

Municipal Judge As Assistant Prosecutor

An assistant prosecutor also serves as an elected municipal judge. He has asked this Committee if his dual responsibilities pose a conflict of interest.

Municipal judges have criminal jurisdiction over violations of city ordinances. Appeals are tried de novo in Circuit Court and the city is represented by the city attorney, not the county prosecuting attorney's office.

The Committee has previously considered whether a municipal judge may defend criminal cases, but has never explicitly answered the precise question posed here. L.E.I. 77-3 stated that a municipal judge should not act as an attorney for defendants in criminal trials in any other court:

One who assumes to act as a judge on one day and as an advocate the next is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system. To permit a judge with criminal jurisdiction to practice criminal law would weaken the confidence of the public in the impartiality and objectivity of the judiciary. It could lead to the suspicion that the judge was using the prestige of his position to further his private practice.

In L.E.I. 79-3, the question was raised whether a Charleston municipal judge's disqualification to practice criminal defense law would be imputed to other lawyers in a legal corporation. That opinion noted that Charleston's City Charter provided that municipal judges "shall not appear as counsel in any criminal case in any court during his term of service." The Committee concluded

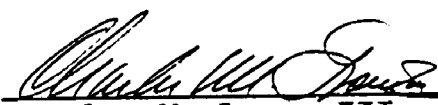
that if the lawyer were elected municipal judge, no member of his firm could "try criminal cases in the Circuit Court Kanawha County."

If the municipal charter of the inquiring assistant prosecutor prohibits a municipal judge from "appearing as counsel in a criminal case in any court," this ban would apply to prosecutors as well as defense counsel. The Committee also believes that the appearance by a municipal judge as counsel in a criminal case for the State calls into question the judge's impartiality and objectivity no less than an appearance as defense counsel. As a prosecutor, he or she may call police officers as witnesses one day and listen to the same officers' testimony as a judge the next.

It is true that when municipal judges act as prosecutors, there is no inference that they are using their public office to benefit their private practice. But another erroneous inference may be made that prosecutors and municipal judges are arrayed on one side against criminal defendants on the other. While prosecutors do have a court imposed duty to do justice unlike a defense counsel, their responsibilities still differ from those of a judicial officer.

Therefore, the Committee finds that it would be prejudicial to the administration of justice for a municipal judge to be employed simultaneously as an assistant prosecuting attorney.

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Charles M. Love, III, Chairman
Committee on Legal Ethics