



NEW YORK STATE BAR ASSOCIATION

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**Committee on Professional Ethics**

**Opinion 603 - 11/2/89 (15-89)**

**Topic:** Part-Time Public Official or Employee; Assistant City Attorney; Conflict of Interest.

Modified by N.Y. State 629

**Digest:** A part-time assistant city attorney, or any member or associate of his private law firm, may not represent clients before city agencies with which the attorney is associated; but the attorney or his law firm may represent private clients before other agencies, if the proposed representation and the agency are unrelated to the attorney's public function.

**Code:** Canon 9;  
EC 5-2, 5-14, 5-15, 8-8,  
9-3, 9-6;  
DR 5-105(A), (B), (C), and  
(D); 8-101(A)(1);  
9-101(B).

**QUESTION**

May a part-time assistant city attorney, or any member of his private law firm, represent private clients before city agencies?

**OPINION**

A part-time assistant city attorney is considering part-time employment on a regular basis with a private law firm. The law firm sometimes appears

before agencies of the city on behalf of the firm's private clients. The assistant city attorney inquires whether the law firm may ethically continue to represent clients before city agencies if the attorney accepts employment with the law firm.

If permitted by law to have a private law practice, there is generally no ethical prohibition preventing an assistant city attorney from joining a private law firm. Under such an arrangement, however, ethical principles prevent both the attorney and the law firm from representing clients before certain city agencies. DR 5-105(A), (B), (D); EC 5-14, EC 8-8. See N.Y. State 482 (1978); N.Y. State 450 (1976); N.Y. State 444 (1976); N.Y. State 292 (1973); N.Y. State 257 (1972); N.Y. State 143 (1970).

Maintaining independent professional judgment precludes a lawyer's "acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client." EC 5-14. In addition, "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." EC 8-8. Such an officer should also do more than avoid actual conflicts of interest; he should avoid the possibility of conflicting interests. EC 5-2, EC 5-15, EC 8-8; N.Y. State 392 (1975). A public attorney must be especially alert to the possibility of a conflict because a public attorney does not have available the DR 5-105(C) exception, which allows the conflict to be cured by the consent of both clients. A public body cannot consent to such dual representation. N.Y. State 482 (1978); N.Y. State 450 (1976); N.Y. State 143 (1970).

A conflict of interest may arise when a municipal attorney undertakes the representation of a private client before the municipality. The attorney's obligation to attain the best results for the private client might conflict with the attorney's duty as a municipal attorney to protect the interests of the municipality. Further, such a situation could raise questions of confidence and trust since the attorney's official responsibilities and association with the municipality may make the attorney privy to information which could influence the outcome of the matter. N.Y. State 450 (1976); N.Y. State 143 (1970); N.Y. State 444 (1976); cf. N.Y. State 226 (1972).

Canon 9 provides: "A lawyer should avoid even the appearance of professional impropriety." In N.Y. State 392 (1975), we observed:

Lawyers whose public employment is part-time find themselves in a position of special sensitivity. They should take par-

particular care not to engage in activities or accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system, or which would give an "appearance of impropriety even if none exists." Cf. EC 9-3. Thus they must avoid private employment which might involve or give rise to suspicion that unfair influence may be involved either in the securing of private clients or in representing them against the state agency by which they are employed.

See also N.Y. State 484 (1978); N.Y. State 450 (1976); DR 8101(A)(1); EC 9-6.

In light of the preceding considerations and principles, it is clear that a part-time city attorney may not ethically represent private clients before city agencies for which the city attorney's office provides legal representation or assistance. See N.Y. State 292 (1973); N.Y. State 484 (1978). Because the corporation counsel's office is one with broad powers and responsibilities in relation to city agencies, both direct and indirect, members of that office will be disqualified from appearance before most if not all city agencies. Consistent with prior opinions, however, we do not apply a *per se* rule of disqualification to all instances and matters in which a part-time assistant city attorney represents a private client before city agencies. In N.Y. State 484 (1978), we held that a lawyer-member of a town's Zoning Board of Appeals can represent private clients before other town agencies in matters unrelated to zoning, if it is clear that such agencies are not *functionally* related to the Zoning Board of Appeals. Such a functional analysis allays conflict of interest concerns, while not unreasonably deterring a lawyer's service in public employment:

The Code, for example, reminds us that it is "highly desirable" for lawyers to hold public office. EC 8-8. In this light, to disqualify lawyer-members of municipal boards from handling all matters involving agencies of the municipality in which they serve, without reference to the nature of their public office or private employment, would seem unduly restrictive and almost certain to discourage that which the Code expressly seeks to promote.

*Id.*; see also N.Y. State 392 (1975) (a State estate tax attorney may not represent private clients in any matter involving his agency in any court, including Surrogate's Court, but may represent clients in non-tax matters in

Surrogate's Court); N.Y. State 278 (1973) (a part-time county attorney may represent private clients in Family Court if "the nature of the proceedings is such that the office of the county attorney does not perform and is not charged with a duty to perform services with respect thereto" and there is no appearance of impropriety).

Thus, in deciding the ethical problem which arises when a municipal attorney considers representing a private client before the municipality's other agencies with which the attorney's office is not associated, the focus should be on "the relatedness of the proposed representation to the nature of the lawyer's public function." N.Y. State 484 (1978).<sup>1</sup> As noted above, inasmuch as the corporation counsel's office generally has city-wide responsibilities and influence, appearance on behalf of private clients before any city agency by a member of the corporation counsel's office will generally be precluded. In any event, if there is any doubt whether representation will involve a conflict of interest, the representation should not be undertaken. EC 5-15; N.Y. State 143 (1970).

If, after the preceding analysis, a part-time public attorney is ethically barred from directly representing the private client, no member of the attorney's law firm may undertake the representation. DR 5-105(D); N.Y. State 280 (1973). See N.Y. State 568 (1985); N.Y. State 426 (1976).

The only exception to this vicarious disqualification is when a *former* public employee is disqualified pursuant to DR 9-101(B). N.Y. State 502 (1978). In that instance, the lawyer's firm is not disqualified as long as the individual lawyer is "screened" from any direct or indirect participation in the matter. *Id.* This exception is a "narrow qualified" one, N.Y. State 568 (1985), to the requirement of vicarious disqualification and applies only to the *former* public employee situation of DR 9-101(B). In other situations, screening or insulating the attorney from the representation is irrelevant. See N.Y. State 568 (1985); N.Y. State 426 (1976). In addition, the instant attorney's characterization of his status with his law firm as neither "partner or associate" nor as limited "exclusively to paperwork" is of no import. The role the attorney plays within the law firm, and the use and benefits the law firm chooses to derive from the attorney's skills, are irrelevant.

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<sup>1</sup> If a part-time municipal attorney exercises responsibility with respect to criminal proceedings on behalf of the municipality, the attorney is disqualified from representing private clients in criminal matters in *all* courts of the state. N.Y. State 544 (1982); N.Y. State 234 (1972). Acting as a prosecutor on one day and as defense counsel on another creates the appearance of professional impropriety. N.Y. State 234 (1972).

**CONCLUSION**

A part-time assistant city attorney may not represent private clients before any city agency with which he or anyone else in the same municipal office is associated or provides legal representation or assistance. A part-time city attorney may represent private clients before other city agencies with which the city attorney's office has no association, if the proposed representation and the agency are unrelated to the attorney's public function and that of the office in which the attorney serves, with all doubts resolved against representation. If the attorney is ethically prevented from undertaking the representation, no member or associate of the attorney's private law firm may do so, regardless of the role the attorney performs within the firm.

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