

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 630 - 3/23/92 (8-91)

Topic: Conflict of Interest;
representation of private clients
before town planning board or
zoning board of appeals by
special counsel to town

Digest: Absent differing interests, not
improper for special counsel to
town to represent private clients
before town's planning board and
zoning board of appeals

Code: DR 5-105(A),(C),(D); DR 5-108;
EC 5-15

QUESTION

May an outside attorney retained as special counsel to a town represent private parties before the town's planning board or zoning board of appeals?

OPINION

Town Law §20(2)(a) empowers the town board of any town that has established the office of town attorney to "employ counsel to the town attorney¹ in respect to any particular subject matter, proceeding or litigation ... as it may necessarily require." This authorization is separate and distinct from the power conferred by the same statute to appoint deputies in the office of the town attorney. A deputy or assistant town attorney is a permanent part of the town's administrative legal structure and customarily serves as a salaried employee, while a special counsel is an outside attorney who is retained as an independent contractor and who customarily is compensated on a per matter basis.

¹ We see no ethical significance to the fact that special counsel technically serves as counsel to the town attorney, rather than as counsel to the municipality or its town board.

The issue is whether special counsel retained for a "particular subject matter, proceeding or litigation" may represent private clients before the planning board or zoning board of appeals of the same town.² While we have concluded that special counsel may undertake such representation, under the circumstances outlined in this opinion, we emphasize at the outset that a different rule would apply if the attorney frequently represented the town as special counsel, or if the extent of the current representation was such that special counsel was functionally equivalent to a part-time member of the town attorney's staff.

DR 5-105(A) requires a lawyer to "decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests" "Differing interests" are defined in the "Definitions" section of the Code as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

While this Committee declined, in N.Y. State 603, to "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, " we, nonetheless, concluded in that case -- based on a functional analysis of the relation between "the proposed representation [and] the nature of the lawyer' s public function" -- that the part-time city attorney could not "ethically represent private clients before city agencies for which the city attorney's office provides legal representation or assistance."

We assume for purposes of this opinion that the town attorney's office provides legal representation to both town agencies (the planning board and the zoning board of appeals) before whom special counsel proposes to appear on behalf of private clients.³ We also assume that with respect to the "particular subject matter, proceeding or litigation" for which the special counsel is retained by the town, the special counsel's client is "the entire [town] government" and that "any private employment that might conflict with any part of the government must be prohibited." Note, Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1427 (1981).⁴

² If special counsel is so precluded, no member of his or her law firm may undertake such representation. DR 5-105(D); N.Y. State 603 (1989).

³ If the planning board or the zoning board of appeals had separate legal counsel which was independent of the town attorney's office, special counsel to the town would have greater ethical latitude to represent private clients before those agencies. See N.Y. State 447 (1976) (counsel to county Department of Social Services may represent private clients in other civil or criminal matters involving the county). See also, N.Y. State 484 (1978) (lawyer-member of town zoning board of appeals and his or her partners and associates may represent private clients before other agencies of the town in non-zoning matters) .

⁴ As discussed in the cited article, the precise identity of the client may be relevant to the scope of private employment that a salaried government attorney may undertake. We

Nonetheless, we are not persuaded that the interests of the private clients whom special counsel seeks to represent before the planning board and zoning board of appeals are necessarily so conflicting, diverse or inconsistent with the interests of the town he or she serves as special counsel as to affect adversely his or her judgment or loyalty to either client, and thereby rise to the level of a per se representation of "differing interests" within the meaning of DR 5-105(A).

The fact that a zoning board traditionally hears appeals from adverse determinations of a town official (usually the building inspector) does not necessarily mean that the interests of the applicant are adverse to those of the town. Unlike the building inspector, who is limited to a strict construction of the town's ordinances, a zoning board of appeals is expressly authorized by statute – in the face of "practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinances" – to "vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." Town Law §267(5).

The board of zoning appeals has been characterized "as a 'safety valve' for the zoning system." Anderson, 2 New York Zoning Law and Practice §2209, at 121 (3d ed. 1984). Indeed, the fact that an appeal to the zoning board may be taken not only by an aggrieved property owner, but also "by an officer, department, board or bureau of the town," Town Law §267(2), militates against a conclusion that the interests of an applicant for relief to the zoning board differ per se from those of the town.

With respect to a planning board, its principal function is to approve site plans, subdivision plats and conditionally permitted uses of property. Town Law §§274-a, 276. There is nothing in the statutory scheme to suggest that an application to a planning board for a particular approval involves interests that are necessarily conflicting, diverse or inconsistent with those of the town.

Of course, if differing interests actually exist, the representation of the private client cannot be undertaken unless consent can be obtained in accordance with the requirements outlined in N.Y. State 629 (1992).⁵

The fact that a disappointed applicant to a planning board or a zoning board of appeals ultimately may commence litigation against the town does not disqualify special

do not regard such an analysis as helpful in deciding whether special outside counsel ethically may represent private clients before agencies of the same municipality.

⁵ That opinion requires that (i) the obviousness test of DR 5-105(C) and all other disciplinary rules be met, (ii) the lawyer be reasonably certain that both the entity is legally authorized to waive the conflict and all legal prerequisites to the consent have been satisfied, and (iii) the process by which the consent is granted is sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

counsel from appearing in the first instance before the town agency. Of course, once litigation is anticipated, and perhaps before, the conflict would be palpable. N.Y. State 580 (1987)⁶; N.Y. State 444 (1976). Accordingly, before undertaking the representation, special counsel should advise the prospective private client that extra expense and delay may flow from his inability to handle any future litigation.⁷

We are mindful that retaining special counsel to appear before a town agency may give rise to a perception that his or her services are being secured in order to influence that agency or to obtain special consideration. However, absent affirmative evidence or representations to that effect, the mere perception of impropriety is insufficient to justify a *per se* rule of disqualification. As we noted in N.Y. State 564 (1984) (special district attorney ethically may engage in the private practice of criminal law), "we do not believe that the mere possibility of public suspicion should preclude appointment of persons best qualified by their experience and training to serve."

A critical factor in our conclusion is that special counsel ordinarily has limited duties and responsibilities and does not have the town-wide responsibilities and influence of the town attorney or a permanent member of his or her staff. A different rule would apply where the nature or volume of legal work handled by special counsel makes him or her the functional equivalent of a regular, ongoing member of the town attorney's staff,⁸ or where the subject matter of the particular representation is of such overriding importance to the town that special counsel is perceived as having significant influence with the planning board or zoning board of appeals. In those situations, our opinions in N.Y. State 603 and N.Y. State 580 make clear that the duty of undivided loyalty and the heightened danger of compromising confidences and secrets, coupled with the "special sensitivity" required of lawyers for the public to "take particular care not to ... accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system" N.Y. State 392 (1975), would preclude representation of private clients before agencies whose legal representation is under

⁶ N.Y. State 580 held that an attorney who represented clients appearing before the zoning and planning board, as well as clients in tax certiorari proceedings and in personal injury claims against the municipality, could not simultaneously become a special bond counsel for the municipality. The Committee did not opine on the appropriateness of the special counsel representation where the attorney only represents clients before the zoning and planning boards.

⁷ Such advice also should include the added expense and delay that would result from the need for special counsel to withdraw should the application be actively opposed by town officials or should differing interests otherwise arise during the course of the representation.

⁸ By way of example, a special counsel who regularly represents the town in particular categories of matters, such as tax certiorari cases, would be the functional equivalent of a member of the town attorney's staff.

the umbrella of the town attorney's office.⁹

In short, the ethical constraints applicable to an outside attorney who is not a permanent member of the town attorney's staff (or the functional equivalent thereof) are more analogous to those applicable to the special district attorney considered in N. Y. State 564, than those applicable to the part-time town or city attorneys addressed in N.Y. State 143 (1970), N.Y. State 470 (1976) and N.Y. State 603. A contrary rule "would inevitably curtail the availability of qualified attorneys to serve as special [counsel]." N.Y. State 564, at 2.

⁹ Again, we express no opinion as to whether special counsel who is the functional equivalent of a regular member of the town attorney's staff could, in any given case, satisfy the tests for obtaining governmental consent pursuant to N.Y. State 629 (1992).

CONCLUSION

For the reasons stated and subject to the qualifications set forth above, the question posed is answered in the affirmative.