



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 081
TRENTON, NJ 08625-0080

PHILIP D. MURPHY
Governor

GURBIR S. GREWAL
Attorney General

SHEILA Y. OLIVER
Lt. Governor

May 15, 2019

Matthew Platkin, Esq.
Chief Counsel, Office of the Governor
State House, Box 001
Trenton, NJ 08625

Re: *Identifying Government Clients for Purposes of Conflicts of Interest*

Dear Mr. Platkin:

You have asked for our advice regarding whether and when special counsel appointed to represent specific New Jersey state government entities can represent private parties with interests adverse to other New Jersey state government entities. This Office first addressed this issue in an August 2, 1984 letter from then Attorney General Irwin I. Kimmelman (the “Kimmelman Letter,” a copy of which is attached). Subsequent case law has confirmed and expanded upon the position the Kimmelman Letter espoused. In short, the Rules of Professional Conduct (“RPCs”) require a determination regarding whether special counsel is simultaneously representing and adverse to the same specific government client. The relevant government client may be a particular Department or Authority, or it may be a specific subsidiary unit within that Department or Authority. While identification of the particular government client is inherently fact bound, this letter provides general guidance for conducting that conflicts analysis.

An attorney who represents a public body has the same obligation as any other attorney to comply with RPCs regarding conflicts of interest. See, e.g., In re Advisory Comm. On Prof'l Ethics Opinion 621, 128 N.J. 577, 592 (1992); Michels, New Jersey Attorney Ethics § 20:1-1 (2017). As relevant here, RPC 1.7(a) provides that an impermissible conflict exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. In other words, RPC 1.7 establishes that no attorney can serve two masters. See State ex rel. S.G., 175 N.J. 132, 139 (2001). A government entity—unlike private clients—cannot waive such conflicts of interest. RPC 1.7(b)(1); RPC 1.8(l); RPC 1.9(d).

The question thus becomes which government entity qualifies as the represented “client” for conflicts purposes. Longstanding Attorney General guidance and New Jersey case law make clear the State is “so varied, so multifaceted, so extensive that to regard it as one unitary monolithic



employer/client is unrealistic.” In re Opinion 621, 128 N.J. at 597. Indeed, the Kimmelman Letter advised that counsel appointed to represent a specific “agency” may not appear on behalf of private parties before that agency or take adversarial positions against it on behalf of other clients. The Kimmelman Letter recognized that representation of a particular government entity while being adverse to a different government entity does not necessarily create a conflict of interest. The Department has consistently taken that position in the years since.

Subsequent case law has further established that the retention of special counsel for discrete engagements on behalf of one government unit subsidiary to a Department or Authority does not necessarily disqualify the lawyer from being adverse to another unit within the same Department or Authority. In In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549 (2006), the Court considered whether a law firm was precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of the municipality’s boards or agencies. Id. at 555. The Court held that “an attorney who plenary represents an agency subsidiary to the governmental entity’s governing body is barred from representing private clients before that subsidiary agency only.” Id. at 553. The analysis was based on an examination of 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 of determining the existence of a conflict with the interests of the attorney’s private client. Id. at 560. The Court concluded that a law firm is “not *per se* precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of [its] boards.” Id. at 568.

The Superior Court’s ruling in the unreported decision in Correctional Medical Services v. State, Docket No. MER-L-2771-08 (Law Division, Mercer County 2008), also confirms that the government client may be a subsidiary component of a Department or Authority. In that case, the court considered whether representation of the Treasury Department’s Division of Pensions and Benefits by Ballard, Spahr, Andrews and Ingersoll, L.P. and that same law firm’s representation of a private party in contract litigation with the Treasury Department’s Division of Purchase and Property created a conflict of interest. Id., slip op. at 1. The court found no conflict. Among other things, the court found that the firm did not represent the Treasurer. Instead, the court concluded that the firm’s representation extended only to the pension plans and the Division of Pensions and Benefits. Id., slip op. at 31-40. The court recognized that the firm was adverse to the Division of Purchase and Property, but that matter was “substantially different and discreet” from the firm’s representation of the Division of Pension and Benefits. Id., slip op. at 50. The court implicitly rejected the notion that the Treasurer or the Department of the Treasury were the clients for conflict analysis in all cases where a firm represented one Division in the Department.

That longstanding conclusion makes sense. The observation that the State is “so varied, so multifaceted, so extensive that to regard it as one unitary monolithic employer/client is unrealistic” is applicable to many Departments within the State. Several Departments have various functions that are distinct and essentially unrelated. For example, Treasury includes, among other entities, the Division of Pensions and Benefits, the Division of Purchase and Property, and the Division of Taxation. The Department of Health includes, among other entities, the Office of the Chief State Medical Examiner and the Office of Health Care Financing. And my own Department includes,

among other entities, the Division of Consumer Affairs, the Division of Gaming Enforcement, and the Division on Civil Rights. The units in a Department do not necessarily share confidential information as part of their day-to-day operations, engage in the same functions, or have the same management teams. Moreover, such units generally retain outside counsel to perform discrete functions that do not involve all of the operations of the larger entity to which that unit belongs. See Fitzgerald v. Linnus, 336 N.J. Super. 450, 470-71 (App. Div. 2001) (recognizing that an attorney and client may limit the scope of representation). In light of the complexity and diversity of the government entities within a single Department or Authority, the representation of one subsidiary unit within a Department or Authority while being adverse to another subsidiary unit will not necessarily create a conflict.

As a result, the RPC conflict analysis requires identifying with particularity which unit is truly the party in interest and is therefore the relevant government client. In some instances, the client may be a Department or an Authority, but in other cases the client may be a subsidiary unit other than a Department or an Authority.

As the above discussion makes clear, the identification of the particular government client is a fact sensitive process that must rely upon a careful analysis. Based on longstanding practice and the relevant case law, factors that may be considered include but are not limited to:

- Whether the matter involves an operation or responsibility that is unique to a particular government unit and is distinct from the operations of the other units within the relevant Department or the Authority.
- Whether retention of outside counsel is limited to a circumscribed and well-defined role. For example, counsel's retention is limited to serving as bond counsel, or providing tax advice to a pension fund.
- Whether outside counsel is dealing primarily with personnel inside the unit when providing advice or formulating litigation and settlement strategy.
- Whether resolution of the matter will directly affect the authority, funding, or privileges of another government unit within the relevant Department or Authority.

The following factors provide additional evidence that a subsidiary unit is the government client, but these factors are not necessary for reaching such a conclusion:

- The represented unit has "sue and be sued" authority.
- The represented unit is "in but not of" the relevant Department.

Please let me know if I can be of further assistance.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Gurbir S. Grewal", followed by a period.

Gurbir S. Grewal
Attorney General