

RE: Advisory Opinion 2001-01
 Arkansas Bar Association

DATE: March 8, 2001

Subject: Concurrent conflicts with representation of local governments

Facts: A law firm is considering a civil lawsuit against a city. However, a member of the firm is a part-time city prosecutor. His city salary is paid directly to him and is not a part of any firm revenues. He would have no involvement in the lawsuit against the city.

Opinion: The Arkansas Rules of Professional Conduct prohibit concurrent conflicts. For an attorney to simultaneously represent a client and sue that client would deprive that client of the loyalty that is a fundamental part of the attorney-client relationship. The Official Comments to Arkansas Rule of Professional Conduct 1.7 state: "Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."

The disqualification of one attorney is imputed to all members of the firm. Ark. R. Prof. Conduct. 1.10(a). Likewise, the Rules do not permit a firm to create a Chinese Wall and screen one member of the firm from confidential information. The ethical rules presume that information is freely shared within a law firm, and that the disqualification of one is a disqualification of all.

In addition to the Rules themselves, recent judicial opinions give this committee guidelines. In recent years the Arkansas Supreme Court has applied the appearance of impropriety concept to conflict of interest disputes. See Norman v. Norman, 333 Ark. 644, 970 S.W.2d 270 (1998); McAdams v. Ellington, 333 Ark. 362, 970 S.W.2d 203 (1998); Burnette v. Morgan, 303 Ark. 150, 156, 794 S.W.2d 145, 148 (1990); and, First American Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990). In Burnette the court stated: [The principle] is "a rock in the foundation upon which [are] built the rules guiding lawyers in their moral and ethical conduct. This is a factor that should be considered in any instance where a violation of a rule of professional conduct is at issue."

The most pertinent case is City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982), where the Court found that an attorney who brought a class action to recover improperly collected water taxes, while at the same time representing the city in an employment discrimination action, acted unethically.

The differences between that case and this issue, namely a different lawyer in the firm handling the matters, the criminal and civil litigations, and the firm not being financially benefitted, while significant, are not sufficient to override the appearance of impropriety. To all outward appearances, while the firm is representing the city in criminal matters, it would be suing the city in a civil matter. Such a conflict is intolerable.

We note that the comments to Rule 1.7 suggest some instances in which an apparent concurrent conflict would be tolerated. However, those examples, such as suits for declaratory judgments or

suits with government lawyers representing government employees, present far more remote conflicts that present here.

Our Advisory Opinion 97-01 refused to adopt a per se rule on whether a lawyer may be retained by one independent agency of a city and simultaneously sue a separate independent agency or commission. Here such issues are not present. No independent agencies are involved. The representation would be directly against a client of the firm.

Conclusion: A law firm, one of whose members is a part-time attorney for the city, cannot bring a lawsuit against the city, even if the lawsuit is unrelated, unless both the city and the proposed civil litigant consent to and waive the conflict.

NOTICE

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ARKANSAS BAR ASSOCIATION

By: _____

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