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Ethics of Representing Multiple Public Entities

Avoiding conflicts of interest after the elimination of the appearance of impropriety standard

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It seems that almost daily a story appears about a New Jersey politician being investigated for ethics violations. Public officials are under the proverbial microscope regarding all of their activities. Christopher Christie, the U.S. Attorney for the District of New Jersey, has made political corruption the cornerstone of his administration, having successfully convicted some of the most prominent public figures in the state. Acting Gov. Richard Codey has appointed former Supreme Court Justice Daniel O'Hern and Seton Hall Law School professor Paula Franzese to study the need for ethics reform in the state. Justice O'Hern and Professor Franzese have recently submitted their report to the acting governor. The report makes several recommendations, including the establishment of an independent State Ethics Commission and an Ethics Guide. The topic of ethics is so prevalent in New Jersey that it will likely dominate the upcoming gubernatorial election.

Lawyers who represent municipalities and governmental agencies also find themselves immersed in issues involving ethics. For many years, lawyers have been asked to provide opinions regarding potential conflicts of interest involving members of their governing bodies. More recently, attorneys have become the subject of ethics issues raised by members of the public or their own governing bodies. Typically, these issues surround potential conflicts of interest involving the attorney's representation of multiple public-entity clients. For these reasons, it is critical that lawyers representing municipal entities be conversant in the ethics decisions as well as the recent changes that have been made to the Rules of Professional Conduct.

RPC 1.7 has traditionally governed a lawyer's ethical duty when faced with a potential conflict of interest involving the representation of public entities. There is an established body of case law construing the "appearance of impropriety" standard formerly contained in RPC 1.7. Effective Jan. 1, 2004, the Supreme Court amended RPC 1.7 to delete the appearance standard, thereby changing the landscape of future ethics' decisions in this area.

Prior to the rule amendment, RPC 1.7 prohibited a lawyer from representing a public client if the representation of that client would be "directly adverse" to another client. Importantly, the prior rule left undisturbed the decisional law regarding the "appearance of impropriety" standard. It stated: "[t]his rule shall not alter the effect of case law or ethics opinions to the effect that ... in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible." Moreover, the prior rule recited the test to be applied: whether "an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients."

In *In re Opinion 415*, 81 N.J. 318 (1979), the Court scrutinized the propriety of an office association between counsel for a municipality and counsel for a county. Arguing that the possibility of a conflict was too remote to require the withdrawal from representing one of the two entities, the attorneys sought to continue the simultaneous representation of the county and a municipality within the county. Id. at 322. The Court disagreed, noting that the appearance doctrine was intended to instill public confidence in the integrity of the legal profession. Id. at 323. The

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Court noted that "[w]hen representation of public bodies is involved, the appearance of impropriety assumes an added dimension." Id. at 324. Thus, the Court found a per se ethics violation in an attorney's representation of both a county and a municipality within that county.

Since its decision in *Opinion 415*, the Court has applied the appearance standard with varying results. See *In re Opinion 662*, 133 N.J. 22 (1993) (finding no per se ban on an attorney, or an attorney and associate, from simultaneously serving as municipal attorney and municipal prosecutor in the same municipality); *In re Opinion 653*, 132 N.J. 124 (1993) (finding no per se ban prohibiting an attorney from serving simultaneously as county counsel and counsel to the county vocational school board); *In re Opinion 552*, 102 N.J. 194 (1986) (finding no per se ban on a municipal attorney representing both the municipality and individual officers and employees of that municipality when all have been sued as co-defendants in a §1983 civil rights action). But see *In re Opinion 569*, 103 N.J. 325 (1986) (approving the Advisory Committee's six-month disqualification rule prohibiting a former Deputy Attorney General from representing private clients in disciplinary proceedings before the state licensing board for which he had served as counsel and in which investigation of the Deputy Attorney General's client had begun during his employment by the state); *In re Opinion 452*, 87 N.J. 45 (1981) (upholding the Advisory Committee's per se prohibition of an attorney or members of one firm from serving the same municipality as both prosecutor and planning board counsel). Courts have also ruled that an attorney representing a municipality may also represent an autonomous agency in the municipality, such as a board of education or board of health. See *Bodkin v. Westwood*, 52 N.J. Super. 416, 425 (App. Div. 1958); *Grosso v. City of Paterson*, 55 N.J. Super. 164 (1959).

As stated, RPC 1.7 was amended effective Jan. 1, 2004 to delete the appearance of impropriety standard. This change was the result of much criticism of the rule on vagueness and other grounds over a period of many years. Indeed, the elimination of the rule had been advocated by the Kutak Commission, the Debevoise Commission, the American and New Jersey State Bar Associations and nearly every other state. One of the chief criticisms of the rule was that it imposed the "ordinary knowledgeable citizen" standard on courts and ethics panels deciding the cases, as well as on the attorneys who faced the potential conflict of interest.

The current version of RPC 1.7 proscribes representation that involves a "concurrent conflict of interest," which has been defined as 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." In addition, RPC 1.8 was amended to include a specific provision regarding attorneys employed by public entities. It provides that a lawyer representing a public body "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." If such a conflict exists, the public entity cannot consent to representation proscribed by the rule.

The rule traces concepts well grounded in the RPCs: diligence and competence. Also, the rule uses the term substantial, which has a specific definition contained in RPC 1.0. Thus, it would appear that the new standard in RPC 1.8 eliminates the vagueness complained of under the appearance test. The test is similar to other inquiries governing conduct of lawyers. Specifically, it imposes a duty on the lawyer to assess whether the representation would substantially affect the lawyer's duty to provide competence and diligence representation or render independent advice.

For lawyers representing public bodies, the rule changes are long overdue. They eliminate the murky waters of the appearance standard, and rely on well-settled concepts in ethics jurisprudence. Indeed, prior to the rule amendment, the mere mention of an "appearance of impropriety" was sometimes damning to an attorney representing public entities. Today, the inquiry is removed from the "ordinary knowledgeable citizen" and returned to its proper place: the lawyer's own judgment.

Lawyers who represent multiple public entities must analyze each potential representation to determine whether it will affect their diligence and competence or their ability to render independent advice to the public-entity client. Typically, such issues arise when attorneys represent contiguous municipalities whose interests may at times be adverse to one another, autonomous agencies within a county, or instrumentalities of the state and counties themselves. It is critical that attorneys practicing in this area fully understand the interrelationship between public entities, including budgeting, the providing of services, and the history of adverse action between similarly situated public entities.

Recently, the Supreme Court Advisory Committee on Professional Ethics issued a notice to the bar reminding lawyers of the elimination of the appearance of impropriety standard and of the process by which attorneys should submit inquiries to the committee. That the committee was required to issue such a directive indicates the level of activity the change in the rule has generated. The committee has prescribed that the inquiry must set forth the full factual details concerning the nature of the proposed representation and the potential conflict. Lawyers have always been encouraged to submit detailed inquiries to the committee when posed with a potential conflict involving the multiple representations of public entities. With the new rules governing conflicts of interest in this area, such inquiries are particularly prudent now. ■