

# The Rules Governing Lawyers In Public Office

BY MARY C. DALY

Since the founding of the Republic, lawyers have played a prominent role in government at all levels -- national, state, and local. DeTocqueville's description of lawyers as the newly minted country's aristocracy rings true even today. In New York, lawyers have served with distinction as governors, legislators, officers of executive agencies, district attorneys, and, of course, judges.

Often, the public offices held by lawyers are full-time positions which preclude private law practice. But many government functions are not full-time. In some parts of the state, it is common for lawyers to hold part-time government positions and also maintain a private law practice. This article deals with some of the general ethical issues that can arise when lawyers hold either full or part-time public offices. Readers are cautioned, however, that the conduct of a public officer holder may also be governed by specific ethics-in-government legislation and regulations that are outside of the article's scope.

The New York Lawyer's Code of Professional Responsibility (Code) acknowledges the important contribution lawyers can make to the advancement of the rule of law and encourages their participation in civic affairs, especially in law reform. At the same time, however, the Code acknowledges that a lawyer who holds public office can misuse the law for the inappropriate benefit of a client. The Code is also concerned with actions that create an appearance of impropriety in behalf a client.

DR 8-101 and the ethical considerations associated with it represent an attempt to strike a reasonable balance between the important goal of encouraging lawyers to hold public office and the danger of an actual abuse of the office, or the appearance of such an abuse.

DR 8-101 is addressed to "[a] lawyer who holds a public office." While the Code does not define "public office," the term includes, for example, municipal judges, members of a town's zoning board, city and county legislators, district attorneys, and assistant district attorneys. It includes both elected and appointed officials. *See* N.Y. Op. 702 (1998); N.Y. Op. 692 (1997); N.Y. Op. 655 (1993); N.Y. Op. 603 (1989). *See also* N.Y. Pub. Off. §2 (McKinney 2001) (defining "state officer" and "local officer").

## **Temptation In Three Settings**

DR 8-101 consists of three subsections, each of which addresses a separate setting in which abuse or its appearance may occur. Subsection A (1) focuses on a lawyer's attempts to influence legislation improperly; Subsection A(2) on a lawyer's improper efforts to influence a court; and Subsection (A)(3) on the acceptance by a lawyer of "anything of value" when he knows or should know that the offer to him is for the purpose of influencing his actions as a public official.

Subsection (A)(1) of DR 8-101 prohibits a lawyer from "us[ing] the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest." This prohibition seeks to prevent the weakening of public trust in the legitimacy of government that inevitably ensues when a public office is used for private gain. The prohibited conduct occurs, for example, whenever a lawyer-legislator introduces or supports legislation benefiting a particular client of his law firm, even though the lawyer-legislator is not convinced that the legislation serves the public weal. EC 8-4 sums up this principle nicely: "[W]hen a lawyer purports to act on behalf of the public, the lawyer should espouse only those changes which the lawyer conscientiously believes to be in the public interest."

Assume, for example, that the lawyer-legislator is a member of a law firm A&B and that C Corporation has retained A&B in a matter pending before a state agency. Under DR 8-101, it would be improper for the lawyer-legislator to introduce legislation that would restrict the penalties that the state agency might impose on C Corporation, "under circumstances where the lawyer knows or it is obvious that such action is not in the public interest."

## **Avoiding Suggestions of Influence**

A lawyer-legislator should also be mindful of DR 9-101(C) which forbids a lawyer from stating or implying that "the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." For example, if the lawyer-legislator in our example initially suggested that C Corporation should retain A&B because the lawyer-legislator was an influential member of the legislature's budget committee with jurisdiction over the state agency, the lawyer-legislator would violate DR 9-101(C).

Subsection (A)(2) prohibits a lawyer who holds public office from "us[ing] the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or a client."

The public policy underlying this provision is obviously very similar to that underlying Subsection (A)(1). The prohibition is designed to preserve the public's overall confidence in the judicial branch of government. To promote this confidence, the NYSBA Committee on Professional Ethics has concluded that a part-time municipal judge may not appear before a zoning board of appeals and the planning board of the same municipality in which he sits as judge. N.Y. Op. 632 (1992). Conduct that violates Subsection (A)(2) is likely to violate DR 9-101 as well. Under some circumstances, the judge's partners and associates may make an appearance before other municipal bodies, but care must be exercised lest the appearance be seen as a subterfuge or a violation of DR 8-101. *Id.*

## **The Office Holder And Bribery**

Subsection (A)(3) of DR 8-101 forbids a lawyer who holds public office from "accept[ing] anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official." The wording of this provision suggests that it is aimed, at the very least, at conduct constituting the crime of bribery. A lawyer-office-holder who accepts a bribe is engaging in conduct that is likely to violate a number of other Code provisions as well. His actions may invoke several Subsections of DR 1-102. These forbid a lawyer from engaging in conduct that: adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer (Subsection (3)); involves dishonesty, fraud, deceit, or misrepresentation (Subsection (4)); or is prejudicial to the administration of justice (Subsection (5)). Depending upon the circumstances, acceptance of "anything of value" may also violate DR 7-102(A)(7), which prohibits a lawyer from counseling or assisting the client in conduct that the lawyer knows to be illegal or fraudulent.

It would be a mistake, however, to assume that proof of impropriety under Subsection (A)(3) of DR 8-101 is as difficult for the complainant or prosecutor as under the state's penal laws prohibiting the bribing of public officials. To prove a violation of Subsection (A)(3), bar counsel need only show that the lawyer accepted "anything of value" and that the lawyer knew, or it was obvious, that the offer was made for the purpose of influencing the lawyer's action as public official.

A comprehensive analysis of the ethical responsibilities imposed by the Code on a lawyer who also holds a public office should not, however, be confined to Subsections (A)(1)- (3) of DR 8-101. The courts and Bar association ethics committees also give great weight to EC 8-8. "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which a lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's professional duties."

## **Interpretation In Ethics Opinions**

Not surprisingly, most of the discussions citing EC 8-8 focus on the difficult issue of determining in individual instances what sorts of personal and professional interests may have conflicted with the professional duties of a particular public officer. The vagueness of the admonition in EC 8-8 has afforded its interpreters great latitude. Three examples will demonstrate the broad swath it cuts. In N.Y. Op. 692 (1997), the NYSBA Committee on Professional Ethics decided it would be prejudicial to the administration of justice to allow a lawyer-legislator to accept the representation of a client in a criminal matter if the representation would require the lawyer to cross-examine a police officer employed by a police department over which the legislative body exercised budgetary or appointment power. It subsequently adhered to this position in N.Y. Op. 702 (1998), concluding that the prejudice remained even if the lawyer legislator abstained from voting on the district attorney's budget and publicly announced his intention to do so. The Opinions' rationale was that the disqualification served two purposes: first, to stop private clients from hiring a part-time public official in the hope of gaining an improper advantage; and second, to dispel public suspicion that the client was gaining an advantage by retaining the public official.

In contrast, N.Y. Op. 655 (1993) did not consider either of these rationales dispositive. In that Opinion, the Committee found no ethical bar to allowing a lawyer-member of a town zoning board to represent a private client in a personal injury suit against the town. Among the factors it considered were: the lawyer-member's lack of influence over those with authority to settle the suit; the absence of a connection between the proposed engagement and the public office held by the lawyer-member; the remoteness of

risk to preservation of the client's confidences and secrets; and the town's employment of outside counsel to defend it in personal injury suits.

In sum, a lawyer who takes public office is acting in the finest traditions of the legal profession stretching back in time to the founding of the Republic. The Code imposes special responsibilities on the lawyer, however. Some of those responsibilities are not always obvious from the text of DR 8-101 and EC 8-8. The lawyer-office-holder must take special care to conduct comprehensive research into his professional obligations under the Code and any pertinent legislation and regulations affecting his office.

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