New York State Bar Association

Committee on Professional Ethics

Opinion 773 – 1/23/04

Clarifies: N.Y. State 655 (1993)

Topic: Lawyer-member of municipal board; conflict of interest; appearance of impropriety; imputation of disqualification in "of counsel" relationship.

Digest: A lawyer who serves on a municipal board is prohibited from appearing before that board on behalf of a private client. Lawyers who are "of counsel" to a law firm are "associated" with the law firm for purposes of DR 5-105(D), and so the firm is likewise disqualified from appearing before the board unless the client gives informed consent. Whether the firm is disqualified by other rules depends on the facts and circumstances, but if not and if the firm does appear, the lawyer-member must recuse him or herself.

Code: DR 1-102(A)(2),(5); 2-102(A)(4); 5-101(A); 5-105(A),(B),(D); 5-108 (A),(B); 8-101(A)(2); 9-101(B), (C); Canon 9; EC 8-8.

CJC: Canon 2

QUESTION

1. Is a lawyer who serves on a municipal board prohibited from appearing before that board?

2. If so, is a law firm with which that lawyer has an "of counsel" relationship also disqualified from appearing before that board?

3. If so, does the lawyer's recusal from the board's deliberations on matters involving the firm avoid disqualification?

OPINION

Question #1: Is a lawyer who serves on a municipal board prohibited from appearing before that board?

In a line of opinions dating back at least to 1970, this Committee has held that an attorney who is a public officer may not represent private clients before the body on which he or she serves. Indeed, most of our opinions have addressed the circumstances in which that prohibition would extend to appearance before bodies, or adverse to entities, other than the one on which the lawyer serves but over which the lawyer-member has some measure of control as a public officer.[1] We have repeatedly noted two rationales for these prohibitions:

> Rules disqualifying lawyers who are part-time public officials from accepting private clients in certain situations are designed to serve two basic purposes. 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.

N.Y. State 431 (1976), *quoted* in N.Y. State 435 (1976), 510 (1979), 692 (1997), 702 (1998). The Committee has also opined that at least in some circumstances these ethical concerns would not be cured by recusal from all votes relating to the private representation. N.Y. State 702 (1998) (lawyer-legislator could not appear adverse to district

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1 *See, e.g.,* N.Y. State 702 (1998) (lawyer-legislator cannot practice criminal law where legislature has authority over district attorney budget; recusal from voting on budget does not cure conflict); N.Y. State 692 (1997) (part-time legislator cannot represent criminal defendants if legislature has budgetary authority over opposing prosecutor or police); N.Y. State 510 (1979) (part-time deputy town supervisor may not represent private clients in tax certiorari or other proceedings involving town); N.Y. State 435 (1976) (county legislator may not represent client seeking permit from county health department but may represent clients before municipal bodies and county courts or in ministerial processes in county clerk's office); N.Y. State 431 (1976) (county legislator with "line item" control over salaries of district attorney's office may not represent criminal defendants), *overruled by* N.Y. State 692; N.Y. State 424 (1975) (part-time county legislator should not represent criminal defendants where district attorney's funding is from legislature of which lawyer is member); N.Y. State 364 (1974) (member of school board should not represent property owner seeking reassessment); N.Y. State 209 (1971) (attorney who is city council member may not act as attorney for school district dependent on city services). *See also* N.Y. State 484 (1978) (member of zoning board of appeals may practice before other agencies of town in matters unrelated to zoning); *Kings Point Gate, LLC v. Aroche,* 192 Misc. 2d 45 (Nassau Cty. Dist. Ct. 2002) (citing various of these opinions in refusing to disqualify counsel who was town council member in county in which action was pending); Nassau County 93-20 (city council member may not appear before judge or opposite city attorney appointed by council, or where council member may need to cross-examine city official).

attorney). In so finding, we cited the following sources in the Code: DR 1-102(A)(5) (barring conduct "prejudicial to the administration of justice"), EC 8-8 ("A lawyer who is a public officer, whether full or part-time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties."), DR 8-101(A)(2) (lawyer in public office shall not "[u]se the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client"), and Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

In addition to enforcing the bar on improper influence and the appearance of impropriety, the Committee has noted that "[t]here may also be special circumstances in which a conflict could arise between the lawyer-legislator's duties or political objectives in the lawyer's role as legislator, and the lawyer's professional obligations to a client. In such circumstances, the lawyer-legislator must apply the principles of DR 5-101(A)," which deals with conflicts of interest affecting the lawyer's exercise of professional judgment on behalf of clients. N.Y. State 692. We noted that where this concern operates, the private client may be able to give effective consent. *Id.*

Question #2: Is the law firm with which that lawyer has an "of counsel" relationship also disqualified from appearing before that board?

The question presented here is whether the prohibitions on a lawyer appearing before the body of which he or she is a member extend to a law firm with which the lawyer has an of counsel relationship.

DR 5-105(D) provides that all lawyers "associated in a law firm" are disqualified from accepting or undertaking an engagement if any one of them practicing alone would be disqualified under certain enumerated rules: DR 5-101(A), DR 5-105(A) or (B) and DR 5-108 (A) or (B), all concerning conflicts of interest affecting the exercise of professional judgment on behalf of a client or duties of confidentiality to present or former clients, and DR 9-101(B), concerning conflicts arising out of public employment, an issue not applicable here.[2] In order to determine whether the disqualification of the lawyer-

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[2] DR 9-101(B) addresses situations in which the lawyer-public employee had or has personal involvement in the matter or representation at issue, which we assume is not the case here. DR 9-101(B) provides:

> Except as law may otherwise expressly permit: (1) A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom; and b. There are no other circumstances in the particular representation that create an appearance of impropriety. (2) A lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may know-

public officer from appearing before the body on which he or she serves is imputed to the partners and associates of his or her "of counsel" firm under DR 5-105(D), we must determine the following: (1) whether the disqualification arises out of any of the enumerated rules, and (2) whether an of counsel lawyer is "associated in a law firm" with partners and associates of the firm for purposes of DR 5-105(D).

As noted above, the general ban on a lawyer-public officer appearing before the body on which he or she serves, or before or adverse to entities over which the public officer has some control, arises out of rules relating to the appearance of impropriety, improper influence and conduct prejudicial to the administration of justice. Those rules are not subject to automatic imputation under DR 5-105(D). But the bar that we have said may arise in "special circumstances" (where the public officer's duties might conflict with the lawyer's duties to a client) arises out of DR 5-101(A), which is subject to automatic imputation under DR 5-105(D).[3] We turn, therefore, to whether a lawyer-public officer is "associated" with a firm to which he or she is of counsel within the meaning of DR 5-105(D).

DR 2-102(A)(4) provides that "A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." We have interpreted the "of counsel" relationship to mean that the of counsel lawyer is "available to the firm for consultation and advice on a regular and continuing basis." N.Y. State 262 (1972). The ABA Ethics Committee has characterized the "of counsel" relationship as "close, regular [and] personal." ABA 90-

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> ingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom. (3) A lawyer serving as a public officer or employee shall not: a. Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or b. Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

[3] In one opinion, this Committee has suggested that a member of a board of zoning appeals exercises professional judgment on behalf of a client within the meaning of DR 5-101(A) in the member's zoning appeals votes. N.Y. State 655 (1993) ("we perceive no obvious danger that the exercise of professional judgment by a lawyer-member of a board of zoning appeals on behalf of a private client *or with respect to the lawyer's zoning board judgments* 'will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests'" when the lawyer represents personal injury clients against town) (emphasis added, footnote omitted). To the extent this remark may be read to suggest that DR 5-101(A) addresses a lawyer-member's votes on the board of zoning appeals, we believe it was misplaced. DR 5-101(A) applies only to conflicts affecting "the exercise of professional judgment on behalf of [a] client," not to conflicts affecting other roles a lawyer may assume. Thus, DR 5-101(A) does not serve to protect the board or the town from votes by a member who has a private client with a matter before the board; it serves to protect only the private client from conflicts and thus, in certain circumstances, can be waived by the client, as stated in N.Y. State 692.

357 (citing and withdrawing ABA 330 [1972]). The ethics committee of the Association of the Bar of the City of New York has taken a similar view. *See* N.Y. City 1996-8; N.Y. City 1995-8; N.Y. City 81-3 (1982).

Both the ABA and the Association of the Bar of the City of New York have concluded that a lawyer who is "of counsel" to a law firm is "associated" with that firm for purposes of imputation of conflicts of interest. *See* ABA 90-357; N.Y. City 1995-8 ("attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, 'of counsel' relationships are treated as if the 'counsel' and the firm are one unit"). *See also Nemet v. Nemet*, 112 A.D.2d 359 (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602 (1985); N.Y. City 2000-4. The same position has been adopted by the *Restatement of the Law Governing Lawyers*, which states:

> A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.

Restatement (Third), *The Law Governing Lawyers*, § 123 cmt. c(ii) (1998).

We agree with the aforementioned authorities and conclude that if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an "of counsel" relationship.

Therefore, if a lawyer-public officer is barred from undertaking a client engagement because his or her exercise of professional judgment on behalf of the client would be or reasonably might be affected by the lawyer-public officer's political or fiduciary duties to the municipal board, the law firm would likewise be barred. Thus, for example, if a prospective client sought to hire a partner of the firm to argue against a bill that the lawyer-public officer had offered, the partner could not do so, at least not without the informed waiver of the prospective client.

Question #3: Does the lawyer's recusal from the board's deliberations on matters involving the firm avoid disqualification?

DR 5-105(D) is not the only potential limitation on the law firm's practice before the municipal board. In N.Y. State 632 (1992), we addressed whether the partners and associates of a part-time judge were prohibited from appearing before the municipal zoning board of appeals or planning board. After concluding that the judge would be so barred, this Committee held that whether the partners and associates of the judge could practice before those boards "depends on the particular facts and circumstances":

> None of the Code provisions identified in DR 5-105(D) applies here, where the disqualification of the judge rests on [Code of Judicial Conduct] Canon 2 [mandating avoidance of the appearance of impropriety] and DR 8-101(A)(2). Thus, whether the partners and associates of the part-time judge may practice before the boards of the same municipality depends on the particular facts and circumstances. Clearly the partners and associates of a part-time judge may not represent or imply that hiring the firm will result in using the influence of the judge in zoning and planning matters. *See* DR 9-101(C). The judge may not circumvent the force of CJC's Canon 2 by sending a partner or associate to represent the judge's clients before these boards. *See* DR 1-102(A)(2); DR 8-101(A)(2) and Canon 9. On the other hand, vicarious disqualification should not be imposed if the judge's partners and associates have an ongoing independent practice before these boards, the judge is screened from any involvement, and their practice is conducted without using or even appearing to use the name and influence of the judge.

A similar examination of the facts and circumstances is required to determine whether a partner or associate of a firm can appear before a municipal board of which an of counsel lawyer of the firm is a member.

If the firm appears, the lawyer-member must recuse him- or herself. We have said, "A lawyer holding public office has a duty to abstain from voting or otherwise participating in a matter in which his firm was involved at a time when he was a member of the firm, irrespective of whether the client had been represented by him or by one of his partners or associates." N.Y. State 145 (1970). We think the same precept applies to lawyer-public officer who are of counsel to the firm. Indeed, it is likely that the codes of ethics of many if not most boards would require recusal in such circumstances. *Cf., e.g., In the Matter of Nicholas Quennell*, N.Y.C. Conflict of Interest Board Case No. 97-60 (Art Commission member fined for failure to recuse himself from vote on matter involving his architectural firm).

Many codes of ethics of municipal boards likewise address whether others affiliated with a board member can appear before the board even if the member is recused. *See, e.g.,* N.Y.C. Conflict of Interest Board Advisory Op. 96-04 (law firm of which community board member is a partner may not appear before board even if member is recused); N.Y.S. Ethics Comm'n Advisory Op. 99-12 (restrictions on practice of a member of a state commission who is of counsel to a firm do not apply to firm as long as the of counsel lawyer does not share in the relevant net revenues). If so, those codes should govern, since any recusal rules are designed to protect the processes of the board, rather than the representation of a client, which is the primary concern of the Code. [4] If the ethics codes of the board do not directly address the question, the law

[4] The New York State Ethics Commission has similarly observed that where its rules permit a former state employee to undertake a matter that might otherwise be prohibited by DR 9-101(B), the state ethics rules will govern because DR 9-101(B) contains an exception "as law may otherwise expressly permit." N.Y.S. Ethics Comm'n Advisory Op. 90-14.

firm may still have a duty under the Code to decline the representation in order to avoid an appearance of impropriety and any suggestion that the client is getting special access to the remaining members of the board. Whether this duty arises will depend on a number of factors, such as the size of the firm and of the board, how long the of counsel lawyer-public officer has practiced with the firm, the extent to which the of counsel lawyer is publicly identified with the firm, and other factors. *Cf.* N.Y. State 513 (1979) (appearance of impropriety bars partner of the chair of the local political committee from serving as city attorney).

CONCLUSION

A lawyer who serves on a municipal board is prohibited from appearing before that board. Whether a law firm to which the lawyer is of counsel is barred depends on the facts and circumstances. First, any conflicts that could affect the lawyer's ability to represent the client under DR 5-101(A) are imputed to all lawyers in the firm, but the private client may be able to waive the conflict after adequate disclosure. Second, the lawyer-public officer would need to be recused from any matters in which the law firm appears before the board. Third, even with recusal, the law firm may be barred from appearing before the board if, under the circumstances, the law firm's appearing would give rise to a suggestion of special access to the board or other appearance of impropriety.

(20-02)