



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

Opinion 1242 (07/07/2022)

Topic: Conflicts; Town Attorney

Digest: A town attorney is prohibited from representing a private client before boards of a neighboring town with respect to zoning and land use matters if the town attorney has conflicting personal interests, unless the conflict is consentable and the town attorney obtains informed consent from both the town board that appointed him and the private client. In any case, Rule 1.11(f)(2) prohibits the town attorney from using his official position to improperly influence a tribunal to act in a private client's favor.

Rules: 1.0(f) & (w); 1.7(a)(1)-(2) & (b); and 1.11(f)(2)

FACTS:

1. The inquirer is a town attorney who, with the consent of the town board that appointed him, has continued to maintain a private practice. In his private practice, the inquirer represents a client who has commercial real estate interests both within the town he serves and in neighboring towns. The inquirer would like to represent the private client on a zoning and land use matter in one of those neighboring towns.

QUESTION:

2. May a town attorney represent a private client on a zoning and land use matter in another town if the private client also has commercial real estate interests within the town the town attorney serves?

OPINION:

3. Absent informed consent from each affected client, Rule 1.7(a) of the New York Rules of Professional Conduct ("Rules") prohibits concurrent representations when a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (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. [*Emphasis added.*]

Rule 1.7(a)(1): Differing interests among clients

4. "Differing interests" are defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."

5. Zoning and land use issues come before the town board, planning board, zoning board and perhaps other boards in the town which the inquirer serves. These boards normally fall within the

definition of a “tribunal” in Rule 1.0(w), which provides that the term “Tribunal” denotes “a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. ...”

6. The zoning and land use issues that come before these boards may be of regional or county-wide importance. The same or similar zoning and land use issues, implicating the same or similar development and land use policies and concerns, may come before boards of coordinate jurisdiction in neighboring towns – for example, the protection of environmentally sensitive areas, the preservation of open space and agricultural lands, waterfront development, the creation of multi-family or two-family zoning districts, or the expansion of commercial uses in business districts.

7. It would appear, at first blush, that the town attorney would be representing “differing interests” in a situation where the same or similar land use issues were at play in both the inquirer’s own town and a neighboring town, and the inquirer took a position on a land use issue on behalf of the private client in the neighboring town that contradicts the position favored by the town board that appointed him. The Comments to Rule 1.7, however, indicate that Rule 1.7 does not ordinarily require client consent to such a conflict, which is often called a “positional” or “issue” conflict. Specifically, Comment [24] to Rule 1.7 provides in pertinent part:

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. ...

8. Accordingly, even if the inquirer here, in representing his private client before a neighboring town’s board, were to take a position inconsistent with a position that the town board employing him would take, there would be no conflict of interest within the meaning of Rule 1.7(a)(1).

Rule 1.7(a)(2): Personal interest conflicts

9. Nevertheless, the inquirer may have a conflict under Rule 1.7(a)(2) if there is a significant risk that his personal and financial interests would adversely affect the inquirer’s professional judgment in representing the town board that employs him or the private client in the neighboring town. As the rest of Comment [24] to Rule 1.7 states:

[24] ... A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. ... Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients’ interests. If there is significant risk of an adverse effect on the lawyer’s professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation. [Emphasis added.]

10. A significant risk might exist here. For example, the inquirer might not zealously advocate

for a position that would benefit the private client in the neighboring town if that position would be contrary to the preferred land use policies of the town board that employs him. The inquirer in that case might “pull his punches” out of concern that the town board that appointed him would be so displeased that the town board would fire him or refuse to renew his appointment, or that the town board would revoke its consent for him to continue to maintain a private practice. Alternatively, in order to avoid displeasing his private client, the inquirer might soften his positions on behalf of his town board employer or recommend that the town board adopt land use policy positions less hostile to, and more consistent with, the best interests of his private client.

11. In N.Y. State 1216 (2021), we addressed a similar dynamic in a different context. The inquirer there, an assistant county attorney, was responsible for the implementation of a particular vendor’s insurance management software in the county that employed him. The same vendor then offered to retain the assistant county attorney as a consultant to facilitate the vendor’s sale of the software to other counties. In addressing the “financial, business, property or other personal interests” arising under Rule 1.7(a)(2), we expressed concern that the vendor might pressure the assistant county attorney not to fully assert the county’s contractual rights or not to assert the county’s best bargaining position when the software service agreement with his county employer came due for renewal, because the inquirer might fear that the outside vendor would terminate him and thereby cut off a significant source of income. *Id.* ¶ 14.

12. We lack sufficient facts to determine here whether there is a “significant risk” under Rule 1.7(a)(2) that the inquirer’s personal and financial interests would adversely affect his professional judgment in representing either the town board which employs him or his private client. The inquirer will have to assess the level of risk himself in light of all of the facts and circumstances, including the factors listed in Comment [24] to Rule 1.7 (quoted above).

Rule 1.7(b): Consentability and consent

13. Even if the inquirer determines that a conflict of interest exists under Rule 1.7(a)(2), the concurrent representation may nonetheless be permitted under Rule 1.7(b) which provides:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

14. We have previously opined that a unit of government may waive a conflict pursuant to Rule 1.7(b), provided the conflict is waivable under the Rules and “(i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequisites to the consent had been satisfied and (ii) the lawyer reasonably believed that 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.” N.Y. State 1130 ¶15 (2017). The inquirer should determine whether any conflict waiver by the town board satisfies these criteria. See also, N.Y. State 1238 ¶ 14 (2022) (quoting same passage from N.Y. State 1130).

Additional caveats

15. Even if there is no conflict under Rule 1.7(a), or if there is a waivable conflict and informed consent to the representation is properly sought, secured, and confirmed in writing under Rule 1.7(b) from both the town in which the inquirer serves and the private client, two additional caveats are in order.

16. First, this committee interprets the Rules and we do not opine on questions of law. Therefore, the inquirer should be mindful that, independent of any ethical concerns, the inquirer's proposed conduct may violate applicable law governing town attorneys, including but not limited to the Public Officers Law, the General Municipal Law, the Town Law, and the town's own ethics code. See N.Y. State 1130 ¶ 7 (2017).

17. Second, the inquirer must also be mindful of Rule 1.11(f)(2) which cautions that a lawyer who holds public office shall not "use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client" (other than the town that employs him). See also Rule 1.11, Cmt. [3] (Rule 1.11(f) is designed to "prevent the lawyer from exploiting public office for the advantage of another client"); and N.Y. State 1065 ¶ 11 (2015) ("even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence or attempt to influence, any tribunal to act in favor of the [inquirer's] proposed client.").

CONCLUSION

18. A town attorney is prohibited from representing a private client before boards of a neighboring town with respect to zoning and land use matters if the town attorney has conflicting personal interests, unless the conflict is consentable and the town attorney obtains informed consent from both the town board that appointed him and the private client. In any case, Rule 1.11(f)(2) prohibits the town attorney from using his official position to improperly influence a tribunal to act in a private client's favor.

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