

Formal 37.

## **Connecticut Ethics Opinions**

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#### FORMAL OPINION 37

Simultaneous Representation of Clients Against Municipality and Service As Member of Municipal Agency

[Revised as Formal Opinion No. 47]

The Committee on Professional Ethics has been asked to express an opinion regarding the circumstances under which an attorney may properly represent private clients against a municipality or in matters before its agencies if he or another attorney affiliated with the same firm<sup>1</sup> is serving as a member of an elected or appointed board, commission, authority or other agency of the municipality.

As discussed below, this committee's Opinion rests upon a recognition of both the duty of a public official to serve the public's interests within the scope of his position - both actual and as reasonably perceived by the layman - and the professional obligation of a lawyer to represent clients zealously while avoiding (1) compromises of confidences or secrets, (2) circumstances which interfere with independence of judgment or loyalty to a client, and (3) professional impropriety or even the appearance of the same. These factors bring into play several Canons of Connecticut's Code of Professional Responsibility, specifically Canons 4 (confidentiality), 5 (independent judgment), 7 (zeal), 8 (actions as a public official), and 9 (appearance of impropriety), each of which will be described briefly before an effort is made to synthesize their provisions in the context of this opinion.

Canon 4 requires that a lawyer preserve the confidences and secrets of a client. Ethical Consideration 4-5 cautions against the use of any information acquired in the course of the representation of a client to the disadvantage of the client and counsels care to prevent both the disclosure of the confidences and secrets of one client to another (regardless of whether their positions are adverse) and the acceptance of any employment that might require such disclosure. While the request for this opinion does not contemplate a lawyer acting as such on behalf of multiple clients, the principles inherent in Canon 4 should nonetheless be applied in the context of service as a public official, whose actions must be such as to maintain public confidence in government.

Canon 7 imposes upon a lawyer a duty to represent a client zealously; in litigation the exercise of zeal presupposes an unencumbered willingness to pursue and use, within the bounds of the law, information helpful to the client's cause. Should such information come to the attention of a lawyer by virtue of his exercise of public duties, the use of such information in answer to the dictates of Canon 7 could well conflict with a public duty, or give rise to a layman's<sup>2</sup> inference that the attorney is using his public office to advance his own professional ends,<sup>3</sup> or may create an appearance of professional impropriety in contravention of Canon 9.

Canon 5 requires that a lawyer exercise independent professional judgment on behalf of a client; his judgment should be free of compromising influences and loyalties, and the interests of other clients or desires of third persons should not be permitted to dilute his loyalty to his client. EC 5-1. Disciplinary Rules 5-105(A) and (B) restrict the acceptance and continuation of multiple employment where it is likely that a lawyer's independent professional judgment on behalf of a client may be adversely affected by representation of another or where the multiple employment is likely to involve the lawyer in representing differing interests. Multiple representation is permissible under Disciplinary Rule 5-105(C) only where (1) it is obvious that a lawyer can adequately represent the interests of each client and (2) each client knowingly consents after the lawyer has fully disclosed the implications of the circumstances with respect to his exercise of independent judgment. In the situation presented, while the question of formal legal representation is not in issue, the principle of differing interests applies, and it is generally accepted that where the public is concerned the consent necessary to permit multiple representation cannot be obtained.

Canon 8, dealing with improvement of the legal system, prohibits the use by a lawyer of a public position to obtain or attempt to obtain improper advantages in legislative matters for himself or a client; DR 8-101(A)(1); or to influence or attempt to influence a tribunal to act in favor of himself or of a client. DR 8-101(A)(2). Ethical Consideration 8-8 counsels a lawyer against allowing his personal or professional interests to conflict with his official duties.

Canon 9 provides that the lawyer should act so as to avoid even the appearance of professional impropriety. His actions should not suggest that he is in a position to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official or to circumvent established procedures; DR 9-101(C), EC 9-4; and the lawyer should inspire the confidence, respect, and trust of his clients and of the general public. EC 9-6. The foregoing admonitions are the more significant where a lawyer is serving as a public official.

This committee has had occasion to issue several opinions over the past several years on the subject of lawyers serving in various municipal capacities and simultaneously representing private clients in dealings with the same municipalities. Where the public office occupied by the lawyer placed him in a position of responsibility for municipal affairs generally and municipal agencies in particular, the committee has found it improper for him to represent clients against the municipality or before its agencies.<sup>4</sup> Where the public office held by a lawyer was of visibly limited scope and independent of town government decision making, the Committee has found it proper for a lawyer to represent clients against the town and before its agencies.<sup>5</sup>

Recently the committee has issued Informal Opinion 84-7, which addressed the issue of one member of a firm serving as counsel to a local government while another member served as a member of the town's legislative body, a representative town meeting. In that opinion, we found that the simultaneous occupying of the two public positions posed a problem of appearance of impropriety when judged from the layman's viewpoint and recommended that, while the Code of Professional Responsibility might not require resignation of one of the two positions, the inquiring law firm consider resigning from one. In that Opinion, as in the instant one, it was considered that the reasonable public perception of the lawyers' roles must be a weighty factor in guiding the lawyers' conduct. While a lawyer should not allow possible public misunderstanding to lessen his

or her sense of obligation to the client or to the public, he or she should "determine his or her conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." EC 9-2. Such a determination should include regard for the principles of Canon 8 and specifically, Disciplinary Rule 8-101(A) prohibiting the improper use of a public office to influence public decision making or gain special advantages. Lawyers should be scrupulous to avoid not only the conduct proscribed by Disciplinary Rule 8-101(A) but also circumstances which, in the mind of the layman unaccustomed to nice distinctions, offer too great an opportunity for misunderstanding, for criticism of the legal profession, and for deterioration of public confidence in both the bar and local government.

When a lawyer chooses to serve in a public office, it is essential that he or she consider decisions about his or her law practice with careful regard for the principles relating to differing interests, which term extends beyond direct conflicts and includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." CPR Definition (1). Operating in a setting of differing interests requires both the absence of doubt that each interest can be adequately represented and the knowing consent of both clients after full disclosure of the effect of the situation upon the lawyer's independent professional judgment. DR 5-105(C). In situations involving the public, it is unrealistic to assume that any meaningful consent may be obtained even if it is obvious that all differing interests can be adequately represented. Furthermore, a lawyer must satisfy both him or herself and the clients that the lawyer's own personal interests - which may well be construed to include advancement in public offices - will not impair the exercise of his or her professional judgment on behalf of the clients. DR 5-101(A). While in the circumstances contemplated by DR 5-101(A) a lawyer may well be able to fully explain his or her position to a client and obtain meaningful consent, he or she must nonetheless be sensitive to the possibilities of influences upon his or her judgment and must certainly avoid, in his or her efforts to allay any apprehensions of a client, any suggestion that his or her occupying of a public office places his client in a position to gain special advantage. DR 9-101(C); EC 9-4. Simultaneously he or she must avoid the implication that he or she is using a public office for personal advantage. DR 8-101(A). In matters involving public trust, the lawyer may be called upon to tread a fine line indeed in his efforts both to be properly available and zealous on behalf of clients and to maintain the confidence and respect of the public for both him or herself and the profession.

In emphasizing, to the extent that we do, the appearance of conflicting interests as an important consideration, we are not unmindful of the subjectivity of - and frequent unfairness resulting from application of - a standard that ignores intent and purity of motives in favor of perceptions often born of misinformation or insufficient information. In private law situations, we would be reluctant to find conflict if the only reason for doing so were the *appearance* of a conflict.

We deal here, however, with that aspect of a lawyer's life most open to the public and therefore most susceptible to popular judgment: the lawyer as public official. In that context, we do not write on a clean slate. Connecticut case law, at least since *Low v. Madison*, 135 Conn. 1, 60 A.2d 774 (1948), has been unequivocal in its insistence that public officials must not only be free of impropriety but of the appearance of impropriety as well. This insistence upon satisfying public

perceptions is based upon the premise that public confidence in the integrity and disinterestedness of public officials is essential to that popular consent to the decisions of officials upon which all democratic governments must ultimately depend. Thus, in the area of the lawyer as public official, the dictates and counsel of the Code of Professional Responsibility are reinforced by the significant body of common law applying to public officials generally.

Accordingly, this committee is of the opinion that when a lawyer holds a municipal office neither he or she nor any lawyer affiliated with him or her may represent clients against the municipality or before any municipal board, commission, authority or agency if, by virtue of the relationship between the public office and the entity against which the lawyer may contend for a client - or from which the lawyer may seek a benefit on behalf of a client - there is good reason to believe that the public would reasonably misunderstand the dual roles and perceive a detriment to its interests because of it.

While no easy formula can be stated that will give the lawyer the answer to all factual situations, the degree of independence between the body on which he serves and the body against which he or she may be pitted on behalf of a client, and the closeness of the relationship between the two bodies, are paramount considerations. If the entity before which the lawyer would appear is subordinate to the entity on which the lawyer serves or vice versa, unless the subordinate entity is of a wholly advisory or ceremonial nature, the playing of both roles is impermissible. In determining whether a body is subordinate to another, one should consider whether it would reasonably be perceived by the public to be under the control of the other body, either because its members are subject to removal or reappointment by the other body, or because its decisions are reviewable by the other body, or because the other body has financial control over it (except for minimal or non-controversial appropriations).

If a body before which the lawyer appears is subordinate to the body on which the lawyer serves, or vice versa, there is too great a likelihood that either an individual client or the public will misinterpret the lawyer's conduct of his representation as either staying his or her hand to preserve his or her public office or, on the other hand, subordinating the importance of his or her public office to his or her personal interests. A few examples are in order. If neither a municipal police commission - when acting solely as a police commission, and not for instance as a traffic commission - nor a zoning board of appeals is subordinate to the other as measured above, then it would be permissible for a police commissioner to represent a client before the zoning board. On the other hand, a member of the planning commission could not appear before the zoning commission because planning commission rulings or recommendations are often reviewable by the zoning commission and affect the size of the majority required for the zoning commission to pass a resolution. A closer question would be whether a member of a planning commission could appear before the zoning board of appeals. The answer could depend upon whether the zoning board has authority under local regulations to review decisions of the planning commission, either directly or indirectly via review of zoning commission decisions. *See, Conto v. Zoning Commission*, 186 Conn. 106, 117-18, 439 A.2d 441 (1982). Even if the planning commission is not in any sense subordinate to the zoning board, a member of the former may consider it inappropriate to appear before the latter, or vice versa, if the relationship between the two is close. If, for example,

it is customary for the two agencies to consult with one another on common projects, or if the planning commission often takes official positions on issues before the zoning board, disqualification would be in order. While a frequent relationship of that character would require disqualification, an occasional such relationship (similar to the situation where a police commission might occasionally be consulted on a zoning matter) would not require disqualification.

Another example is a board of education, which is an agency of the state and generally independent of influence by town officials except the board of finance or its equivalent. This committee has held permissible the representation of clients against a town by a lawyer who serves as counsel to a school board. Inf. Op. 4a-74. Similarly, it is unlikely that service on an elected library board would reasonably be perceived as in conflict with representation of a client before the zoning board of appeals seeking a variance, or before the planning and zoning commission seeking subdivision approval, unless, of course, the library board, because of the proximity of subject sites to libraries, would ordinarily have been expected to take a position on the matter.

On the other hand, a member of the governing body in a town (such as the town council or the board of selectmen) would probably be disqualified from appearing before most nonceremonial boards in town other than the board of education because most boards would be considered subordinate to it. Likewise, a member of most boards in a town would probably be disqualified from appearing before the governing body for the same reason of subordination.

In rendering this Opinion, the committee is mindful of the desirability of lawyers' making their skills available for public service in their communities and does not intend that its interpretations of the restraints imposed upon lawyers by the Code of Professional Responsibility construct disincentives to community service. On the other hand, if public service is not to become a disservice - either to the public or to the legal profession - the lawyer must resolve any reasonable doubts against being cast in two roles which may confuse the public as to the nature of the service being performed and the motivations affecting the judgment and loyalty of the lawyer.

1. For the purposes of this Opinion, it makes no difference whether dual roles are played by one lawyer or by lawyers affiliated with the same firm. A restriction upon one applies to all. DR 5-105(D); CBA Informal Opinion 84-7.

2. ABA Opinion 192 (1939) holds that an attorney in public office should avoid all conduct which might lead a layman to conclude that the attorney is utilizing his public position to further his professional success.

3. See EC 8-8, which warns a lawyer who is a public officer against engaging in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

4. Attorneys having firm members serving in the following municipal capacities may not appear in matters against the same town: (1) town economic development commissioner, Inf. Op. 4a-71; (2) town meeting moderator, Inf. Op. 5a-74; (3) town burgess, Inf. Op. 8a-74; (4) city treasurer, Inf. Op. 10a-74; (5) member of board of finance, Inf. Op. 15a-74; (6) member of town council, Inf. Ops. 80-2, 80-7. The committee has also issued two recent informal opinions regarding restrictions imposed upon town attorneys: Inf. Ops. 83-30, 85-3.

5. Attorneys with firm members serving in the following municipal capacities may appear in

matters against the same town: (1) member of city ethics committee, Inf. Op. 12-71; (2) independent urban renewal agency, Inf. Op. 2-72; (3) counsel for recreation commission, Inf. Op. 2a-74; (4) member of bicentennial or charter revision committee, Inf. Op. 3a-74; (5) counsel to police department appointed by police commissioners, Inf. Op. 76-34.

1988 Committee Comment: Affirmed, see Rules 1.6, 1.7, 1.3 and Comments thereto, 3.1 through 3.9, and 8.4.