

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 634 - 8/1/92 (37-91)

Topic: Disqualification of former government attorney representing other governmental entities; vicarious disqualification.

Digest: Former government attorney may not in private practice represent another governmental body in matters in which the attorney participated; lawyers in same firm may do so if in compliance with conditions of DR 9-101(B).

Code: DR 9-101(B)

QUESTIONS

(1) May a lawyer formerly engaged part-time as general counsel for a city represent another municipality or governmental agency in matters involving the city in which the inquiring lawyer participated personally and substantially?

(2) May members of a firm in which the inquiring lawyer is associated represent another municipality or governmental agency in such matters?

OPINION

The inquirer formerly served as a part-time general counsel for a city and now seeks to represent in his private practice another municipality in a matter in which he participated personally and substantially for his former employer.

DR 9-101(B)(1) states that unless expressly permitted otherwise by law, "[a] lawyer shall not represent a *private client* in connection with a matter in which the lawyer participated personally and substantially as a *public officer or employee ...*" (emphasis supplied). The inquiry involves determining the proper definitions of the

highlighted phrases.

DR 9-101(B)(1) is applicable to a lawyer who formerly served as a "public officer or employee" in any capacity. A lawyer who receives a regular paycheck from the government is a public employee. Similarly, a lawyer elected or appointed to a public office is a public officer. For purposes of DR 9-101, public officers include, but are not limited to, district attorney, assistant district attorney, county attorney, city attorney, town attorney, village attorney and corporation counsel, whether full-time or part-time, however titled and however compensated.¹

Where a lawyer is in private practice, a public entity can be the lawyer's "private client." In determining the appropriate meaning of that term, the emphasis is on the nature of the lawyer's practice, not on the characterization of the client as a public or private entity. *See, e.g., General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974) (attorney's representation of the City of New York in an antitrust action was private employment); ABA 342 (1975) (private employment refers to employment as a private practitioner).

Thus, an attorney who formerly served as a part-time general counsel for a city is prohibited by DR 9-101(B) from subsequently representing another government agency (as a private client) in a matter in which the attorney previously "participated personally and substantially."

As the attorney may not personally represent the government agency, the next question is whether another member of the lawyer's firm may do so. DR 9-101(B) provides:

Except as law may otherwise expressly permit:

1. A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such matter unless:
 - a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom; and

¹ We recognize that for other purposes the courts have defined the term public officer in a more restrictive manner. *See, e.g., People ex rel. Dawson v. Knox*, 267 N.Y. 565 (1935), *aff'd* 231 A.D. 490 (3d Dep't 1931) (county attorney); *Fisher v. City of Mechanicville*, 225 N.Y. 210 (1919) (village attorney); *Rappel v. Roberts*, 79 Misc. 2d 201 (Sup. Ct. Nassau Co. 1973) (corporation counsel). However, the term public officer in DR 9-101 is more generic than the limited definition of that term applied under the law regarding such matters as residency requirements and the right to hold over after expiration of a term [*see, e.g., Public Officers Law* §§ 2, 3].

- b. There are no other circumstances in the particular representation that create an appearance of impropriety.
2. A lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may knowingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom.

Thus, another lawyer associated with the firm may represent the other governmental agency provided the disqualified lawyer is effectively screened from participation in the matter and receives no part of the fee attributable to the matter.

CONCLUSION

For the reasons stated above and subject to the qualifications noted above, question one is answered in the negative and question two is answered in the affirmative.
