



# Ohio Board of Professional Conduct

## OPINION 2019-5

Issued August 2, 2019

### **Conflicts of Part-Time Law Director and Imputation to Part-Time Law Director's Firm**

**SYLLABUS:** When a part-time law director also engages in the private practice of law, the law director may not represent private clients in matters related to his or her employing municipality. Associated lawyers in a part-time law director's law firm are permitted to represent clients in matters related to the part-time law director's employing municipality. The conflicts of a part-time law director are not imputed to the other members of a law director's private law firm.

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# Ohio Board of Professional Conduct

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**QUESTION PRESENTED:** May a lawyer associated in a law firm with an elected, part-time law director represent a client in matters before the law director's municipality or one of the employees, officers, commissions, or boards of the municipality?

**APPLICABLE RULES:** Prof.Cond.R. 1.7, 1.10, 1.11

**OPINION:** The Board must first consider the law director's conflicts of interest prior to addressing the imputation question posed. A law director of a municipal corporation provides legal advice and representation to the municipality, its officers, and its entities. The specific legal duties of a city law director are established by law. *E.g.*, R.C. 705.11, 733.51, 733.52, 733.53, 733.54, 733.56 733.57, 733.58, 733.62, 1901.34 and 3313.35.<sup>1</sup> Some

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<sup>1</sup> A law director may also be subject to specific job related duties or regulation by city charter or as determined by his or her employing government entity.

law directors are statutorily tasked with the duty to prosecute criminal violations of state law, while other law directors are not required to prosecute criminal violations of state law because county prosecutors in those counties are tasked with the responsibility.<sup>2</sup>

A law director is not prohibited from engaging in the private practice of law in Ohio, and many lawyers employed as part-time law directors continue to maintain a private practice at law firms. A part-time law director or other lawyers associated in a law firm with a part-time law director are often approached to represent clients in matters coming before various divisions of a municipality, such as an application pending before or requiring approval by the city engineer, planning commission, or city council. The Board previously addressed in Adv. Op. 2008-06 whether a law director and lawyers associated in a law firm with a law director may represent criminal defendants, but has not specifically addressed the related concept of representation of clients in a civil context.

*Part-Time Law Director's Ability to Represent Civil Clients in Matters Related to the Municipality*

A lawyer's 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). Furthermore, public officers owe an undivided duty to the public, and thus they may not hold an additional position that subjects them to divided loyalties, conflicting duties, or the temptation to act other than in the public interest. 2016 Op. Att'y Gen. No. 2016-033 (citing Op. Att'y Gen. 2014-014, at 2-115). Here, the part-time law director's acceptance of the representation of a client in a matter coming before a division of his or her employing municipality has the potential for a disqualifying conflict.

For example, if the matter for which the prospective client seeks assistance is a zoning application and the prospective client and municipality are interested in different

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<sup>2</sup> See R.C. 1901.34. This Opinion does not apply to law directors' representation of criminal defendants or to the determination of potential conflicts of interest between or among a city, city officials, or city entities. For guidance on conflicts of interest in the criminal context the reader should consult Adv. Op. 2008-5 and Adv. Op. 2008-6. For guidance on conflicts of interest related to conflicts between or among a city, city officials, or city entities the reader should consult Adv. Op. 2007-4.

outcomes, it may be necessary for the employees of the municipality to seek legal advice concerning approval or denial of the application from the law director. Further, in a matter where both clients are interested in different outcomes, the resolution of the zoning application would involve the assertion of a claim by one client against another in the same proceeding and thus representation of both parties by the law director would be prohibited and could not be ameliorated by client consent. Prof.Cond.R. 1.7(c)(2).

In further analyzing the zoning application example, even if there is no such direct adversity because the municipality and prospective client want the same outcome, the law director would need to consider if a difference in interest is likely to arise between the municipality and prospective client during the zoning application process. Perhaps the municipality and prospective client disagree on the means to secure approval of a pending request or application. The law director should consider whether his or her ability to exercise independent professional judgment in deciding how to proceed on behalf of either client will be materially limited. Prof.Cond.R. 1.7, cmt. [14]. The Board is of the view that there is a substantial risk that a disagreement may arise during a zoning application process, or any similar process requiring approval by a municipality officer, and that representation of a private client would materially limit the law director's ability to provide adequate advice to both of the affected clients due to his or her loyalty to each. Accordingly, a part-time law director must avoid representation of the prospective client in this instance unless it is possible for the conflict of interest to be ameliorated. Prof.Cond.R. 1.7(b).

The question then becomes whether the law director, as a public officer with the duty to act in the public interest, may seek consent from his or her employing municipality. Ohio has been identified with other jurisdictions which adhere to a "per se" government non-consent rule in the context of government consent to a representation burdened by a conflict. Adv. Op. 2019-03. Because a governmental entity may be unable to provide consent in this context as a matter of law, the Board continues to caution government lawyers that requesting informed written consent from an employing government entity in order to represent a private client burdened by a conflict is not advisable.

Further, the law director would be prohibited by law from representing a private client on any matter in which he or she personally participated. R.C. 102.03 states that "[n]o present or former public official or employee shall, during public employment

represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” Consequently, R.C. 102.03 directs the conclusion that the law director would be prohibited from representing the client, if during his or her employment the law director worked on any matters related to the prospective client’s zoning application.

*Representation of Civil Clients in Matters Related to the Municipality by Other Lawyers in the Part-Time Law Director’s Law Firm*

The practice of hybrid public and private sector lawyers presents a challenge when applying the imputation of conflict provisions of the Ohio Rules of Professional Conduct. Adv. Op. 2014-2. The Rules give special consideration to government lawyers and those lawyers associated in the government lawyer’s private law firm as to conflicts of interest. Prof.Cond.R. 1.10(f) states “[t]he disqualification of lawyers associated in a *firm* with former or current government lawyers is governed by Rule 1.11.” When reviewing Prof.Cond.R. 1.11, division (d) is the only portion of the rule that specifically addresses a lawyer *currently* employed as a government lawyer. Division (d) does not differentiate between part-time and full-time employees, nor does it provide any specific guidance for lawyers engaged in simultaneous practice in both the public and private sector.

Prof.Cond.R. 1.11(d)(1) obligates a government lawyer to personally abide by the general conflict provisions of Prof.Cond.R. 1.7 and 1.9, but does not indicate that the imputation principles of Prof.Cond.R. 1.10 are applicable in regard to the associated members of the law director’s private firm. Reading Prof.Cond.R. 1.10(f), Prof.Cond.R. 1.11(d), and Prof.Cond.R. 1.11 cmt. [2] and [3] together, it is clear that the general imputation rule contained in Prof.Cond.R. 1.10, prohibiting other lawyers in a firm from representing a client when one member of the firm is disqualified, is not applicable when the conflict is a result of the member of the firm serving as a government lawyer. Consequently, the Board concludes that other lawyers in the part-time law director’s firm are permitted to represent clients in matters coming before divisions of the law director’s municipality.<sup>3</sup>

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<sup>3</sup> This advice is consistent with the Board’s advice offered in Adv. Op. 2014-2 related to non-imputation of conflicts in a part-time prosecutor’s law firm.

*Additional Considerations when Lawyers and Part-Time Law Directors Practice in the Same Private Firm*

Prof.Cond.R. 1.11(d) requires the law director to analyze his or her own individual conflicts. Should the other lawyers associated with the law director's private firm take on a client with matters related to the law director's employing municipality, the law director must be aware of material limitation conflicts present as a result of his or her hybrid role as both a government lawyer and a lawyer in private practice. The law director will naturally have continuing and close relationships with members of the private law firm and an ongoing interest in the success of the firm. As discussed above, it is not advisable for the law director to seek consent of the employing municipality to ameliorate the law director's conflict. Thus, the law director must not handle matters for the municipality in which the associated lawyers in his or her private law firm are also involved.

Because of the special problems associated with imputation of conflicts within a government agency, the conflicts of the law director are not imputed to other associated government officers or lawyers within the municipality. Prof.Cond.R. 1.11, cmt. [2]. Assistant law directors within the law director's government office may handle matters the law director is prohibited from handling.<sup>4</sup> Nonetheless, it is generally prudent for the municipality to screen the law director from those matters that involve the law director's private firm. *Id.* Likewise, the Board advises that the law director's private law firm should adopt the screening and apportionment of fees requirements contained in Prof.Cond.R. 1.11(c), despite the fact that the division of the rule appears to apply to

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<sup>4</sup> Generally in the event the municipality does not employ other lawyers, such as an assistant law director with the ability to provide the required legal advice or representation necessary, the law director or city has the ability to obtain outside counsel to act on behalf of the city when the law director is ill, absent, or otherwise disqualified from acting. See generally *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350; see also *City of Cuyahoga Falls v. Robart*, 58 Ohio St.3d 1, 567 N.E.2d 987 (1991). In evaluating whether to seek the assistance of outside counsel, the law director should consider all applicable state statutes, resolutions or ordinances of the legislative authority of the specific municipality, and any applicable charters. Prior to seeking to hold a position as either an elected or appointed law director, with the intention of maintaining a private law practice, the Board encourages lawyers to critically evaluate how often a potential conflict as discussed above may arise. Frequent need to retain outside counsel due to a law director's conflicts related to his or her private practice, especially when apparent at the outset of taking on the role, is not always appropriate and not in the best interest of the public. Despite the non-imputation of conflicts pursuant to Prof.Cond.R. 1.11, the Board encourages any such lawyers or law firms in this position to carefully consider the needs of the public as well as the needs of the law firm's clients. The best practice, although not strictly required by the Rules, is for the law firm to use its best efforts to minimize the need of the law director to conflict off cases, as the result is an additional expense to the public.

*former* government lawyers entering private practice.<sup>5</sup> The best practice to protect the interests of the civil clients of lawyers associated in the law director's private firm is to screen the law director from any files maintained at the private law firm involving the law director's municipality. Finally, the law director should not be apportioned any part of the fees associated with the law firm's representation of clients involving the law director's municipality.

**CONCLUSION:** A law director is prohibited from representing clients in matters related to his or her employing municipal corporation. A law director should not attempt to ameliorate the conflict by seeking the informed written consent of the employing government agency. The other lawyers in a law director's private firm, however, are permitted to represent clients in cases related to the municipality. Prof.Cond.R. 1.10(f) and 1.11 indicate that conflicts of a part-time law director associated with government practice are not imputed to other lawyers in the firm. Despite the non-imputation of conflicts to other lawyers in a law director's private firm, the law director should not participate in any matter in which members of his or her private firm are involved. A part-time law director should be screened at both the private law firm and the government office from any related matters. A part-time law director should not be apportioned any part of the fees associated with the law firm's representation of clients involving matters related to the municipality.

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<sup>5</sup> This advice is consistent with the Board's advice offered in Adv. Op. 2014-2 related to non-imputation of conflicts in a part-time prosecutor's law firm.