

Advisory Opinion 1985-10

The question is whether an Assistant District Attorney (Requesting Party) in one district, may prosecute municipal court traffic cases in a second district, on a pro bono basis. The prosecutions for the municipality are not related to the Requesting Party's regular assistant district attorney job. While there is no ethical restriction that would reflect on the Assistant District Attorney's main job, there may be a legal prohibition against an attorney, who does not have a court order and the District Attorney's permission in the second district, from prosecuting cases in municipal court in the second district. If there is a legal prohibition, such prohibition will control the ethical consideration.

A. FACTS SET FORTH IN THE REQUEST FOR ADVISORY OPINION

1. Requesting Party is a full time assistant district attorney in one district.
2. Requesting Party lives in the second district.
3. Requesting Party serves as the Village Prosecutor in the second district. He appears only on request of the Village, and only when the defendant in the case is represented by legal counsel.
4. Requesting Party appears only at evening court sessions, so that appearances do not interfere with his normal work in the first district.
5. Requesting Party appears only in municipal court; any appeals are handled by the Village Attorney.
6. Requesting Party receives no compensation of any kind. He is a volunteer motivated by civic duty.

FACTS NOT STATED IN THE REQUEST

1. Whether Requesting Party serves as Village Prosecutor under court order, and with permission of the district attorney's office in the second district.
2. Whether the District Attorney in the first district has any objection to the Requesting Party performing prosecutorial functions in the second district.

For the purposes of this opinion, it is assumed that the Requesting Party is not operating under a court order and with the express permission of the District Attorney in the second district; and that the District Attorney in the first district has not expressed objection to this prosecutorial work for the Village.

B. ADVISORY OPINION REQUESTED

The specific request for advisory opinion is whether the Requesting Party is committing any ethical violation by serving as Village Prosecutor in the second district.

C. OPINION

The Committee does not believe that the Requesting Party is violating any ethical standard directly by serving voluntarily as a prosecutor for a Village in a second district, when such work is done without pay and is motivated by civic duty. We are unaware of any provision in the Code of Professional Responsibility which would preclude such conduct.

On the contrary, the American Bar Association in its model Rules of Professional Conduct (formally adopted August 2, 1983), encourages attorneys to seek improvement in the administration of justice. *Rule 6.1*. Voluntary service in the role as a prosecutor could well serve this general purpose, just as pro bono defense of the poor would do.

A second consideration presented by the above request is more difficult. The question arises as to whether there is a legal prohibition against the Requesting Party serving as the Village Prosecutor under the above circumstances. If there is a legal prohibition, then it would control the ethical consideration.

District attorneys are subject to the statutory provisions set out in §§ 36-1-1 to 36-1-27 NMSA (Repl. 1984). Two particular provisions could apply. Section 36-1-4 NMSA states that an assistant district attorney is prohibited from engaging in the private practice of law. The purpose of prohibiting assistant district attorneys from engaging in the private practice of law is to prevent conflict of interests or the appearance of a conflict of interest. *1977 Op. Atty. Gen. No. 77-7*. However, since Requesting Party is engaging in public practice by serving as village Prosecutor in a district other than the one in which the Requesting Party acts as a prosecutor, is not drawing compensation for his work as the Village Prosecutor and confines his activity to those described in the facts recited above, it does not appear he is engaging in the private practice of law as contemplated under the statute. This Committee, though, is not empowered to interpret statutory provisions or give legal advice. The Requesting Party should request an Attorney General's Opinion if he has some doubt.

In § 36-1-19(A), there is a prohibition against a person representing the state or any county in any matter in which the state or county is interested, unless such person works for the Attorney General or District Attorney, or is authorized to do so under court order with the permission of the District Attorney.

It is unclear if this section applies to the Requesting Party's situation involving a municipality. If it does, it apparently creates a legal prohibition against him performing the duties of Village Prosecutor unless he obtains a court order in that regard and the permission of the District Attorney's office that has jurisdiction in the Village District.

The Requesting Party is advised to seek an opinion from the Attorney General's Office on whether § 36-1-19(A) applies in his factual context and follow the guidance provided.