

ETHICS
OPINION 76-1

Propriety of an Attorney Who is a Member of a Legislative Body or Members of His Firm Practicing or Representing Clients Before that Legislative Body.

(Approved by Board of Governors 7/30/76)

The Committee's opinion has been requested in connection with the following statement of facts:

"A", an attorney admitted to practice in Alaska, is elected to the Borough Assembly of the Borough in which he is a resident. The Borough Assembly has no authority to appoint, recommend, remove or affect the pay and emoluments of any magistrate or other judicial official within the Borough. The Assembly does, however, have the power by ordinance to hire, fire, and fix the pay and emoluments of the Borough Attorney. The Borough Charter requires each member of the Assembly to vote on each question raised for determination by the Assembly, except when otherwise prohibited from doing so, or when excused by all remaining members of the Assembly entitled to vote. The Charter also provides that a member of the Assembly is prohibited from voting on a matter wherein he has a substantial financial interest. Interpreting this latter provision as requiring abstention where a member of his law firm is either personally financially interested, or is employed to represent an applicant or litigant, "A" scrupulously abstains in such cases without putting the matter to a vote of the Assembly. Further, "A" personally refrains from accepting any employment which involves representation before the Assembly, or any city staff agency, board or commission, and announces his intention to refrain from voting on questions relating to the hiring, firing, or pay of the Borough Attorney. If forced to a vote on abstention, "A" would in any event refuse to vote. The sanction in the Borough Charter for such act would be a vote by the Assembly to remove the Assemblyman from office. Under the circumstances described, may other attorneys from the firm in which "A" is a partner undertake civil representation of clients having claims against the Borough; appear in civil matters before the Borough Assembly; and appear before Borough boards and commissions such as the planning and zoning commissions?

1. An attorney who is a member of a legislative body such as a borough assembly, which apparently has both legislative and quasi-judicial responsibilities, may not practice or represent clients before that body.

DR 9-101(b) provides that, 'A lawyer shall not accept private employment in a matter in which he has substantial responsibility while he was a public employee.'

The proscription, obviously applies to present public employment as well as past. The problem becomes clearer when considered in the light of DR 9-101(c), which provides that a lawyer "shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." In the ABA Opinion, No. 296, August 1, 1959, it is stated that a law firm should not accept employment to appear before a legislative committee while a member of the firm is serving in the legislature. In an informal opinion, No. 855, it is stated that a judge should not practice in a court over which he occasionally presides, and neither should a partner or associate practice over which such judge occasionally presides. Insofar as the borough assembly has quasi-judicial powers in certain matters, this proscription would be applicable by analogy.

Arizona Ethics Committee Opinion 74-28 addresses the question of whether the members of a firm may appear on civil matters before the city council where one of the members of the firm is a member of that council, and answers the question negatively. The Arizona opinion does not directly address the question of whether the attorney member may himself appear before the Assembly, but the answer is obvious.

ABA Informal Opinion No. 1182, expresses the opinion that there is no flat proscription upon an appearance by a lawyer-legislator before a Workmen's Compensation Board, the members of which are appointed by the legislature or where their compensation is fixed by the legislature. However, EC 8-8 states, "A lawyer who is a public officer, whether full or part time, should not engage in activities in which a personal or professional interest is or foreseeably may be in conflict with his official duties." EC 9-2 provides, "When explicit ethical guidance does not exist a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and the efficiency of the legal system and the legal profession." EC 9-6 provides in part, "Every lawyer owes a solemn duty . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."

2. An attorney should not practice before agencies or adjudicative bodies from which the normal course of appeal is to the legislative and quasi-judicial body of which the attorney is a member.

EC 9-2 and EC 8-8 appear to be in point on this matter. The statement appears to be simply an extension of the first statement that the attorney may not practice before the body of which he is a member. The Code of Judicial Conduct is also instructive by analogy. Part II, 1(A) of the Judicial Canons provides that a part-time judge should not

practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves. While the Judicial Canons in effect in this State apply only to officers of the Alaska Court System, to the extent that the Borough Assembly exercises quasi-judicial powers, the analogy is valid.

3. An attorney who is a member of a legislative and quasi-judicial body may not practice before that body, or agencies from which an appeal lies to that body, even if the attorney disqualifies himself from acting upon the matter as a member of the body.

While the proscription against engaging in activities which give the appearance of impropriety is sometimes vague and may be overly broad, it seems clear that at least this type of activity would fall within the category and would be improper and unethical. It should also be noted that an appearance before the body of which the attorney is a member would be improper even if there was no objection to it, inasmuch as the public, whom the attorney serves as a member of the body, cannot give its consent to such a procedure if it involves a conflict of interest. ABA Opinions No. 16, 34, 71, 77, 192.

4. If the attorney himself cannot practice before the body, or before agencies from which an appeal lies to that body, his associates and partners are similarly prohibited.

It appears to be fairly settled that associates or partners of an attorney who is disqualified from representing a client are similarly disqualified. Disciplinary Rule 5-105(d) provides, 'If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his law firm may accept or continue such employment.' While the attorney in this case is not prevented from practicing before the body because of DR 5-105, the principle seems equally applicable. In ABA Opinions 33, 49, 50, 72, and 103, it has been held that a partnership cannot undertake any professional relationship which any one of the partners, because of adverse influences and conflicting interest, could not ethically undertake. In informal opinion No. 855, it is said ' . . . the duties and considerations of possible conflicts are such that what a lawyer cannot do because of these ethical precepts relating to other parties, neither his partner, his associate, nor one with whom he shares offices, may do.' Informal opinion No. 1182, addressing the ethical constrictions on a lawyer-legislator states:

It is generally recognized that disqualification of a lawyer includes disqualification of his law partners; see e.g., ABA Formal Opinion 33; Basset v. Cook, 201 F. Supp. 821 (1862); Consolidated Theater v. Warner Brothers, 113 F. Supp. 265 (1953); Note, 73 Yale 1058 (1964); C.f. DR 5-105(D)(Relating specifically to differing interests of two clients); DR 1-102(A)(2); But see ABA Formal Opinion 220 (1941).

While the question is not completely free from doubt, in our opinion, the same rules apply to a lawyer partner of the legislator. A lawyer legislator should never of course use his position in the legislature to his advantage in the representation of his clients (see DR 8-101), and his conduct should be governed at all times by the Code.

The Committee on Rules of Professional Conduct of the Arizona Bar has addressed a very similar fact situation in Opinion No. 74-28 (Sept. 24, 1974). The Opinion states that partners and associates of a lawyer-councilman are prohibited by EC 9-3, EC 9-6, and DR-101, directly and by implication, from practicing or appearing professionally before the council or boards or agencies from which an appeal lies to the council. The basis for this proscription is the inevitable appearance of impropriety attendant to such practices. This Committee is in accord with Arizona Opinion 74-28.

5. The Committee has insufficient facts to decide whether the lawyer-assemblyman, or his partners or associates, may prosecute claims against the municipality involved.

Inasmuch as the role of the Assembly and its members is not set forth in the facts hypothesized with reference to municipal handling of claims, nor the municipality's litigation practices or the character of claims involved, the Committee feels it should refrain from addressing this question in this Opinion.