DELAWARE STATE BAR ASSOCIATION COMMITTEE

ON PROFESSIONAL ETHICS

OPINION 1982-5

The Committee has been presented by the President of the Delaware State Bar Association with seven questions concerning restrictions on the private practice of a lawyer who also serves in the Delaware General Assembly. The questions, which will be taken up one by one, are quite broad and it is difficult to contemplate the innumerable situations which might arise within their scope. Consequently, categorical answers cannot be given to all of the questions. Nevertheless, the Committee recognizes that knowledge of ethical constraints will aid members of the Bar in deciding whether to run for elective office. We shall therefore endeavor to give as much guidance as we can.

GENERAL PRINCIPLES

The regulation of the ethical conduct of a lawyer-legislator is shared by Delaware Supreme Court and the General Assembly.[1] The General Assembly regulates the conduct of its own members, Del. Const. art. II, § 9. A legislator who is an attorney is also subject to the

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[1] Some states have constitutional or statutory provisions touching this question. See p. 9 below. We know of no such provision in Delaware, and in any case our function is restricted to advice on ethics and does not include the construction of Constitutional, statutory or common law.

ethical standards of his profession. Higgins v. Advisory Committee on Professional Ethics, 73 N.J. 123, 373 A.2d 372 (1977). This Committee's role does not include advice on the ethics of legislators in their legislative role. We are concerned only with advising on the ethical conduct of lawyer-legislators in their roles as lawyers.

Where the regulation of ethical conduct is joint, the respective bodies will exercise their regulatory powers on a complementary basis. State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977). Accordingly, in applying the Delaware Lawyer's Code of Professional Responsibility to lawyer-legislators, the Code's standards should be read in a way that impinges the least on the authority of the legislature to determine the propriety of conduct and the freedom of popularly elected legislators to carry out their legislative duties.

Our paramount obligation under the Code is to "maintain the highest standard of professional conduct...," Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975). We are also conscious that such conduct includes furthering other public interests. One such interest which has impact on the present question is the access to service in the General Assembly of citizens trained in the law. As the ABA recognizes:

> Lawyers often serve as legislators.... This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system.

Model Code of Professional Responsibility EC 8-8.

> If government service will tend to sterilize an attorney in too large an area of law for too long a time... the sacrifice of entertaining government service will be too great for most men to make.

Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv.L.Rev. 657, 668 (1957). Undue regulation of the livelihood of a lawyer-legislator will tend to discourage abler attorneys from seeking public office. Service in the General Assembly is a part-time position. The legislative session lasts 50-55 days per year and a member is paid $11,400 per year. If a lawyer-legislator is to maintain the expected standard of living he or she must also be free to have a meaningful and remunerative legal practice.

Canon 9 provides that every attorney:

> "SHOULD AVOID EVEN THE APPEARANCE OF IMPROPRIETY."

Model Code of Professional Responsibility Canon 9. Recent judicial interpretations of this Canon support the conclusion that disqualification in the absence of actual or threatened wrongdoing is not necessary to preserve the

integrity of the Bar. An attorney's conduct need not be governed by standards attributable only to the most cynical members of the public, Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); rather, Canon 9 speaks to the view of the average layman. Price v. Admiral Insurance Co., 481 F.Supp. 374, 378 (E.D.Pa 1979).

While in some contexts courts have disqualified attorneys under Canon 9 in the absence of an actual breach of another Canon, see, e.g., Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976), the clear trend is away from such a subjective and undefinable standard. In the Woods case, for example, the Fifth Circuit adopted a two-part standard for determining whether an attorney should be disqualified under Canon 9. The Court there required, first that there be "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur" Woods, 537 F.2d at 813 and second, that the Court "must also find that the likelihood of public suspicion ...outweighs the social interests which will be served by a lawyer's continued participation in a particular case." Id. at n. 12. Accord, Church of Scientology v. McLean, 615 F.2d 691, 693 (5th Cir. 1980); Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978). This two-part test appears to us to be appropriate for our

analysis. That is, not only must there be a strong likelihood of reasonable public suspicion but there must exist as well a reasonable possibility of actual impropriety i.e., a violation of the law or the Canons of Ethics.

The Fifth Circuit reasoned in Woods that an inflexible application of Canon 9 would defeat important social interests such as "the lawyer's right freely to practice his profession, and the government's need to attract skilled lawyers." Woods, 537 F.2d at 812.

That the "appearance of impropriety" doctrine should not be given an overbroad application was recently reaffirmed in Arkansas v. Dean Foods Products Co., 605 F.2d 380 (8th Cir. 1979), wherein the Eighth Circuit stated:

> [D]isqualification in spasm reaction to every situation capable of appearing improper to the jaundiced cynic is as goal-defeating as failure to disqualify in blind disregard of flagrant conflicts of interest.

Id. at 383.

The Second Circuit has adopted a strictly factual approach when applying Canon 9. In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), the court recognized that "ethical problems cannot be resolved in a vacuum," Id. at 753, quoting Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2d Cir. 1973), and that "[t]horough consideration of

the facts...is required." Id. at 753. The Second Circuit relying on the words of Judge Kaufman in United States v. Standard Oil Co., 136 F.Supp. 345 (S.D.N.Y. 1955), advised:

> When dealing with ethical principles, it is apparent that we cannot paint with broad strokes...the conclusion in a particular case can be reached only after painstaking analysis of the facts....

Id. at 367. See also Board of Education v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) ("appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases"); R-T Leasing Corp. v. Ethyl Corp., 484 F.Supp. 950, 954 (S.D.N.Y. 1979), aff'd, 633 F.2d 206 (2d Cir. 1980) ("Canon 9...has been cautiously applied by the courts...").

The application of the rule of these recent decisions to the matter at hand leads us to conclude that a lawyer-legislator should be disqualified from areas of legal practice as to which public suspicion of impropriety might attach only where, on the facts of the specific case there is a reasonable possibility that a specific impropriety has occurred or is likely to occur. One such potential impropriety which stands out is the absolute prohibition against a lawyer-legislator using his or her office to obtain a personal advantage or advantage for a private client. Where there is a reasonable possibility that

actions taken by the lawyer-legislator will violate this proscription, the lawyer will be disqualified and if such conduct occurs the lawyer will be subject to professional discipline.

QUESTIONS

I. The first question is: "Would a lawyer-legislator be prohibited from representing a state agency, county government, municipal corporation (or agency thereof), school board, school district or other political subdivision?"

There is no ethical bar to a lawyer-legislator representing the State or one of its agencies. This view is supported by ABA, Committee on Ethics and Professional Responsibility, Informal Opinion 1182 (1971), which found that "[n]o Disciplinary Rule necessarily prohibits a legislator from being employed in another capacity by the state...." Id. at 415. Under Delaware law a member of the General Assembly may be employed by the State in another capacity. Opinion of the Justices, Del.Supr., 245 A.2d 172 (1968).

The state Constitution provides that a member of the General Assembly may not hold another state "office." Del. Const. art. II, § 14. We do not read that provision to prohibit from representation of government bodies in the legislator's individual capacity as a private lawyer but

rather a prohibition from service in an official position such as Attorney General or State Auditor.

If while carrying out the duties of a private lawyer, the legislator uses his political position to obtain an advantage for his or her clients that lawyer will be subject to professional discipline. A clear instance of profiting from public office would be the acceptance of employment as a result of a political favor. Just as public service should not directly limit private practice, by the same token, public service should not bring private benefit.

II. The second question is: "Would a lawyer-legislator be prohibited from litigating against, making an appearance before, or otherwise taking an adversary position against the State, any State agency, county government, municipal corporation (or agency thereof), school board, school district or other political subdivision, on behalf of a client?"

There is no absolute ethical bar to a legislator representing private clients against the State or its agencies. There is no apparent conflict of interest in these circumstances because a member of the General Assembly represents not the State government, nor any of its branches, departments or agencies, but rather, his or her constituency. Compare, ABA, Committee on Ethics and Professional Responsibility, Informal Opinion 287.

A lawyer-legislator who votes for funds for a particular agency does not thereby establish a sufficient relationship with the government body to justify a per se disqualification from representing interests against or before that agency. (Compare U.S. v. Standard Oil, 136 F.Supp. at 364 where Judge Kaufman declined to restrict former government attorneys from practicing before the agencies for which they had previously worked.) Similarly, it is not reasonable to disqualify a lawyer-legislator from representing a client against the State where there is not some close factual relationship between the lawyer's legislative responsibilities and the case at hand. If the legislator uses public office to wield influence or otherwise advance the interest of a private client, professional discipline for the specific breach is appropriate.

A member of the General Assembly who has worked closely with a particular agency or state official, however, must be especially careful to avoid profiting personally from this relationship. There would be clear grounds for professional discipline, for example, if the legislator, in working with an agency, became privy to confidential information concerning a specific matter and thereafter represented a party who might be aided by the use of the information.

We note that the Oregon Constitution specifically prohibits lawyer-legislators from opposing the State in civil litigation, Oregon Const. art. XV, § 7, and the Georgia Constitution has recently been so construed. Georgia Department of Human Resources v. Sistrunk, et al., 291 S.E.2d 524 (Ga. Supr. 1982). New Jersey has a statute which precludes practice before State agencies (N.J.S.A. 52:13D-16). There may be other such provisions in other states. We have not done a fifty state search.

The Delaware Constitution has no such provision and we know of no Delaware statute on the question. The Georgia Supreme Court in the Sistrunk case specifically stated that civil and criminal representation against the State was not proscribed by Canon 9.

III. The third question is: "Would a lawyer-legislator be prohibited from representing persons accused of criminal or traffic offenses?"

There is no absolute ethical bar to a legislator representing persons accused of criminal or traffic offenses against the State. The lawyer must not, however use his position to repeal or amend existing law for a client's benefit and if the lawyer doubts his capacity to retain an impartial attitute toward criminal legislation then such representations should be declined. Our reasoning is the same as that which allows a legislator to represent a

private interest against the State. Members of the General Assembly represent not the State but rather the member's constituency. Cf. ABA, Committee on Ethics and Professional Responsibility, Informal Opinion 1126 (1969). We distinguish what may appear to be contrary language in Opinion 1980-4 because that opinion dealt with the Lieutenant Governor a high state official who, in the public eye, represents the sovereignty of Delaware.

We note, however, that it would be inappropriate for the lawyer-legislator to permit parties to the Court (or administrative) proceedings to use the title "Senator" or "Representative" and it would be highly unethical for the member to use the position of legislator to intercede with the State on behalf of a client.

IV. The fourth question is: "If a lawyer-legislator serves in the State Senate, are there any particular ethical strictures applicable because of the Senate's constitutional role in the process of confirmation of appointees to the judiciary or to other positions in the Executive Branch?"

There are no ethical strictures which would bar a lawyer-Senator from carrying out the constitutionally established role in the appointment process. A Senator (members of the House do not participate in the appointment process) must be free to carry out this function as part of their duties. Once an individual has been nominated

by the Governor, there should be no blanket prohibition on a Senator voting for the nominee even if he were also a client if there exists a good faith belief that the client is qualified for the position.

The Senator should also be mindful of Disciplinary Rule 8-101(A)(3) which provides that a lawyer shall not:

> accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

The Senator's vote must not be influenced by the promise of or potential for personal benefit from the nominee.

The Senate's reappointment of judicial officials every twelve years might be seen by some to give rise to opportunities for improper legislative influence on the judiciary or benefits to a lawyer-legislator in his private practice. Judges are subject to many pressures and are owed a presumption of honesty and integrity. Experience shows that our judges regularly render fair and just decisions regardless of the status or power of the lawyer or party who appears before them. Should a lawyer-Senator attempt to exert such influence, severe professional discipline would be appropriate.

V. The fifth question is: "In instances where a constituent or member of the public contacts a lawyer-legislator about a problem and the lawyer-legislator believes that the problem requires a private legal solution rather than a political solution, is the lawyer-legislator prohibited in any way from accepting the constituent or member of the public as a client?"

This question presents the facts with sufficient particularity to justify per se disqualification. Where a lawyer, acting in his or her official capacity as a legislator, is contacted by a constituent for reasons related to legislative matters, the lawyer may not generate or seek to generate private legal business from that constituent. If the lawyer-legislator determines that the constituent requires legal assistance, it would be appropriate to refer the constituent to another attorney.

As we have emphasized, a lawyer-legislator is absolutely prohibited from using public office to gain advantage in private legal practice. Taking on business generated through public office would violate this proscription. A lawyer who is contacted first in the capacity of legislator is therefore prohibited from simultaneously acting as the constituent's lawyer in the same matter.

VI. The sixth question is: "What ethical, statutory or constitutional restrictions would be applicable with respect to the advocacy or promotion of a client's cause by a lawyer-legislator in the legislature, including voting on a particular act, bill or resolution affecting this client?"

> A. A lawyer who holds public office shall not:
>
> (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

Model Code of Professional Responsiblity DR 8-101(A)(1) (1979).

As interpreted in ABA, Committee on Ethics and Professional Responsibility, Informal Opinion 1182 (1971) DR 8-101(A)(1) is not a blanket prohibition against supporting legislation which affects a client's interests. If the Code stood for such a blanket proscription, it would have been drafted to state that a lawyer while serving in the legislature is disqualified from supporting legislation which affects the interests of a client. Such a measure, however, would be as impractical as it would be drastic. Few pieces of legislation do not affect the interests of some client of a busy lawyer.

Under DR 8-101(A)(1), the legislator is prohibited only from obtaining a "special advantage" for a client. This has been interpreted as a "direct and peculiar" advantage. ABA Committee on Ethics and Professional Responsibility Informal Opinion 1182 (1971). A lawyer should not be restricted in the support of a bill of general interest to the public, even if the bill also happens to affect the interests of a client.

Lobbying by the lawyer legislator or members of the lawyer legislator's firm is prohibited by several ethics

opinions, e.g., Opinions 83 and 87 Michigan State Bar Committee Professional Ethics. We think the better rule permits lobbying only if full disclosure of the interest is made pursuant to Article II § 20 of the Delaware Constitution and the legislator does not vote on the question. ABA, Committee on Ethics and Professional Responsibility, Formal Opinion 306 (1962).

Although it is not contrary to the Code of Professional Responsibility to propose and vote on legislation which affects the interests of clients if the legislator believes in good faith that the legislation is in the public interest, the lawyer-legislator must abide by Ethical Consideration 8-1 which provides:

> Lawyers...should propose legislative and other reforms...without regard to the selfish interests of clients.

A lawyer-legislator would violate the public trust (and perhaps be subject to professional discipline) were he or she to confine legislative initiatives in the General Assembly to legislation which favorably affected private clients.

VII. The seventh question is: "If the lawyer-legislator is disqualified in any given instance, are partners and associates in his firm similarly disqualified?"

If a lawyer-legislator is disqualified in a given instance, law partners and associates are similarly disqualified. The Code is explicit on this point, providing that:

> If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Model Code of Professional Responsibility DR 5-105(d). Other authorities recognize that disqualification of a lawyer includes disqualification of law partners. See, e.g., ABA, Committee on Ethics and Professional Responsibility, Formal Opinion 33 (1931); W. E. Bassett Co. v. H. C. Cook Co., 201 F.Supp. 821 (D.Conn.), aff'd, 302 F.2d 268 (2d Cir. 1962); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953).

CONCLUSION

The Committee has attempted to resolve the acutely sensitive dilemma of advising on the ethical conduct of lawyer-legislators without needless interference with the public's historic access to the service of lawyers in the General Assembly. While the broad nature of the questions posed makes precise answers difficult, the Committee believes that blanket disqualification of lawyer-legislators without evidence of actual conflict or other impropriety is not called for by the Code and if applied, would be contrary to the public interest. The proper solution, we believe, is to discipline those lawyers who, in fact, use public office for private gain in the practice of law.

Mr. Russell would not, because of Canon 9 considerations, permit a lawyer legislator to represent the State or a private client before a State agency or in a matter against the State. Mr. Hearn does not believe that it is appropriate for the Committee to opine on the proper conduct of lawyers in the legislative context.

The Committee on Professional Ethics

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