



# Ohio Board of Professional Conduct

**OPINION 2019-3**

Issued April 5, 2019

## **Representation of Governmental Clients and Criminal Defendants in Unrelated Matters**

**SYLLABUS:** A lawyer may not represent a municipality in real estate matters while another lawyer associated in the same firm represents criminal defendants who are prosecuted in the municipal court of the same municipality or are the subject of investigations by police officers employed by the same municipality.

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# Ohio Board of Professional Conduct

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### **Representation of Governmental Clients and Criminal Defendants in Unrelated Matters**

**SYLLABUS:** A lawyer may not represent a municipality in real estate matters while another lawyer associated in the same firm represents criminal defendants who are prosecuted in the municipal court of the same municipality or are the subject of investigations by police officers employed by the same municipality.

#### **QUESTIONS PRESENTED:**

- (1) Whether a lawyer associated in a firm may represent a municipality in real estate matters while another lawyer associated in the same firm represents criminal defendants prosecuted in the municipal court of the same municipality?
- (2) Whether a lawyer associated in a firm may represent a municipality in real estate matters while another lawyer associated in the same firm represents criminal defendants in matters investigated by police officers employed by the same municipality, and heard in another court?

**APPLICABLE RULES:** Prof.Cond.R. 1.7, 1.10

**OPINION:**

Many municipalities in Ohio, whether classified as a city or village, outsource legal matters to private law firms. The services that private law firms provide to municipal clients range from ongoing availability to provide advice in particular areas of the law to accepting special retainers for representation in complex litigation. Many of these private law firms have diverse practice areas and may encounter clients wishing to oppose the municipal client in other matters. The analysis of whether or not a law firm may accept a client opposed to a municipal client begins with a general conflict analysis. A firm must also consider the rules related to imputation of conflicts of interests.

A lawyer's acceptance of representation of a client creates a conflict of interest if the representation of that client will be directly adverse to another current client or if 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, a third person, or by the lawyer's own personal interest. Prof.Cond.R. 1.7(a)(1)-(2). Because the principles of loyalty and independent judgment are fundamental to the client-lawyer relationship, neither the interests of other clients nor the lawyer's personal interest should be permitted to dilute the lawyer's loyalty to a client. Prof.Cond.R. 1.7, cmt. [1].

While lawyers are associated in a firm, none of them may represent a client when the lawyer knows that any one of them practicing alone would be prohibited from doing so by Prof.Cond.R. 1.7. Prof.Cond.R. 1.10(a). The imputed disqualification rule gives effect to the principle of loyalty to the client in the context of lawyers practicing in a firm. Prof.Cond.R. 1.10, cmt [2]. A firm of lawyers is essentially treated as one lawyer for purposes of a conflict analysis. *Id.*

In analyzing a conflict of interest under Prof.Cond.R. 1.7, the first consideration is whether a lawyer or law firm's representation of a client will result in direct adversity between current clients. In litigation, the representation of one client is directly adverse when one of the clients is asserting a claim against another client of the lawyer (or law firm) in another proceeding. Prof.Cond.R. 1.7, cmt. [11]. A lawyer may not act as an advocate in one proceeding against a person (or an organization) the lawyer or the law firm represents in some other matter, even though the matters are wholly unrelated. *Id.* In the first question presented, the law firm would represent criminal defendants and

advocate against their prosecution in opposition to the objectives of the law firm's other client, the municipality. In the second question posed, the municipality would remain a current client of the law firm and the law firm would represent criminal defendants prosecuted on behalf of the public with municipal police officer employees as material witnesses in the criminal matter. The law firm must keep in mind that a directly adverse conflict may also arise when effective representation requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in a suit.<sup>1</sup> *Id.* Thus, in either situation, as acknowledged by the firm in its request for an advisory opinion, the law firm's current clients would be directly adverse. Pursuant to Prof.Cond.R. 1.10(a), the direct adversity conflict remains imputed to other lawyers in the law firm.

The second consideration is whether there is a substantial risk that the lawyer or law firm's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited by the lawyer or law firm's responsibilities to another client or by the lawyer or law firm's own personal interest. By statute, a municipality has the right to establish local ordinances, maintain the peace and property within the municipality's jurisdiction, organize and maintain police and fire departments, and maintain a municipal court within the municipality's jurisdiction.<sup>2</sup> Consequently, a municipality has an interest in the prosecution of violations of the municipality's ordinances. Conversely, a criminal defendant being prosecuted by a municipality has an interest in preserving his or her constitutional rights and avoiding a criminal conviction if at all possible. A lawyer or firm representing a criminal defendant must have the ability to vigorously oppose the prosecution of the criminal defendant. This opposition may be accomplished through a variety of measures to include argument that a particular municipal ordinance is unconstitutional or that the municipality failed to properly train municipal police officer employees resulting in either the systematic or an individual officer's failures to properly apply the law or follow procedures. In advancing these types of arguments, the lawyer must also consider his or her ability to effectively cross-examine the municipal police officers involved in the matter. There is a substantial risk that the lawyer or other lawyers in the law firm may conduct a

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<sup>1</sup> An organizational client acts through its constituents, including its officers, directors, employees, shareholders or those in equivalent positions if the organization is not a corporation. Prof.Cond.R. 1.13 (a) & cmt. [1].

<sup>2</sup> R.C. §§ 715.44, 715.49, 715.03, 715.67, 715.05, and 715.16.

deferential, rather than through, cross-examination of municipal employees related to the criminal matter. In addition, the lawyer or law firm's financial interest in maintaining a continuing attorney-client relationship with the municipality cannot be permitted to have an adverse effect on other current clients. Prof.Cond.R. 1.7, cmt. [20]. The Board is of the view that there is a substantial risk present in this situation that the duty owed to the law firm's criminal defendant may be compromised. Thus, a material limitation conflict exists that also is imputed to other lawyers in the law firm per Prof.Cond.R. 1.10(a).<sup>3</sup>

Where a conflict, imputed or otherwise, exists, Prof.Cond.R. 1.7 and Prof.Cond.R. 1.10(e) provide an avenue for representation to continue or be undertaken. This avenue requires the lawyer to determine that he or she can provide competent and diligent representation to each client, determine that the representation is not prohibited by law or does not involve the assertion of competing client claims in the same proceeding, and obtain informed, written consent from each client.

A central question that must be addressed is whether a municipality, essentially tasked with criminal prosecutions on behalf of the public, can consent to representation of a criminal defendant burdened by a conflict. Over time a broad doctrine has developed commonly referred to as the "government cannot consent" rule. The initial impetus for the rule relates back to the American Bar Association's early advisory opinions. ABA Formal Opinion 16 (1929); ABA Formal Opinion 34 (1931); ABA Formal Opinion 77 (1932). When discussing whether a member of a law firm was barred from representing criminal defendants in cases prosecuted by another member of the firm who was also a part-time prosecutor, the committee stated "[n]o question of consent can be involved as the public is concerned and it cannot consent." ABA Op. 16 (1929). This Board's prior Advisory Opinions and some Ohio case law acknowledges the concept that those charged with the authority to prosecute are deemed to have the citizens of the state of Ohio as a client and are unable to consent to representation burdened by a conflict.<sup>4</sup> As such, Ohio

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<sup>3</sup> The Board acknowledges that in situations with similar facts, the provisions of Prof.Cond.R. 1.11 may provide for a different outcome related to the imputation of conflicts to other lawyers in a firm who are engaged in private practice with a current or former government lawyer. Adv. Op. 2014-2. However, the Board must narrowly interpret Prof.Cond.R. 1.11 and conclude that it is inapplicable in this instance because the facts as presented here do not involve any current or former government lawyers.

<sup>4</sup> Adv. Op. 2014-2 (citing Adv. Op. 88-08)(concluding that "if a part-time prosecutor is authorized by agreement to prosecute cases on behalf of a municipal corporation, he or she is also prohibited from representing criminal defendants against that municipal corporation. Such criminal defense representation

has been grouped with other jurisdictions, such as West Virginia and New Jersey that adhere to a “per se” government non-consent rule. Bennett, Cohen & Gunnarsson, *Annotated Model Rules of Professional Conduct*, 153 (8<sup>th</sup> ed. 2015).

The referenced prior Board opinions invoking this concept relate to lawyers who are either elected, appointed, or hired but nonetheless are specifically employed by the government on a part-time or full-time basis to prosecute violations of state or municipal law. Here, the lawyer and law firm are not specifically employed in the public sector as government lawyers, but are retained as private counsel by a client tasked with authority to enforce and prosecute criminal violations of municipal ordinances. Although the Board is unable to issue opinions on questions of law and despite the slightly differing facts here, due to the history outlined above, the Board must caution lawyers and firms that requesting informed written consent from governmental clients representing public interests may lead to a judicial finding that a government entity in this context is unable to provide consent to the conduct. Assuming *arguendo* the municipality concerned has the ability to consent to the conflicted representation, the Board is not inclined to advise that the law firm seek the written informed consent of the municipality or criminal defendant due to the lingering doubts of the lawyer and law firm’s ability to provide competent and diligent representation to each affected client because of the competing obligations outlined above. *See* Prof. Cond.R. 1.7(b)(1).

**CONCLUSION:** A lawyer’s acceptance of representation of a client creates a conflict of interest if the representation of that client will be directly adverse to another current client or if 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, a third person, or by the lawyer’s own personal interest. Here, the conflict stems from both the direct adversity of the current clients as well as the substantial risk that the lawyer or law firm’s obligation to the municipal client would materially limit the representation of the criminal defendant. Despite the ability of a lawyer or law firm to generally request informed written consent to ameliorate conflicts in some instances, the Board recommends forgoing seeking informed written consent, in this context, from the municipal client and criminal defendant clients. The ability of the municipal client to consent to the

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is a conflict of interest under Prof. Cond.R. 1.7(a) that cannot be ameliorated through Prof. Cond.R. 1.7(b)”; *Melling v. Stralka*, 8<sup>th</sup> Dist. Cuyahoga No. 45622, 1983 WL 3092 (June 16, 1983)(Markus, J., dissenting).

representation is questionable due to the public interest involved and questions about the lawyer and law firm's ability to provide competent and diligent representation to all affected clients when faced with these types of conflicting obligations.