



Committee on Professional Ethics

Opinion 909 (2/28/12)

Topic: Imputation of conflicts of member of town board

Digest: Where a member of a town board is barred from representing clients in certain matters in town Justice Court because the board has salary or budget control over the Court or the police department, other lawyers in the member's law firm are not disqualified unless there are particular facts that would likely give rise to public suspicions of improper influence or to a conflict of interest between the private client and the member's duties to the town.

Rules: 1.7(a)(2), 1.10, 8.4(d), 8.4(e).

QUESTION

1. Where an associate in a law firm serves on a town board that has control over the budget of the town Justice Court, the salary of the town justice and the budget for the town police department, can other lawyers in the firm appear on civil and criminal matters in that Court?

OPINION

2. This inquiry is largely governed by two lines of this Committee's prior opinions. One holds that lawyer-members of a local legislative body are not barred from appearing before a judge whose salary is set by the legislative body but may be barred from certain types of cases. That line of opinions does not address imputation of the proscription to other lawyers in the member's firm. The second line of opinions holds that lawyer-members are barred in the particular setting of criminal cases from appearing adverse to law enforcement authorities over whom the legislative body has budgetary control. We have addressed imputation in the latter situation and found that the prohibitions are not generally imputed, but may be in certain circumstances.

3. In the first line of opinions, of which N.Y. State 226 (1972) and N.Y. State 435 (1976) are representative, this Committee opined that a lawyer who served as member of city council or county legislature that set the salary of the town justice was not barred from appearing before the court:

[T]he mere possibility that a judge may be influenced by the lure or fear of a councilman's vote on the salaries of judges of his court does not pose so evident a threat to the impartial administration of justice as to warrant barring the

councilman from practicing law in his court

N.Y. State 226. The Committee’s reasoning rested on DR 8-101, now Rule 8.4(e), which bars a lawyer who holds public office from using his or her public position to influence or attempt to influence a tribunal to act in favor of a client.

4. In those opinions, however, we noted certain limitations on this general proposition. The legislator or board member would be barred from appearing (i) before a judge who was appointed or subject to confirmation by the legislative body or board, (ii) in matters in which the town or county, or a town or county agency, was a contesting party, or (iii) in matters in which the interpretation or validity of a town or county ordinance or regulation was at issue. N.Y. State 226; N.Y. State 435. *Accord* Nassau County 93-20 (City Council member could not “appear before the specific judge appointed by the Council, could not challenge acts of the City and could not oppose the City Attorney in court”). The opinions based these limitations both on DR 8-101 and on the rules dealing with conflicts of interest, principally DR 5-101, now Rule 1.7(a)(2) – that is, the conflict or apparent conflict between the lawyer’s personal duty as a legislator or board member to advance the interests of the city or county and the lawyer’s duty to his or her client to advance the client’s interests in the particular matter. We did not address the extent to which these prohibitions would be imputed to the legislator’s or board member’s law firm (and neither did the Nassau County ethics opinion).

5. In the second line of opinions, this Committee held that a lawyer-legislator could not represent clients adverse to law enforcement authorities over which the legislature has budgetary control or influence. N.Y. State 692 (1997); N.Y. State 798 (2006).

[I]f the lawyer/legislator would be adverse to law enforcement authorities (*e.g.*, because he or she would have to cross-examine them) or prosecutors over whom the legislature has budgetary control or influence, we believe that the lawyer/legislator should be disqualified because of the possibility that the law enforcement officers or prosecutors would exercise undue caution in handling the case.

N.Y. State 798 ¶ 3.

6. We addressed the imputation of this latter prohibition in N.Y. State 798. We concluded that the prohibition on appearing adverse to law enforcement authorities was not automatically imputed to other lawyers in the lawyer-legislator’s firm. *Id.* ¶ 9. We reasoned that this prohibition derived from the bans on conduct prejudicial to the administration of justice then contained in DR 1-102(A)(5), and now contained in Rule 8.4(d), and rules relating to improper influence contained in DR 8-101(A), now Rule 8.5(e).¹ The automatic imputation rule in Rule 1.10 (then DR 5-105(D)) applies only to disqualification under Rules 1.7, 1.8 and 1.9, not to these other rules. N.Y. State 798 ¶¶ 9, 11.

¹ We also referred to the injunction in former Canon 9 that lawyers should avoid even the “appearance of impropriety.” N.Y. State 789 ¶ 9. The disciplinary rules that appeared under that Canon in the former Code are now distributed in various Rules, principally Rules 1.11, 1.12(a) and 8.4(e)(1).

7. We noted, however, that “[a] representation by another lawyer in the firm may involve facts and circumstances in which the lawyer/legislator’s disqualification should be imputed to everyone in the firm.” *Id.* ¶ 11.

Because the purpose of disqualifying the lawyer/legislator is to avoid the public perception that the lawyer/legislator is misusing his or her influence over police and prosecutors, the circumstances in which others in the firm should be disqualified are those in which the public is likely to suspect that the lawyer/legislator’s influence will still have an effect. This is most likely to occur where the lawyer/legislator is particularly prominent, e.g., a party leader, or where the case is particularly prominent, even if the lawyer/legislator is not personally working on the case.

Id. ¶ 12. *Cf.* N.Y. State 773 (2004) (partner or associate of a member of municipal board is not automatically barred from appearing before board, but may be barred depending on the particular facts and circumstances); N.Y. State 632 (1992) (same as to lawyers in same firm with part-time judge who was barred from appearing before municipal zoning board of appeals or planning board).

8. Combining these two lines of opinions takes us a long way in answering this inquiry. First, neither the associate nor the firm is barred from appearing in town Justice Court by the mere fact that the town board has control over the budget of the Justice Court or the salary of the town justice. Second, while the associate is barred from representing clients adverse to the town police department, other lawyers in the firm generally will not be. The firm may, however, be barred in particular circumstances implicating the public perception of favoritism, as when the case or the associate are particularly prominent. Third, the associate may be barred from appearing in certain matters that our prior opinions have suggested raise particular concerns either with respect to public perceptions of favoritism or conflicts of interest, namely, appearing (i) before a judge who was appointed or subject to confirmation by the legislative body or board, (ii) in matters in which the town or county, or a town or county agency, is a contesting party, or (iii) in matters in which the interpretation or validity of a town or county ordinance or regulation is at issue.

9. Our prior opinions have not addressed the extent to which this last set of restrictions is imputed to the firm. The answer, as our reasoning in N.Y. State 798 suggests, depends on the source of the prohibition. If the prohibition arises out of the public perception of favoritism, the prohibition is not imputed automatically to the firm but may be in certain circumstances. If the prohibition arises out of the rules governing personal conflicts of interest, the prohibition is imputed to the firm. But conflicts under Rule 1.7 are generally waivable by the affected client with informed consent. *See* N.Y. State 773 (where certain prohibitions on practice of a municipal board member arise out of conflicts rules they are imputed to lawyers in the member’s firm but “the private client may be able to give effective consent”); N.Y. State 692 (1997) (same). Thus, where the associate would be barred from representing a private client because of a conflict between his duties to advance the interests of the town and duty to advance the interests of the private client, that prohibition will generally be imputed to other lawyers in the firm, but also may be waivable with the informed consent of the client.² As these determinations are highly fact intensive, we do not in this opinion attempt to delineate how the rules would apply to any particular set of facts.

CONCLUSION

10. Except where the facts and circumstances make it likely that the public will suspect undue influence, the partners and associates of a member of a town board may appear in town Justice Court, even though the board has control over the salaries and budget of that Court and of the police department that may be the adversary in certain matters. There may be particular cases, however, in which a representation would present the town board member with a conflict of interest that would prevent the member from representing the private client without the informed consent of the private client, and that prohibition will be imputed to the other lawyers in the member’s firm.

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² As indicated by its language, Rule 1.7(a)(2), like its predecessor, DR 5-101(A), is concerned with protecting the exercise of “the lawyer’s professional judgment on behalf of a client,” and not with protecting the lawyer’s judgment in other roles the lawyer may undertake. Thus a conflict under that rule can generally be waived by the private client, as long as the lawyer can competently and diligently represent that client. N.Y. State 773 at n.3. As discussed in N.Y. State 773, the town board’s own rules may affect whether the associate can take on representations that touch on matters that also come before the town board and whether, for example, the associate must recuse himself from certain votes.