

NOTICE TO THE BAR

Conflict of Interest: Representation of Public Entities After the Elimination of the Appearance of Impropriety Rule

The purpose of this Notice is to remind the members of the bar of the continuing limitations that the Rules of Professional Conduct (“RPCs”) impose in situations involving the representation of public entities, notwithstanding the Supreme Court’s recent elimination of the “appearance of impropriety” rule. This Notice also reminds practitioners of the need for specificity and completeness when submitting inquiries to the Advisory Committee.

The amended RPCs continue to impose limitations on attorney representation of public entities even absent the appearance of impropriety rule. See, in particular, new RPC 1.8(k), which requires counsel to analyze each situation to determine whether the lawyer’s “responsibilities to the public entity would limit the lawyer’s ability to provide independent advice or diligent and competent representation to either the public entity or the client.” Of related importance, the Advisory Committee notes that public entities cannot consent to a representation where there is a conflict of interest, a proscription that remains unchanged. RPC 1.7(b)(1) and RPC 1.8(1).

The Court’s recent elimination of the appearance of impropriety rule has prompted practitioners to submit inquiries to the Advisory Committee concerning potential dual or multiple-client representation situations involving public entities. The Advisory Committee cannot respond to inquiries on such issues unless the inquirer provides all relevant factual details concerning the nature of the proposed representation and the potential conflicts.

Rule 1:19-3 requires, inter alia, that all inquiries submitted to the Advisory Committee “shall be in writing, shall set out the factual situation in detail, and shall be accompanied by a short brief or memorandum citing the rules of court or canons of ethics involved and any other pertinent authorities....” Accordingly, the brief or memorandum of law submitted to the Advisory Committee in support of the inquiry must contain a detailed statement of relevant specific facts, a summary of the applicable law and an analysis of the law as applied to the particular factual circumstances presented. Failure to adhere to the provisions of R.1:19-3 may result in the Advisory Committee dismissing an inquiry.

Melville D. Miller, Jr., Esq., Chair
Supreme Court Advisory Committee on Professional Ethics
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