Town of Clifton Park

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November 29, 2017

RE: Request for ethics advisory opinion dated October 4, 2017.

This opinion is rendered pursuant to Section 17-13(G) of the Town Code, and is in response to your request for an advisory opinion dated October 4, 2017.

Within that request, you had asked about 4 separate categories of legal representation before the Town's Justice Court, and for this committee's advice on whether your representation of private clients before the local court, in any or all of these categories of cases, would be prohibited under the applicable ethics code. These categories are:

1. Representation of clients charged with violation of Town Code provisions, in defending against appearances tickets written by Town employees.
2. Representation of clients charged with violation of the New York State Agriculture and Markets Law on appearance tickets written by Town employees.
3. Representation of clients on tickets written by Police or County Sheriff's office under the New York State Vehicle and Traffic Law, where the tickets are prosecuted by the Saratoga County DA's office.
4. Representation of private clients in civil litigation matters.

As a threshold matter, we note that you are covered by the Town's Ethics Code in your capacity as a "Town Official" under Chapter 17-3 of the Code , and thus the "prohibited activities" of Section 17-4 apply to you.

Turning to your request, your question as to the first category of representation, the question was posed under Section 17-4(A)(2) the Town's Ethics Code, which prohibits a Town Official from:

- Acting as attorney, agent, broker, employee, consultant or representative for any person in connection with any business dealing that person has with the Town.

The question was thus framed because in correspondence dated September 27, 2017, Judges Rybak and Hughes of the local court had written to you asserting that your representation of a private client in a VTL matter before the local tribunal constituted a business dealing, because they would need to approve any plea deal on a traffic ticket, and the plea itself constituted a "business dealing" under Section 17-3 of the code. Thus, you would be prohibited from representing clients in these types of cases under Section 17-4 A (2). The September 27 letter concluded: "Our reading of these sections leads us to conclude that you may *not represent*

defendants in any cases in our court and to do so would be a violation of the Town's Ethics Code.

The applicable definitions of a "Business Dealing from Section 17-3 is reproduced below.

§ 17-3. Definitions.

When used in this chapter and unless otherwise expressly stated, the following terms shall have the meanings indicated:

BUSINESS DEALING

A. Having or providing any contract, service or benefit to or for the town.
B. Buying, selling, renting, leasing or otherwise acquiring from or dispensing to the town any goods, services or property.
C. Applying for, petitioning, requesting or obtaining any approval, grant, license, permit or other privilege from the town government.

Correspondence from Judge Rybak dated June 5, 2017, in an earlier case involving a dog off-leash appearance ticket written by a Town Animal Control Officer had cited Section 17-4(A)(3), which prohibits a Town Official from "appear[ing] as Attorney, ... against the interests of the Town in any matter in which the Town is a Party."

On October 12, the Judges responded to an inquiry from you as to whether they had changed their position, broadening their reading of the Code from one that would prohibit your involvement in cases prosecuting tickets written by Town employees to all other types of cases. This letter confirmed that the Judges' position was based on their interpretation of the Town of Clifton Park Ethics Code, and cited opinion I-92 from this Board relating to the Office of the Town Attorney. The letter reasoned that your representation of private clients on VTL matters would run afoul of §17-3(C), defining business dealings, because "plea agreements require our approval which makes it a business dealing" under Section 17-3(C), and concluded:

"To summarize our legal basis for the position we have taken that *you cannot represent private clients in our Court* is based upon the following sections of the Town's Ethics Code: (emphasis added)

1. Any plea bargain proposed requires our approval which makes it a "business dealing" (Section 17-3 (C);

2. You are a town official (Section 17-3), and

3. You cannot *act as an attorney in our* court since a court proceeding is a business dealing. (Section 17-4 (A) (2).

Although the 1992 Opinion did not detail what types of cases or categories of representation that it covered, it responded to the question: "Can the Clifton Park Town Attorney or Assistant Town Attorney appear and represent private individuals in Clifton Park Town Court.?"

While referencing Section 17-4 A. (2) (3) and (5) the Board advised that Town Attorneys should not undertake such representation. The conclusion was specifically "based on the finding

that local justices are part of Town Government, are employees as defined in the Ethics Law, and Town Attorneys are both officers and employees of the Town', and recited the prohibitions of the above reference code sections.

Presumably because the Judges had expanded the scope of their interpretation from cases involving appearance tickets such as those written by Town Animal Control Officers, (which you were potentially prohibited from participating in under Section 17-4 A (3) to all representation of all private clients, and from "act[ing] as an attorney in our court" you asked the Board to analyze all 4 categories of cases where you might seek to appear as counsel, each of which were now implicated under the broad standard put forward by the Judges.

In this regard, you asked for specific interpretations of the Town's Ethics Code, as it related to each of the four categories of potential representation you detailed above. Your inquiries were directed essentially to the line of reasoning that held that representation of clients in court constituted a "Business Dealing" with the Town, and are paraphrased as follows:

1. Does my representation of a defendant in Town Court violate Section 17-4 (A) (2).. which prohibits an attorney from acting as an attorney, agent, broker, employee, consultant, or representative for any person in connection with any business dealing that the person has with the Town?

2. Does my representation of a defendant in Town Court constitute "petitioning" or "obtaining" approval from a Town Judge as those terms are used in the Town Code's definition of "business dealing" under § 17-3-C?

3. Does the term "Town Government" as that term is used in the definition of "Business Dealing" include Town Judges who are by definition pledged to be impartial in their roles, and who are specifically excluded from the definition of "Town Official" by Section 17-3 of the Code? and

4. In consideration of the presumed independence of the 3 branches of government, you asked for clarification of whether any of four categories of representation enumerated above constitutes a "business dealing" with "Town Government"

The Board met with you on October 14, 2017, at which time you described the duties and responsibilities of the elected, At-Large County Supervisor's position that you hold, as well as the nature of your practice with your special emphasis on animal Law and animal rights, which areas of practice would arise under both the Town's Dog Ordinance and the State Agriculture and markets Law locally. You also described the progression of the correspondence which is excerpted above, and advised that the issue of a potential conflict with the Town's Ethics aw had first arisen in a Dog-off-leash case in the spring, and had recently moved on to a traffic ticket case under the Vehicle & Traffic Law, which remains pending but adjourned while awaiting an opinion here. Full copies of the relevant correspondence excerpted above were distributed to the Board. The Board adjourned to November -14-2017 to read the correspondence file and discuss the merits as a Board.

Subsequently, on October 30, 2017, the Board received correspondence from Judge Rybak, directly asserting that you, as a County Supervisor, were precluded from <u>all</u> representation because any proposed resolution of any case requires approval of the Judge, which brings it within the definition of a "business dealing". He also asserted there was an appearance

of impropriety in criminal cases in which the District Attorney is prosecuting because the D.A.'s budget is approved by the County Board of Supervisors, regardless of the applicability of the Town's Code of Ethics.

In his correspondence, Judge Rybak sought an opportunity to appear before the Board and explain his position further to the Board. Nevertheless, the Judge reminded the Board, our opinion is advisory only, and he would not feel particularly bound by any opinion rendered here, as he "retained the right to prevent any situation in my court which creates an appearance of impropriety."

During an appearance before this Board on November 14, 2017, Judge Rybak presented six pages of prepared, written testimony, a one-page undated letter signed by David Grandeau, 12 Valleywood Drive, Niskayuna, NY 12309, and an opinion #798 from The New York State Bar Association Committee on Professional Ethics.

The Judge advised the committee that he had reached out to Mr. Grandeau over the weekend preceding the hearing, and discussed retaining him in this matter. Ultimately, Mr. Grandeau apparently wrote his undated letter, and faxed it to the local Town Court on the morning of the 14th, along with Opinion #798.

Much of the discussion centered around whether the representation of clients in routine traffic ticket cases could be considered a "Business Dealing with the Town" simply because the courts approve all pleas agreements. Discussion was had concerning whether the Town Court embodied the "Town Government" for purposes of the Section 17-3 definitions of the types of Business Dealings defined in the code, versus contracts, and agreements with the Town Board, and applications for approvals and permits before the land use boards such as Planning and Zoning.

The Judge conceded that the definition of "Business Dealing" was arguable, but asserted that NYS Bar Association Opinion #798 covered this type of representation in any event.

Subsequently, on November 16, 2017, the Judge sent yet another letter to the Board, seemingly confirming this Board's decision, and providing Mr. Grandeau's one-page letter, now dated November 14, 2017, and providing copies by to District Attorney Karen Heggen and to Tahnya Grazulis, ADA, whom we understand handles the criminal court in Clifton Park for the Saratoga County District Attorney's Office.

OPINION

1. The Board is cognizant of your special expertise in the area of animal rights and the representation of dog owners before the court with respect to appearance tickets written by Town Animal Control Officers, and we understand your argument that the Town is not directly a party in cases where the recipient seeks to contest such tickets. However, we do note that the appearance ticket is written by a Town employee, and prosecuted or presented by the Town Attorney's Office. We also believe that the Town has an "interest" in seeing its Code enforced, and therefore in the tickets written under that Code successfully prosecuted or negotiated to achieve the deterrence sought. While we don't find the resolution in such cases to constitute a "business deal" regardless of

whether the court approves plea bargains, it is not necessary to reach that argument in these cases because it is our opinion that Section 17-4A(3) of the Code would act to prohibit representation of private clients in this category of cases. This opinion is based on our view that the Town has an interest in enforcing its Code, thus in successfully presenting, prosecuting or negotiating the tickets written under that Code. Because the County Supervisor is specifically included in the Code's definition of "Town Official", Section 17-4(3), and because Town Officials are prohibited from appearing as an attorney against the interests of the Town, we advise against representing private clients in these cases.

2. With regard to representation of clients on appearance tickets written by Animal Control Officers based on New York State Agriculture and Markets Law, we don't see a material distinction from tickets written as Town Law violations. The Town's Animal Control Officer is charged with enforcing the State Agriculture & Markets Law in relation to these types of issues within Clifton Park, and the case is presented in the local court by the Town Attorney's Office. Therefore, we believe the same considerations prevail as those affecting the first category of cases and would advise against representation of clients in Clifton Park local court in these categories of cases pursuant to Section 17-4(A)(3).

3. With regard to the representation of defendants with traffic tickets written by the Saratoga County Sheriff's Office or New York State Police, the Board finds no support for the theory that in presiding over plea agreements between the D.A. and defense counsel, the case somehow becomes a business deal between the Town and the respondent, bringing respondent's attorney under the prohibition of Section 17-4 (A)(2).

In this regard The Board gave no weight to Mr. Grandeau's opinion, finding firstly, that it was based on correspondence provided to him which did not even include the request for advisory opinion that he was opining on, that the opinion included no citations to any authorities supporting the "business deal" theory, although it endorsed that theory in conclusory fashion, as well as the fact that the opinion was "pre-cleared" by the Judge, who admitted that he had confirmed that Mr. Grandeau would agree with him before retaining him in this matter.

However, we do take note of the Bar Association Ethics Opinion #798, dated September 28, 2006, that Mr. Grandeau provided to Judge Rybak on November 14, which does appear to address the issue. Based on Bar Association Opinion #798, we advise you against accepting the representation of private clients responding to tickets written by the County Sheriff's office or prosecuted by the District Attorney.

4. Finally, with regard to representing civil litigants in Town Court under the court's civil jurisdiction, we do not find any prohibition against this category of representation. For reasons set forth above relative to the "business deal" analysis, we don't find that representing a private client in a civil suit for money damages against another private client would be prohibited by Chapter 17 of the Town's Ethics Code, and Judge Rybak

conceded as much, after discussion outlining how few of these cases come before the court on an annual basis.

Brian Glick Chairman

Concur	Dissent	Recuse
Ochrym	None	Campion
DiCaprio		
Mahon		

NEW YORK STATE BAR ASSOCIATION
Serving the profession and the community since 1876

ETHICS OPINION 798

1 of 3

New York State Bar Association
Committee on Professional Ethics

Opinion #798 - 09/28/2006

Topic: Practice of criminal law by legislator/lawyer

Digest: A lawyer/county legislator may not represent criminal defendants in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. It is irrelevant whether the county or the budget is large or the representation involves only plea bargaining. If the lawyer/legislator is employed by a law firm, other lawyers in the firm are not *per se* vicariously disqualified, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

Code: DR 1-102(A)(5), DR 5-101(A), DR 5-105(A) and (B), DR 5?105(D), DR 5-108(A) and (B), DR 8-101(A), Canon 9, DR 9-101, DR 9?101(B)(1)(a).

QUESTION

1. May a lawyer who is also a member of a county legislature practice criminal law in the county where he/she is a legislator if the legislature has budget authority over the police department or district attorney's office? If the lawyer is personally disqualified from representing a client, and the lawyer is associated with a law firm, are the other lawyers in the firm vicariously disqualified?

DISCUSSION

1. N.Y. State 692 (1997) and 702 (1998) prohibit a legislator/lawyer from participating in a matter that requires the legislator to cross-examine a police officer, or to be adverse to a prosecutor, who works for the county where the legislature has the authority to approve the budget of the county. Thus a legislator/lawyer could represent defendants in federal criminal cases or criminal cases brought by the attorney general of New York, but could not undertake representations in any court in the county in which the budget for the prosecutors or law enforcement witnesses must be approved by the legislative body on which the lawyer/legislator sits. We have been asked a number of questions pertaining to the practice of criminal law by a county legislator:

1. Whether N.Y. State 692 and 702 may be distinguished where the county in which the legislator serves is large and has a large budget;
2. Whether the lawyer/legislator may, with the advance consent of the client, handle criminal work in that county if the work involved only plea bargaining, on the understanding that if more were required, the lawyer/legislator would pass the case to another lawyer; and
3. (3) Whether the lawyer/legislator may take a position in a criminal defense firm in a nearby county that represents criminal-defense clients in the county where the lawyer is a legislator, if the lawyer/legislator is screened from those matters.

ATTACHMENT A 7

SIZE OF COUNTY OR BUDGET

798 203

1. As we noted in N.Y. State 692, this Committee has been addressing the limits of the private law practice that may ethically be maintained by a part-time legislator for more than 30 years. The purpose of ethical restrictions on the practice of criminal law by legislators is to prevent private clients from retaining a part-time public official in the hope of gaining an improper advantage as a result of the lawyer's public office. DR 8-101(A). They also are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official. *Id.* For example, if 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.
2. In N.Y. State 431 (1976), we distinguished between whether the legislature had line item approval over members of the prosecutor's office or rather appropriated a lump sum for the entire office, leaving it to the district attorney to set the salaries of his or her assistants. We allowed the lawyer-legislator to be adverse to a prosecutor or law enforcement officer in the latter case. In N.Y. State 692, however, we rejected that distinction. Although one of the reasons for this rejection was that an appearance of impropriety might exist where a small legislature, small DA's office or small police department was involved in a lump sum budget approval, we did not limit disqualification to these instances. Rather, we stated that a lawyer-legislator 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 be adverse to a prosecutor whose office is similarly affected. We believe the concerns that motivate this prohibition apply regardless of the size of the legislature at issue. Accordingly, the fact that the legislator's county is large and has a large budget is irrelevant to whether he or she may practice criminal law in the county.

REPRESENTATION INVOLVING SOLELY PLEA BARGAINING

1. This Committee has a series of opinions dealing with the issue of whether a lawyer may limit the scope of representation of a client. For example, in N.Y. State 604 (1989), we held that a lawyer whose client is the subject of a grand jury investigation that could result in serious felony charges and does not have sufficient funds to pay for the lawyer's services beyond the grand jury stage may enter into a limited-scope retainer, provided that the limitation is consistent with competent representation under the Lawyer's Code of Professional Responsibility (the "Code") and provided that the lawyer makes certain disclosures to the client. We express no opinion as to whether a representation limited to post-indictment plea bargaining would be consistent with competent representation under the Code.
2. Even assuming that limiting the scope of the representation to plea bargaining were appropriate under other circumstances, however, we do not believe that a limited representation would circumvent the conflicts described above. In plea bargaining, the lawyer/legislator still would have to conduct an investigation and interview members of the police force, and would be bargaining with the members of the county prosecutor's office. Consequently, all of the policy reasons for our earlier positions apply in this case.

VICARIOUS DISQUALIFICATION OF OTHER LAWYERS IN THE LEGISLATOR'S FIRM

1. The third question is whether the lawyer/legislator may take a position as associate, partner or "of counsel" lawyer in a criminal defense firm in a nearby county, without affecting the ability of other lawyers in that firm to represent criminal-defense clients in the county court of the county where the lawyer/legislator is a legislator. In particular, the inquirer asks whether any vicarious disqualification of the other lawyers in the firm can be avoided by the creation of a screening mechanism within the firm.
2. Prior to 1990, our opinions applied vicarious disqualification to the partners or associates of a lawyer-legislator. *See, e.g.*, N.Y. 415 (1975). At that time, DR 5-105(D) of the Code provided that, if one lawyer in a law firm was disqualified from representation, then all were disqualified. In 1990, however, the Code was amended so that such vicarious disqualification applies only when the primary lawyer was prohibited from undertaking the representation under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B) or DR 9-101.

3. In N.Y. State 692, the basis of the disqualification of the lawyer/legislator is stated to be DR 1-102(A)(5) (lawyer shall not "engage in conduct prejudicial to the administration of justice"), which is not one of the Code sections for which vicarious disqualification applies under the current text of DR 5?105(D). The ban on a lawyer-public officer appearing before or adverse to entities over which the public officer has some control might also be said to arise out of rules relating to the appearance of impropriety or improper influence. Canon 9, DR 8-101(A). None of these Code sections are sections to which automatic vicarious disqualification applies under DR 5-105(D).
4. In N.Y. State 773 (2004), we discussed whether a lawyer public official could be "of counsel" to a law firm without resulting in disqualification of the law firm from a private representation. We identified two different situations in which vicarious disqualification might apply: (1) Where the lawyer/public official was disqualified under one of the Code sections enumerated in DR 5-105(D), in which case the entire firm is disqualified. This includes a case where the bar against the lawyer/public official arises because the public official's duties might conflict with the lawyer's duties to a client, in which case the disqualification arises out of DR 5-101(A), and other lawyers in the firm are subject to automatic imputation under DR 5-101(D). (2) Where the lawyer/public official was disqualified under a Code section other than one of the enumerated ones, in which case there is no *per se* imputed disqualification of the other lawyers in the firm, although, depending upon the circumstances of the proposed representations, disqualification might be appropriate.
5. Where the lawyer/legislator is a partner or associate of a law firm (including being associated as an "of counsel" lawyer) but does not undertake representations involving questioning of police or taking positions adverse to district attorneys, and does not undertake representations that might conflict with his or her duties as a public official (*e.g.*, lobbying for or against matters being considered by the legislature), we believe the other lawyers in the lawyer/legislator's firm should not be *per se* disqualified from undertaking representations that the lawyer/legislator cannot undertake. A representation by another lawyer in the firm may, however, involve facts and circumstances where the lawyer/legislator's disqualification should be imputed to everyone in the firm.
6. 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.

SCREENING

1. Formal screening may be used as a mechanism to ensure that the lawyer/legislator does not participate in the representation where the lawyer/legislator is personally disqualified. But if the facts and circumstances were such that the disqualification of the lawyer/legislator were imputed to others in the firm, screening would not prevent the imputation. The Code in New York does not generally recognize the efficacy of screening. The only instance where the Code allows screening is in the case of a former government employee who was personally and substantially involved in a matter as a public employee and who later joins the private sector. DR 9-101(B)(1)(a). That is not the case here.

CONCLUSION

1. A lawyer who is a member of a county legislature may not undertake criminal representation in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. The size of the county or budget is not relevant. The lawyer/legislator may not undertake such a criminal representation that involves only plea bargaining, since the plea bargaining would be with the members of the same prosecutor's office. If the lawyer/legislator is employed by a law firm, the lawyers in the firm are not automatically disqualified from undertaking cases that the lawyer/legislator could not accept, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.