

ETHICS ADVISORY OPINION

11-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Attorney represents a County as part of his private practice. As county attorney, Attorney occasionally interacts with members of the County Sheriff's Office (CSO), although he does not represent the CSO in court. The Solicitor's Office prosecutes any criminal cases involving the CSO in General Sessions or magistrate's court. In addition, the CSO employs its own attorney in the detective division who provides legal advice and representation on a day-to-day basis. In situations where a cause of action is brought against a member of CSO, the County's insurance underwriter selects an attorney to defend that action on the County's behalf. In general, Attorney is not usually asked to provide legal advice to the CSO in his role as County Attorney.

Attorney also serves as the Municipal Judge for a town in the same county. The Town does not have an independent police force; instead, it employs off-duty CSO officers to provide police protection. As such, Attorney presides over cases investigated and prosecuted by CSO officers, acting in their dual capacity as town police officers. Attorney would step down as municipal judge if he were to begin accepting criminal defendants as clients in that county.

Question Presented:

May Attorney accept cases representing criminal defendants in General Sessions or Magistrate's Court in the county in which he acts as the County Attorney?

Summary:

An Attorney may not represent criminal defendants in the same county in which he acts as county attorney if he provides any legal advice to the CSO concerning criminal matters. If Attorney does not provide any legal advice to the CSO concerning criminal matters, representation of criminal defendants in that county is permissible.

Opinion:

Rule 1.7 of the South Carolina Rules of Professional Conduct states that an attorney may not undertake representation if “the representation of one client will be directly adverse to another client.” Rule 1.7. In this inquiry, if the Attorney were to give any legal advice concerning criminal law to the County Sherriff’s Office, the Attorney would run afoul of Rule 1.7’s prohibition that clients’ interests cannot be adverse to each other.

However, if, pursuant to Rule 1.7(b), an attorney may still undertake the representation of criminal defendants if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Thus, the representation may be permissible if the Attorney can satisfy the above elements, even if a concurrent conflict were to exist.

Whether an attorney can undertake representation in the face of a concurrent conflict of interest hinges on whether the attorney reasonably believes that he can provide competent and diligent representation to each affected party.

Previously, in a broader context, this Committee issued companion opinions that addressed the issue of county or city attorneys representing private clients in that county. In Ethics Advisory Committee Opinion 92-16, the Committee opined: “When a county or city attorney has provided legal services directly to an employee, official, board, agency, department, or other part of city or county government and that person or entity is directly involved in litigation, we do not believe it would ever be reasonable for the lawyer to represent a person with adverse interests in that

litigation.” Specifically, in the area of criminal law, it is similarly difficult to conceive of any circumstance where an attorney may reasonably provide legal advice to a party involved in litigation, in this case the CSO, while representing a criminal defendant whose alleged crime may be linked to that legal advice.

Therefore, we believe that the only circumstances under which the attorney may represent a criminal defendant would be if the attorney does not give any legal advice to the CSO, thereby eliminating the concurrent conflict.