Iowa Ethics Opinion

April 28, 2017

WHEN A LAW PARTNER HOLDS PUBLIC OFFICE: GUIDELINES FOR THE CONDUCT OF LAWYERS AND THEIR LAW FIRMS WHEN A PARTNER HOLDS PUBLIC OFFICE.

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Ethics and Practice Guidelines Committee.[1]

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Introduction

Iowa lawyers are encouraged to aspire to public office, but what happens to their law firms if they do. Are their partners conflicted from representing clients before all boards, commissions or other decision-making bodies affiliated with the government where the partner serves? Our predecessor committee has opined that

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conflict exists because of the "appearance of impropriety," a standard that existed under the prior Iowa Code of Professional Responsibility.

Analysis

Lawyers hold office at all levels of government, from the president down to boards, commissions, and councils at the local level. Were lawyers required to retire from their practices to serve, few would do so and the community would be deprived of their service. However, we recognize the possibility that some would think that by hiring the lawyer's law firm they would have an influential edge. This too is of concern because it carries a strong inference of "influence peddling".

The Committee is asked to give guidance to several Iowa lawyers who have achieved or are running for election for mayor of their community. Because the mayoral position is part time, they continue to practice law. Lawyers in their law firms question whether they can appear before boards and commissions which fall under the jurisdiction of the city council, of which the mayor is a member.

The question is complicated by an opinion from our prior committee IA Sup. Ct. Board of Prof'l Ethics and C. Formal Op. 91-49 (05/28/1992) stating:

> "In consideration of all the foregoing the committee is of the opinion that you [commissioner on the 11 member city planning commission] could not represent a client before the Planning Commission. Under DR 5-105 (E) your partners are also precluded from such representation.
>
> The committee further is of the opinion that recusing yourself, in a Commission proceeding, even with full disclosure and consent of the client, is no solution. The possibility that one might believe the Commission would be influenced favorably or "lean over backwards" unfavorably still would invoke Canon 9."

> The committee further is of the opinion that it would be improper for you or members of your firm to represent any client or clients before the City Council after City Planning Commission action on the matter involved."

An appeal was taken from the committee's opinion under the rules of procedure of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. On appeal, the opinion was affirmed by clarifying:

> "The important thing from the standpoint of public perception is the relationship existing between the attorney, the client, and the municipal body. What must be scrupulously guarded against is conduct giving the appearance that clients stand to gain advantage by reason of the attorney's public office. Committee on Professional Ethics and Conduct v Liles, 430 N.W.2d. 111,113 (Iowa 1988); see DR 8-101(A)(1) (lawyer holding public office must not use public position to obtain special advantage for client or influence tribunal in client's favor); EC 9-6 (lawyer must strive to avoid not only professional impropriety but also appearance of impropriety.)"

The opinion and appeal decision were based upon the prior Iowa Code of Professional Responsibility (Code) which cautioned against the "appearance of impropriety." In 2005, the Iowa Supreme Court adopted the Iowa Rules of Professional Conduct (Rules) which are based on the American Bar Association's Model Rules of Professional Conduct. The concept of "appearance of impropriety" was eliminated from the present Rules.

With the adoption of the Rules, the focus changes from the "appearance of impropriety" to the prohibition against stating or implying that one has "an ability to influence improperly a government agency or official or to achieve results by means that violate the Iowa Rules of Professional Conduct or other law;" See Iowa. R. Prof'l C. 32:8.4(e).

The prior opinion was based upon the presumption that it would be improper for a member of a law firm to represent a client before a decision-making board or commission that was either inferior or superior to the governmental board held by another partner in the same law firm even though the lawyer board member was not an officer of or in any way involved in the decision-making process. The opinion offered no evidence to support the assumption nor did it articulate an analytical rationale. Instead, it seemed to assume that either the client chose the lawyer because the lawyer could influence peddle or that the lawyer led the client to believe the same. Additionally, the opinion assumed that all members of boards and commissions would be subject to such influence.

We take a different approach, one based upon the concept that all Iowa lawyers are presumed to follow the Iowa Rules of Professional Conduct until the contrary is shown[2]. The Iowa Rules of Professional Conduct are "rules of reason" Iowa R. Prof'l C. 1.0 Comment [14].

We also assume that public members of boards and commissions take their service seriously and avoid improper influences. Iowa lawyers are to be encouraged

[2] State Bar of Michigan in Ethics Opinion RI-236, May 22, 1995 has taken an opposite approach as has the Virginia State Bar Association in LEO 1763, January 6, 2002. While recognizing that the appearance of impropriety standard of the prior Code is no longer applicable, the Virginia committee found the matter to be governed by Virginia's [Model] Rule 1.11 holding: "This committee opines that the situation in the present hypothetical triggers an impermissible conflict of interest under the Rules for Professional Conduct. This conflict of a partner representing a client before a partner's board should not be "cured" by the board member's recusal from the matter. Such recusal goes against the directive found in Comment 1 to Rule 1.11 [Prof. Conduct Rule 1.11], which states, "This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public." The Virginia Rule 1.11 Comment [1] differs significantly from Comment [1] to the Iowa R. Prof'l C. 32: 1.11. As described further on, we find Iowa R. Prof'l C. 32:8.4(e) to be relevant and instructive.

to hold public office. In doing so, lawyers should be mindful of Iowa R. Prof'l C. 32: 1.11 Comment [1]:

> A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Iowa Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in rule 32:1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule.

Our analysis does not change when the law firm represents a client before the same board, commission or council of which the lawyer is a member. While the lawyer is not serving as a lawyer, but as a private citizen and no attorney-client relationship is involved, the lawyer and the lawyer's law firm are both bound by Iowa R. Prof'l C. 32: 8.4(e).

A serving lawyer acting on matters that directly affect the lawyer's law firm and its clients directly violates the Rule. Additionally, many governmental entities have rules and codes which regulate the potential for conflict between their board, commission or council members and their own personal interests[3]. Consequently, a serving lawyer should choose disclosure, recusal, and sequestration from deliberations on matters where the lawyer's law firm is appearing for a firm client.

[3] For example, Cedar Rapids Board of Ethics Rules provides: "6.22 Conflict of Interest Action means any one of the following: A. Any Official Action on a matter in which the City Official has or can reasonably be expected to have a Private Financial Interest in the outcome; *** C. Acting in a private capacity on matters dealt with as a City Official. For purposes of these rules, "acting in a private capacity" is limited to the City Official and does not include the City Official's Immediate Family … *** E. Appearances on behalf of the private interests of third parties without full and complete disclosure of the City Official's status and that the Appearance is not on behalf of the third parties in any official capacity."

OPINION

When a lawyer is serving as a member of a municipal, county or state board, commission or council, the lawyer's law firm may represent a client before a board, commission or council that is inferior or superior to that on which the lawyer partner serves. Likewise, a law firm may represent a client before the board, commission or council on which a member of the law firm serves, provided the lawyer discloses the relationship and is recused and sequestrated from all deliberations and consideration regarding the matter.