

NEW YORK STATE BAR ASSOCIATION

**Committee on Professional Ethics**

Opinion 702 - 5/7/98 (60-97/60a-97)

Topic: Practice of law by member of county legislature.

Digest: Prohibition against practice of criminal law by a lawyer-legislator not cured by abstention on votes affecting District Attorney's budget and public disclosure of intention to abstain.

Code: DR 1-102(A)(5); EC 8-8; EC 9-6.

Code of Judicial Conduct: Canon 2; Canon 5(C)(1).

**QUESTION**

Is the ethical proscription of the practice of criminal law by a lawyer-legislator still applicable if the legislator abstains from all votes affecting the district attorney's budget and publicly discloses the intention to abstain?

**OPINION**

In N.Y. State 692 (1997), this Committee concluded that it would be prejudicial to the administration of justice for a lawyer-legislator to "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*" (emphasis added). We reiterated in N.Y. State 692 that the "two basic purposes" of rules disqualifying lawyers who are public officials are to (1) "prevent private clients from retaining a part-time public official in the hope of gaining some improper advantage by reason of his lawyers' public office," and (2) "prevent public suspicion that the client may be gaining some improper advantage by retaining the public official."

We have now been asked by a member of a county legislature who practices criminal law in that county whether the ethical proscriptions of N.Y. State 692 would still be applicable if the lawyer-legislator abstained from all specific votes on the district attorney's budget and made public disclosure of that intention.

A public disclosure of an intention not to vote on the district attorney's budget would not, in the opinion of this Committee, be adequate to prevent the conduct and public perception that the disqualification rule is designed to avoid. It is membership in the county legislature and the attendant influence of that membership on the deliberations and determinations of that body, rather than any individual final vote on the district attorney's budget, that might induce a private client to retain the lawyer-legislator as criminal defense counsel "in the hope of gaining some improper advantage." Moreover, the fact that the lawyer-legislator personally abstains from voting on the budget could not, in and by itself, "prevent public suspicion that the client may be gaining some improper advantage by retaining [you]."

The public's perception alluded to in N.Y. State 692 "that a prosecutor or public officer may exercise undue caution in dealing with a defense attorney who, in the role of legislator, has some authority over their offices," while arguably diminished by a public disavowal of personal participation in budgetary determinations, could not confidently be eliminated entirely by such a disavowal. Recusal on budget votes could also be insufficient to cure the potential conflicts alluded to in N.Y. State 692 "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." As we stressed in N.Y. State 660 (1994), "where the matter relates to the criminal justice system, consent usually is unavailing."

In short, the importance of the public perception of integrity in the administration of the criminal justice system is simply too great to accommodate the proposed relaxation of the proscriptions of N.Y. State 692. The public could reasonably conclude that a prosecutor whose budget is fixed by the county legislature "is to some degree beholden to a member of that Legislature" who appears as defense counsel in a criminal trial, notwithstanding a public disavowal by the legislator of his intention to vote on the overall budget. *See generally* N.Y. State 418 (1975) (improper for a county legislator to represent a party in court in the same county where the opposing party is represented by the county attorney appointed by the county legislator). Accordingly, we believe that DR 1-102(A)(5) and ECs 8-8 and 9-6 compel the same result here as they did in N.Y. State 692.

## CONCLUSION

The ethical prohibition on the practice of criminal law by a member of a county legislature that exercises budgetary or appointment authority over a police department or district attorney is not cured by abstention on all votes affecting the district attorney's budget and accompanying public disclosure of the intention to abstain.

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