

ADVISORY ETHICS OPINION 2001-11

SYNOPSIS:

First Question: This opinion addresses two requests. First, an attorney who holds a position as a part-time State's Attorney and also has a separate private practice, who is not otherwise prohibited by law, may represent a private party in a litigation matter where the State of Vermont is an opposing party and that is not related to the attorney's position as a State's attorney.

Second Question: With respect to the related request, the State (through the Attorney General's office (the "AG")) may continue to represent the requesting attorney as one of several defendants in an action against the State and other State's Attorneys in a case testing the constitutionality of a law which is completely unrelated to the matter the requesting attorney is handling for the private client.

QUESTION PRESENTED:

First Question: Does the fact that an attorney represents the State of Vermont as a part-time prosecutor create a conflict of interest that precludes that attorney from representing a private party in an action against the State that is unrelated to the requesting attorney's prosecutorial role representing the State?

Second Question: In a related request, the AG's office poses the question whether the fact that the AG's office is representing the requesting attorney in the requesting attorney's public office (among others, the requesting attorney is one of a number of defendants in the suit being handled by the State) in a separate action not related to the claims in the civil suit being handled by the requesting attorney creates a conflict of interest for the AG's or the requesting attorney because the AG's office is also defending the civil suit being handled by the requesting attorney?

FACTS

An attorney who has both a private practice and serves in a public capacity as a part time prosecutor inquires whether the requesting attorney may represent a private party in a civil action against the State while continuing to perform the duties of the attorney's public office. The case involving the private client does not involve any matter that bears on the attorney's public office and does not relate to criminal matters in any way. As a part-time prosecutor, the attorney's public office is one that has a high level of public awareness. Vermont law permits the requesting attorney to have both the public office and the private practice.

In the related request, the State discloses that the State is also representing itself and several other persons including the requesting attorney in a civil suit in which the State and the several others are defendants. The factual and legal basis for this third lawsuit does not involve any matters related to the action in which the requesting attorney is representing a private party against the State.

DISCUSSION:

The attorney's public office is as a part time prosecutor in a specific county/district of the State. The attorney also represents private parties in many different matters, including litigation matters. One of the attorney's private clients has a proceeding pending before an administrative board of the State. The AG's office is defending the State in the civil matter being handled by the requesting attorney.

The applicable rule in this matter is Rule 1.7 regarding conflicts of interest. The issue related to Rule 1.7 is relatively easy to address. Rule 1.7 provides:

- (a) **A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:**
- (1) **the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**
 - (2) **each client consents after consultation.**

As a part-time prosecutor the requesting attorney represents the State. The central question is whether the attorney's public office makes the State a "client" for the purpose of looking at conflicts of interest. The simple answer is yes. The more complex answer requires a determination of what part of the "State" is the client. The State is not a monolith. The State is

composed of a number of branches, offices, agencies and political subdivisions. Under certain circumstances, parts of the State may be in conflict with each other.

This Committee concluded in Opinion 88-9 that a part-time State's Attorney could not also be a criminal defense attorney in another county because the part-time State's Attorney represented all the people of the State and could not simultaneously represent the interests of single defendant. This case is different. Here the attorney is representing a private party against the State, but in a matter that does not relate to the requesting attorney's role as a part-time. The civil matter does not arise out of events transpiring in the county where the requesting attorney functions as the part-time prosecutor. The attorney's role in the private matter cannot be confused with the attorney's public office. Where the two roles do not overlap in jurisdiction or impact, there is no conflict of interest between the attorney as a representative of the State and the attorney's representation of a private client. The analysis might be different if the private or civil matter arose out of facts learned by the attorney in performing the attorney's role as a prosecutor, or if the claim against the State involved events occurring within the county of the requesting attorney's jurisdiction.

Other states have reviewed the similar questions presented by the related requests under review here. The issue in the summaries presented is almost always, how is the government "client" defined? Those decisions may be summarized in general as follows: (a) an attorney who has both a public office and a private practice may not represent private clients in matters involving the attorney's public office; (b) an attorney with both a public and a private practice may represent private clients with claims against state agencies and officials that are unrelated to the attorney's public office. BNA Manual on Professional Conduct Section 91:4107. The examples cited include: (i) an attorney representing a county school district representing parties before county planning boards (permitted as the two government entities were distinct) ABA Formal Ethics Opinion 97-405 (1997) and attorney representing water commission representing clients before other government agencies (permitted as long as the water commission is a distinct entity) District of Columbia Ethics Op. 268 (1996). Summaries extracted from BNA Manual 91:4107.

The fact that the Attorney General's office is simultaneously defending the requesting attorney in a third suit does not change the result or create a conflict of interest what would require the AG's office to withdraw from any of the litigation. The requesting attorney's public office involves only criminal matters in a specific county in the State. The lawsuit in which the AG's office is representing the requesting attorney involves the requesting attorney's public office and also involves a number of other parties. The requesting attorney's involvement as a defendant in that suit is limited and the State is the primary defendant in the case. The requesting attorney's representation of the private client against the State (which the AG's office is defending) is a civil matter unrelated to the requesting attorney's public office and the suit against the State. The BNA Manual reports several cases in which an attorney general's office represents state agencies in conflicting matters. BNA Manual 91:4105-4106. Because the matters in which the requesting attorney and the AG's office are distinct, this Committee concludes that there is not a conflict of interest that would preclude each of the attorney's from continuing to represent the parties each is presently representing.

Each of the attorneys involved must make a separate and independent determination that the interrelationships in this particularly odd set of facts will not adversely affect such attorney's ability to effectively represent his or her client. Where an attorney's judgment will be subject to influence because of personal interest or the influence of a third party, the attorney may not represent a client whose interest is adverse to the factors that would influence the attorney's professional judgment.