NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #435 - 7/13/76 (44-76) Topic: Private practice of county legislators; conflict of interests

Digest: Guidelines for private practice of county and other part-time legislators; no disqualification where no actual or potential conflict of interest, no appearance of improper influence, and no basis for public suspicion that private client seeks some improper advantage.

Code: EC 5-2, 5-14, 8-8, 9-2, 9-6
DR 5-105(A)(B), 8-101(A)(2)(3), 9-101(C)

QUESTION

May a part-time county legislator represent a private client in the following matters:

(1) A business franchise application from a municipality with the county?

(2) A tax refund claim against a municipality within the county?

(3) A restaurant's application for a permit from the County Health Department?

(4) Matters in the County Court, in the Surrogate's Court or in the Family Court within the county?

(5) Matters involving ministerial processing in the County Clerk's office?

OPINION

We continue to receive inquiries respecting the limitations imposed upon the private practice of part-time legislators.

The same basic principles apply to all part-time public officials. No lawyer holding a public office should represent private interests which are adverse or potentially adverse to the public body which he serves or represents. As stated in EC 8-8:

"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."

Such representation would also be potentially violative of such other Code provisions as EC 5-2, EC 5-14, DR 5-105(A) and (B), and EC 9-6.

OVER---

See also ABA 192 (1939), decided under the former Canons.

In addition, lawyers have a professional obligation to act "in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession". EC 9-2. Thus lawyers holding public office are forbidden from using their public position to influence, or attempt to influence, any adjudicatory body to act in favor of a client, or from accepting any employment intended to influence the officeholder's action as a public official. DR 8-101(A) (2) and (3). Similarly no lawyer may state or imply "that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official". DR 9-101(C). The underlying purposes of such EC's and DR's were explained in N.Y. State 431 (1976) as follows:

> "Primarily the disqualification rules serve to prevent private clients from retaining a part-time public official in the hope of gaining some improper advantage by reason of his lawyer's public office. In addition the rules are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official."

Where "public suspicion of possible misuse is sufficiently great" disqualification is justified, even in situations where it is "highly unlikely that any such advantage would in fact be gained or that the legislator would misuse his position". N.Y. State 431 (1976). As recognized in N.Y. State 110 (1969), danger that unfair influence may be exerted is particularly great "when a member of one public body seeks to represent private interests before another public body". See also N.Y. State 141 (1970); N.Y. State 259 (1972); N.Y. State 292 (1973) and N.Y. State 424 (1975).

Conversely, however, where there is no actual or potential conflict between the official's public duties and the interests of private clients, no use of improper influence, or appearance thereof, and no basis for public suspicion that the private client is seeking or hoping to get some improper advantage, there should be no disqualification.

Applying these principles to the questions now before us, we find no basis for disqualification of a county legislator from representing clients seeking business franchises or tax refunds against municipalities within the county, or from processing ministerial applications in the county clerk's office, merely because he serves as a county legislator. The fact that the legislator can cast a vote on matters relating to the financial affairs of the municipality does not of itself suggest an ability to exercise improper influence. Should, however, the matter involve the validity or interpretation of county legislation or regulations issued thereunder, or should there be any attempt on the part of either the client or his lawyer to gain some improper advantage, or should particular facts give rise to either a direct conflict or any public suspicion of any potential of improper advantage, then, of course, disqualification would be required. We thus give an affirmative answer to questions numer (1), (2) and (5), subject to a special circumstances qualification.

CONT'D---

With respect to appearances in courts located within the county, there may be a disqualification requirement even absent special circumstances, if the judge before whom he would be appearing was appointed or subject to confirmation by the legislative body of which the lawyer was a member. N.Y. State 110 (1969). Cf. N.Y. State 226 (1972). The county legislator would also be disqualified from appearing in such a court if the county or a county agency were a contesting party, or if the interpretation or validity of a county ordinance or regulation were at issue. N.Y. State 141 (1970); N.Y. State 226 (1972). While the question is a close one, our Committee has held that county legislators are disqualified from representing private clients in criminal matters where the legislature fixes prosecutorial salaries in a "line item" legislative budget, but that there is no such disqualification where the legislature appropriates a"lump sum for the entire office, but does not fix individual salaries". N.Y. State 424 (1975); N.Y. State 431 (1976). For reasons set forth in N.Y. State 226 (1972), there is no disqualification, however, from appearing in courts where judicial salaries are set by the legislative body of which the lawyer is a member. Subject to these additional exceptions and in the absence of special circumstances, we also give an affirmative answer to question number (4).

We hold, however, that it would be improper for a county legislator to represent a private client applying for a permit from the County Health Department. Here there could well be a direct conflict between the duty owed by the lawyer to his client in seeking the permit and his duty to the County to make certain that the public's interest is protected. N.Y. State 259 (1972). There would also be the possibility of public suspicion that the permit application may be improperly facilitated by reason of the public office of the applicant's lawyer. Cf. N.Y. State 431 (1976). Thus we answer question number (3) in the negative.

The same principles govern the private practice of all part-time members of other legislative bodies. Our prior opinions answering specific questions respecting the private practice of county legislators are N.Y. State 141 (1970); N.Y. State 259 (1972); N.Y. State 326 (1974); N.Y. State 418 (1975); N.Y. State 424 (1975); N.Y. State 431 (1976). Our prior opinions answering such specific questions respecting city council members are N.Y. State 110 (1969); N.Y. State 145 (1970); N.Y. State 209 (1971); and N.Y. State 226 (1972).
