

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 692 (55-96/26-97) 6/23/97	Topic:	Part-time legislator's practice in criminal courts in city and county
Overrules: N.Y. State 431 (1976)	Digest:	A part-time city or county legislator may not represent criminal defendants in cases in which the legislator expects to cross-examine a police officer who is a member of a police department over which the legislature has budgetary authority, or in which the legislator would be opposing a lawyer over whose office the legislature has budgetary authority.
	Code:	EC 8-8, 9-6; DR 1-102(A)(5), 5-101(A), 8-101(A).

QUESTION

May a part-time city or county legislator represent criminal defendants in cases in which the legislator expects to cross-examine a police officer from a police department over which the municipal legislature has budgetary authority, or in which the legislator would be opposing a prosecutor over whose office the municipal legislature has budgetary authority?

OPINION

The Committee has been asked to consider the effect of its previous opinions dealing with limitations on the private practice of county legislators on the private criminal defense practice of a member of a city council. This opinion does not distinguish between the two, except insofar as the powers of such legislatures may differ, and is applicable to part-time municipal legislators generally.

For thirty years or more, this Committee has addressed the limits of the private law practice that may ethically be maintained by part-time legislators. See, e.g., N.Y. State 418 (1975) (improper for county legislator to appear in opposition to the county attorney in the county in which the attorney is legislator, where county legislature appoints county attorney); N.Y. State 424 (1975)

(county legislator may not oppose district attorney's office in county); N.Y. State 431 (1976) (clarifying N.Y. State 424 (1975), county legislator may not oppose district attorney's office in county where legislature approves "line item" budget for office); N.Y. State 435 (1976) (*inter alia*, county legislator-lawyer may not defend against prosecutor over whom legislature has line item budget authority, may not under certain circumstances appear in County Court); *see also* N.Y. State 259 (1972) (improper for lawyer-legislator to represent agency funded in part by the legislature); N.Y. State 226 (1972) (legislative approval of judicial appointment disqualifies legislator from appearing before judge); N.Y. State 209 (1971) (lawyer-legislator may not act as attorney for school district receiving services from the municipality); N.Y. State 141 (1970) (not proper for county lawyer-legislator to represent plaintiff against defendant where claim is based upon county agency regulation).

The Committee has explained the purpose of the restrictions as follows:

Rules disqualifying lawyers who are part-time public officials from accepting private clients in certain situations are designed to serve two basic purposes. Primarily the disqualification rules serve to prevent private clients from retaining a part-time public official in the hope of gaining some improper advantage by reason of his lawyer's public office. In addition the rules are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official.

N.Y. State 431 (1976).

The effective administration of our criminal justice system depends not only upon actual probity by the lawyers who participate in it, but upon the public's perception of its fairness and even-handedness. N.Y. State 683 (1996). Where an elected part-time legislator acts as criminal defense counsel, there can be circumstances in which the public perception of fairness is compromised. Although it is important that lawyers serve as legislators, EC 8-8, and where such service is part-time the lawyer necessarily must be permitted to engage in private practice (including a criminal defense practice), in those special circumstances where the lawyer-legislator's performance of a private representation would undermine the public's confidence in the criminal justice system, the lawyer-legislator must forego the private engagement. DR 1-102(A)(5) (lawyer shall not "engage in conduct prejudicial to the administration of justice"); EC 9-6 (every lawyer must "strive to avoid not only professional impropriety but also the appearance of impropriety").

In the context of an elected part-time member of a municipal legislature, we believe that special circumstances warranting disqualification would be present if the lawyer-legislator would be required as part of the private engagement to be adverse to law enforcement authorities over whom or which the legislature has control or influence. For example, if the legislature passes

upon the budget of or appointments to the prosecutor's office, the police department, or other pertinent law enforcement offices, the public's perception that a prosecutor or police officer may exercise undue caution in dealing with a defense attorney who, in the role of legislator, has some authority over their offices cannot be dismissed. We have already held that to be the case in circumstances where every assistant district attorney's salary is fixed by a "line item" in the budget approved by the legislature. N.Y. State 431. That opinion concluded that a part-time lawyer-legislator is not prohibited from acting adverse to a district attorney for whose office the legislature appropriates a "lump sum" for the entire office, leaving it to the district attorney to set the salaries of his or her assistants, on the ground that there "is no appearance of impropriety in this situation as it is too remote and too far removed to be a concern to the public..." We believe N.Y. State 431 drew too fine a distinction, however, as it is conceivable that where the size of the legislature, the district attorney's office or police department is small, even "lump sum" budgetary authority will be enough to trigger a public perception that the district attorney or police officer will be led to avoid contentiousness with the lawyer-legislator. We believe that the importance of the public perception of integrity in the administration of the criminal justice system is too great to permit such fine line-drawing. Accordingly, we now opine that a lawyer who is a part-time member of a municipal legislature should not take on a matter that will require the lawyer to cross-examine a police officer from a police department over which the legislature exercises budgetary or appointment authority, or to be adverse to a prosecutor whose office is similarly affected by the legislature. Accepting such an engagement would be prejudicial to the administration of justice. DR 1-102(A)(5). Cf. DR 8-101(A)(2) (lawyer who holds public office may not "[u]se the public position to influence ... a tribunal to act in favor ... of a client"). See Nassau County 93-20 (an attorney serving on a City Council may not represent criminal defendants where the attorney may have to cross-examine city police officers).

There may also be special circumstances in which a conflict could arise between the lawyer-legislator's official duties or political objectives in the lawyer's role as legislator, and the lawyer's professional obligations to a client. In such circumstances, the lawyer-legislator must apply the principles of DR 5-101(A), which bars the lawyer from representing a client without the client's consent obtained after full disclosure where the lawyer's "exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." See EC 8-8 ("A lawyer who is a public officer, whether full or part-time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties."). Client consent is effective in such circumstances only where it is obvious that notwithstanding the potential conflict the lawyer's representation will be adequate. DR 5-105(C); N.Y. State 660 (1994); N.Y. State 595 (1988).

CONCLUSION

For the reasons stated, a lawyer who is a member of a municipal legislature that has budgetary or appointment authority over law enforcement authorities may not take on a criminal defense engagement that requires the lawyer to be adverse to such authorities.
