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

Opinion 706
Advisory Committee on Professional Ethics

Conflict of Interest: Concurrently Serving as Assistant County Counsel And Council Member in Municipality in Same County

An inquirer asks whether the elimination of the "appearance of impropriety" provision of former *RPC* 1.7(c)(2) permits an assistant county counsel to serve as a council member in a municipality in the same county. Such dual office holding clearly would have been prohibited under our Opinion 530, 113 *N.J.L.J.* 400 (1984) (an assistant county counsel cannot serve as mayor of a municipality within that county). The inquirer takes the position that, since that opinion relied upon the "appearance of impropriety," its prohibition against holding both offices no longer applies.

This Committee's Opinion 530 relies on the Supreme Court opinion in *In re Opinion No. 415*, 81 *N.J.* 318 (1979), which held that lawyers in the same firm cannot serve as county counsel and municipal attorney for a town in the same county. While the Court in that case clearly spoke in terms of the appearance of impropriety, Justice Schreiber, writing for the Court, took pains to detail the numerous situations in which the interests of a county and one of its constituent municipalities might conflict. 81 *N.J.* at 325-26. The Court noted that 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. The Court also cited numerous cases involving counties and their constituent municipalities as adversaries.

Quoting from *McDonough v. Roach*, 35 *N.J.* 153, 159 (1961), Justice Schreiber concluded: "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.'" 81 *N.J.* at 325. Obviously, the sheer numbers of transactional areas and adversarial cases have increased significantly in the years since *In re Opinion No. 415* was handed down.

Even though the Supreme Court has eliminated the "appearance of impropriety" provision, the *Rules of Professional Conduct* continue to impose limitations on attorneys who represent public entities. *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:
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> (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).

An entirely new section, *RPC* 1.8(k), with roots in the prior appearance of impropriety doctrine, 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.

An attorney who represents a county and concurrently seeks to be a member of a municipal governing body in the same county must assess whether 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 assess whether 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).

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.

Certain factors may diminish the probability that recurring actual conflicts will arise. The structural organization of the county counsel's office, distinctions that may exist between the position and responsibilities of county counsel and that of an assistant

county counsel, the full-time or part-time status of assistant county counsel, the municipality's geographical and population size as compared to that of the county, the municipality's form of government and structural organization, and the job responsibilities of the municipal council member are relevant. For example, a part-time assistant county counsel who has limited interaction with county counsel or limited responsibility relating to the business of the county may be able to avoid providing legal advice to the county on issues affecting the pertinent municipality.

The ultimate questions are whether there is a significant risk that the representation of the county will be materially limited by responsibilities to the municipality, *RPC* 1.7(a)(2), and whether, given the actual job duties as assistant county counsel and the actual obligations as a member of the municipal council, there is a substantial risk that an attorney's responsibilities to the municipality would limit her or his ability to provide independent advice or diligent and competent representation to the county, *RPC* 1.8(k). The attorney must fully and fairly consider the effect of divided loyalty and recurring challenges to objectivity and independence of judgment.

The inquirer does not provide sufficient details on the two positions or the factors described above to permit us to determine whether a *per se* ban under *RPC* 1.8(k) is appropriate in this case. We observe, however, that an attorney representing a county while concurrently serving as a member of a municipal governing body in the same county is likely to experience divided loyalty and challenges to his or her objectivity and independence of judgment on a recurring basis. The contexts in which this impairment will surface may not be readily foreseeable, and recusal on a case-by-case basis may not fairly serve the interests of either the municipality or the county, especially if it occurs

with any frequency. Assessing this frequency, and consequent harm to the public interest, is part of the analysis required of the attorney under *RPC* 1.8(k), and in some circumstances may require the attorney to refrain from holding both positions. While there cannot be a bright-line frequency standard, we are of the opinion that multiple recusals or withdrawals annually presumptively would not well serve the public interest.