DELAWARE STATE BAR ASSOCIATION COMMITTEE
ON PROFESSIONAL ETHICS

OPINION 1980-4

We have been asked by a candidate for the office of Lieutenant Governor of Delaware to provide an opinion to him as a member of the Delaware Bar in response to questions concerning limitations that may be imposed on his private practice of law if he is elected.

The specific questions posed are:

1. Are there any absolute prohibitions in his practice?

2. Would he be restricted from representing an agency of the State?

3. Would any firm with which he is associated be restricted from representing an agency of the State?

4. Would he or any firm with which he is associated be restricted from having an action against the State? Would this be changed if the State provided an insurance policy and was only nominally named?

5. Would representing defendants in criminal cases be affected by the fact that the State is a party to such cases?

OPINION

Subject to general considerations discussed below, the answers to questions one through three are "no".

With regard to question number four, it is our opinion that it would be unethical for the inquiring attorney or a member of any firm with which he is associated to represent parties in an action against the State.

In response to question number five, it is our opinion that ethical limitations prohibit either the inquiring attorney or a member of any firm with which he is associated from representing defendants in criminal cases.

DISCUSSION

Most of the questions with which we are presented are quite broad and it is difficult, if not impossible, to contemplate the innumerable specific circumstances which might arise within their scope. Nevertheless, because of the significance of the question to the member and the public we shall seek to give as much guidance as we can.

The Lieutenant Governor has two specific areas of responsibility. First, he is President of the Senate,

"but shall not vote unless the Senate be equally divided."[1] He is a member of the Board of Pardons[2], and shall serve as President of the Board[3].

In addition, the Delaware Constitution provides that in the case of the Governor's "inability to discharge the powers and duties of the said office, the same shall devolve on the Lieutenant Governor."[4] Hence, the Lieutenant Governor may at any moment be called upon to serve as Governor. Although the Committee does not address such a succession in this opinion because it goes beyond the present inquiry, the potentiality of such a succession lends to the position of Lieutenant Governor a significance its otherwise fairly routine duties would not have.

Although we do not provide advisory opinions on state law, we do call the inquiring attorney's attention to 29 Del.C. § 5851 et. seq., the statute regulating state officials' conflicts of interests.[5]

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[1]Delaware Constitution, Article III, § 19; Article II, § 7

[2]Delaware Constitution, Article VII, § 21; Article III, § 19

[3]Par. Bd. R. 5

[4]Delaware Constitution, Article III, § 20

[5]We are confident that the inquiring attorney and any firm with which he is associated will proceed with considerastion for the possible application of that section of the law, and with due regard, in particular, for sections 5854 and 5855.

It cannot escape notice that the relatively low salary provided for the Lieutenant Governor makes it essential that he have other sources of income if he is to maintain a standard of living and quality of appearance normally expected of a leading public official. Correlatively, conflict of interest rules read too strictly would deprive the State of able candidates for this office. Indeed, conflicts of interest can be read so narrowly as to deny more rights than are protected. See Address of Delaware Supreme Court Justice Quillen before the Wilmington Rotary Club quoted in the Sunday News Journal May 25, 1980 at page H-3. Balanced against these considerations is the unquestioned fact that the Lieutenant Governor is a high officer of the State, is properly so viewed by the public, and owes the State and the people of Delaware the obligations of a public trustee.

Question 1:

The Committee's research discloses no authority for absolute prohibitions on the private practice of law by a Lieutenant Governor. We cannot, therefore, say that the inquiring attorney is prohibited from serving in the dual capacity of Lieutenant Governor and private practitioner of law.

Questions 2 and 3:

It seems to the Committee that the office of the Lieutenant Governor can be analogized to that of a lawyer-legislator for the purpose of a response to this inquiry. The Lieutenant Governor may be called upon to cast deciding votes on issues upon which the Senate may be equally divided and common sense tells us that the parliamentary maneuvering subject to the control of the President of the Senate frequently has substantial effect on the outcome of legislation.

ABA Informal Opinion 1182 (December 5, 1971) addresses the question: "Is it proper for a lawyer-legislator to accept legal employment by the State or by one of its agencies?" That opinion states in pertinent part:

> "No disciplinary rule necessarily prohibits a legislator from being employed in another capacity by the State, but this dual employment is often controlled by local law. We do not undertake to answer questions of law; see question two, supra. We call attention, however, to the ethical guidance given to the lawyer by EC 8-4, which indicates that a lawyer holding such dual employment should make clear whether his position, pro or con, concerning particular legislation is a position taken in his capacity as legislator or in his capacity as a State employee. In accepting such dual employment, a lawyer in any event should consider the guidance given in the Ethical Considerations of Cannon 9.

> Your eighth Question is: 'Do the same rules apply to a law partner of the legislator?'
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> It is generally recognized that disqualification of a lawyer includes disqualification of law partners; see, e.g., ABA Formal Opinion 33 (1931); W.E. Bassett Co. v. H. C. Cook Co., 201 F. Supp, 821 (1962); Consolidated Theater Corp. v. Warner Bros. Pictures, Inc. 113 F.Supp 265 (1953); Note, 73 Yale L.J. 1058 (1964); cf. DR 5-105 (D) (relating specifically to differing interests of two clients); DR 1-102 (A) (2); but see ABA Formal Opinion 220 (1941). While the question is not completely free from doubt, in our opinion the same rules apply to a lawyer partner of the legislator. A lawyer legislator should never, of course, use his position in the legislature to his advantage in the representation of his clients (seee DR 8-101), and his conduct should be governed at all times by the Code."

Even though there is no prohibition against the Lieutenant Governor representing the State, we have some concern that if he or a member of his firm is employed by a State agency after his election, the public perception might be that such employment was a result of political favoritism to the firm because of the close political nexus between the Lieutenant Governor and the Governor, who for all practical purposes has great control over State agencies. In this context the firm might well prefer to decline such an opportunity in order to avoid the appearance of impropriety.[6]

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[6] EC 9-2: "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."

Relying upon the ABA Informal Opinion cited above, and because none of the specific provisions of DR 9-101 necessarily prohibit representation of a State agency, it is the opinion of the Committee that there is no absolute ethical bar to such representation.[7]

Question 4:

The two matters raised in this question deal not only with the appearance of impropriety, but also with a genuine potential for direct conflicts.

Taking up the second matter first, we are of the opinion that whether the State provided an insurance policy and was only nominally named in an action against the State would not affect the outcome. We say this because: (1) it is immaterial to the issue of appearances, and (2) there always is the possibility of a verdict in excess of such coverage.

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[7]DR 9-101: (A) lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity. (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Although the constitutionally defined role of the Lieutenant Governor is limited, he serves as a member of the State's administration, and, particularly if a member of the same political party as the Governor, is associated closely with the chief executive of the State. As Lieutenant Governor, an attorney would have access to virtually any information known to or possessed by any State agency. The Lieutenant Governor, as counsel, might well acquire information which would be adverse to the interests of the State. The possession of such information would create an immediate conflict between public duty and the private interest of his client.

In addition, the Lieutenant Governor may at any time be called upon to act in the Senate with regard to a legislative matter potentially affecting the litigation.

We are of the opinion that not only would one holding the office of Lieutenant Governor create the appearance of impropriety by representing a litigant in an action against the State, but also he would be in danger of finding himself involved in a genuine conflict from which it might be impossible to withdraw without a breach of duty either to the State or to his private client. It follows therefore the Lieutenant Governor would be precluded from such representation and any member of a firm with which he

were to be associated would likewise be precluded from representing litigants in actions adverse to the State.

Question 5:

Representation of a criminal defendant before the Board of Pardons by either the inquiring attorney or a member of any firm with which he is associated is likewise not permissible. The Lieutenant Governor, as President of the Board of Pardons, is charged with fulfilling the responsibility of that office. Although perhaps he could abstain from and play no role in the determination of a given case, to do so in an effort to preserve his private practice would involve an abdication of the functions for which he was elected, without constitutional or legislative permission.[8] As with agency practice, no member of the Lieutenant Governor's firm could act if the Lieutenant Governor himself was precluded from acting. If a matter arises before the board in which the Lieutenant Governor or a member of his firm acted before his election, the Lieutenant Governor should abstain.[9]

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[8]See ABA Formal Opinion 306 (May 26, 1962)

[9]Compare the Delaware Code of Judicial Conduct, Canon 3 C (1) b, which states: "C. Disqualification. (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (B) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;"

Although the representation of a criminal defendant might in one sense, not to be representation of an interest "adverse to the State", it would be improper for the Lieutenant Governor, or any member of a firm with which he is associated, to represent a defendant in a criminal case in this state.

Not only would it appear improper for the Lieutenant Governor to lend the weight and prestige of high public office to the representation of a criminal defendant such a representation would undercut the prosecution and quite properly perplex the jury and the public. It follows in this instance as well as the other examples cited that it would not be permissible for a member of a firm with which the Lieutenant Governor is associated to undertake such a representation if the Lieutenant Governor himself could not do so.*

Dated: June 16, 1980

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* Clifford B. Hearn, Esquire, would not have responded to the request for this opinion because it is his view that the inquiry goes beyond the purview of the Committee's responsibilities.