
E-77-11 Ethical propriety of attorney member of Police and Fire Commission defending persons in criminal and traffic cases in the municipality

Question

May an attorney member of the police and fire commission or any member of his firm represent criminal or traffic defendants where the police officers of the city are involved in investigation or prosecution?

Answer

No. Neither the attorney nor any member of his firm may ethically undertake such representation.

Discussion

Canons 5, 8, and 9 of the Code of Professional Responsibility are applicable to this question. Any one of them considered separately would seem to preclude the proposed conduct. Taken together, they provide even more persuasive arguments against the ethical propriety of the conduct.

Canon 5 proscribes a situation in which an attorney's judgment on behalf of a client is or may be affected by personal interests, or other clients, or the desires of third persons. The police and fire commission has the authority to appoint the chief of police, it presides over hearings regarding suspension of policemen, and it fixes their salaries. Wis. Stats. § 62.13. In passing on these matters the attorney's public duty requires him to use his best judgment concerning the merits of the issue and not to be affected by outside interests or concerns. As counsel for a criminal or traffic defendant, the attorney's duty to his client requires his vigorous defense of the client against his accusers.

Where the police of the municipality are involved in investigating or prosecuting a case, the attorney could find himself in a position of opposition to the very policemen over whom he exercises substantial control, whether directly or

indirectly, as a member of the commission. His duty to his client would require him to oppose the position of the police. It is likely he would be required to attack the credibility of police witnesses. Conversely, his duty as a public official may require him to pass on matters directly affecting the job or livelihood of a policeman whom he opposes in defense of a client. Despite his intentions to fully carry out both duties, there will inevitably be times when the interests involved would conflict.

This is the reasoning used by Opinion 139 (1950) of the Michigan State Bar Ethics Committee, concluding an attorney/mayor who sits on the city council which fixes police salaries and who appoints members to and sits on the police and fire commission which oversees the discipline, suspension and discharge of policemen could not represent criminal defendants when the police of his municipality were prosecuting or investigating. This conclusion was based on Canon 6 of the Canons of Professional Ethics; Canon 6 is basically the predecessor to Canon 5 of the current Code.

Specifically, Disciplinary Rules 5-101(A) or 5-105(A) of the Code may be applicable. Consent of all involved after full disclosure of the possible effect of differing interests on the lawyer's judgment, under DR 5-105(C) would not apply. Such consent is only possible when the differing interests can be adequately represented, i.e., when they are not in direct conflict. Furthermore, it has been said many times that consent does not apply where one interest is that of the public. *See, for example*, Drinker, *Legal Ethics*, p. 120; State Bar of Wisconsin Advisory Opinion 12-1965; American Bar Association Formal Opinion 296.

Canon 8 of the Code deals with the conduct of lawyers acting as public officials. No Disciplinary Rule deals specifically with the situation at hand; however, EC 8-8 states in part:

"A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

A footnote comment on this Ethical Consideration states:

The principle applied in [opinions passing on the propriety of an attorney who is a public officer representing private interests adverse to those of the public body which he represents] is that an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing

his public position to further his professional success or personal interests. ABA Opinion 192 (1939).

Under this Canon, the Illinois State Bar Association, in Opinion 291, concluded a lawyer who is a village trustee and a member of the police and fire commission should not represent a defendant charged with a crime committed within the village.

Canon 9, exhorting lawyers to avoid even the appearance of impropriety, is applicable also. DR 9-101 is specially directed toward lawyers acting in judicial or public positions.

In Opinion 139 of the Michigan Bar, *supra*, the Ethics Committee was also concerned about public impressions:

“ . . . regardless of the integrity of counsel, the public might easily conclude that the testimony of a policeman [who is a prosecuting officer or complaining witness against the defendant] was being slanted in favor of the defendant because the chief executive was the lawyer for this particular defendant.”

A mayor is a more visible symbol of control over the police of a municipality than would be an individual member of the police and fire commission. Nevertheless, where public impressions are concerned, the opinions of the American Bar Association and the State Bar seem to indicate a belief that erring on the side of caution is the best approach. *See, for example*, State Bar of Wisconsin Advisory Opinion 2-1954 and E-76-11; American Bar Association Formal Opinions 136 and 186.

The Ethics Committee of the State Bar of Wisconsin was presented with the question posed in this inquiry in Informal Opinion B-1970. Because the lawyer commission member in that situation agreed not to represent criminal or traffic defendants when the city was the prosecutor or the municipality's police were involved, the committee did not reach the question whether the representation would be proper. The opinion did state, however, that:

“ . . . no partner or associate may represent criminal or traffic defendants in cases where their attorney partner on the police and fire commission would have to abstain.”

This is in accord with DR 5-105(D):

“If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.”

Thus, if the attorney in the instant situation may not ethically defend clients against the city or its police, no partner or associate may undertake the representation.

Conclusion

According to Canons 5, 8, and 9 of the Code of Professional Responsibility, an attorney member of a municipal police and fire commission may not ethically represent criminal or traffic defendants when the police whom he oversees as a commission member are involved in the prosecution or investigation. His duties to exercise independent judgment on behalf of a defendant client on one hand and as a commission member on the other hand would inevitably be in conflict if he must oppose the same policemen whose jobs he oversees. Regardless of his intent to vigorously defend his client and impartially serve on the commission, such representation could subject him to the public suspicion that he can influence the conduct or testimony of the police because of his supervision of them. Additionally, attorneys serving in public positions have a special duty to avoid the appearance of impropriety.

If the attorney is ethically prevented from the representation, no partner, associate or other affiliate may undertake the representation. DR 5-105(D) specifically states this, and it is strictly applied.