Nebraska Ethics Advisory Opinion for Lawyers
No. 75-12

LAWYERS HOLDING GOVERNMENTAL POSITIONS INVOLVING LEGISLATIVE DUTIES MAY ENGAGE IN LAW PRACTICE SUBJECT TO THE FOLLOWING RESTRICTIONS:

(1) THEY MAY NOT USE THEIR OFFICIAL POSITION FOR THE SPECIAL ADVANTAGE OF THEMSELVES OR THEIR CLIENTS AS PROVIDED IN CANON 8 OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

(2) THEY MAY NOT REPRESENT A CLIENT IN ANY MATTER THAT IS SPECIFICALLY REVIEWABLE BY THEM AS AN OFFICIAL.

(3) THEY MUST COMPLY WITH STATUTORY REQUIREMENTS RELATING TO CONFLICTS OF INTEREST.

THESE RESTRICTIONS EXTEND AND APPLY TO THE PARTNERS AND ASSOCIATES OF LAWYER OFFICEHOLDERS AND TO LAWYERS WITH WHOM THEY SHARE OFFICE FACILITIES.

DISCUSSION

This opinion responds to the request of a number of attorneys that a comprehensive opinion of this Committee be adopted as to the application of the Code of Professional Responsibility to members of the bar occupying governmental positions involving legislative functions. These offices include state legislators, county commissioners and city councilmen.

The Canon directly relating to this matter is number 8 for which the Code establishes the following "Disciplinary Rules":

"DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official."

The "Ethical Considerations" prefacing the foregoing rules recognize that it is a prime obligation of the lawyer to "Assist in Improving the Legal System"; that he is "especially qualified to recognize deficiencies" and to "initiate corrective measures" (EC 8-1); that he should encourage the "simplification of laws and repeal of outmoded laws" (EC 8-2); that lawyers "often serve as legislators" and this is "highly desirable, as lawyers are uniquely qualified to make contributions" and he should not engage in personal or professional activities in conflict with his official duties. (EC 8-8).

The "Preface" to the above Code expresses the conviction that it was adopted to meet "changing conditions" which "require new statements of professional principles". The "Preamble and Preliminary Statement" accompanying the Code in Note number 1 thereto refers to the numerous footnotes set forth as a part of each canon of the Code. These "footnotes", it is said, are to "enable the reader to relate the provisions of this Code" to previous "Canons", "opinions" and "a limited number of other sources".

One of the "sources" referred to in Canon 8, as to the limitations and restrictions on attornevs. is footnote #11

that cites an Illinois decision. The framers apparently felt that this decision is suggestive of how Canon 8 is to be interpreted. The quotation in the footnote is as follows:

> "'The next question is whether a lawyer-member of a legislative body may appear as counsel or co-counsel at hearings before a zoning board of appeals, or similar tribunal, created by the legislative group of which he is a member. We are of the opinion that he may practice before fact-finding officers, hearing bodies and commissioners, since under our views he may appear as counsel in the courts where his municipality is a party. Decisions made at such hearings are usually subject to administrative review by the courts upon the record there made. It would be inconsistent to say that a lawyer-member of a legislative body could not participate in a hearing at which the record is made, but could appear thereafter when the cause is heard by the courts on administrative review. This is subject to an important exception. He should not appear as counsel where the matter is subject to review by the legislative body of which he is a member...We are of the opinion that where a lawyer does so appear there would be conflict of interests between his duty as an advocate for his client on the one hand and the obligation to his governmental unit on the other.' In re Becker, 16 Ill. 2d 488, 494-95, 158 N.E.2d 753, 756-57 (1959)."

Under the foregoing decision, the lawyer as a city councilman could not appear before any administrative tribunal or court in behalf of a client if the specific matter were reviewable by "the legislative body of which he is a member". Beyond this restriction, the lawyer is free to represent clients before administrative tribunals and courts of the governmental agency in which he has legislative responsibilities.

The Becker case was deemed of sufficient stature to be cited as precedent by our Supreme Court in State v. Jensen, 171 Neb. 1, as to the nature of disciplinary proceedings.

A later decision, People v. Capuzi, 20 Ill. 2d, 170 N.E.2d 625, affirms the above decision saying that a "lawyer-member of a legislative body" may appear in "litigation wherein his government unit is a party, even in cases where acts of that body are sought to be unconstitutional".

Before proceeding further to analyze and review the interpretations of the Code as applied to legislative activities it should be noted that the ethical position of lawyers acting as lawyers for governments and governmental agencies is much different than lawyers acting in other capacities for governments and governmental agencies. A lawyer for the government acts in a professional capacity. He owes the government all the duties and obligations of a client. He is subject to all the restraints of Canons 5 and 9 as to multiple or conflicting client interests and appearances of impropriety. He can accept no business of private clients or client groups inconsistent with his duty to the government agency. See Formal Opinions 128, 129; Informal Opinion 1112.

The Code recognizes that lawyers occupying positions other than professional with a government agency hold offices that any citizen might perform and the ethical situation is somewhat different. As noted in Informal Opinion No. 1182:

> "...the Code of Professional Responsibility did not undertake to regulate the conduct of the lawyer as a legislator, leaving this to local law."
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> "No Disciplinary Rules of the Code of Professional Responsibility contain a provision that will necessarily and always prohibit a lawyer's representing either an

> individual or an organization that is likely to be affected by the passage or defeat of proposed legislation, even though the lawyer also is a legislator. In certain circumstances, however, the Disciplinary Rules may have the effect of proscribing acceptance of a tendered retainer."

To eliminate clients who might be "affected by the passage or defeat of proposed legislation", as stated in the foregoing opinion would be so "drastic" as to leave "few clients whom the lawyer-legislator could represent". The disability of such lawyer-legislator occurs where he uses his position for the "special advantage" of a client "under circumstances where he knows or it is obvious that such action is not in the public interest". See DR 8-101 (A).

Earlier opinions distinguish certain Canons as being "directed at lawyers, not legislators acting in their capacity as such". Informal Opinion No. 1030.

Various provisions of the Code encourage lawyers to hold office and practice law. Informal Opinion No. 1240 cites DR 2-102 as permitting the lawyer's name to be included in the firm name if he is "actively and regularly practicing law", and also refers to EC 2-12 in this connection.

The lawyer-legislator must comply strictly with the requirements of DR 8-101 and not use his official position in any way to influence any tribunal or obtain any special advantage for his clients. Moreover, under Canon 9, the legislator may have certain responsibilities and be subject to certain restrictions after leaving office as to matters upon which he "had substantial responsibility" while holding office. This Canon and these restrictions appear, however, to be directed at lawyers holding professional responsibilities in government. Typical applications of the restriction apply where the government lawyer leaving service handles private matters involving matters handled as a public prosecutor or public counsel. See Formal Opinions 134,

135, and 37.

Formal Opinions 296 and 306 reflect the policy of encouraging lawyers to engage in legislative activities. The first of these opinions preventing a lawyer's associates from appearing before legislative committees is modified by the later opinion where local law permits such appearance. This modification was made because the first opinion "deterred many able young lawyers" from seeking legislative seats.

The contrasting situation between government lawyers and lawyers holding other offices is also reflected in Formal Opinion 26, where it was held:

> "An attorney who has formerly been governor may accept employment to attack the validity of legislation passed during his term of office, whether he approved or vetoed the legislation."
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> "The prohibition contained in the second paragraph of Canon 36 applies only to attorneys who have been in public office or public employ as attorneys and not to those who have held public office as legislators or executives."

The lawyer-legislator must, as suggested in Informal Opinion 1182, comply with local law. In Nebraska this includes Chapter 49, Article 11, dealing with the matter of Conflict of Interest of legislators.

The restrictions imposed by the Code, as reviewed above, apply not only to the attorney holding the governmental office but also to his partners and those with whom he shares office facilities. See Formal Opinion 33 and Informal Opinion 284. The latter opinion states:

> "Two lawyers who share offices, although not partners, bear such close relation to one another as to bring Canon 6 into play."

To the same effect are Formal Opinion 104; Informal Opinion 855; Drinker, Legal Ethics, page 106; and Wise, Legal Ethics, page 286.

The position stated in this opinion as to participation of lawyers in government is consistent with the approach advocated by recognized scholars who have weighed the public interest and ethical requirements. Dean Manning of Stanford University in an article entitled The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation (Federal Bar Journal 24, Number 3) points out the "chronic crises" faced by government by reason of lack of professional participation. He describes the difficulty of defining "conflict of interest" in today's society and the impossibility of removing from government everyone with some "personal interest."

> "In the United States today we cannot hope to build a system of restrictions that will keep all persons connected with the government from acting in any matter in which they have a personal interest. Such a system is a mirage. In part it is a mirage because these persons and their views are often needed by the government. Much more important, it is a mirage because it is an ideal founded upon the premise that there is a distinction between government and non-government. Because, in our mixed economy, this distinction has grown tenuous, we can no longer hope to keep our interests in neat identifiable compartments.
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> "The result is that any program of restraints for the United States must be content with approximation. Plato's philosopher kings could isolate themselves from private interests; America's democratic government cannot.
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> "One may wonder whether the cause of Morality in government is furthered by a national psychology that would have demanded of President Washington that he dispose of Mount Vernon on the ground that issues involving slavery and tobacco might come up during his administration. The best way to make a man trustworthy is to trust him. And the best way to attract men of dignity to public office is to treat them as men of dignity.
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> "The public has had no idea that each extension of conflict of interest restrictions is being paid for by exacerbating the problem of drawing skill and leadership into government service, ant that, as our society is evolving, the situation is growing worse. Men are often evil or weak, or both. And purity in politics is a splendid ideal. But any one ideal pursued singlemindedly will eventually collide with another equally valid."

Those who have studied this matter in Nebraska report that Nebraska now has the lowest representation of lawyers in the state legislature of any state in the Union. Any unrealistic or inappropriate extension of restrictions or disabilities further depleting representation in legislative areas of government would be inconsistent with the public interest.

To the extent that the conclusions in this opinion are inconsistent with Opinion No. 75-4 and any other prior opinions of this Committee, the latter are modified.