
**E-83-12 City attorney acting as prosecutor while
advising trier of fact**

Question

May a city attorney simultaneously prosecute a complaint filed under Wis. Stat. sec. 125.12 (1981-82) concerning the revocation, nonrenewal or suspension of a retail liquor license, while advising the administrative body that is the trier of fact on those charges?

Answer

No.

Opinion

Under Wis. Stat. sec. 125.12 any resident of a municipality issuing liquor licenses may file a sworn written complaint with the municipal clerk against a licensee. Upon the filing of the complaint, a summons is issued by a clerk commanding the licensee to appear before the municipal body to show cause why his or her license should not be revoked or suspended. In Kenosha, these charges are filed by the police chief and the city attorney represents the police chief before the Common Council. To date, independent counsel has been retained to represent the Common Council in these proceedings. The city attorney(s) anticipate that the Common Council will order him/her to serve as its legal counsel, and the ethical propriety of representing both the complaining party and the trier of fact is questioned.

A city attorney is required to conduct all the law business in which the city is interested. Wis. Stat. sec. 62.09(12)(a) (1981-82). He or she is obligated to provide written legal opinions when requested to do so by city officers. Wis. Stat. sec. 62.09(12)(c). These provisions suggest that a city attorney's primary obligation is to his or her employer. This view is supported by Supreme Court Rule 20.23(3)(e) which states, in part, that "a lawyer employed by a corporation or similar entity owes his or her allegiance to the entity and not to a stockholder, director, officer, employer, representative or other person connected with the

entity.” *See also* [Wisconsin] Attorney General Opinion 31-83 (Aug. 11, 1983) (county is the client of the corporation counsel or district attorney under Wis. Stat. sec. 59.47 (1981-82)).

Several other provisions of the Supreme Court Rules are pertinent to this inquiry. A lawyer appearing before an administrative agency, whether the nature of the proceedings be legislative, quasi-judicial or both, has the continuing duty to advance the cause of his or her client within the bounds of law. SCR 20.34(2)(1). Moreover, in order to function properly, the adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. SCR 20.34(3)(b).

While the responsibility of a public prosecutor differs from that of the usual advocate in that he or she has a duty to seek justice and not merely convict, the situation here described puts the city attorney in an untenable position. The city attorney is asked to be both a zealous advocate of the complaining party and advisor to the impartial trier of fact. The Professional Ethics Committee is not convinced that a city attorney can adequately serve both of these competing interests. Moreover, even if such a dual representation were proper, the appearance of impropriety is overwhelming. *See* SCR 20.48.

Accordingly, the committee holds that a city attorney cannot act as a prosecutor under Wis. Stat. sec. 125.12 and as advisor to the trier of fact in the same proceeding. *See* 57 of Michigan Bar Journal, Opinion C1-297, p. 327 (Feb. 1978). *See also* 55 Wisconsin Bar Bulletin, p. 51 (May 1982), Supreme Court Order (denying petition of attorney general which would have amended Code of Professional Responsibility to permit assistant attorneys general to represent state officers or agencies with conflicting interests).

The Ethics Committee is aware that an administrative agency may conduct both investigative and adjudicative functions without necessarily violating due process. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Kachian v. Optometry Examining Bd.*, 44 Wis. 2d 1, 13, 170 N.W.2d 743 (1969); *LeBow v. Optometry Examining Bd.*, 52 Wis. 2d 569, 574-5, 191 N.W.2d 47 (1971). These cases, however, did not address the propriety of the combined prosecutor-advisor role as set forth in the instant case. Indeed, the U.S. Supreme Court in *Withrow v. Larkin*, noted that such a combining of functions had been found to violate due process. 421 U.S. 35, 51 n. 16 (1975) (citing *American Cyanimid Co. v. FTC*,

363 F.2d 757 (6th Cir. 1966)). *See also Stas v. Milwaukee County Civil Service Comm'n*, 75 Wis. 2d 465, 470, 249 N.W.2d 764 (1977); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 211, 94 N.W.2d 711 (1959).

In light of the above, the State Bar Professional Ethics Committee finds it unnecessary to address the due process question. Moreover, the question is one of law, not of ethics, and is therefore beyond the committee's authority. *See State Bar Bylaws, Art. IV, sec. 5.*