NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

Committee on Professional Ethics

Opinion 415 - 10/6/75 (76-75)

Topic: Disqualification of partners and associates.

Digest: Members other than the legislator of a law firm of which the legislator is a partner may represent clients before a state agency only when a statute expressly authorizes such representation.

Code: Canon 9
DR 5-105(C),(D); 8-101; 9-101(B)
EC 8-8; 9-2; 9-6.

QUESTION

Where a state statute prohibits a state legislator and certain other specified public officers from appearing before state agencies on behalf of clients but expressly permits such appearances by members or associates of law firms of which the legislator or public officer is a member, may the members and associates of such firm so appear?

OPINION

A lawyer who engages in an illegal act is in the usual case engaging in an unethical act. The converse is of course not true. Many actions that are not illegal violate the Code of Professional Responsibility. See, e.g. N.Y. State 323 (1974).

In the usual circumstances neither a legislator nor any member of a law firm of which he is a member can appear on behalf of a client before a legislative committee. ABA 296 (1959). Ordinarily neither the legislator-lawyer nor any member of his firm may appear on behalf of clients before boards or agencies whose members are elected or approved by the legislature. ABA Inf. 1182 (1971); DR 5-105(D).

In certain cases the legislator is specifically prohibited by statute from appearing before certain boards or agencies on behalf of clients or representing clients in claims against the state. Cf. Section 73(4) of New York Public Officers Law. In such case, absent any other statutory provision, the usual rule that a lawyer's disqualification applies to his partners and associates is applicable and the legislator's partners and associates may not appear before the specified agency or represent a claimant with respect to such claim against the state. "The relations of partners in a law firm are such that neither the firm, nor any member or associate thereof, may accept any professional employment which any member of the firm cannot properly accept." ABA 72 (1932). See also, N.Y. State 254 (1972); N.Y. State 257 (1972); N.Y. State 392 (1975); DR 5-105(D).

The issue now presented is whether these rules are applicable

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when a state statute expressly and affirmatively provides that members or associates of the legislator's law firm may appear before the specified agency. ABA 306 (1962) concluded that such a statute constituted "consent" by the state to the representation of the possibly conflicting interests and that, therefore, such representation pursuant to express statutory permission is not improper. Although this conclusion was reached prior to the adoption of the present Code specific statutory legislative authorization would seem to comply with DR 5-105(C). Cf. N.Y.State 213 (1971); N.Y. State 218 (1971); N.Y. State 247 (1972); N.Y. State 364 (1974) where consent short of a statute is insufficient where the public interest is involved.

There is nevertheless some doubt as to whether DR 5-105(C) can be satisfied by such a statute because the question of the adequate representation of the conflicting interests and the possible effect of such representation on professional judgment might require a case-by-case analysis. There would also seem to be an appearance of impropriety and a possible violation of Canon 9, DR 9-101(B), EC 8-8, 9-2, 9-6 and DR 8-101(A), especially if the legislator is permitted by statute to share in the fees earned from such representation.

However, if the state has by law expressly determined that certain kinds of conduct by lawyers is in accordance with the public policy of the state, it should require a very clear case before such expressly permitted conduct is treated as improper because it is unethical. The issues presented by the present inquiry do not seem to involve such a clear case or to require such a decision of impropriety.

Of course, this committee does not express any view with respect to the wisdom of the statute which affirmatively permits such representation by partners and associates of legislators and which permits legislators to share in fees so earned. The New York State Bar Association in a report issued in April 1975 entitled "Toward A More Effective Legislature" said on page 22 "that the banning of direct personal dealing with state agencies for private gain by legislators and legislative employees would constitute a positive and meaningful first step in restoring public confidence in the Legislature".

We reluctantly conclude that in spite of the proscriptions of DR 5-105(D), where a statute expressly authorizes the appearance of the associates or partners of a lawyer who may not himself appear before the agency, such appearance would not be improper. Cf. N.Y. State 323 (1974). However, in the usual situation where the lawyer is disqualified, his associates and partners are similarly disqualified, if the statute disqualifying the lawyer is silent as to his associates and partners.

For the guidance of the Bar we quote at some length from what we consider pertinent provisions of the Code.

DR 5-105(D) provides in pertinent part:

"If a lawyer is required to decline employment or to

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> withdraw from employment ... no partner or associate of his or his firm may accept or continue such employment."

This proscription when coupled with the provisions of EC 8-8, which provides in pertinent part as follows:

> "... A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

leads inevitably to the conclusion that Canon 9, which provides:

> "A lawyer should avoid even the appearance of professional impropriety."

is violated in the absence of express statutory authorization. This conclusion is reenforced by DR 9-101(B) which provides:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

and by EC 9-2, which provides in pertinent part:

> "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. ... When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Finally, EC 9-6 provides in pertinent part:

> "Every lawyer owes a solemn duty to ... avoid not only professional impropriety but also the appearance of impropriety."
