
E-75-25 Attorney in private practice holding public office

These questions have been raised concerning possible conflicts in representation of private clients by a lawyer who is a municipal public official. These are:

1. May a member of a city council “represent a defendant” in a case in which the city is plaintiff?
2. May a county supervisor represent a private client in an action against the county?
3. May an alderman or supervisor who is also on the county personnel committee represent a defendant in an action prosecuted by the district attorney’s office?

The committee has addressed similar questions in Informal Opinion E-1973, Advisory Opinion 2-1954, and Memorandum Opinion dated March 15, 1967. Advisory Opinion 12-1965 also contains an extensive discussion of county official conflicts, although the inquiry concerned a prosecutor rather than a municipal legislator.

Canons 5, 8, and 9 of the Code of Professional Responsibility apply to these questions. In particular, we refer to DR 5-101(A), and 5-105, prohibiting acceptance or continuation of employment which might impair the lawyer’s independent professional judgment; DR 8-101, prohibiting a lawyer’s use of public office to obtain special advantage from a legislative or judicial tribunal; and DR 9-101(B) and (C), which proscribe “even the appearance of impropriety” in certain specified situations, to be discussed in more detail below.

While the ABA Ethics Committee has issued many opinions dealing with conduct of attorneys representing municipalities (district attorneys, corporation counsel, and city attorneys), it has not dealt as directly with problems of attorneys holding a legislative public office. See ABA Formal Opinion 306 (1962) and Informal No. 1182, 12/5/71. The Informal Opinion, which answers inquiries concerning lawyers as members of legislative bodies, states that the Code of Professional Responsibility does not attempt to regulate the conduct of the

lawyer as a legislator, but leaves such regulation to “local law.” The committee refused to categorically proscribe acceptance of a retainer from an organization which is “likely to be affected” by passage or defeat of proposed legislation, from a landowner whose property is being taken by state eminent domain, or from a state employee prosecuting a claim before the state workmen’s compensation commission. In specific cases, the committee stated, representation might be prohibited under the above-cited disciplinary rules of Canons 8 and 9.

Wisconsin statutes provide no prohibitions in the situations you raise, although local ordinances should be consulted to determine whether municipal official ethics codes enacted pursuant to sec. 19.45(11)(c), Wis. Stats., apply.

1. Representation of Defendant by Alderman. Informal Opinion E-1973 of this committee should be read in its entirety, although it concerned representation before administrative bodies rather than courts. In particular note our previous citations to EC 8-8 and 9-2, and DR 9-101(B). That opinion held, and the committee reiterates, “. . . it behooves an attorney with these official responsibilities to examine each private retainer on a case-by-case basis to assess and determine his ethical responsibility to the public and to the individual client who seeks his service, and consult with such client regarding these potential adverse interests before making his decision” (page 48, supplement to December 1974, Wis. Bar Bulletin).

DR 9-101(B) may prohibit the private representation if the defense involves or may involve an attack on the validity of an ordinance for which the attorney had “substantial responsibility” as a council member. In an extensive discussion of 9-101(B) as affecting former government lawyers, the ABA Ethics Committee describes “substantial responsibility” as: “an important, material degree in the investigative or deliberate processes regarding the transactions or facts in question.” 62 ABA Journal 517, at 520, Op. 342 (1975). *See also* ABA Informal No. 1182, *supra*, which proscribes representation by a lawyer-legislator in an attack on the constitutionality of a statute for which the legislator had voted.

As to the more routine defense against ordinances in actions in which the attorney did not participate significantly as a city council member, representation is not flatly prohibited. An attorney should avoid frequent acceptance of such cases, however; the duty to espouse a client’s cause vigorously, and the natural desire to develop client’s cause vigorously, and the natural desire to develop clientele, would conflict sooner or later with the duty of honest, impartial

consideration of all matters before the city council. Such conduct also jeopardizes public confidence in the lawyer, in both roles.

Note that representation of a plaintiff in a suit against the city would present additional problems not discussed here. *See* Memorandum Opinion 3/15/67, and Advisory Op. 2-1954.

2. Representation by Supervisor in Suit Against County. If the private action involves a claim against the county, or defense against a county condemnation action, representation would be improper. *See* Advisory Opinion 2-1954 and Mem. Op. 3/15/67; and sec. 59.76, Stats., requiring that claims against a county be presented first to the county board. The conflicts or apparent conflicts in the latter situation are obvious.

In other types of cases, the foregoing discussion is applicable. The lawyer's duties to the public and to the would-be client should be examined closely for potential conflict or the appearance thereof.

3. Defense of a Criminal Action by Personnel Committee Member. So long as the attorney-supervisor does not set the salary of the decision-making tribunal, the last situation posed does not automatically present an ethical question. The attorney-supervisor would undoubtedly violate the spirit of DR 8-101(A) if he or she attempted to influence opposing counsel, the district attorney, to make decisions on the basis of personal gain rather than the public interest.

(Note that this hypothetical differs from that in ABA Informal No. 1182, which disapproved representation by lawyer-legislators before decision-making boards whose members had their compensation set by the legislature.)