

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2007-4**

Issued June 8, 2007

**SYLLABUS:** A city director of law must apply Rule 1.11 and Rule 1.7 of the Ohio Rules of Professional Conduct to determine whether a conflict of interest exists between or among a city, city officials, or city entities and whether representation may be provided to each by assistant city law directors employed in the law director's office. Rule 1.11(d)(1) requires a city director of law to comply with Rule 1.7. The application of Rule 1.7 requires the exercise of professional judgment. First, a city director of law must determine whether there is a conflict of interest under Rule 1.7(a)(1) or (a)(2). Not every disagreement among a city, its officials or its entities creates a conflict of interest. Second, if a conflict of interest exists, the city director of law must determine whether the conflict falls under Rule 1.7(b) or Rule 1.7(c). Rule 1.7(b) allows the representation of clients with a conflict of interest, if the ameliorating conditions set forth in Rule 1.7(b)(1) through (3) are met. The conditions are that the city director of law must determine whether competent and diligent representation could be provided, such as through different assistant city law directors; must obtain informed consent confirmed in writing by the affected clients, and must determine that the representation is not prohibited by Rule 1.7(c). Rule 1.7(c)(1) prohibits, even with client consent, representations prohibited by law. Rule 1.7(c)(2) prohibits, even with client consent, a representation of clients that involves the assertion of a claim by one against another in the same proceeding. For purposes of Rule 1.7(c), a proceeding includes acts and events before a tribunal, as well as acts and events before mediators, arbitrators, or other administrative bodies.

Whether representation may be provided by different assistant city law directors employed in the office of the city director of law depends upon whether the conflict of interest is one that may be ameliorated under Rule 1.7(b) or one that falls under Rule 1.7(c). For conflicts of interest that may be ameliorated under Rule 1.7(b), representation by different assistant law directors is appropriate if the law director determines that the conditions set forth in (b)(1) through (b)(3) are met. For conflicts of interest that fall under Rule 1.7(c), once a city director of law determines that a representation is prohibited by law or that the city, its officials, or its entities have a claim against each other in the same proceeding, the city director of law should not attempt to represent all of them in the

proceeding, not even through different assistant law directors employed in the office of the city director of law.

**OPINION:** This opinion addresses a question regarding conflicts of interest of a city director of law in representing a city, city officials, and city entities. This opinion does not address conflicts of interest of the attorney general's office in representing several government agencies in intragovernmental legal controversies.

When there is a conflict of interest between or among a city, city officials, or city entities, is it proper for a city director of law to provide legal counsel to each through different assistant law directors employed in the city law director's office?

### Duties of a city director of law

As a lawyer, a city director of law is subject to the Ohio Rules of Professional Conduct, for which the Board of Commissioners on Grievances and Discipline is the appropriate advisory body. As a government officer, a city director of law is also subject to Ohio Ethics Law, for which the Ohio Ethics Commission is the appropriate advisory body. This advisory opinion is limited to the Board's application of the Ohio Rules of Professional Conduct, pursuant to its advisory authority under Gov.Bar R. V § 2(C).

A city director of law of a municipal corporation provides legal advice and representation to a municipality, its officers, and its entities. The legal duties of a city director of law of a municipal corporation are established by law. See e.g., Ohio Rev. Code Ann. §§ 705.11, 733.51, 733.52, 733.53, 733.54, 733.56, 733.57, 733.58, 733.62 (West 1994); § 1901.34 (West Supp. 2006), and § 3313.35 (West 2005). In a charter city which exercises the powers of local self-government pursuant to Section 3, Art. XVIII, Ohio Constitution the legal duties will depend upon the charter.

Sometimes, a city director of law employs assistant law directors in the office to assist in carrying out the legal duties of the office. Ohio Rev. Code Ann. § 733.621 (West 1994).

Inevitably, a city director of law will face conflicts of interest when fulfilling the duty of providing legal advice and representation to a city, city officials or its entities. The requester of this opinion raises two examples: 1) providing legal advice to city and to a school board when there is a dispute between the two; 2) representing a city in a disciplinary proceeding against an employee before the civil service commission while providing legal counsel to the civil service commission regarding the employee discipline matter.

### Rules governing conflicts of interest of a current government lawyer

Rule 1.11 and Rule 1.7 of the Ohio Rules of Professional Conduct are pertinent to this opinion. Rule 1.11 is a special rule governing conflicts of interests of a current government lawyer. Rule 1.7 is the general rule governing conflicts of interest with current clients. A current government attorney is required by Rule 1.11(d)(1) to comply with Rule 1.7, except as law may otherwise expressly permit.

**Rule 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYERS**

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:

(1) Rules 1.7 [Conflicts of Interest: Current Clients] and 1.9 [Conflicts of Interest: Former Clients];

(2) [Omitted].

Comment [1] to Rule 1.11 explains that a lawyer who has served or who is currently serving as a public officer or employee is subject to the prohibition against concurrent conflicts of interest in Rule 1.7.

**RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

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

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

### Special consideration given to government lawyers

In application of these rules, it is important to note that The Ohio Rules of Professional Conduct give special consideration to government lawyers as to conflicts of interest.

Rule 1.11(d) requires a government lawyer to comply with Rule 1.7, **except as law may otherwise expressly permit**.

The Scope Section of the rules acknowledges there may be circumstances in which a government lawyer may undertake a representation of multiple parties where a private lawyer may not. Comment 18, of the Scope Section states:

Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. **Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority. [Emphasis added].**

Further, special consideration is given to government attorneys as to imputation of conflicts of interest. Comment [2] to Rule 1.11 explains:

Divisions (a)(1), (a)(2) [which apply to former service as a government officer or employee] and (d)(1) [which applies to current service as a government officer or employee] restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this rule. Rather, division (b) sets forth a special imputation rule for former government lawyers that provides screening [by a law firm] and notice [to the government]. Because of the special problems raised by imputation within a government agency, division (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

### Application of rules

Application of Rule 1.7 requires professional judgment. Disagreements are bound to occur with the city, its officers, and its entities. But, not every disagreement creates a conflict of interest for a city law director.

First, a city director of law must determine whether there is a conflict of interest under Rule 1.7.

A determination of whether there is a conflict of interest under either Rule 1.7(a)(1) or (a)(2) requires a city director of law to examine the duties of the office and the identity of the entities or officials to whom these duties are owed. See ABA Formal Opinion 97-405 (1997) for its discussion of the identity of a government client for conflict of interest purposes.

Under Rule 1.7(a)(1) a conflict of interest exists in the representation if the city, its entities, or the city officials are directly adverse to each other. Direct adversity should not be equated with discussions in which there are differing opinions. A city, its entities, or its officials may express different views without being directly adverse to each other. Expression of different views while discussing an issue or topic is part of the process of city government. Determination of a direct adversity conflict of interest is fact and circumstance specific.

Under Rule 1.7(a)(2), a conflict of interest exists if there is a substantial risk that the ability of the city director of law to carry out the representation of one (the city, its officials, or its entities) will be materially limited by responsibilities to

another. Determination of a material limitation conflict of interest is fact and circumstance specific.

Second, if there is a conflict of interest, the city director of law must determine whether the conflict may be ameliorated under 1.7(b) so that representation of all the affected clients may be undertaken, or whether such representation all the affected clients is flatly prohibited by Rule 1.7(c).

Under Rule 1.7(b) a conflict of interest may be ameliorated if under (b)(1), a city director of law decides that competent and diligent representation could be provided, such as through different assistant law directors appropriately screened; if under (b)(2) a city director of law obtains informed consent, confirmed in writing by the affected clients to the dispute, and under (b)(3), a city director of law determines that the representation is not prohibited by Rule 1.7(c).

Under Rule 1.7(c) a representation is flatly prohibited, even with the informed consent of the clients if 1) the representation is prohibited by law or 2) the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

The word “proceeding” as used in 1.7(c)(2) is not defined in the rule. We look outside the Rule for its meaning.

proceeding. 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing. 5. Bankruptcy. A particular dispute or matter arising within a pending case—as opposed to the case as a whole.

*Black’s Law Dictionary* 1241 (8<sup>th</sup> ed. 2004).

legal proceeding. Any proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.

*Black’s Law Dictionary* 915 (8<sup>th</sup> ed. 2004).

A “proceeding” under Ohio Rule 1.7(c) is not limited to a proceeding before a tribunal. A “proceeding” includes acts and events before a tribunal, as well as acts and events before mediators, arbitrators, or other administrative bodies.

In adopting Rule 1.7(c), Ohio chose a different approach from the ABA. ABA Model Rule 1.7(c) uses the words “proceeding before a tribunal.” Comment 17 to ABA Model Rule 1.7(c) explains that mediation is not a “proceeding before a tribunal.” Ohio’s Rule 1.7(c) does not limit a “proceeding” to a “proceeding before

a tribunal.” The notes following Ohio’s Rule 1.7(c), in the section entitled Comparison to ABA Model Rules of Professional Conduct, explain that a proceeding could include mediation.

Representation by assistant city law directors employed in the office of the city director of law

As to representation by assistant city law directors employed in the office of the city director of law, the Board’s view is as follows. For those types of conflicts of interest that can be ameliorated under Rule 1.7(b) by compliance with the requirements of Rule 1.7(b)(1) through (b)(3), representation through different assistant law directors may be appropriately carried out—the affected clients to the conflict have the opportunity of disclosure and informed consent confirmed in writing.

But, for conflicts of interest falling under Rule 1.7(c), namely, a representation prohibited by law or a representation involving a claim *in the same proceeding* by one client against another to whom the city law director has a legal duty to represent, the representation of each affected client should not be carried by the city director of law, even through different assistant city law directors employed in the office of the city director of law. Rule 1.7(c) provides no consent provision to ameliorate the conflict.

Thus, if a city director of law determines that the city, its officials, or its entities have a claim against each other in the *same proceeding*, the city director of law should not attempt to represent all the sides in the proceeding, even through different assistant city law directors employed in the office of the city director of law.

In both examples raised by the requester more facts would be needed for a determination. As to the first example raised by the requester, a city director of law or his or her assistant law directors providing legal advice to a city and to a school board when there is a dispute between the two, more facts would be needed such as whether there is a conflict of interest and whether there is a proceeding in which claims by one against the other are asserted. However, as to the second example raised by the requester, a city director of law representing a city in a disciplinary proceeding against an employee before the civil service commission while providing legal counsel to the civil service commission regarding the employee discipline matter, there is a strong appearance that advising a civil service commission as to a particular employee discipline matter while representing the city in the matter before the commission is inappropriate under Rule 1.7(c).

Thus, in conclusion, the Board advises as follows. A city director of law must apply Rule 1.11 and Rule 1.7 of the Ohio Rules of Professional Conduct to determine whether a conflict of interest exists between or among a city, city

officials, or city entities and whether representation may be provided to each by assistant city law directors employed in the law director's office. Rule 1.11(d)(1) requires a city director of law to comply with Rule 1.7. The application of Rule 1.7 requires the exercise of professional judgment. First, a city director of law must determine whether there is a conflict of interest under Rule 1.7(a)(1) or (a)(2). Not every disagreement among a city, its officials or its entities creates a conflict of interest. Second, if a conflict of interest exists, the city director of law must determine whether the conflict falls under Rule 1.7(b) or Rule 1.7(c). Rule 1.7(b) allows the representation of clients with a conflict of interest, if the ameliorating conditions set forth in Rule 1.7(b)(1) through (3) are met. The conditions are that the city director of law must determine whether competent and diligent representation could be provided, such as through different assistant city law directors; must obtain informed consent confirmed in writing by the affected clients, and must determine that the representation is not prohibited by Rule 1.7(c). Rule 1.7(c)(1) prohibits, even with client consent, representations prohibited by law. Rule 1.7(c)(2) prohibits, even with client consent, a representation of clients that involves the assertion of a claim by one against another in the same proceeding. For purposes of Rule 1.7(c), a proceeding includes acts and events before a tribunal, as well as acts and events before mediators, arbitrators, or other administrative bodies.

Whether representation may be provided by different assistant city law directors employed in the office of the city director of law depends upon whether the conflict of interest is one that may be ameliorated under Rule 1.7(b) or one that falls under Rule 1.7(c). For conflicts of interest that may be ameliorated under Rule 1.7(b), representation by different assistant law directors is appropriate if the law director determines that the conditions set forth in (b)(1) through (b)(3) are met. For conflicts of interest that fall under Rule 1.7(c), once a city director of law determines that a representation is prohibited by law or that the city, its officials, or its entities have a claim against each other in the same proceeding, the city director of law should not attempt to represent all of them in the proceeding, not even through different assistant law directors employed in the office of the city director of law.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.**