NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #431 - 4/28/76 (2-76;10-76)

Topic: County legislator; Criminal practice.

Clarifies #424

Digest: Improper for county legislator to represent defendant in same county when prosecution is by a district attorney or assistant district attorney in a county where the district attorney's office has a "line item" budget.

Code: EC 5-15; 7-13; 8-8; 9-1; 9-2; 9-6.
DR 5-101; 5-105(A)
Canon 9

QUESTION

Is the prohibition upon a county legislator representing defendants in criminal proceedings limited by the nature of a district attorney's budget?

OPINION

In N.Y. State 424 (1975) it was determined that for a variety of reasons set forth in some detail below, it would be improper for a county legislator to represent a defendant in a criminal proceeding where the People are represented by a district attorney who receives funding from the county legislature of which the legislator is a member. This rule is applicable to all district attorneys and assistant district attorneys whose salaries are fixed as a "line item" in the legislative budget. It does not apply to a situation where the legislature appropriates a "lump sum" for the entire office of the district attorney and the district attorney determines the individual salaries of his assistants as 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 or the profession.

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. While our Committee believes it highly unlikely that any such advantage would in fact be gained or that the legislator would misuse his position, we believe that public suspicion of possible misuse is sufficiently great to justify disqualification in situations where the legislature controls individual prosecutorial salaries. See, N.Y. State 292 (1973).

The result reached in N.Y. State 424 (1975) and in this opinion are but an application of a series of opinions. For example, in N.Y. State 209 (1971) it was held that it is improper for a city legislator to act as attorney for a city school district which receives services from the city. There it was stated that "where a legislator is retained to act

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as attorney for a client dependent to any substantial extent upon the legislature of which the legislator is a member, an impression of impropriety is inevitably created in the eyes of the public which should be avoided. N.Y. State 141 (1970)." A fortiori where the adversary rather than the client is dependent upon the legislature.

The public must be assured that the public prosecutor does not and of equal importance, does not appear to, engage in improper conduct. Unless the prosecution has the confidence of the public, the high esteem in which this important public officer should be held will be tarnished. Permitting the legislator who in part fixes the prosecutor's salary to be his opponent at least creates the suspicion that those with whom the prosecutor must deal could influence his conduct. We find no contravening interest that would permit part time legislators to practice criminal law in such a situation.

The duties and responsibilities of a prosecuting attorney are unique and differ greatly from those of a lawyer engaged in private practice. His position is not only that of advocate but of administrator of impartial justice. As stated in ABA 150 (1936), "it is his primary duty not to convict but to see that justice is done." See EC 7-13 and EC 8-8.

On the other hand, in N.Y. State 226 (1972) it was held not to be improper for a city legislator to practice law in city court of the city, notwithstanding that the salary of the judges of those courts are set by the city legislature. There we held that "the 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, assuming that the city council does not appoint the members of the court." In that case we went on to state that:

> "where a client and a municipality or one of its agencies are the contesting parties, or the validity of a city ordinance is in question, a conflict of interest would exist, for then it would be the duty of the lawyer to contend for the best result for his client and at the same time as a member of the city council do his utmost to protect the interests of the city. In such case, as well as appearance before an administrative agency of the city, the councilman would be disqualified from representing the private client. DR 5-101; DR 5-105(A); EC 5-15. See N.Y. State 141 (1970) and N.Y. State 110 (1969)."

Thus, the line is clearly drawn between the permissible and the impermissible. N.Y. State 424 (1975) is only an application of the rules stated in N.Y. State 226 (1972).

In N.Y. State 259 (1972), it was held that it is improper for a county legislator to act as attorney for a health clinic which is partially funded by the county where his duties to act on behalf of his client may foreseeably be in conflict with his duties as a legislator.

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In N.Y. State 326 (1974) it was held to be improper for a member of a county legislature to act as counsel for a board of appeals of a town situate within the same county because of the inherent conflict and the appearance of impropriety as decisions of the town board of appeals may be reviewed by the regional or county planning board whose members are selected in a manner determined by the county legislature.

Similarly, it has been held to be improper for a city councilman to represent a client before the city urban renewal agency. N.Y. State 110 (1969), and for a county legislator to represent a client in an action to enforce compliance with regulations issued to the township by county agency. N.Y. State 141 (1970).

The relationship between a county legislature and the situations where a county legislator is disqualified enumerated above is sufficiently close and the legislature's interest in and control over the particular activity is great enough to merit the application of Canon 9 that prohibits even the appearance of impropriety or conflict of interest. So, too, is the relationship between the county legislature and its control over and funding of the office of the district attorney in the "line item" budgets.

In N.Y. State 418 (1975) it was held to be improper for a county legislator to represent a party in court in the same county when the opposing party is represented by the county attorney appointed by the county legislature. It is appropriate to quote at some length from that opinion:

> "Although it is highly desirable that attorneys, being uniquely qualified to do so, should serve as legislators (EC 8-8), due care must be exercised by attorneys who are part-time legislators so to conduct their private practice as to avoid any appearance of professional impropriety (Canon 9). EC 9-1 asserts the necessity that 'the public have faith that justice can be obtained through our legal system', and EC 9-6 mandates that lawyers 'encourage respect for the law and for the courts'. The public may reasonably conclude that a legislature appointed county attorney is to some degree beholden to a member of that legislature. Accordingly, were a member of the county legislature to appear in court in opposition to the county attorney, or his assistant, an appearance of impropriety would arise, and 'public confidence in the integrity . . . of the legal system and the legal profession' (EC 9-2) would be eroded."

We cannot make any meaningful distinction between the appointment of a county attorney and the control of the salary of an assistant district attorney. We are not unaware of the provisions of the New York State Constitution, Article XIII Section 13, which require that the district attorney's salary be not less than the salary of a supreme court judge in a county having a population of more than 500,000. It, however, does not prohibit salaries in excess of such sum and, accordingly, for the reasons stated above, the district attorney is in the same position as his assistants.

We have carefully reviewed the determinations made in N.Y. State 424 (1975) and conclude that the Code and prior opinions lead inevitably to

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the result that it would be improper where "line item" budgets are involved to permit a county legislator to defend criminal matters in the county where the district attorney and his assistants represent the adversary. We have said in another context that the rights and privileges of public office are burdened with certain limited obligations. Here the county legislator is burdened with a disqualification in a section of his private practice. Common sense demands no more and our system of justice demands no less.

This opinion should serve to clarify the prohibitions with which N.Y. State 424 (1975) were concerned. However, because it might be claimed that certain legislators were not aware of the rule at the time they last ran for office, it is not contemplated that a past failure to comply would be grounds for disciplinary proceedings. Those who in good faith claim that they were unaware of the prohibitions set forth in such opinion prior to its publication should not be required to resign their office or forego the practice of criminal law with respect to those matters for which they are presently retained. Furthermore, the prohibitions set forth therein are deferred in their application until the expiration of their present term of office as to those legislators who make a bona fide claim that at the time they were elected they were unaware of such prohibition.
