

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 722

Conflict of Interest: Concurrently Serving as County Counsel and Mayor of a Constituent Faulkner Act “Strong Mayor” Entity

Inquirer asks whether an attorney may concurrently serve as county counsel and mayor of a municipality in the same county. The municipality is formed as a Faulkner Act mayor-council (“strong-mayor”) entity, *N.J.S.A. 40:69A-1 et seq.* The Committee finds that a *per se* conflict arises when an attorney concurrently serves as county counsel and mayor of a constituent “strong-mayor” Faulkner Act municipality and the attorney may not concurrently serve in both roles.

In a Faulkner Act “strong-mayor” municipality, there is a “concentration of power in the hands of a highly-visible, independently-elected Chief Executive who has substantial power over the administration.” *McCann v. Clerk of the City of Jersey City*, 167 *N.J.* 311, 330 (2001) (quoting 34 *New Jersey Practice, Local Government Law*, Section 4.15 (Michael A. Pane) (rev. 3d ed. 1999)). Pursuant to *N.J.S.A. 40:69A-40* and -41, the mayor has the power and authority to “[s]upervise, direct and control all departments of the municipal governments,” prepare and submit the annual budget, “[s]upervise the care and custody of all municipal property, institutions and agencies,” “[s]ign all contracts, bonds or other instruments requiring the consent of the

municipality,” “[n]egotiate contracts for the municipality,” appoint the heads of all administrative departments, “recommend to the council whatever action or programs he deems necessary for the improvement of the municipality and the welfare of its residents,” “make recommendations concerning the nature and location of municipal improvements and execute improvements determined by the governing body,” “[a]ssure that all terms and conditions imposed in favor of the municipality or its inhabitants in any statute, franchise or other contract are faithfully kept and performed,” and approve or veto all municipal ordinances. The power and authority of the mayor in this form of government is “substantial.” *McCann, supra*, 167 N.J. at 330.

“The broad grant of authority to the mayor, however, is qualified by ‘a heightened standard of ethical responsibility.’” *Thompson v. City of Atlantic City*, 190 N.J. 359, 374 (2007) (quoting *McCann, supra*, 167 N.J. at 331). This “heightened standard of ethical responsibility” imposed on a mayor in a Faulkner Act “strong-mayor” entity underpins the Committee’s decision in this matter.

RPC 1.7 frames the general conflict rule:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* * * *

(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.

RPC 1.7(a)(2) conflicts may be cured by informed consent, but a public entity cannot consent to representation in a conflict situation. *RPC 1.7(b)(1)*.

RPC 1.8(k) provides:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that 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.

This Committee in Opinion 706 previously considered whether an attorney may concurrently serve as assistant county counsel and council member of a municipality in the same county. 184 *N.J.L.J.* 1183 (June 26, 2006), 15 *N.J.L.* 1413 (July 3, 2006). While the Committee concluded that an attorney is not prohibited on a *per se* basis from serving in these dual roles, it noted "the numerous situations in which the interests of a county and one of its constituent municipalities might conflict."

Counties and municipalities might contract or otherwise transact business together in connection with public transportation, operation of recreational facilities, public health services, alleviation of flood conditions, public improvements, sewage disposal, drainage projects, road projects, purchase of materials and supplies, and the sale of county or municipal property.

[Opinion 706.]

The Committee also noted that there have been many cases involving counties and constituent municipalities that were adversaries in lawsuits. "The assignments of various functions to county and municipal governments 'invite a clash of the obligations each unit of government owes to its respective citizens.'" Opinion 706 (quoting *In re Opinion No. 415*, 81 *N.J.* 318, 325 (1979)). The Committee observed that "the sheer numbers of transactional areas and adversarial cases have increased significantly in the years since *In re Opinion No. 415* was handed down."

The Committee, in Opinion 706, discussed the actual conflicts that will arise when an attorney concurrently serves as assistant county counsel and member of a municipal governing body:

In the capacity of municipal council member, the attorney's exclusive obligation is to further the interests of the municipality, while the exclusive obligation of the office of the county counsel is to represent the interests of the county. There are numerous intersecting points at which there may be "a clash of the obligations each unit of government owes to its respective citizens." *In re Opinion No. 415, supra*, 81 N.J. at 325. Actual conflicts will arise in matters pertaining to pending litigation and contracts involving police, fire, transportation, recreational facilities, health services, road improvements, sewerage and garbage disposal, sale of real estate, construction and operation of public buildings, and myriad administrative, financial, and tax matters. The list is not exhaustive; actual conflicts may arise in other contexts.

[Opinion 706.]

The Committee declined to find that, as a *per se* rule, assistant county counsel could not concurrently serve as member of the municipal council in a municipality in the same county. The Committee noted that the structural organization of the county counsel's office may permit an assistant county counsel to have limited interaction with county counsel or limited responsibility for the business of the county, and the municipality's form of government and job responsibilities of a municipal council member may permit the attorney to avoid conflicts with county matters. The Committee concluded that while recusal from county or municipal matters may be required too frequently, a *per se* rule prohibiting the dual roles was not necessary.

In contrast, inquirer here asks about county counsel, not assistant county counsel, serving concurrently as mayor of a constituent Faulkner Act "strong-mayor" municipality, not as municipal council member. County counsel is "the chief legal officer or advisor of the governing body of the county," *N.J.S.A. 30:4-27.2*, and heads the

county's legal department, *N.J.S.A. 40:41A-55, N.J.S.A. 40:41A-67, N.J.S.A. 40:41A-81.*

The mayor of a Faulkner Act "strong-mayor" municipality has substantial power and authority. An attorney who represents a county and concurrently serves as mayor in this form of municipality in the same county must recognize that there is a substantial risk that the attorney's responsibilities to the municipality would limit the attorney's ability to provide independent advice or diligent and competent representation to the county. *RPC 1.8(k).* The attorney must also recognize that there is a significant risk that the representation of the county will be materially limited by the attorney's responsibilities to the municipality. *RPC 1.7(a)(2).* These risks are exacerbated when the municipality is a Faulkner Act "strong-mayor" entity.

The Committee finds that an attorney serving as county counsel and mayor in a constituent Faulkner Act "strong-mayor" municipality has such a substantial risk of conflicts that holding both positions is prohibited.