



ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 749

**Conflict of Interest: Corporation Counsel
for a Municipality Concurrently Serving
as General Counsel for a Regional Fire and
Rescue Organization that Serves that Municipality**

Inquirer asks whether an attorney may concurrently serve as corporation counsel for a municipality and as general counsel for a regional fire and rescue (RFR) organization that serves that municipality and several neighboring municipalities. The Committee finds that a per se conflict of interest arises when an attorney concurrently serves as corporation counsel for a municipality and as general counsel for a RFR of which that municipality is a member.

Corporation counsel is retained by the municipality, which is organized under the Walsh Act form of government, run by a mayor and a Board of Commissioners, to act as its attorney of record. N.J.S.A. 40:70-1 et seq. The duties of corporation counsel are defined by local ordinance and include

supervision of the execution, preparation and enforcement of all contracts, deeds, documents, statutes, ordinances, resolutions or legal correspondence for the municipality as well as the duty to prosecute and defend all legal matters for or against the municipality or any of its officials, departments, employees or personnel.

The RFR was formed pursuant to the Uniform Shared Services and Consolidation Act, which provides for agreement between local governmental units and other entities for the provision of shared services. N.J.S.A. 40A:65-1 et seq. The Act authorizes the governing bodies of two or more local units to contract for the formation of a regional service agency for the provision of public services, including police, fire, and rescue services. The Inquirer explained that the member municipalities share the cost of fire and rescue services in accordance with agreements signed by the member municipalities. The agreements detail how the annual costs and expenses of operating the RFR will be allocated between each participating municipality. The RFR is governed by a “Management Committee” comprised of representatives of each of the constituent municipalities, which oversees budgetary decisions, personnel matters, operational policies and strategic planning.

The question before the Committee is whether inherent aspects of the lawyer’s anticipated dual role would create a per se structural conflict of

interest that would pose a substantial risk that the lawyer could not provide independent advice or diligent representation to one or both entities. Absent per se conflict, the dual representation must comply with RPC 1.7(a)(2)¹ and RPC 1.8(k).²

The New Jersey Supreme Court, in In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549 (2006), held that an attorney who “plenarily 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 “plenarily 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

¹ RPC 1.7(a)(2) provides that there is a conflict of interest when “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.”

² RPC 1.8(k) provides: “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.”

boards, agencies, or municipal court of the municipality. Id. at 567-69. An attorney who represents a municipality in a limited, not plenary, way must still comply with the provisions of RPC 1.7, RPC 1.9, and RPC 1.8(k). Id. at 568.

While Opinion 697 addressed conflicts concerning the representation of **private clients** before a subsidiary board or agency, its holding was expanded to conflicts concerning representation of the board or agency itself by the Committee in Opinion 736 “Lawyer May Concurrently Serve as Municipal Prosecutor and Planning Board Attorney in Same Municipality; Superseding Opinions 452 and 366” (June 25, 2019). There, the Committee reviewed an inquiry asking whether a lawyer may concurrently serve as municipal prosecutor and planning board attorney in the same borough. The Committee determined that if the municipal prosecutor was permitted to represent **private clients** in matters before the subsidiary agency in question, it follows that the municipal prosecutor may also concurrently serve as attorney **for** a subsidiary board or agency itself.

When analyzing local governmental conflicts of interest, the Committee noted that the appearance of impropriety doctrine was removed from the Rules of Professional Conduct in 2004. Prior Committee Opinions resolved primarily by reference to that doctrine are of little continued relevance. Instead, the Committee noted that the conflict should be examined under the

three tiers of per se conflicts identified by the Court in Opinion 697. If the lawyer is found to plenarily represent the municipality, the “member of the municipal family” doctrine is applied. If the lawyer is found to provide legal services to the municipality in a lesser role, they are no longer subject to broad, per se restrictions on their practice. Those lawyers are still subject to case-by-case restrictions and recusals under RPC 1.7(a)(2) and RPC 1.8(k).

In practice, where “membership” in the “municipal family” establishes 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,” a per se conflict of interest will be inferred. Opinion 697, 188 N.J. at 566 (citing RPC 1.8(k)).

In Opinion 722, “Conflict of Interest: Concurrently Serving as County Counsel and Mayor of a Constituent Faulkner Act ‘Strong Mayor’ Entity” (June 27, 2011), the Committee concluded that the lawyer could not concurrently serve as both county counsel and mayor of a constituent municipality. The Committee noted that Faulkner Act “strong mayor” municipalities concentrate substantial power in the hands of the chief executive. Mayors in these municipalities prepare budgets, supervise all municipal property, negotiate contracts for the municipality, appoint the heads

of administrative departments, along with other duties which include acting in the best interest of the municipality. County counsel is generally considered the “chief legal officer or advisor of the governing body of the county” and heads the county’s legal department. The Committee found a per se conflict in holding both positions.

Unlike the assistant county counsel in Opinion 706 “Conflict of Interest: Concurrently Serving as Assistant County Counsel And Council Member in Municipality in Same County” (July 3, 2006), who the Committee concluded could concurrently serve as a member of the municipal council in a municipality in the same county, the structural organization of county counsel’s office would not permit the same opportunity for case-by-case recusal for county counsel who sought to concurrently serve as mayor of a constituent municipality.

Here, corporation counsel is the chief legal officer for the municipality and thus owes a duty of loyalty to promote the individual interests of that municipality above other competing interests. General counsel for the RFR, however, would serve as chief legal counsel for a consortium that serves all constituent municipalities, and its general counsel would owe a duty of loyalty to promote the collective interests of the consortium as a whole and not only that one constituent member. The Committee concludes that these competing

loyalties present an inherent and unavoidable conflict of interests that would preclude a lawyer from serving in both roles concurrently.

In some ways the RFR is analogous to a subsidiary agency to each constituent municipality. On the other hand, it is also possible to conceptualize each municipality as a subsidiary to the RFR, in that any decision made by the consortium is necessarily a collective decision with ramifications for each funding entity. But unlike typical subsidiary agencies that are subjected to the control of the municipal governing body, each participating municipality is an autonomous and independent entity not subject to the ultimate authority of the RFR except to the extent it has contractually agreed to abide by collective decisions. It nevertheless still exercises its independent authority by participating in the governance through its role in the RFR Management Committee.

In order to achieve the efficiencies of shared services, each municipality has agreed to abide by the compromise resource allocation decisions made by the Management Committee of the RFR, even if those decisions do not maximize the interests of one of the constituent municipalities. In advising either the RFR or the municipality on how to exercise its authority to allocate resources in any particular situation, a lawyer attempting to act as counsel for

both entities would regularly confront the reality that their interests not only are not coterminous but often will conflict.

For example, how could the lawyer advise the RFR on which firehouses may be closed when he or she is also tasked as corporation counsel to the municipality with a duty to advocate for keeping the firehouses within its borders open? The Committee finds that a lawyer cannot serve as corporation counsel to a single funding entity while concurrently serving as general counsel to the entity being funded without creating a per se structural conflict of interest, not remediable by case-by-case recusal, that cannot be waived.^{3,4}

³ RPC 1.7(b)(1) and RPC 1.8(l) prohibits public entities from consenting to otherwise waivable conflicts of interest.

⁴ The Inquirer cites Opinion 292 “Conflict of Interest Attorney for Fire District Municipal Practice” (October 17, 1974) in support of the proposed dual representation. However, it is inapposite. While Opinion 292 concerned an attorney who represented the board of fire commissioners for a municipality, the question there was whether that attorney could appear before a municipal court in the same town to represent a third party on a non-related legal matter. The question was not whether the attorney could represent both the fire district and the municipality itself. For the fire district in question, and under the statutes that governed fire districting at that time, the Committee noted that the fire district was run by elected fire commissioners, and the budget was determined by referendum. Thus, the voters controlled both the membership of the commissioners and the overall budget for fire and rescue services. The Committee concluded that the fire district was analogous to an autonomous body not subject to municipal control. Thus, the Committee likewise concluded that employees of the fire district, including its counsel, were not subject to limitations on their private practice in the municipality.

We recognize that per se conflicts of interest have become disfavored since the Pollock Commission report recommended, and the Supreme Court enacted, the abolition of the appearance of impropriety rule. Nevertheless, we think this is one of the relatively rare situations in which individual recusals would be insufficient to permit a lawyer to provide competent representation to two entities whose interests would actually overlap with such regularity. We therefore answer the inquiry in the negative and conclude that a lawyer may not concurrently represent plenarily both a municipality and a RFR in which that municipality is a constituent member.