



New York State Bar Association
Committee on Professional Ethics

Opinion 965 (4/10/13)

Topic: Conflicts of interest

Digest: A Town attorney who has given a Town building inspector legal advice about issuance of a certificate of occupancy for a building may, ordinarily, appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building. If there were unusual circumstances that would involve the attorney in representing differing interests, then the attorney could not represent the Board absent appropriate client consent.

Rules: 1.7; 1.13(a), (d)

FACTS

1. The inquirer was retained by a Town to provide services as Town Attorney. In that capacity, the inquirer provided legal advice to the Town building inspector concerning issuance of a certificate of occupancy for a building to be constructed by Property Owner A pursuant to a building permit issued by the Town. Property Owner B, a neighbor of Property Owner A, had objected to issuance of the building permit to Property Owner A and appealed that issuance to the Town Zoning Board of Appeals, which denied the appeal. Property Owner B has commenced an Article 78 proceeding against the Zoning Board of Appeals. The Zoning Board of Appeals wants the inquiring attorney to appear for it in the Article 78 proceeding.

QUESTION

2. May an attorney appear for a Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit, although the attorney has given a Town building inspector legal advice concerning issuance of a certificate of occupancy for the building in question?

OPINION

3. A lawyer for a governmental organization, like a lawyer for a private organization, represents the organization as an entity and does not thereby automatically represent any of its constituent individuals. *See* New York Rules of Professional Conduct (“Rules”), Rule 1.13(a) & Cmt. [9]. However, the lawyer may be engaged to represent one or more such constituents as well, subject to the provisions of Rule 1.7 on conflicts of interest. *See* Rule 1.13(d).

4. Thus, a lawyer providing services to constituents of a governmental entity does not necessarily represent those constituents in their own right, but rather may be providing the services solely in the course of representing the entity. In particular, a Town attorney may provide legal services to constituents like a building inspector and a Zoning Board of Appeals,¹ but such services may nonetheless be rendered in the course of representing the town rather than those constituents.² Whether in a given case the attorney for an entity represents only that entity or also some of its constituents “can depend on the circumstances and may be a question of fact,” and it will ultimately depend on legal considerations beyond the scope of the Rules. Rules Scope ¶ 9; *see* Rule 1.13, Cmt. [9] (referring specifically to government entities). Such matters are not within our jurisdiction, and we do not opine on them.

5. Rule 1.7(a)(1) provides that except when allowed by appropriate client consent, “a lawyer shall not represent a client if a reasonable lawyer would conclude that...the representation will involve the lawyer in representing differing interests....”

6. Insofar as the lawyer provides services to various constituents in the course of representing the Town as an entity, there will be no representation of differing interests, but only a representation of the interests of the Town. A lawyer may represent a single client in multiple matters without risk of representing differing interests. *See* Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated* 266 (2013 ed.) (Rule 1.7(a)(1) can create conflicts for any lawyer or law firm “that has more than one client”).

7. We also consider the situation that would arise if the inquirer’s proposed appearance in the Article 78 proceeding were to involve a representation of the Zoning Board of Appeals in its own right. In that case, there could theoretically be representation of differing interests, but that is not to say that such differing interests would actually exist.

8. When we previously considered such a situation, we found the existence of differing interests unlikely. We opined that “the duties owed to the town board by the office of the town attorney, as well as the preeminent authority of that board, usually will be of no ethical relevance to the assistant’s service as counsel to the zoning board of appeals; and, under normal circumstances, there would be no impropriety in an assistant town attorney accepting assignment to act as counsel to the zoning board of appeals.” N.Y. State 501 (1979). That opinion was

¹ “The zoning board of appeals is an agency of the town and the assistant town attorneys are generally obliged to act in a manner consistent with the broad scope of the duties impressed upon the office of the town attorney. Those duties include rendering legal advice to the town’s zoning board of appeals.” N.Y. State 501 (1979) (citing 21 Op. State Compt. 322 (1965) (duties of town attorney include acting as legal advisor to all town officers) and 1973 Atty. Gen. (Inf.) 208 (interpreting Town Law§ 20[2] to require town attorney to render legal advice to all town boards)).

² *See* 21 Op. State Compt. 322 (1965) (duties of a town attorney include acting as legal advisor to all town officers “in their official capacities”); *cf.* N.Y. City 2004-03 (“unless circumstances indicate otherwise, a government lawyer representing an official named solely in his or her official capacity would still, in effect, be representing the client agency alone, and, unless circumstances indicated otherwise, the government lawyer would deal with the named official as a constituent of the agency rather than as someone personally represented by the government lawyer”).

decided under the prior Code of Professional Responsibility, but we perceive no difference in the current Rules of Professional Conduct that would lead to a different result.

9. On the other hand, if in fact there were differing interests, then the attorney could not represent the Zoning Board of Appeals absent appropriate client consent under Rule 1.7(b). Situations in which differing interests could arise are conceivable. Indeed, N.Y. State 501 concerned an Article 78 proceeding brought against a zoning board of appeals not by a property owner but by the Town Board. We noted that when “the relationship between the two boards has become antagonistic to the point where one seeks to institute suit against the other, the theoretical harmony of their relationship must give way to the reality of their conflicting interests,” and we concluded that “counsel fully independent from the office of the town attorney should be retained to represent the zoning board of appeals.” *See also* Rule 1.7(b)(3) (conflict may not be cured by client consent when attorney represents two clients before a tribunal where one is asserting a claim against the other).

10. The current inquiry, however, does not involve any proceeding brought by the Town against the Zoning Board of Appeals. Nor is there any other respect in which the facts of the inquiry contain any suggestion of differing interests that could take this situation out of the ordinary rule.

CONCLUSION

11. Under the facts of the inquiry, an attorney who gave legal advice to the Town Building Inspector as to issuance of the certificate of occupancy for a building may appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building.

(72-12)