

NYSBA Report Looks at Challenges for Lawyers Who Want To Serve in Public Office

By Robert Kantowitz and Andrew L. Oringer

The New York State Bar Association has issued a report entitled “How an Attorney’s Professional Activities Affect Consideration of the Attorney for Judicial and Political Positions: A Framework for Citizens.”¹ The report addresses the possibility and extent to which a lawyer’s prior activities could have a practical impact on the later consideration of the lawyer for elected or appointed office. It seeks to emphasize to the non-lawyer public that a lawyer’s role and responsibility extends to the representation of unpopular and even despised clients.

The report begins:

One of the pillars on which our legal system is built is an unflagging emphasis on access to justice, which necessarily includes representation by counsel. This principle often results in the representation by lawyers of unpopular clients and causes, sometimes even where the lawyers themselves are not supportive of the clients or sympathetic to the causes. There is a concern that the lawyer’s role in providing representation to unpopular, sometimes extremely unpopular, clients is sometimes not fully understood.

At the same time, it is also true that lawyers, perhaps even disproportionately relative to people in other walks of life, seek to serve in government, whether in elective office, in appointed roles or on the bench.

The confluence of these two contexts can, particularly in these sometimes tense and strident times, raise a host of issues and questions.

The report is intended to educate the public about the lawyer’s role and to provide a framework – most critically for the lay community, but also for lawyers as well – to consider the roles of lawyers in society and to organize and address important considerations that often point in different directions without passing judgment on what may or may not be appropriate for consideration or concern and without attempting to resolve how one should or might balance the various considerations. It was drafted over a period of approximately six years, after which it was adopted by the Committee on Attorney Professionalism with no objection, enthusiastically approved by the Executive Committee and resoundingly endorsed by the House of Delegates. As finalized, the report is intended to be descriptive and educational; it is not intended to be normative or otherwise to pass judgment.

As is discussed in the report, one of the signal achievements of the American legal profession has been in making representation available to everyone who needs it, even the deeply despised, and it is unquestioned that once a lawyer undertakes to represent a client, the lawyer has a duty to do so diligently and competently. This can best be accomplished if those seeking representation have access to, and can choose from, a wide range of available counsel. If a lawyer’s willingness to represent unpopular clients is adversely influenced by concerns about the lawyer’s own professional well-being, the commitment of the legal system to its broad mission could be strained.



The issue of the impact of a lawyer's prior activities on future opportunities is not new, but the issue has arguably taken on increased urgency due to at least two developments. One key development is the evolution of technology that is different not only in degree but in kind. The proliferation of data management and data retrieval technology has provided an unparalleled and ever-increasing ability for anyone and everyone to find information from the distant past and from nearly forgotten sources and places and has made it easy to disseminate information and express opinions. There is virtually instantaneous access to extensive, detailed and often obscure information – not all of which is necessarily true, reliable or presented in an unbiased and complete way – about events and people, and there is generally a striking preservation of posted information.

A second development is the breakdown in traditionally shared viewpoints across many issues, leading to strong and irreconcilable differences among citizens and groups in the United States regarding an ever-increasing number of issues, together with a general and sometimes toxic erosion of civil discourse on political matters. Even in the context of a particular individual's activities, what some observers might view as exemplary conduct, others might view as utterly disqualifying, and the criticism that one group might level could well be dismissed by another group as political theater.

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Together, these developments have resulted in a proliferation of calls that individuals in general, and attorneys in particular, who took on a particular assignment or staked out a position at some time in the past or who once were associated with purportedly bad actors, be effectively disqualified from taking on future public positions or other positions with educational institutions, interest groups or other high-minded organizations (or even being permitted to take a role in polite society). The public perception of, and reaction to, a lawyer's previous work – both as to which clients that lawyer has represented and how that lawyer has represented those clients, including whether

the results obtained do or do not square with what members of the public believe is appropriate contemporaneously and in the future – can, justly or unjustly, make it difficult or impossible for the lawyer to obtain a desired position in the future.

The ability of any person, no matter how unpopular, to obtain competent legal representation is a fundamental cornerstone of our society and the rule of law. Indeed, many lawyers not only accept and respect this principle but personally feel an affirmative responsibility to provide representation to the unpopular and otherwise unrepresented. A famous example in American history is John Adams' representation of the British soldiers who had fired on the crowd in the Boston Massacre. Another example is Abe Fortas' willingness to represent an indigent habeas corpus petitioner, Clarence Gideon, when the request came to him from Chief Justice Warren, leading to the seminal constitutional ruling guaranteeing counsel in state criminal cases.

The New York Rules of Professional Conduct make clear that a client's views and positions are not generally to be imputed to the client's lawyer. As a result, it is rarely ever proper as a matter of legal and ethical rules for a lawyer to be considered unfit for public duty merely because the lawyer represented unpopular or even unquestionably vile clients or clientele. And yet, although lawyers understand that representing an unpopular client is not an endorsement of that client or that client's positions, the converse is not necessarily true. Lawyers can, and often do, seek to represent persons and causes that comport with their own viewpoints, and the American lawyer usually has complete discretion as to what to undertake to do.

The report recognizes that, more important than the distinctions and nuances that the bar sees concerning this issue, the bar has no control over the court of public opinion. The bar, therefore, arguably has an interest in educating the public and attempting to bring about an understanding of this basic principle of legal representation.

Thus, the report lays out some of the considerations that should go into examining and evaluating a lawyer's corpus of work whenever a question arises as to whether what the lawyer has done in the past may be relevant to fitness for an office of public trust, including pointing out certain pressures that may, in fact, be on lawyers as they decide which projects to pursue and accept.

The kinds of considerations suggested in the report as applicable to client work are the following:

1. The type of representation: in what circumstances and in what capacity did the lawyer come to represent the client?

2. What, realistically, was the nature of the lawyer's role and activity?
3. When did the events take place?
4. What was the nature of the client and the representation?
5. What were the alternatives?
6. What actions did the lawyer take in representing the client or clients?
7. What were the evolving roles over the course of a representation or other project?
8. How may an association with a particular law firm or lawyer or other association be perceived?

The factors that the report mentions in relation to speeches, writings and publications, as distinct from client representations, include the following:

1. The nature of the writing or other expression.
2. The legitimate expectations of privacy.
3. Writing may have purely theoretical aspects in a way that client representation does not.
4. Lawyers produce professional and academic writing for a variety of different forums.
5. Writing includes more than just original compositions.

In light of the sensitivity of these topics, the report makes no value judgments about the appropriateness of the public's consideration of a lawyer's choices regarding whether and how to represent any particular client and does not purport to dictate the manner in which the various considerations and factors should be weighed or resolved. In addition, given the report's specific focus on activities in the civic realm, the report does not address broader employment or reputational issues that may plague lawyers who served in, or represented, an unpopular administration or who represent clients in certain industries or the potential that students who have disrupted speakers at law schools may find themselves identified as having done so and denied certain legal employment opportunities.

The report may also be useful to attorneys as they practice in the private sector and engage in other advocacy pursuits to consider the impact of representations that they undertake on future endeavors. Here, as well, the report makes no recommendations regarding whether or how lawyers should make decisions regarding client representation or other advocacy work based on these considerations.

The report concludes by expressing an aspiration, shared by at least a number of members of the Executive Committee and of the House of Delegates during the approval process, that it will advance informed discus-

sion and polite debate regarding these nuanced and important matters.

Consideration is being given by the association to how the message of the report may be disseminated widely. A number of defense attorneys, seeing the report, have bemoaned experiences they've had with harsh criticism and even vilification, merely because they have endeavored to fulfill their responsibilities to enhance broad access to justice among a diverse clientele. They and others have identified value in having the presentation in the report made widely available to the public to advance the report's educational purposes. There has even been mention of the possibility of a NYSBA task force to assist lawyers who may be the subject of unfair criticism of prior efforts to represent their clients. Some have focused upon the national leadership position of the New York State Bar Association as a further impetus for it to take action regarding these matters.

The authors have been gratified by the report's broad acceptance within the Committee on Attorney Professionalism, the Executive Committee and the House of Delegates and hope that it can play even a small role in the development of greater acceptance of and appreciation for a lawyer's appropriate and foundational role in the American justice system.

Endnote

1. The principal authors of the report were the authors of this article. Robert Kantowitz spearheaded this effort in the NYSBA's Committee on Attorney Professionalism and was the main draftsperson. Andrew Oringer, who chaired the Committee on Attorney Professionalism when the report was initially developed and is a current member of the committee (and of the Committee on Professional Ethics), was a primary contributor to the drafting effort. This article liberally draws extensive language from (and, for the sake of readability, not always specifically attributed herein to) the report.



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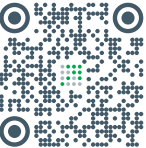
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