

ADVISORY ETHICS OPINION 81-06

SYNOPSIS:

An attorney who is an elected official of a town (Justice of the Peace, and by virtue thereof, a member of the Board of Civil Authority) may represent clients in an action against that town seeking, inter alia, damages for wrongful taking, trespass, removal of trees, correcting drainage and punitive damages.

FACTS:

An attorney has brought a civil action against Town A. That attorney is also a Justice of the Peace of Town A. The duties of the Justice of the Peace are limited in scope and none of the duties impacts on the litigation brought by him on behalf of his clients.

The suit was brought on behalf of landowners in Town A against an employee of the town (whose duties are unspecified) and the town averring that the defendants and others under their direction built a road over a portion of plaintiffs' property, effecting an illegal taking and trespass, among other things, and seeking damages.

The appropriateness of the representation of the attorney has been raised.

ISSUE:

Whether an attorney, who represents clients suing a town in which he is the Justice of the Peace, can continue to represent the clients where the subject matter of the suit is unrelated to the statutory duties of Justices of the Peace, after the appropriateness of his representation has been raised.

OPINION:

EC 8-8 states that:

“(a) lawyer who is a public official, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.”

The duties of a Justice of the Peace are varied but none of those duties directly impacts the litigation as framed in the instant question. As to what constitutes conflicting or differing interests, footnotes 18 and 19 to EC 5-15 state that:

“a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.”

The statutory framework of the duties of a Justice of the Peace do not impose any specific duty upon such an official to oppose the suite, in contrast to the situation if the attorney were a selectman, a road commissioner, or the Town surveyor for example.

While an attorney has the ethical duty of avoiding the appearance of impropriety (DR 8-101 and EC 9-6) an attorney need not withdraw simply because his representation might subject him to criticism.¹

Further, an attorney cannot use his or her position as a public official to gain special advantage (DR 8-101), but there is no evidence of that on these facts.

The Vermont case of In Re Themelis² indicates that an attorney may not “undertake the discharge of inconsistent duties,” but that case does not bar representation here where the attorney’s town duties are outside the scope of the complaint and reasonably foreseeable litigation.

¹ EC 9-2.

² In Re Themelis, 117 Vt. 19 (1951).