

Advisory Committee on Professional Ethics
Appointed by the Supreme Court of New Jersey

Opinion 707
Advisory Committee on Professional Ethics

**Conflict of Interest: Serving as Member of Board of
Education and as Municipal Attorney in Same Township**

The Committee has been asked whether contemporaneously serving as a member of an elected New Jersey board of education and as municipal attorney in the same township constitutes a conflict of interest under the *Rules of Professional Conduct*. The Committee has concluded that on the facts submitted it does not.

The question of dual holding of such municipal and elected board of education offices by the same attorneys or their firms has been addressed by the Committee numerous times, and due in part to changes from time to time in the *Rules* and case law governing professional conduct, the published opinions have not always been consistent. In this regard we call attention to the following opinions of this Committee: Opinion 44, 87 *N.J.L.J.* 297 (May 14, 1964) (councilman and board of education attorneys in same firm permitted); Opinion 59, 87 *N.J.L.J.* 741 (Nov. 19, 1964) (acting as attorney for municipality and attorney for board of education in same town permitted); Opinion 39, 87 *N.J.L.J.* 191 (March 26, 1964) (borough attorney may advise board of education); Opinion 464, 106 *N.J.L.J.* 498 (Dec. 11, 1980) (counsel to board of education should not contemporaneously serve as a member of the borough council, based on the “appearance of impropriety”); Opinion 470, 107 *N.J.L.J.* 127 (Feb. 12, 1981) (same attorney may be attorney for board of education and township attorney – apparently reversing Opinion

464); Reconsideration of Opinion 464, Notice to the Bar, 132 *N.J.L.J.* 522 (Nov. 2, 1992) (clarifies that Opinion 470 is reversed and Opinion 464 is upheld).

Those opinions which approved the dual office holding relied on the fact that an elected board of education in its general operations is a body entirely independent of the governing body of the municipality except in the limited circumstances of the municipal obligation to deal with the board's budget if it fails to be approved by referendum. In such case, and in the case of an actual conflict, the attorney's recusal would be called for. See, *e.g.*, Opinion 470, *supra*, and *cf. Bodkin v. Westwood*, 52 *N.J. Super.* 416, 425 (App. Div. 1958).

The decisions which did not permit the dual office holding, Opinion 464, *supra*, and the Committee's most recent determination on the subject, Reconsideration of Opinion 464, *supra*, relied essentially on the "appearance of impropriety" concept of the former *RPC* 1.7(c) which was eliminated by the adoption of Rules of Professional Conduct Revision, effective January 1, 2004.

Given that the appearance of impropriety is no longer a standard of conduct under the *RPCs*, the Committee is of the view that there is no longer a basis for a finding of a *per se* conflict in the dual office holding in the factual circumstances presented. The only inherent overlap in the responsibilities of the two entities is the municipality's obligation to deal with the board's budget when its budget referendum fails. In light of the essential autonomy of an elected board of education vis-à-vis the municipal government, an autonomy confirmed in a very recent decision of this Committee in Opinion 697, 181 *N.J.L.J.* 536, 14 *N.J.L.* 1563 (August 8, 2005) (currently on appeal to the New Jersey Supreme Court on other grounds), and in the absence of an actual conflict which would

call for recusal, the only potential obstacle to such dual office holding are current *RPCs* 1.7 (a)(2) and 1.8(k).

RPC 1.7(a) provides:

A current 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 1.8 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.

We find nothing in the facts presented that would suggest that such a "significant" or "substantial" risk exists so as to bar the holding of both positions by the inquiring attorney.