 1.0(f) (“‘Differing interests’ include every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting,

inconsistent, diverse, or other interest”). In addition, Rule 1.7(a)(1) provides that “a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests,” which is substantially similar to the former Code conflict language construed in N.Y. State 544.

11. The present inquiry does not require the Committee to reconsider or modify its prior opinions on part-time municipal attorneys. We adhere to the view that even part-time municipal attorneys who do not prosecute cases on behalf of a local government may not appear on behalf of criminal defendants in the municipality’s court. To the extent such an appearance would amount to “representing an interest adverse to that locality” (N.Y. State 544), the Committee believes that no such adverse representation would occur in the situation presented here because the CAP is not the court of the town for which the attorney acts as a part-time town attorney. This factor, along with the limited nature of the proceedings in the CAP, essentially eliminates any perception that the attorney is simultaneously representing both the town and a criminal defendant adverse to the town. In other words, the attorney would not be representing “differing interests.”

12. The situation here is similar to that of a part-time town attorney who represents criminal defendants in courts of other towns, which is permitted under N.Y. State 544 (1982) if certain criteria are met. It is true that one of the criteria stated in N.Y. State 544 and other opinions is that the “the defense does not require [the attorney] to appear before a judicial or public officer of the locality the attorney publicly represents.” However, in referring to judicial officers or town justices of the same town, the prior opinions referred in substance to the same town’s court. Our prior opinions did not contemplate a situation like the situation here, where the town justice is sitting not in the town court but rather on rotation in a centralized court that has only limited jurisdiction over arraignments and related preliminary proceedings. These factors negate any concern that the Chief PD would be representing “differing interests.”

CONCLUSION:

13. A part-time town attorney who has no prosecutorial responsibilities may, in his role as a county public defender, represent criminal defendants at arraignments before a justice of the same town’s court when the justice is presiding in a centralized arraignment part.

(14-23)