

RE: Advisory Opinion 97-01
Arkansas Bar Association

DATE: June 27, 1997

SUBJECT : Representation of
Municipal Commissions

This issue presented in this opinion is whether an attorney who represents a city agency or commission may represent other clients in their dealings with other branches of the city government. The further, more specific, issue is whether an attorney who represents, for example, a city water commission on an on-going basis may concurrently represent a landowner whose property is condemned by the city parks department or a citizen who wishes to bring a civil rights against the city police department.

These issues hinge upon the nature of the attorney-client relationship: namely whether the attorney has a relationship only with the city agency or whether the attorney has a relationship, even if less direct, with the city itself.

Counsel for the water commission has submitted extensive research documenting the independence of the entity from the city. {A.C.A. § 14-234-100 et. seq. } . If, in fact, the waterworks is a separate and distinct entity from the city, no inherent conflict of interest would exist if counsel for the waterworks represented a client adverse to the city. However, if the waterworks is found to be merely a division of the city, a conflict of interest may exist. The nature of the relationship between the city and the waterworks is a question of fact which this committee cannot resolve. However, the committee can provide the following guidelines in light of the requirements of the Ark. Rules of Professional Conduct.

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 under state law, the degree of independence that the commission has from 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.

An attorney has a duty of loyalty to a client. If the attorney concludes that the waterworks is also the city, then the attorney who represents the commission also has an attorney - client relationship with the city and he would obviously be barred from representing another client in an adverse relationship suit against the city. The governing law is found in Arkansas Rule of Professional Conduct 1.7 (a), which prohibits the representation of a client "if the representation of that client will be directly adverse to another client."

These issues are presented in City of Little Rock v Cash, 277 Ark. 494, 644 S.W. 2d (1982). In that case, which involved concurrent litigation, the Court stated: "A lawyer is charged with a high degree of loyalty to his client. Suing and defending the same client at the same time is, at the very best, unseely in that regard." Id. At 508.

On the other hand, if the attorney concludes that the city and waterworks are separate and distinct, then the issue is analyzed under Rule 1.7 (b), which says a lawyer shall not represent another client if the representation might be materially limited by the attorney's duty to the first client.

If the ability to represent the second client is not impaired by representation of the first client, no conflict exists. However, if representation may be materially hampered, the attorney must employ the three part analysis suggested by Rule 1.7(b) : (1) would a reasonable attorney believe that the representation of the second client would be adversely affected, (2) has the attorney informed the second client of the attorney's representation of the first client, and (3) has the second client knowingly consented and waived the potential conflict?

The language in the eighth paragraph to the Comment to Rule 1.7 is helpful: "For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party."

The initial burden of resolving questions of conflicts of interests is primarily the responsibility of the lawyer undertaking the representation. See Comment to Rule 1.7. The attorney should keep in mind that the Arkansas Supreme Court has applied the "appearance of impropriety" standard to disqualification matters. Berry v. Saline Memorial Hospital, 322 Ark. 182, 907 S.W. 2d 736 (1995) . However, use of that standard may override the right of a litigant to choose his own counsel. Saline Memorial Hospital v. Berry, 321 Ark. 588, 906 S.W. 2d 297 (1995) .

In deciding whether to proceed with the second client, the attorney should consider the likelihood that opposing counsel may move to disqualify the attorney. That possibility should be disclosed to the second client, who may be reluctant to retain an attorney who will face a disqualification motion.

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.

NOTICE

"This is an opinion only of the Arkansas Bar Association which is a voluntary association of attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association's best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee."

ARKANSAS BAR ASSOCIATION

By: _____
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