
**E-76-2 Propriety of attorney-legislator
representing clients before state agencies**

The following facts and question were posed to the committee for its consideration:

Facts

Attorney A was elected to Wisconsin's Legislature. The Senate must consent to the appointment of a person nominated by the Governor for appointment as head of state agency B, before the person may assume that office. The head of agency may be removed by the Legislature by joint resolution adopted in each house by a majority of the members elected to such house. (Section 13.30, Wis. Stats.) As a member of the Legislature, Attorney A will introduce, discuss and vote on bills affecting the budget, staff and duties of state agency B.

Question

Does the Code of Professional Responsibility promulgated by the Supreme Court of Wisconsin prohibit Attorney A from representing clients for compensation before state agency B?

Several provisions of the Code of Professional Responsibility relate to the above.

Canon 8

A lawyer should assist in improving the legal system.

DR (Disciplinary Rule) 8—101 deals with the action that a lawyer should take as a public official and provides in part:

(A) A lawyer who holds public office shall not:

(2) Use his public position to influence, or attempt to influence a tribunal to act in favor of himself or of a client.

The committee is aware that it is generally recognized that the position of lawyer-legislator is unique. He occupies a position of public honor and trust for which he receives compensation paid from public funds. He owes a duty to the public to present the public with undivided fidelity. This representation, however, is political rather than professional. Thus, technically, no professional lawyer-client relationship may arise between a lawyer and the public upon his election to the Legislature.

But this loyalty owed to the public is not, however, limited solely to legislative matters. The people are also entitled to have their political representative (whether they be attorneys or laymen) refrain from accepting private employment, which will align them against the legislative or executive branch of the government and from using the influence of their position for personal gain. (Not unlike duties owed by a lawyer who is an officer but not counsel to a corporation to the shareholders.)

The committee is of the further opinion that no interpretation of professional ethics should be made that would tend to prevent an attorney from discharging his responsibilities as a citizen to participate in public affairs and hold public office, and that to deny an attorney an opportunity for public service would unnecessarily restrict his rights as a citizen. Notwithstanding this, it is the committee's opinion that in such instances the lawyer-legislator should always be alert to the ever-existing potential for either a conflict of interest or at least the appearance thereof.

The foregoing reference and interpretation of Canon 8 deals primarily with the duty owed by a lawyer-legislator to the people and the government whom he or she may represent. In addition to that responsibility, the lawyer has the added responsibility that is imposed upon every lawyer, whether he or she be a public official or not. Canon 9 provides:

A lawyer should avoid even the appearance of professional impropriety.

DR 9-101 sets forth guidelines for avoiding even the appearance of impropriety and subdivision (C) thereof admonishes:

“(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.” (Emphasis supplied.)

Attorney A has the right of approval or disapproval of a nominee as head of state agency B, the Legislature has the right to remove such person and Attorney A will be expected to introduce, discuss and vote on bills affecting the budget, the staff and the duties of the agency in question.

Consequently, it is evident that he would be in the position whereby he has not only the opportunity to exercise a degree of control over the personnel, compensation and duties of said state agency, including all state agencies similarly created, staffed, budgeted and controlled, but might find himself in the position that either he or the staff of the state agencies would inadvertently tend to curry favor with each other. Consequently, the following query should be posed:

Will Attorney A's actions as a legislator be influenced by success obtained on behalf of his clients before one or more state agencies, or, will the decision of a state agency be influenced, no matter how slightly, by the lawyer's actions as a state legislator, and, should the answer to both questions be "no," will it appear to the public as though the answer might to either question be "yes"?

The committee's belief that the answer to the above query must be in the affirmative, and that the public, and after a time, the legislator's clients, depending upon his success before state agencies, or the lack thereof, might well be inclined to believe that some impropriety existed, even though both the legislator and the members of the state agency acted with extreme caution.

Consequently, it is the committee's opinion that in order to comply with the Canons and Disciplinary Rules above quoted, and in order to avoid even the appearance of impropriety, Attorney A should be prohibited from representing clients for compensation before state agency B (and all other state agencies so composed) and the answer to the question should be "yes."

The above opinion should not be interpreted as prohibiting a lawyer from conducting a general practice of law (when not engaged in his required legislative duties), nor from appearing before tribunals, other than any state agency, as long as his appearance before the other tribunals does not conflict with his duties as outlined in Canon 8.

To the extent that any parts of Informal Opinion E-1973 of this committee are inconsistent with the provisions of the above opinion, the language in the prior opinion is expressly overruled. (Note: Overruled by E-78-2.)