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Committee on Professional Ethics

Opinion – 580 — 3/30/87 — (33-86) Topic: Conflict of interest; Municipal bond counsel; Simultaneous representations.

Modified by N.Y. State 629

Digest: Municipal bond counsel may not simultaneously represent private clients in administrative or judicial proceedings against the municipality; different rule applies to municipal Industrial Development Agency bond counsel.

Code: DR 5-105, 5-105(C); EC 5-1, 5-14, 5-15.

QUESTION

May a law firm accept employment as special counsel to a municipal Industrial Development Agency or the municipality itself for bond work when (A) it represents clients before the same municipality's Zoning and Planning Board, (B) represents clients in tax certiorari proceedings against the municipality, and (C) represents clients in personal injury claims against the municipality?

OPINION

It is well settled that an attorney representing client A in litigation with client B cannot accept an engagement to represent client B simultaneously absent the effective consent of both A and B after disclosure of the pertinent facts. DR 5-105, EC 5-1, EC 5-14.

There are two interests at stake: The need to maintain confidences and secrets of the client and the duty of undivided loyalty to the client. The confidentiality

principle is usually invoked when the proposed simultaneous representations involve related matters and there is a danger of cross-use of confidential information. The loyalty principle is invoked, however, even if the proposed simultaneous representations are entirely unrelated. For example, in *Cinema 5, Ltd. v. Cinerama*, 528 F.2d 1384 (2d Cir. 1976), the court held that representation of one party in litigation and the representation of a second party in wholly unrelated litigation against the first party presents a "prima facie" case of impropriety.

> When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that litigation was at an end, it had his undivided loyalty as its advocate and champion, *Grievance Committee v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82 (1964), and could rely upon his "undivided allegiance and faithful, devoted service." *Von Moltke v. Gillies*, 332 U.S. 708, 725, 68 S. Ct. 316, 324, 92 L. Ed. 309 (1948). Because "no man can serve two masters", Matthew 6:24, *In Re W. T. Byrns, Inc.*, 260 F. Supp. 442, 445 (E.D. Va. 1966); *Woods v. City of Nat'l Bank and Trust Co.*, 312 U.S. 262, 268,61 S. Ct. 493, 8 L. Ed. 820 (1941), it had the right to expect also that he would "accept no retainer to do anything that might be adverse to his client's interests." *Loew v. Gillespie*, 90 Misc. 616, 619, 153 N.Y.S. 830, 832 (1915), *aff'd*, 173 App. Div. 889, 157 N.Y.S. 1133 (lst Dept., 1916).

Id. at 1386. The court held that "the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation." Id. at 1387 (emphasis in original). This is a standard which has subsequently been described as "a burden so heavy that it will rarely be met." *Gluek v. Jonathan Logan, Inc.*, 653 F.2d 746, 749 (2d Cir., 1981). *See*, C. Wolfram, *Modern Legal Ethics* 352 (1986) ("it seems doubtful that the exception was ever meant to be realized").

While multiple representation of private clients is sometimes permitted if each client consents to representation after full disclosure to the clients of the possible inherent conflicts (DR 5-105(C)), this Committee has consistently held that a public body is incapable of giving its consent. N.Y. State 453 (1976); N.Y. State 450 (1976); N.Y. State 322 (1973); N.Y. State 247 (1972); N.Y. State 143 (1970). In addition, by virtue of DR 5-105(D), if a lawyer has a disqualifying conflict of interest, every member of his firm similarly has such a conflict.

Accordingly, the issue posed by this inquiry distills to whether the simultaneous performance of legal services to a municipality or its IDA for bond work and the representations of the three classes of clients identified above will, from any affected client's perspective, likely impair or adversely affect the exercise of independent judgment on behalf of, and the duty of undivided loyalty due, the other implicated clients. For example, would an attorney's status as bond counsel give rise to an appearance that the attorney could improperly secure benefits for his private clients? Would he perform as the attorney should as bond counsel when he is also representing clients against the same municipality? Conversely, recognizing the inability of a public body to consent to multiple representation, is it possible that acceptance of the public client will adversely affect the competent or prudent representation of his private clients under circumstances that are difficult to foresee. These and other concerns, such as the special sensitivity of the position of an attorney for a municipality and the potential to undermine public confidence in the integrity and efficiency of the legal system as it relates to municipal affairs, are central to this Committee's prior opinions. See, *e.g.*, N.Y. State 450 (1976); N.Y. State 544 (1982) (broad principle that an attorney for a municipality should not "put himself in a position where it would be his duty, on behalf of one of his private clients, to contend for something which his duty to the locality would require him to oppose").

Resolution of these questions requires an examination of the role of bond counsel in municipal matters. The duties of bond counsel are fully discussed at length in National Association of Bond Lawyers, *The Function and Professional Responsibilities of Bond Counsel and Model Bond Option Project* (Nov. 17, 1983) (hereinafter cited as Project Statement). The Project Statement contends that bond counsel does not always have an attorney-client relationship in the traditional sense with a party to a bond transaction even though he or she has been retained by one; the Association further contends that the services rendered by bond counsel in providing an "expert and objective legal opinion" involve strict objectivity and are not partisan in nature. Project Statement, 4-6, 8-9.

While we accord some deference to this contention, this Committee is not empowered to resolve issues of fact concerning the predominant practice of bond counsel. At the same time, we agree with the Association's recognition that the Lawyer's Code of Professional Responsibility, "has no provision directly referring to bond counsel's function." *Id.* at 10 (citing ABA Model Rule 2.3). However,

we nevertheless believe that the simple engagement by a municipality of an attorney for bond work triggers the traditional Code conception of the attorney-client relationship, which demands not only that confidences and secrets be held inviolate but that the retained lawyer maintain a high degree of undivided loyalty to each client. Therefore, the conflict of interest inherent in the simultaneous representation proposed by this inquiry is manifest.

We recognize that we depart somewhat from certain statements in *City of Cleveland v. Cleveland Illuminating Co.*, 440 F. Supp. 193, 199 (N.D. Ohio, 1976), *aff'd* without op., 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978), that bond counsel is engaged "somewhat as a scrivener [who] drafts instruments." Under this view, it is contended that bond counsel's relationship to the municipality, even when considered a traditional attorney-client relationship, may present a *sui generis* case much like the special District Attorney appointed under County Law § 701 who, we have found, is not subject to the same conflict of interest rules applicable to other part-time public prosecutors who serve their county on a regular basis. N.Y. State 564 (1984). Indeed, under this view, the scrivener exception would be functionally equated with the *sui generis* exception to the conflict of interest rule recognized in N.Y. State 564. But a close examination of *City of Cleveland* reveals that it is not helpful to the issue we are here asked to decide.

The court was faced with a motion by the city to disqualify counsel for the utility in an antitrust action against that utility on the ground that counsel had also served on various prior occasions as bond counsel for the city. Relying in part on EC 5-15 ("there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation"), the court found that bond counsel's "ad hoc relationships with the City had fixed parameters, were non-litigious and inherently non-adverse, and with the exception of the 1972 ordinance, were unrelated . . . ." *Id.* at 207 n. 8 (distinguishing *Cinema 5, Ltd. v. Cinerama, supra*, 528 F.2d 1384). However, notwithstanding its intimations that the conventional attorney-client relationship was either "absent," 440 F. Supp. at 201, or "questionable," *id.* at 207, because of bond counsel's limited role as a non-advocate "examiner" or "scrivener," the court nevertheless concluded "that an attorney-client relationship did exist between the City and SS&D as its bond counsel." 440 F. Supp. at 207.

Most important, the court held that the doctrines both of equitable estoppel and waiver (involving deliberate action on the part of the city conveying "with explicit clarity the City's intention to waive any ethical objections that could arise as a result of SS&D's performance as bond counsel") precluded the City's motion to disqualify. 440 F. Supp. at 203-05. Despite the balance of the discussion in the court's opinion concerning the nature of the alleged conflict of interest issue, the true basis of the court's decision lies in the waiver and estoppel doctrines, which in any event are legal doctrines applicable to disqualification motions and are not properly the subject of an ethics committee opinion. C. Wolfram, *Modern Legal Ethics* 338 (1976). Subsequent decisions tend to accord with the view that *City of Cleveland's* discussion of the role of bond counsel was dicta. *International Business Machines Corp. v. Levine*, 579 F.2d 271, 280 (3d Cir. 1978); *General Electric Co. v. Valeron Corp.*, 608 F.2d 265, 267-68 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980).

Accordingly, we are convinced that *City of Cleveland* does not carve out a categorical exception for bond counsel to the general rule of a conflict of interest. In any event, even if all bond counsel retainers could be relegated to a scrivener status, we believe there is some merit to the view that the scrivener exception may be "debatably proper for purposes of testimonial privilege" but is "inappropriate in the different setting of conflicts of interest." C. Wolfram, *Modern Legal Ethics* 325 (1986). *See also* G. Hazard & W. Hodes, *The Law of Lawyering* 130 (1985) ("A lawyer should not be allowed to sue an individual client on behalf of another present client, even if the lawyer represents the first client in a wholly unrelated matter, such as drafting a will.") Rendering a professional opinion for a municipality is professional employment within the meaning of the Code, and bond counsel owes a duty to maintain the confidences of that municipality and to give it undivided loyalty during the course of the engagement.

Bond Counsel for Industrial Development Agency

A different analysis is called for by the proposed retainer by an IDA as its bond counsel. Our differing views are not prompted by a different conception of the role of bond attorneys for IDA's, but rather by the nature of an IDA itself.

In N.Y. State 447 (1976), the Committee was faced with a similar inquiry from an attorney who represented private clients in claims against a county. The

attorney wished to know whether he could be retained on a case-by-case basis by the county's Department of Social Services to represent the department on unspecified specific matters which the regular department attorney was unable to handle. The Committee determined that the separate and discrete department or agency within the county was the client, not the parent municipal corporation or county. The Committee also found that, where the attorney's "relationship with the parent unit or with its legal representatives are (not) sufficiently close to give rise to any public suspicion of improper influence" and the particular department "has its own full-time counsel and is not represented by the County Attorney," there was "no actual or potential conflict of interests, no appearance of improper influence and no basis for public suspicion that the private client is seeking some improper advantage . . . ." N.Y. State 447. The Committee observed that a "more restrictive" rule of disqualification "would needlessly inhibit governmental agencies from getting needed representation on an individual case by case basis." *Id.*

Typically, while the General Municipal Law §858(8) permits the primary municipal attorney to be IDA counsel, attorneys doing bond work for a municipality or its IDA do so on a contract basis because of the specialized nature of the work, not as a member of the municipality's legal department. We also recognize that an IDA is a distinct corporate public entity under our laws, having its own corporate seal, having the capability to sue and be sued in its own name, and having plenary powers to further its discrete public interests. General Municipal Law §858(1)-(16). An IDA also has the power to issue negotiable bonds and notes, General Municipal Law §§864, 866, and the statute declares: "The bonds or notes and other obligations of the agency shall not be a debt of the state or of the municipality, and neither the state nor the municipality shall be liable thereon, nor shall they be payable out of any funds other than those of the agency." General Municipal Law §870. See also General Municipal Law §§878, 880 (remedies and actions against IDA).

With this statutory backdrop in mind, we believe our opinion in N.Y. State 447 clearly controls. The discrete nature of the County Department of Social Services found in N.Y. State 447 to be a distinct client is less definable than the clear statutory separation of an IDA from the parent municipality, and therefore the client may properly be viewed as the IDA and not the municipality. Accordingly, as a general matter and in the absence of extraordinary circumstances indicating otherwise, an attorney may undertake to represent the IDA as bond

counsel without a conflict of interest arising out of his representation of the three classes of litigants identified in the query.

CONCLUSION

For the reasons stated, we believe that a lawyer engaged by a municipality as bond counsel may not simultaneously (A) represent clients before the same municipality's Zoning and Planning Board, (B) represent clients in tax certiorari proceedings against the municipality, and (C) represent clients in personal injury claims against the municipality. A lawyer may, however, be engaged by an Industrial Development Agency for bond work without a conflict of interest arising from his simultaneous representation of the same three classes of litigants against the parent municipality.