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Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

OPINION 697

Conflict of Interest: Concurrent Representation Involving Local Public Entities and Private Clients

This inquiry concerns the propriety of an attorney, whose law partner is either a township zoning board attorney or a housing authority attorney, representing private clients on traffic and disorderly persons matters in that township's municipal court. The inquirer presupposes that "there would be no actual conflict in the course of this representation." We do not agree.

Soon after the creation of the Advisory Committee on Professional Ethics (ACPE) in 1962, we published ACPE Opinion 4, 86 N.J.L.J. 357 (1963). That inquiry concerned a law firm which represented several municipalities and contemplated representing private clients before the boards of adjustment in those municipalities. This situation was found to be improper. We reasoned that an attorney who represents a municipality or any of its agencies "has as his client the entire

municipality…", which would include the board of adjustment.[1] We then held that representation of a private client before the municipality's board of adjustment would be *per se* inconsistent with the then Canons of Professional Ethics #6, which expressly forbad acceptance of employment adversely affecting any interest of a client. Considering that the resulting conflict could not be waived by the public client,[2] undertaking representation was impermissible.

A few months later, the Supreme Court issued a Notice to the Bar indicating that attorneys for municipalities or other public agencies may not represent a private client with interests adverse to those of the public entity. Notice to the Bar, 86 N.J.L.J. 713 (1963). The concept of being "adverse to the public entity" includes representation of "a private client before any board, agency, commission, or other part of the municipality

[1] While a similar conclusion may be reached regarding county government (see opinions cited after footnote 2, infra), the reasoning of this opinion is not intended to extend to an attorney representing an agency of the State, because the State is "so varied, so multifaceted, so extensive that to regard it as one unitary monolithic employer/client is unrealistic." Matter of ACPE Opinion 621, 128 N.J. 577, 597 (1992).

[2] See, RPC 1.7(a) (2) and (b)(2), (1984). Comment to RPC 1.7, N.J.L.J., July 19, 1984, supp. at 3 (Appendix A-2), "to preserve New Jersey's rule that a government agency cannot consent to representation if a conflict of interest exists …" See also In re Advisory Com. on Prof. Ethics, 162 N.J. 497, 504 (2000). Although the Supreme Court Committee on the Rules of Professional Conduct (the Pollock Commission) recommended elimination of the prohibition of consent by these entities, the Supreme Court concluded that the prohibition, essentially a protective remnant of the appearance of impropriety rule, should be retained. (See, Supreme Court of New Jersey, Administrative Determinations in response to the Report and Recommendation of the Supreme Court Commission on the Rules of Professional Conduct, September 10, 2003, p. 20, http://home.courts.judiciary.state.nj.us/notices/reports/admin-deter-rpcs.pdf.)

including its governing body." Matter of ACPE Opinion 621, 128 N.J. 577, 594-595 (1992). We recognize that the Court's discussion in Opinion 621 was grounded in part at least on the "appearance of impropriety", a rule which has recently been abolished. Nevertheless, our findings discussed below as to who the client is when representing a municipal agency, leads us to the same conclusions.

It is against this backdrop that we examine the issue at hand. The broad question is whether the proposed representation would be inconsistent with the present Rules of Professional Conduct (RPC) or Rules of Court. RPC 1.7(a)(1) generally precludes an attorney from representing one client adverse to another. New Jersey Court Rule 1:15-3(b) more specifically prohibits "municipal attorneys" from representing private clients in their municipality's court. The question posed requires that we examine the relationship between the entity represented and the municipality to determine whether counsel for the entity in fact has the municipality as a client for purposes determining the existence of a conflict with the interests of the attorney's private client.

We have addressed this same basic question many times. Our prior decisions[3] demonstrate that we have already dealt with this subject matter, for example, in connection with attorneys for a local housing authority, Opinion 79, 88 N.J.L.J. 460 (1965) and Opinion 18, 86 NJ.L.J.

[3] ACPE decisions can be found on the Internet at www.lawlibrary.rutgers.edu/ethics/search.shtml.

734 (1963); a municipal environmental commission, Opinion 374, 100 N.J.L.J. 646 (1977); a local board of health, Opinion 300, 98 N.J.L.J. 126 (1975); a senior citizen housing authority, Opinion 281, 97 N.J.L.J. 362 (1974); an appointed school board, Opinion 137, 91 N.J.L.J. 797 (1968) and Opinion 77, 88 N.J.L.J. 453 (1965); a redevelopment agency, Opinion 123, 91 N.J.L.J. 97 (1968); and a municipal parking authority, Opinion 52, 87 N.J.L.J. 610 (1964). In each of these situations it was determined that the board, body, or authority at-issue was a subordinate instrumentality of their municipal government and that the proposed representation of private clients before or against any other municipal agency was improper.

Specifically, we held in Opinion 79 that "the attorney for a municipal housing authority cannot appear before the municipal court, board of adjustment, planning board, township committee or other municipal bodies in the municipality which is served by the public housing authority." Our conclusion in Opinion 18, 86 N.J.L.J. 734 (1963) was the same, "[a]n attorney representing a city housing authority has as his client the entire municipality."

Our views on this issue over the years have not changed. Nor, as stated above, does the elimination of the "appearance of impropriety" rule alter those views, since once the client is determined to be the municipality itself, there would be a concurrent conflict in representing a private client before or against one of its subordinate instrumentalities.

RPC 1.7.[4] Counsel representing an adjunct agency of a municipal government must make a choice as to whether they desire to represent the agency and thus preclude the practice by themselves and members of their firms before the various boards and bodies of the municipal government, or whether they believe it to be more advantageous to decline representation of the agency and represent private clients before the same public bodies. Opinion 374, 100 N.J.L.J. 646 (1977).

To aid practitioners in determining if a particular public body is an adjunct agency of a municipal government, the test is whether the agency is subject to the municipal government's budgetary, membership, or decision-making control. Opinion 292, 97 N.J.L.J. 809 (1974). If it is subject to any of these controls, the body is an instrumentality of that governing entity for purposes of the conflicts addressed in this opinion.

Bodies not subject to such control are autonomous and not considered to be part of the particular municipal government for purposes of conflict of interest analysis. We reached that conclusion with regard to a municipal fire district (municipal fire district more of an autonomous body because its commissioners were elected by ballot and its budget was determined by referendum), Opinion 292, supra; and an elected school board, Opinion 41, 87 N.J.L.J. 285 (1964) (elected school board was "clearly autonomous and is not a part of the municipality in

[4] We note that there is also a question concerning the applicability of RPC 1.8(k), but we need not reach it in this inquiry because there is a direct conflict prohibited by RPC 1.7.

which it is located"). The same would be true with respect to a municipal public defender since the public defender does not represent the municipality.[5]

For the reasons stated above, an attorney, law firm, or office associates of that attorney or law firm,[6] representing a municipal body subject to the governing entity's budgetary, membership, or decision-making control, is precluded from representing a private client before (or in a litigated matter against) the governing body, its executive, its legislature, any policy making official in an official capacity, or any office, department, division, bureau, board, commission, or agency, or other body subject to that governing entity's budgetary, membership, or decision making control, and specifically in this case, before the municipal court.

[5] See R.1:15-3(b).
[6] See R.1:15-5(b).