

Committee Opinion
April 1, 1996

LEGAL ETHICS OPINION 1669

PART-TIME COUNTY ATTORNEY AS:
PART-TIME PUBLIC DEFENDER;
PRIVATE DEFENSE COUNSEL.

You have asked the committee to opine as to the propriety of a part-time County Attorney 1) acting as a part-time Assistant Public Defender; 2) acting as defense counsel to private clients in criminal cases, including or excluding accepting conflicts appointments in criminal matters where the County Attorney assists the Board of Supervisors in reviewing the annual budgets of the Sheriff and the Commonwealth's Attorney; or 3) accepting appointments to defend persons on allegations of contempt for failure to pay child support brought by the Division of Child Support Enforcement (DCSE) when the County Attorney represents the local Department of Social Services (DSS).

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(A) which prohibits an attorney from accepting employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by acceptance of the proffered employment, unless, under DR:5-105(C) it is obvious that the attorney can adequately represent the interests of each and each client consents after full and adequate disclosure and; DR:8-101(A)(1) which prohibits an attorney holding public office from using his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

Although the Committee has issued a number of opinions regarding the extent to which a part-time local government attorney may represent private parties (LE Op. 581, LE Op. 610, LE Op. 843) it has never addressed the propriety of a part-time County Attorney simultaneously representing criminal defendants as a part-time Assistant Public Defender. Typically the County Attorney represents the local government in civil and administrative matters and does not prosecute crimes as those are prosecuted by the Commonwealth's Attorney. Thus, for example, a part-time county attorney who is not responsible for prosecuting traffic violations may represent personal injury plaintiffs in accidents involving traffic violations. LE Op. 581. The Committee believes it would be improper under DR:5-105(A) for the Assistant Public Defender to undertake representation of criminal defendants if the County is the alleged victim of such crimes. Moreover, if the County Attorney's Office is charged with the responsibility of prosecuting local ordinances, i.e., violations of building codes or local ordinances concerning zoning, health, environment, etc., then the part-time County attorney/Assistant Public Defender could not represent parties accused of violating such local ordinances. DR:5-105(A); LE Op. 605 (former county attorney may not represent defendant in a special use permit violation case when he had been the county attorney at the time the county initiated the action, caused the suit to be filed, and was aware of its progress). In addition, the committee is of the opinion that a conflict under such circumstances cannot be cured by consent, since it is not obvious that he can adequately represent the interests of each. DR:5-105(C).

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Therefore, while it is nor per se improper for a part-time County Attorney to also serve as a part-time Assistant Public Defender, the committee believes there may be circumstances where conflicting multiple representations might occur. However, if the particular case involves the criminal defense of a party who is not adverse to any of the governmental entities represented by the County Attorney, then it would not be improper for the Assistant Public Defender/County Attorney to represent such a party.

Your second inquiry raises the issue of a conflict, or the appearance of same, in that the County Attorney's duties include advising the Board of Supervisors with regard to the budget, including appropriations for County law enforcement and contribution or subsidy of compensation for law enforcement officers including an assistant Commonwealth's Attorney. If the County Attorney is also a part-time Public Defender, the appearance of a conflict may exist if an attorney serving in both capacities were to give legal advice to the Board concerning law enforcement funding issues in such a way as to gain advantage for himself or a client whom he represents as an Assistant Public Defender. DR:8-101(A)(1).

The attorney serving in this dual capacity as described in your hypothetical may very well choose to avoid the appearance of impropriety by recusing himself from participation in any budget items or issues impacting directly on the funding of law enforcement agencies. However, the appearance of impropriety by itself is too vague a standard, in the committee's opinion, to conclude that a violation of DR:8-101(A)(1) would occur in the facts you present. The preparation and publication of a county budget is for informative and fiscal planning purposes only and is not an appropriation. Items or expenses contemplated by a proposed budget cannot be paid out until the governing body makes the appropriation for such contemplated expenditure. Va. Code § 15.1-162. The County Attorney is not a member of the governing body and therefore does not vote on the appropriations. Therefore, the committee believes that the facts you present do not create a conflict under DR:8-101(A)(1). With regard to your third inquiry, the committee believes that it would not be per se improper if the part-time County Attorney, in his dual capacity as a part-time Assistant Public Defender, were to accept by appointment the defense of persons brought into court by DCSE on criminal contempt charges arising out of the failure to pay child support. This assumes, of course, that the particular case brought by DCSE did not involve the Department of Social Services in way such that the interests of DSS and the defendant charged with contempt are conflicting. The committee reaches this conclusion based on the premise that DCSE is not an entity which is represented by the County Attorney.

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