New York State Bar Association

Committee on Professional Ethics

Opinion 798 – 9/28/06

Topic: Practice of criminal law by legislator/lawyer

Digest: A lawyer/county legislator may not represent criminal defendants in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. It is irrelevant whether the county or the budget is large or the representation involves only plea bargaining. If the lawyer/legislator is employed by a law firm, other lawyers in the firm are not *per se* vicariously disqualified, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

Code: DR 1-102(A)(5), DR 5-101(A), DR 5-105(A) and (B), DR 5-105(D), DR 5-108(A) and (B), DR 8-101(A), Canon 9, DR 9-101, DR 9-101(B)(1)(a).

QUESTION

1. May a lawyer who is also a member of a county legislature practice criminal law in the county where he/she is a legislator if the legislature has

budget authority over the police department or district attorney's office? If the lawyer is personally disqualified from representing a client, and the lawyer is associated with a law firm, are the other lawyers in the firm vicariously disqualified?

DISCUSSION

2. N.Y. State 692 (1997) and 702 (1998) prohibit a legislator/lawyer from participating in a matter that requires the legislator to cross-examine a police officer, or to be adverse to a prosecutor, who works for the county where the legislature has the authority to approve the budget of the county. Thus a legislator/lawyer could represent defendants in federal criminal cases or criminal cases brought by the attorney general of New York, but could not undertake representations in any court in the county in which the budget for the prosecutors or law enforcement witnesses must be approved by the legislative body on which the lawyer/legislator sits. We have been asked a number of questions pertaining to the practice of criminal law by a county legislator:

(1) Whether N.Y. State 692 and 702 may be distinguished where the county in which the legislator serves is large and has a large budget;

(2) Whether the lawyer/legislator may, with the advance consent of the client, handle criminal work in that county if the work involved only plea bargaining, on the understanding that if more were required, the lawyer/legislator would pass the case to another lawyer; and

(3) Whether the lawyer/legislator may take a position in a criminal defense firm in a nearby county that represents criminal-defense clients in the county where the lawyer is a legislator, if the lawyer/legislator is screened from those matters.

Size of County or Budget

3. As we noted in N.Y. State 692, this Committee has been addressing the limits of the private law practice that may ethically be maintained by a part-time legislator for more than 30 years. The purpose of ethical restrictions on the practice of criminal law by legislators is to prevent private clients from retaining a part-time public official in the hope of gaining an improper advantage as a result of the lawyer's public office. DR 8-101(A). They also are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official. *Id*. For example, if the lawyer/legislator would be adverse to law enforcement authorities (*e.g.*, because he or she would have to cross-examine them) or prosecutors over whom the legislature has budgetary control or influence, we believe that the lawyer/legislator should be disqualified because of the possibility that the law enforcement officers or prosecutors would exercise undue caution in handling the case.

4. In N.Y. State 431 (1976), we distinguished between whether the legislature had line item approval over members of the prosecutor's office or

rather appropriated a lump sum for the entire office, leaving it to the district attorney to set the salaries of his or her assistants. We allowed the lawyer-legislator to be adverse to a prosecutor or law enforcement officer in the latter case. In N.Y. State 692, however, we rejected that distinction. Although one of the reasons for this rejection was that an appearance of impropriety might exist where a small legislature, small DA's office or small police department was involved in a lump sum budget approval, we did not limit disqualification to these instances. Rather, we stated that a lawyer-legislator should not take on a matter that will require the lawyer to cross-examine a police officer from a police department over which the legislature exercises budgetary or appointment authority or be adverse to a prosecutor whose office is similarly affected. We believe the concerns that motivate this prohibition apply regardless of the size of the legislature at issue. Accordingly, the fact that the legislator's county is large and has a large budget is irrelevant to whether he or she may practice criminal law in the county.

Representation Involving Solely Plea Bargaining

5. This Committee has a series of opinions dealing with the issue of whether a lawyer may limit the scope of representation of a client. For example, in N.Y. State 604 (1989), we held that a lawyer whose client is the subject of a grand jury investigation that could result in serious felony charges and does not have sufficient funds to pay for the lawyer's services beyond the grand jury stage may enter into a limited-scope retainer, provided that the limitation is consistent with competent representation under the Lawyer's Code of Professional Responsibility (the "Code") and provided that the lawyer makes certain disclosures to the client. We express no opinion as to whether a representation limited to post-indictment plea bargaining would be consistent with competent representation under the Code.

6. Even assuming that limiting the scope of the representation to plea bargaining were appropriate under other circumstances, however, we do not believe that a limited representation would circumvent the conflicts described above. In plea bargaining, the lawyer/legislator still would have to conduct an investigation and interview members of the police force, and would be bargaining with the members of the county prosecutor's office. Consequently, all of the policy reasons for our earlier positions apply in this case.

Vicarious Disqualification of Other Lawyers in the Legislator's Firm

7. The third question is whether the lawyer/legislator may take a position as associate, partner or "of counsel" lawyer in a criminal defense firm in a nearby county, without affecting the ability of other lawyers in that firm to represent criminal-defense clients in the county court of the county where the lawyer/legislator is a legislator. In particular, the inquirer asks whether any vicarious disqualification of the other lawyers in the firm can be avoided by the creation of a screening mechanism within the firm.

8. Prior to 1990, our opinions applied vicarious disqualification to the partners or associates of a lawyer-legislator. *See, e.g.,* N.Y. 415 (1975). At that time, DR 5-105(D) of the Code provided that, if one lawyer in a law firm was disqualified from representation, then all were disqualified. In 1990, however, the Code was amended so that such vicarious disqualification applies only when the primary lawyer was prohibited from undertaking the representation under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B) or DR 9-101.

9. In N.Y. State 692, the basis of the disqualification of the lawyer/legislator is stated to be DR 1-102(A)(5) (lawyer shall not "engage in conduct prejudicial to the administration of justice"), which is not one of the Code sections for which vicarious disqualification applies under the current text of DR 5-105(D). The ban on a lawyer-public officer appearing before or adverse to entities over which the public officer has some control might also be said to arise out of rules relating to the appearance of impropriety or improper influence. Canon 9, DR 8-101(A). None of these Code sections are sections to which automatic vicarious disqualification applies under DR 5-105(D).

10. In N.Y. State 773 (2004), we discussed whether a lawyer public official could be "of counsel" to a law firm without resulting in disqualification of the law firm from a private representation. We identified two different situations in which vicarious disqualification might apply: (1) Where the lawyer/public official was disqualified under one of the Code sections enumerated in DR 5-105(D), in which case the entire firm is disqualified. This includes a case where the bar against the lawyer/public official arises because the public official's duties might conflict with the lawyer's duties to a client, in which case the disqualification arises out of DR 5-101(A), and other lawyers in the firm are subject to automatic imputation under DR 5-101(D). (2) Where the lawyer/public official was disqualified under a Code section other than one of the enumerated ones, in which case there is no *per se* imputed disqualification of the other lawyers in the firm, although, depending upon the circumstances of the proposed representations, disqualification might be appropriate.

11. Where the lawyer/legislator is a partner or associate of a law firm (including being associated as an "of counsel" lawyer) but does not undertake representations involving questioning of police or taking positions adverse to district attorneys, and does not undertake representations that might conflict with his or her duties as a public official (*e.g.*, lobbying for or against matters being considered by the legislature), we believe the other lawyers in the lawyer/legislator's firm should not be *per se* disqualified from undertaking representations that the lawyer/legislator cannot undertake. A representation by another lawyer in the firm may, however, involve facts and circumstances where the lawyer/legislator's disqualification should be imputed to everyone in the firm.

12. Because the purpose of disqualifying the lawyer/legislator is to avoid the public perception that the lawyer/legislator is misusing his or her influence over police and prosecutors, the circumstances in which others in the firm should be

disqualified are those in which the public is likely to suspect that the lawyer/legislator's influence will still have an effect. This is most likely to occur where the lawyer/legislator is particularly prominent, *e.g.*, a party leader, or where the case is particularly prominent, even if the lawyer/legislator is not personally working on the case.

Screening

13. Formal screening may be used as a mechanism to ensure that the lawyer/legislator does not participate in the representation where the lawyer/legislator is personally disqualified. But if the facts and circumstances were such that the disqualification of the lawyer/legislator were imputed to others in the firm, screening would not prevent the imputation. The Code in New York does not generally recognize the efficacy of screening. The only instance where the Code allows screening is in the case of a former government employee who was personally and substantially involved in a matter as a public employee and who later joins the private sector. DR 9-101(B)(1)(a). That is not the case here.

CONCLUSION

14. A lawyer who is a member of a county legislature may not undertake criminal representation in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. The size of the county or budget is not relevant. The lawyer/legislator may not undertake such a criminal representation that involves only plea bargaining, since the plea bargaining would be with the members of the same prosecutor's office. If the lawyer/legislator is employed by a law firm, the lawyers in the firm are not automatically disqualified from undertaking cases that the lawyer/legislator could not accept, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

(35-05)