



**New York State Bar Association  
Committee on Professional Ethics**

Opinion 1055 (5/27/15)

**Topic:** Municipal employee, business transaction with client, personal conflict of interest

**Digest:** The Rules do not prohibit a city’s lawyer from purchasing from that city or the city’s Urban Renewal Agency (acting as agent for the city) real property owned by the city, if (1) the proposed purchase transaction complies with any applicable statute or regulation governing conflicts of interest of government employees, (2) the lawyer is not responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice, and (3) the lawyer is not in a position to use confidential information of the city in connection with the transaction. If the lawyer is (1) responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice and/or (2) in a position to use confidential information of the city in connection with the transaction, the lawyer may nevertheless ethically purchase the property and/or use such information with the informed consent of the city-client if the lawyer is reasonably certain that the city is legally authorized to waive a conflict of interest (or consent to the use of confidential information, as applicable) and the city gives informed consent through a process sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

**Rules:** 1.6(a) & (b), 1.7(a)(2), 1.8(a), 8.4(b), 1.11

**FACTS**

1. The inquirer is an Assistant Corporation Counsel for a city in New York State (the "City"). As part of the inquirer's job duties the inquirer appears on the City's tax foreclosure matters. Typically, the inquirer files a motion in Supreme Court under Article 11 of the New York Real Property Tax Law, and, once an order is granted, the inquirer enters the order and records a City tax deed. After the City becomes the legal owner of certain properties as a result of the non-payment of taxes, the City markets the property either through the City's Urban Renewal Agency ("URA") or through a public auction. The URA is a public benefit corporation created by the New York State Legislature under Section 553 of the New York General Municipal Law. It provides access to individuals, community organizations and other developers interested in redeveloping properties that have been tax-foreclosed or abandoned or are distressed properties acquired by the City.

2. The inquirer is interested in purchasing a piece of property being sold by the URA. We assume that the URA has its own counsel and is not looking to the inquirer to exercise professional judgment with respect to sale transactions. The inquiry does not state whether the URA has complete discretion with respect to the sale or whether the City has any role regarding

the sale or the negotiation of sale terms, and, if so, whether it would be within the inquirer's job duties to advise the City.

## QUESTION

3. May an Assistant Corporation Counsel whose job duties include appearing on the City's tax foreclosure matters purchase a piece of property that was acquired by the City in a tax foreclosure proceeding and that is being sold on behalf of the City by the City's Urban Renewal Agency?

## OPINION

4. At the outset, we note that we do not rule on matters of law. For example, the General Municipal Law contains provisions on conflicts of interest of municipal officers and employees, and authorizes a city to have a code of ethics as well as a board of ethics to render advisory opinions to officers and employees regarding their obligations under the law and any code of ethics adopted by the city. *See* General Municipal Law, Art. 18. We take no position here on whether the proposed transaction would violate the law. In the event the transaction is illegal and reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, it would violate Rule 8.4(b) of the New York Rules of Professional Conduct (the "Rules"). *See* N.Y. State 845 (2010). In discussing the applicable provisions of the Rules, the remainder of this opinion assumes that the proposed purchase transaction does not violate any applicable law.

### If the Real Property is Being Sold By or on Behalf of the City

5. The answer to the question posed may differ, depending on whether the Urban Renewal Agency is acting as agent for the City or as owner of the property. We will assume, first, that the URA is acting as agent for the City and that the inquirer would be purchasing the property from the City.

### Conflicts of Interest

6. Business transactions between a lawyer and client are governed by Rule 1.8(a), which provides:

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a

reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

7. Rule 1.7(a)(2) more generally governs a lawyer's personal conflicts of interests. It provides:

(a) Except as provided in paragraph (b) [which contains a number conditions under which an exception may be available, including the informed consent of the client], a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

8. We believe that when Rule 1.8 applies, Rule 1.7(a)(2) is not applicable. This is consistent with the principle of statutory construction that rules governing specific matters supersede more generally applicable rules. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."). Rule 1.7 contains the general rules on conflicts of interest, while Rule 1.8, as its title -- "Current Clients: Specific Conflict of Interest Rules" -- indicates, contains rules governing specific conflicts of interest. In any event, the requirements for client consent to conflicts under Section 1.8(a) are at least as stringent as those under Rule 1.7(b).

9. Purchasing real property from the City constitutes a business transaction with the client. Moreover, the City and the lawyer have differing interests in the transaction, in that the City is interested in receiving the highest price for the transaction, while the lawyer-purchaser is interested in paying the lowest price. Consequently, a key issue in determining whether Rule 1.8 applies is whether the City expects the inquirer to exercise professional judgment for the protection of the client -- and we believe the answer to that question depends upon whether the lawyer is responsible for legal advice regarding property sales or supervises other lawyers who are responsible for that advice. If the inquirer is responsible for such advice, or supervises other lawyers who are responsible for that advice, it puts into question whether the client's consent is fully informed. If the inquirer supervises such other lawyers, it also raises the question whether the inquirer would be doing indirectly through subordinates what a lawyer cannot do directly. *See* Rule 8.4(a).

10. If other lawyers in the City's law department or the URA are responsible for giving legal advice to the City regarding property sales, and if the inquirer does not supervise those lawyers regarding property sales, then Rule 1.8(a) by its terms should not apply.<sup>1</sup>

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<sup>1</sup> Rule 1.8(a) applies where the client expects the lawyer to exercise professional judgment in the transaction for the protection of the client. Comment [1] to Rule 1.8 states: "If a lawyer elects . . . to enter into a business transaction with a current client, the requirements of [Rule 1.8(a)] must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the

11. But if the inquirer is responsible for giving legal advice to the City regarding property sales, or supervises other lawyers responsible for giving legal advice to the City regarding property sales, then Rule 1.8(a) prohibits the lawyer from entering into a purchase transaction unless (1) the terms are fair and reasonable to the client, (2) the client is advised to seek the advice of independent legal counsel and (3) the client gives informed consent in writing. Comment [1] to Rule 1.11 warns that statutes and regulations governing government ethics may circumscribe the extent to which a government agency may give consent under Rule 1.11. The inquirer should determine whether the same legal impediment applies to consents under Rule 1.8(a).

12. The requirements of informed consent are set forth in Rule 1.0(j). Until 1992, a long line of ethics opinions had held that the "government" could not consent to a conflict of interest. However, in N.Y. State 629 (1992), we determined that the question of whether the government can consent to a conflict is one of law and that the lawyer may accept consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

13. If Rule 1.8(a) does not apply, Rule 1.7(a)(2) is implicated. The question under Rule 1.7(a)(2) is whether the lawyer's purchase of property from the City creates a significant risk of adversely affecting the lawyer's professional judgment on behalf of the City in matters within the realm of the lawyer's job as Assistant Corporation Counsel. This is a question of fact that is beyond the jurisdiction of our Committee. The inquirer must make that determination. If the property purchase would result in such a significant risk, then the lawyer must consider the applicability of Rule 1.7(b)(1)-(3), all of which describe circumstances under which a conflict is non-consentable (i.e. cannot be waived by the client). If the conflict is consentable, then the lawyer must obtain the client's informed consent to the conflict pursuant to Rule 1.7(b)(4).

### Our Prior Opinions

14. Two prior opinions of the Committee -- both decided under the former Code of Professional Responsibility -- are consistent with the analysis above. In N.Y. State 470 (1977), we held it to be improper for a city attorney to purchase a city-owned building when (i) the lawyer's official duties include giving legal advice to the chairman of that city's urban renewal agency and the common council, and (ii) the common council must approve the sale. N.Y. State

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client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation . . . ." We believe that a number of factors will determine whether the client expects the lawyer to exercise professional judgment on the client's behalf. These include (i) whether the client has other counsel in the matter, for example, because it is a corporation or other entity with a legal department, (ii) whether the lawyer is responsible for client matters in the subject area, and (iii) whether the client is an individual or an entity and the client's level of sophistication in legal matters. We believe it is more likely that an individual client or one that is not sophisticated in legal matters is more likely to rely on a lawyer that does not represent the client in that matter than would be the case with an institutional client.

470 cites DR 5-104(A) -- the predecessor to Rule 1.8(a) -- although the gravamen of that opinion, as well as of two additional opinions that it cites, was that the nature of the inquiring attorney's public duties was such that the attorney appeared to have some influence upon the work of the urban renewal agency. Consequently, we opined that the attorney could not be involved in a transaction that would require any action of the agency.

15. Similarly, in N.Y. State 558 (1988), the inquirer was employed by the Department of Social Services, which proposed to sell some property that the agency had acquired, in a public sale by sealed bids that would be reviewed by the Commissioner of Social Services. We opined that, because the statute gave discretion in the bid process to the Social Services Department, which might be looking to the lawyer for the exercise of professional judgment, the lawyer could not participate in the bid process. We also stated that the city could not consent to the conflict, because, as noted in paragraph 12 above, at that time a long line of ethics opinions had held that a government entity could not consent to a conflict of interest. Finally, in N.Y. State 558, we found that the lawyer's interest in purchasing the property would conflict with those of the municipality because the lawyer had access to the municipality's appraisal of the property and therefore had information that would undermine the fairness of the bidding process.

#### If the Real Property is Being Sold on Behalf of the Urban Renewal Agency

16. If the City has transferred the lien to the URA, then the purchase transaction would not be with the client -- the City -- and neither Rule 1.8(a) or Rule 1.7(a)(2) would apply.

#### Use of Confidential Client Information

17. Rule 1.6(a) prohibits a lawyer from knowingly using confidential information of the client to the disadvantage of a client or for the advantage of the lawyer, except as specifically authorized in section 1.6. The inquirer here represents the City in tax foreclosure matters. The inquiry notes that the inquirer files a motion in Supreme Court under Article 11 of the New York Real Property Tax Law, and, after an order is granted, enters the order and records a City tax deed. The inquiry does not state whether, as a result of that role, the inquirer gains any information about the property that would give the inquirer an advantage in an eventual purchase transaction. If that were the case, then the lawyer could use such information only with the informed consent of the client under Rule 1.6(a)(1), and it would be irrelevant whether the seller of the property were the City or the URA.

### **CONCLUSION**

18. The Rules would not prohibit a city's lawyer from purchasing from that city or the City's Urban Renewal Agency (acting as agent for the city), real property owned by the city, as long as (1) the proposed purchase transaction complies with any applicable statute or regulation governing conflicts of interest of government employees, (2) the lawyer is not responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice, and (3) the lawyer is not in a position to use confidential information of the city in connection with the transaction. If the lawyer is responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice and/or in a

position to use confidential information of the city in connection with the transaction, the lawyer may nevertheless ethically purchase the property and/or use such information with the informed consent of the city-client if the lawyer is reasonably certain that the city is legally authorized to waive a conflict of interest (or consent to the use of confidential information, as applicable) and the City gives informed consent through a process sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

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