

Re: Advisory Opinion 2006-01
Date: March 15, 2006

Subject: Conflict of Interest; City Outside Counsel

Issues: A law firm occasionally represents clients before a city council or before the city's planning commission on behalf of business clients for zoning matters and other issues. The firm is now interested in bidding for a contract with the city's Human Resources Department, under which a member of the firm would give advice on employment law matters and perhaps assist in litigation on wage and hour issues, adverse employment issues, and related matters. The firm asks whether such a role would be an impermissible conflict of interest under the Arkansas Rules of Professional Conduct.

Discussions: We previously discussed this issue in our opinion 97-01, which involved the representation of a city water commission. We stated: "the existence of an attorney-client relationship is an issue of fact. In this instance, relevant factors may include the relationship between the commission and the city, the terms under which the attorney has been hired by the commission, the control over the attorney exercised by the commission or the city, and the source of funds that are used to pay the attorney. . . We conclude that the Arkansas Rules of Professional Conduct neither expressly permit nor prohibit an attorney who represents a city commission from concurrently representing clients in matters before other branches of the same government. A finding of fact as to the nature of the client is required before a determination can be made as to whether a conflict of interest prohibited by the Arkansas Rules exists."

That opinion did not answer the issue of whether a water commission in a particular municipality was sufficient independent of the city so that the attorney could represent the commission while opposing other branches of the city. However, in the present situation the Human Resources Department which handles employment law matters can hardly be called a separate and independent commission. It does not have separate funding authority, nor a separate statutory basis; it is merely an administrative division of the city.

Since that 1997 opinion, the Arkansas Supreme Court has revised the Arkansas Rules of Professional Conduct.

Rule 1.7 now provides:

"(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:

- (1) the representation of one client will be directly adverse to another client; or
- (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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law:

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing."

We also note Comment 16 to Rule 1.7:

"[16] Paragraph (b)(2) describes conflicts that are non-consentable because the representation is prohibited by applicable law. . . . Decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest."

The Arkansas Supreme Court has stated: "Dual representation is particularly troublesome where one of the clients is a governmental body. So, an attorney may not represent both a governmental body and a private client merely because disclosure was made and they are agreeable that he represents both interests. . . . Where the public interest is involved, he may not represent conflicting interests even with the consent of all concerned." *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982).

Apparently such a conflict is prohibited, and therefore consent is not available under Rule 1.7(b).

Further, The Arkansas Supreme Court inserted Comment 37, which is not found in the Model Rules, but is based specially upon decisional law of the past decade: "[37] As an integral part of the lawyer's duty to prevent conflict of interests, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the Rules of Professional Conduct are at issue. The principle pervades these Rules and embodies their spirit."

It is irrelevant that one member of the firm will appear before the city council or planning commission on behalf of a private client, and another will represent the city on employment matters. For purposes of conflicts of interests, the firm is treated as an entity. Rule 1.10. If a single attorney cannot concurrently seek relief or permission from the city, while at the same time being employed by the city, neither can members of a firm. It seems to us to transgress

professional propriety for one member of a firm to be paid by the city, while another member of the firm seeks city permission, blessing, or approval for a private client or in particular challenges city action.

As we stated in Opinion 2001-01, concurrent conflicts are governed by Rule 1.7. Successive conflicts between the representation of a private client and a government entity are governed by Rule 1.11, which has a more relaxed standard. This issue is governed by Rule 1.7.

Conclusion: Nothing in the Rules prohibits a firm from seeking a position as outside counsel for a city on employment law issues. But such a position would bar any member of the firm from appearing before an integral part of the city and seeking relief for a private client. Any attempt by the city to consent and to waive the conflict would appear to be invalid under Arkansas case law.

NOTICE

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ARKANSAS BAR ASSOCIATION

By: _____
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