

DIGEST OF ETHICS ADVISORY PANEL
Opinion #90-36, Request #115
Issued September 18, 1990

An attorney seeks Panel advice as to what ethical limitations her part time role as Assistant City Solicitor places on her part time private practice.

The attorney advises the Panel that she is assigned to prosecute criminal cases in the appropriate division of district court on behalf of the city. The attorney states that she also receives outside assignments as part-time Assistant City Solicitor, primarily involving research and legal advice for city department heads and directors. The attorney indicates that she receives a salary from the city and does not give any part of this fee to the firm of which she is a member. Similarly she does not receive a percentage of the fee earned when another attorney in the firm handles a case involving the city.

The attorney states that whenever an attorney in the firm is hired to represent a client in which she, as assistant city solicitor, would handle prosecution she recuses herself and it is handled by another assistant city solicitor. The attorney advises the Panel that she does not appear before any board or agency of the city, but other attorneys in the firm have appeared before the Zoning Board, Probate Court and the Administrative Adjudication Division of the city.

The attorney first asks the Panel whether she may properly continue to serve as assistant city solicitor as long as she has not represented a client with an interest adverse to the city and declines to do so in the future.

Rule 1.7, titled "Conflict of Interest" provides, in pertinent part:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless

- 1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and
- 2) each client consents after consultation

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In reviewing the practical effect of Rule 1.7(a) Professor Hazard notes that the requirement of "reasonable belief" amounts to a virtually per se ban on simultaneous representation of adverse interests, since the words impose an external standard of propriety. I G. Hazard The Law of Lawyering 132-133 (1989).

The interests of the city thus are generally not implicated, and the Panel takes the position that in general a party to a probate action is not in a position adverse to the town or city in which the action occurs.

The attorney next ask whether the interests of a client who is party to a proceedings before a city zoning board would be adverse to that city within the meaning of Rule 1.6. The power of a city or town to regulate land use is set forth in G.L. 1956 (1988 Reenactment) § 45-24-1:

Power of councils -- Scope of ordinances. -- For the purpose of promoting the public health, safety, morals, or general welfare, the city council of any city, and the town council of any town, upon the approval of the financial town meeting of the town, shall have the power in accordance with the provisions of this chapter within the limits of the city or town by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry residence, or other purposes . . .

The city's interests are explicitly involved in every matter brought before its Zoning Board.

"[T]he subject of land development is one in which the likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the bar should not represent a developer operating in a municipality in which the member of the bar is the municipal attorney or the holder of any other municipal office of apparent influence." New Jersey Supreme Court Advisory Committee on the Canons of Judicial Ethics opinion 193.

The Panel takes the position that a party to a zoning action occupies a position directly adverse to the town or city in which the action occurs.

The attorney next asks if the interests of a client who is party to a proceeding in the state district court would be adverse to the city where the court is located. If the case in question involves the city in any capacity, the client would occupy a position sufficiently adverse to bar the attorney and her firm from representing the client. A wide range of cases which do not involve the city in any capacity may be brought in the state district court, however and these would not involve an interest adverse to the city.

The attorney's next question is whether proceedings in the city's municipal court would constitute adversarial proceedings for purposes of applying Rule 1.7 to her and her firm under the circumstances described.

The municipal court in question is authorized to exercise original jurisdiction to

Accepting a position in the city solicitor's office makes the city a client of the attorney. In Opinion 173 the New Jersey Supreme Court Advisory Committee on Professional Ethics notes:

In a broad sense an attorney representing a municipality or any of its agencies has as his 'clients' the entire municipality, and he should avoid any retainers from others which may place him in a position where he appears to be either seeking relief or favor from the municipality or any of its agencies for a private client or to oppose action by the municipality, or its agencies on behalf of a private client.

The Panel takes the position that the attorney may properly function as a part-time assistant city solicitor provided she, as a private attorney, does not represent a client with an interest adverse to the city. Accord: R.I. Ethics Advisory Panel opinion 90-14 (February 27, 1990). The attorney also asks the Panel what effect her role as part-time assistant city solicitor has on the other members of her firm.

Rule 1.10 titled "Imputed Disqualification" provides, in pertinent part:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.3(c), 1.9 or 2.2.

The Panel takes the position that while the attorney is a part time assistant city solicitor all members of her firm are disqualified from representing a client whose position is directly adverse to the city, Accord: R.I. Ethics Advisory Panel opinion 89-1 (February 21, 1989). The final question the attorney poses is what constitutes an interest which is "directly adverse" within the meaning of Rule 1.7 in a variety of situations, which the attorney lists.

The attorney first asks whether representing a client in a probate proceedings would place her in a role which is adversarial to the city and thus impermissible.

The general jurisdiction of a probate court in this state is primarily

the probate of wills; the granting of administration, the appointment of custodians, of administrators, of guardians of persons and estates, . . . and of conservators; the accepting and allowing of bonds, inventories, and accounts of executors, administrators, and guardians; the granting of leave to sell at public or private sale, or to mortgage property, as hereinafter provided; the making of partition of the real estate of deceased persons; of the adoption of persons eighteen (18) years of age or older; of change of names of persons; of assigning dower to widows; of setting off and allowing real estate and personal property to widows and surviving husbands . . . G.L. 1956 (1981 Reenactment) § 3-9-9

"hear and determine causes involving violation of any ordinance . . . of the city and any violation of the provisions of chapter 24.3 of this titled entitled "The Rhode Island Housing Maintenance and Occupancy Code . . ." G.L. 1956 (1988 Reenactment) § 45-2-19.

Any matter brought in municipal court thus involves the city's interests. It would be impermissible under Rule 1.7 for the attorney or her firm to represent a client on a matter in municipal court.

The attorney next asks whether the interests of a client who is party to a proceeding before a hearing officer of the division for administrative adjudication (AAD) of the Department of Transportation would be adverse for purposes of applying Rule 1.7. This AAD is "charged with the administration and adjudication of traffic violations" G.L. 1956 (1982 Reenactment) § 31-43-1 et seq. Thus, in many instances the city's police officers will be witnesses and an integral part of the prosecution process. In those instances the Panel takes the position that a party to an administrative adjudication hearing occupies a position adverse to the city; the attorney could not properly represent a party under that circumstance. In other situations, however, the state police may be the only witness involved in the prosecution process. If no city police are involved, then the attorney could properly represent a party to an administrative adjudication hearing.

The attorney also asks whether a determination of adversity is affected by whether the city is plaintiff or a defendant in the action. The label of "plaintiff" or "defendant" is not determinative; the adverse nature of the interests at issue, as discussed, is instead the controlling factor.

The attorney's final question is whether a member of her firm may represent a person charged criminally by the city in District Court if the attorney recuses herself and does not participate in the prosecution on behalf of the city.

Rule 1.10 titled "Imputed Disqualification" provides, in pertinent part:

(a) while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

The Panel takes the position that since the attorney could not herself represent the client at issue Rule 1.10(a) prohibits any member of her firm from representing that client even though she has recused herself.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.