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Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

OPINION 709

Advisory Committee on Professional Ethics

**Conflict of Interest: Municipal Police
Officer Who Also Is an Attorney Engaging
in Private Practice of Criminal Law**

The Advisory Committee on Professional Ethics considered an inquiry regarding the propriety of a municipal police officer who is an attorney affiliating with a law firm located in a municipality bordering that in which he serves as police officer. It concluded that *RPC* 1.7 prohibits the inquirer from representing a criminal defendant in certain matters. The Committee further concluded that, under *RPC* 1.8(k) and the rationale of the New Jersey Supreme Court in *State v. Clark*, 162 *N.J.* 201 (2000), the inquirer may not represent any criminal defendant in Superior Court matters in the same county as the municipality in which he serves.

Although the “appearance of impropriety” rule has been eliminated, the *Rules of Professional Conduct* continue to impose limitations on attorneys who are employed by a public entity. *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.

Hence, an attorney who is employed by a municipality as a police officer shall not undertake representation of a client if 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 client. *RPC 1.8(k)*.

In a similar vein, *RPC 1.7* provides that an attorney 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 . . . a third person or by a personal interest of the lawyer." *RPC 1.7(a)(2)*. Accordingly, the attorney must also assess whether there is a significant risk that the representation of a client will be materially limited by the attorney's responsibilities to a third person, such as fellow municipal police officers, the municipal or county prosecutor, or the municipality itself. *RPC 1.7(a)(2)*.

Municipal police officers exercise full law enforcement powers within the territorial limits of their municipality. *N.J.S.A. 40A:14-152*. The Division of Criminal Justice Model Rules and Regulations, a form of which presumably has been adopted by the inquirer's municipality, provides that police officers "shall" take appropriate action to enforce the law, prevent crime, and detect and arrest violators of the law, within the territorial limits of the officer's municipality.

Municipal police officers also participate in the prosecution of criminal matters. When an attorney who is also a municipal police officer represents a criminal defendant, concerns relating to the integrity of the criminal justice process arise. This concern was

addressed, in an analogous context, by the New Jersey Supreme Court in *State v. Clark*, *supra*, 162 N.J. 201. The Court in *Clark* held that a municipal prosecutor may not represent a defendant in a criminal matter in the Superior Court of the county in which he or she serves as municipal prosecutor. The Court noted that a municipal prosecutor may conduct direct examination of a municipal police officer one day in municipal court, then conduct cross-examination of the same officer the next day, in the role of defense attorney, in Superior Court. *Id.* at 206. The Court concluded that the integrity of the criminal justice system could be impaired when an attorney serves a dual role of municipal prosecutor and criminal defense attorney in the same county. *Ibid.*

As noted above, an attorney who is employed by a municipality as a police officer has a duty to the municipality to enforce the law, to take other steps to detect and apprehend violators of the law, and to assist in prosecution of criminal matters. *RPC* 1.8(k) provides that an attorney who is employed by a municipality as a police officer shall not undertake representation of a client if 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 client. With regard to criminal matters arising within the municipality the inquirer serves, there is a substantial risk that his responsibilities as a municipal police officer will limit his ability to provide independent advice or diligent and competent representation to his criminal defense clients. Therefore, such representation is prohibited under *RPC* 1.8(k).

The inquirer's responsibilities as a municipal police officer may limit his ability to provide independent advice or diligent and competent representation to his criminal defense clients when the criminal matter is in the Superior Court of the same county in

which he serves as police officer. The county prosecutor has authority and control over all criminal cases tried in the municipality and the county Superior Court. The inquirer's responsibilities as a municipal police officer, especially those responsibilities arising from his interaction with the county prosecutor in the course of those police duties, may limit his ability to provide independent advice or diligent and competent representation to his criminal defense clients in these matters. Further, as in *Clark*, the inquirer could be the police officer witness giving direct testimony for the prosecutor one day in Superior Court, then appear as opposing counsel to the same prosecutor the next day in his role as defense attorney. Therefore, pursuant to *RPC* 1.8(k) and the rationale of *Clark*, such representation within the county is prohibited.

The Supreme Court, in *Clark*, declined to extend the ban on serving dual roles statewide. 162 *N.J.* at 207. Consistent with this decision, a statewide ban on a municipal police officer serving as criminal defense attorney is not supported. The Committee recognizes that, outside the territorial limits of a municipal police officer's municipality, the police officer has law enforcement powers when a crime or certain motor vehicle offenses are committed in the officer's presence. *N.J.S.A.* 40A:14-152.1; *N.J.S.A.* 39:5-25; *N.J.S.A.* 2A:169-3. However, these limited law enforcement powers, which may be exercised outside the territorial limits of the municipality in which a police officer serves, do not support a statewide ban on representation under *RPC* 1.8(k) or the rationale of *Clark*.

The Committee is also aware that municipal police officers are frequently assigned to task forces involving municipal, county, and State police officers, or to perform extraterritorial duties pursuant to mutual aid agreements between municipalities.

Participation in task forces brings the police officer under the control and purview of other public entities which may lie outside the county in which the attorney serves as a municipal police officer. Depending on the structure of the task force and the duties to which the municipal police officer is assigned, the police officer in a defense attorney role may be faced with the scenario set forth in *Clark*: working closely with fellow police officers and members of a prosecutor's office one day and cross-examining or opposing them as defense attorney the next day. These extraterritorial duties also may give rise to a substantial risk that the attorney's responsibilities to the other public entities involved would limit the attorney's ability to provide independent advice or diligent and competent representation to the criminal defendant client. Therefore, *RPC* 1.8(k) and the rationale in *Clark* may prohibit representation in criminal matters that arise outside the county, depending on the particular circumstances.

This inquiry must also be analyzed under *RPC* 1.7(a)(2), assessing whether there is a significant risk that the representation of a private client will be materially limited by the attorney's responsibilities to a third person. Depending on the circumstances, *RPC* 1.7(a)(2) may prohibit representation of a criminal defendant.

While the language of *RPC* 1.8(k) is similar to that of *RPC* 1.7(a)(2), in that both provisions refer to a risk that the attorney's representation would be limited by his or her responsibilities to a "public entity" or to a "third person," respectively, the Committee recognizes that special concerns arise with regard to attorneys serving the public and, therefore, may lead to different conclusions in some cases. The analysis under *RPC* 1.8(k), combined with the rationale of the *Clark* case, support a ban on representation in

criminal matters in Superior Court of the county in which the inquirer serves as a police officer, while the analysis under *RPC* 1.7(a)(2) requires a case-by-case review.

The inquirer further asked whether, under *RPC* 1.7(a)(2) and *RPC* 1.10, a conflict would extend to other attorneys in the firm. *RPC* 1.10 generally provides that when one attorney associated in a firm is prohibited from providing representation to a client pursuant to *RPC* 1.7 or *RPC* 1.9, then all attorneys in the firm are also so prohibited. As noted above, *RPC* 1.8 and the rationale of the *Clark* case support a prohibition against representing criminal defendants in the county in which the inquirer serves as a municipal police officer. Although there is no stated reason for the omission of *RPC* 1.8 from the language of the imputation rule, the explicit terms of *RPC* 1.10 provide that this prohibition would not be imputed to the firm. Similarly, the imputation rule in *RPC* 1.8(j) applies only to the subsections which precede it, not to 1.8(k), again without explanation. Nonetheless, in such circumstances the conflicted lawyer must be screened completely from any representation by other lawyers in the firm. To the extent the inquirer is prohibited in a particular case from representing private clients under *RPC* 1.7(a)(2), and the conflict is not based on a personal interest, or is not subject to consent under *RPC* 1.7(b)(1), that prohibition would be imputed to the firm under *RPC* 1.10.

Lastly, the inquirer asked whether a conflict arose due to the firm's representation of public school teachers. There is no across-the-board conflict and the firm must be guided in each instance by an analysis of whether a conflict is present under *RPC* 1.7 or *RPC* 1.8(k).