



ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

ACPE OPINION 736

Lawyer May Concurrently Serve as Municipal Prosecutor and Planning Board Attorney in Same Municipality; Superseding Opinions 452 and 366

The Advisory Committee on Professional Ethics received an inquiry asking whether a lawyer may concurrently serve as municipal prosecutor and planning board attorney in the same borough. The Committee decided that there is no per se prohibition against serving in both positions, though the lawyer must consider case-by-case conflicts under Rules of Professional Conduct 1.8(k) and 1.7.

This Opinion supersedes Opinion 452 (1980) and Opinion 366 (1977). In Opinion 366, the Committee reasoned that a municipal prosecutor should be treated the same, for conflict of interest purposes, as a municipal attorney because the lawyer “represents the municipality in prosecutorial functions.” In Opinion 452, the Committee found that a municipal prosecutor should be treated the same, for conflict of interest purposes, as a municipal attorney because the prosecutor “is a creature of the municipal government body which makes the appointment and determines the salary.” Both Opinions rely on the appearance of impropriety and the related

“member of the municipal family” doctrine. The appearance of impropriety doctrine, however, was removed from the Rules of Professional Conduct in 2004.

When considering conflicts of interest in the local government setting, the Committee previously focused on the municipality’s budgetary and decision-making control over the agency represented by the lawyer. This led to the precedent that an attorney who represents a municipality or any of its agencies has as his or her client the entire municipality. Therefore, a lawyer could not represent one part of the municipal client while concurrently representing a private client before or against another part of the municipality.

The New Jersey Supreme Court, in 2006, overturned this precedent. In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549, 564-66 (2006). In its stead, the Court set forth three tiers of per se conflicts. It held that an attorney who “plenary represents a municipal governing body” is “barred from representing private clients before that governmental entity’s governing body and all of its subsidiary boards and agencies, including its courts.” Id. at 569. In contrast, 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.” Ibid. Lastly, “if the scope of an attorney’s engagement by a governmental entity is limited and not plenary,” the attorney may not represent a private client before or against the governing body but may represent a private client before the boards, agencies, or municipal court of the municipality. Id. at 567-69. Of course, an attorney who represents a subsidiary agency, or the municipality in a limited scope, must still comply with the provisions of Rules of Professional Conduct 1.8(k) and 1.7. Id. at 566-68.

The Court thus differentiated between municipal attorneys, attorneys for subsidiary boards and agencies, and attorneys serving the municipality in a limited scope, when determining

whether the attorney has a conflict of interest. The relevant factor in this analysis is the breadth and scope of the attorney's official duties. The municipal attorney, whose duties span the entire municipality, has the broadest restrictions on outside practice. The attorney for a subsidiary board or agency, whose duties extend only to matters before or against that board or agency, is subject to practice restrictions only with regard to that board or agency. The attorney who is retained by the municipality in a limited scope, such as bond counsel, tax counsel, or the like, has closely-defined duties in a specific legal area and is subject to the general restriction of not representing a private client before or against the governmental body itself.

The Committee hereby finds that a municipal prosecutor practices in a manner that is limited in scope and not plenary. The municipal prosecutor has authority only to prosecute cases in municipal court in the name of the municipality or the State; the prosecutor does not represent the municipality generally ("plenary"). In contrast, the duties of the municipal attorney encompass all matters affecting the municipality. Municipal prosecutors and other limited-scope counsel are retained by the municipality and the municipality sets the salary but, as discussed above, this fact no longer results in a finding of a broad, per se conflict.

The Court, in Opinion 697, decided that while limited-scope lawyers may not represent a private client before or against the governing body, they have no other per se prohibitions on their practice. Id. at 569. Accordingly, a municipal prosecutor is not flatly prohibited from appearing before boards or agencies of that municipality on behalf of private clients, but is precluded from representing a private party in a matter before or against the governing body itself. Further, by Court Rule, municipal prosecutors may not represent private clients in any municipal court in the county or in criminal matters in that county's Superior Court. R. 1:15-3(b).

If a municipal prosecutor may represent private clients in matters before an agency subsidiary to the municipality's governing body, it follows that the municipal prosecutor may also concurrently serve as attorney for a subsidiary board or agency, subject to case-by-case restrictions under the Rules of Professional Conduct. Specifically, Rule of Professional Conduct 1.7(a)(2) provides that a lawyer may not represent a client if "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 addition, lawyers should consider Rule of Professional Conduct 1.8(k), which provides that a lawyer who is employed by a municipality shall not undertake representation of a client if there is a substantial risk that the lawyer's responsibilities to the municipality would limit the lawyer's ability to provide independent advice or diligent and competent representation to the client.

As the Court noted in Opinion 697, the "member of the municipal family" doctrine, which was grounded in principles of appearance of impropriety, now applies only to attorneys who plenary represent the municipality. Id. at 564-65. Attorneys providing legal services to municipalities in lesser roles are no longer subject to broad, per se restrictions on their practice. Accordingly, subject to case-by-case conflicts of interest, an attorney who serves as counsel to a municipal planning board may concurrently serve as municipal prosecutor in the same municipality.