NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1130 (7/12/17)

Topic: Conflicts; Town Attorney

Digest: A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters and another lawyer in the firm seeks to represent an applicant before the Town's planning board.

Rules: 1.0 (f), (r) & (w), 1.7(a), 1.7(b)

FACTS

1. The inquiring law firm represents a Town. One of the firm's partners serves as Town Attorney, with principal responsibility for advising the Town Board, while another partner, as Deputy Town Attorney, chiefly advises the Planning Board and the Zoning Board of Appeals. Another lawyer affiliated with the firm ("Lawyer X") concentrates in, among other things, zoning matters for private clients.

2. The inquiry arises out of a plot of land located within the Town in close proximity to residential properties and a school. Another government entity (not the Town) once owned the plot but has since sold it. Upon this sale, the Town changed the zoning of the plot from Limited Industrial to Residential, apparently to prevent expanded industrial use of the plot owing to limited access to the plot. Apart from a railway line, the only access is over a residential street.

3. Recently, a company ("Owner") has acquired a portion of the plot and proposes to expand its existing business there in what the inquirer characterizes as a "low-intensity" use. The inquiry states that the Town Board supports this proposal as long as the Owner limits its use of the plot to the proposed low-intensity use, and therefore intends to return the plot's zoning to Limited Industrial. Lawyer X proposes to represent the Owner in the rezoning application to the Planning Board.

4. The plot cannot be rezoned unless the Town Board adopts a local law. Following referral to the County Planning Department for a review and recommendation, the matter will go to the Town Planning Board for a site plan review. The principal function of a planning board "is to approve site plans, subdivision plats, and conditionally permitted uses of property. Town Law §§ 274-a, 276." N.Y. State 630 (1992). Thus, two of the firm's lawyers would be acting for the Town and its Planning Board on the application, while another lawyer in the same firm would be acting for the Owner as applicant.

5. The inquirer expresses confidence that each lawyer will exercise independent professional judgment for the lawyer's clients, and states that each of the clients is prepared to

sign a waiver of any conflict.

QUESTION

6. May a lawyer in a firm act for a private client in applying to the Town Zoning Board for zoning changes, where other members of the firm currently serve as Town Attorney and Deputy Town Attorney, with responsibility for advising the Town on zoning and planning matters, as long as the Town and the private client each give informed consent?

OPINION

7. This Committee interprets the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the proposed representation would not violate any applicable law governing Town Attorneys and their firms, including, but not limited to, the Public Officers Law, General Municipal Law, the Town Law, and the Town's own Ethics Code. *See, e.g.*, General Municipal Law §§ 800 – 812 (Conflicts of Interest of Municipal Officers and Employees). We do not opine on such questions.

Concurrent Conflicts of Interest

8. Absent informed consent from each affected client, Rule 1.7(a) prohibits concurrent representations when a reasonable lawyer would conclude that either:

> (1) the representation will involve the lawyer in representing *differing interests*; or
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> (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 supplied.]

9. With exceptions not applicable here, when lawyers are associated in a firm, none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a). This Rule applies to attorneys employed by the government, whether full-time or part-time. N.Y. State 1065 (2015) (imputing part-time prosecutor's conflict to entire firm).

10. "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." In N.Y. State 603 (1989) we declined to apply a *per se* rule of disqualification to all instances in which a part-time assistant city attorney represents a private client before city agencies. Instead, we employed a functional analysis of the relationship between the proposed representation and the nature of the lawyer's public function. Applying that functional test, we held in Opinion 603 that neither a part-time assistant city attorney nor any other lawyer in his private law firm could represent clients before the city agencies with which the attorney was associated. In contrast, N.Y. State 630 (1992) involved a lawyer who served a town as special counsel for particular subject matters not involving the town's planning or zoning boards. There, we said the lawyer could represent a private client before the planning and zoning boards because we were not persuaded that the interests of the private client were necessarily so conflicting, diverse or inconsistent with the interests of the

town as to adversely affect the lawyer's judgment or loyalty to either client, i.e. the lawyer would not *per se* be representing "differing interests."

11. Nevertheless, in N.Y. State 630 (1992), we cautioned:

> A critical factor in our conclusion is that special counsel ordinarily has limited duties and responsibilities and does not have the town-wide responsibilities and influence of the town attorney or permanent member of his or her staff. A different rule would apply where the nature or volume of legal work handled by special counsel makes him or her the functional equivalent of a regular, ongoing member of the town attorney's staff, or where the subject matter of the particular representation is of such overriding importance to the town that special counsel is perceived as having significant influence with the planning or zoning board of appeals. In those situations, ... the duty of undivided loyalty and the heightened danger of compromising confidences and secrets, coupled with the "special sensitivity" required of lawyers for the public to "take special care not to accept employment which would tend to undermine public confidence in the integrity and efficiency of the legal system," would preclude representation of private clients before agencies whose legal representation is under the umbrella of the town attorney's office. [Citations omitted.]

12. This caveat in N.Y. State 630 teaches that a lawyer who is town attorney may not concurrently represent private clients whose interests are adverse to the town – and Rule 1.10(a) imputes the town attorney's conflicts to his entire firm. The duty of undivided loyalty, and the special sensitivity required of lawyers for the public not to accept employment that would tend to undermine public confidence in the integrity of the legal system, are paramount. *See also* Rule 1.11(f)(2) ("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 . . . a client."); 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").

13. Opinion 630 was decided under the predecessor to the current Rules: DR 5-105(A) of the New York Lawyer's Code of Professional Responsibility, which, like Rule 1.7(a), addressed conflicts of interest in concurrent representations. The language of the two provisions is not identical but the variances are immaterial to us here. By either standard, a conflict is present here. One of the lawyers in the firm represents the planning board and the zoning board of appeals. An application for a zoning change is essentially a negotiation between the Town and the Owner whereby each party seeks to optimize its own interests in the decision of whether to grant a variance and the terms of such variance. Moreover, a personal interest conflict is present, since there is a significant risk that the independent professional judgment of the lawyers involved will be affected by the personal interest of the attorneys for the Town in continuing representation with the Town or in the interests of the firm in remaining in the good graces of the Owner.

<u>Exceptions to the Prohibition Against Concurrent Representation of Conflicting Interests</u>

14. Concluding that a conflict of interest exists does not end the inquiry. We must also determine whether the conflict is consentable (*i.e.,* waivable).

15. We have previously held that a governmental entity may consent to a conflict of interest as long as the conflict is consentable under the Rules. In N.Y. State 629 (1992), for example, we said that a lawyer in private practice who had previously represented a governmental entity could later represent a client with interests adverse to the government, as long as the lawyer obtained the consent of the governmental entity 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. But the conflict in Opinion 629 was a conflict with the private lawyer's former client, not with a current client, and therefore did not raise the question of "differing interests" that arises when a lawyer or law firm seeks to oppose a current client. Here, the inquiry revolves around a potential conflict between two current clients of the same law firm.

16. In Opinion 630, we did not expressly address whether informed consent could mitigate a government lawyer's conflict because we found no conflict. Here we have found a conflict, so we must analyze whether consent can cure the conflict.

17. Rule 1.7(b) provides:

> Notwithstanding the existence of a concurrent conflict of interest under Rule 1.7(a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (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
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> (4) each affected client gives informed consent, confirmed in writing."

Thus, the Rule authorizes consent to a conflict by the affected clients, unless one of the three circumstances in Rule 1.7(b)(1)-(3) applies, in which case the conflict is nonconsentable. If a conflict is nonconsentable, a lawyer may not even ask for a client's consent. As explained in Comment [14] to Rule 1.7: "If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective." We must therefore examine the three circumstances in Rule 1.7(b).

18. The first circumstance, which is set out in Rule 1.7(b)(1), is that the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." This "reasonable" belief standard is not purely subjective. *See* Rule 1.0(r) (reasonable belief, when used in reference to a lawyer, "denotes that the lawyer believes the

matter in question and that the circumstances are such that the belief is reasonable.") Objective criteria, including public trust in the processes of government, are integral to the analysis. This analysis necessarily involves consideration of the public's reasonable view of a single law firm handling both sides of an issue that affects the public in a significant way, such as allowing industrial use of land abutting residential properties and an educational institution. Whether or not the issue provokes widespread controversy, we believe that our Opinion 630 correctly captures the ethical concerns that this inquiry raises. Where lawyers from a single law firm are both filing an application with a public agency on behalf of a private client and advising the government agency about the applied-for change in the town's current zoning and planning program, government decision-making is affected in ways that consent cannot ameliorate.

19. The second circumstance in Rule 1.7(b) that makes a conflict nonconsentable is that the representation is "prohibited by law." As noted above, whether the conflict here is prohibited by law is a legal question beyond the jurisdiction of this Committee, so we do not answer that question.

20. The third circumstance in Rule 1.7(b) that makes a conflict nonconsentable is that the representation involves 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. Here, there is a question about whether the matter before the planning board involves a "claim" by one client of the firm against another client. There is also a question about whether the planning board is a "tribunal" within the meaning of Rule 1.0(w) ("'Tribunal' denotes . . . an . . . administrative agency or other body acting in an adjudicative capacity," i.e. "when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter."). *See* N.Y. State 838 (2010) (whether a rule-making or rate-making proceeding before an administrative agency should be considered as being before a "tribunal" is a question of fact; principles that would apply to the determination include whether the parties have the opportunity to present evidence and cross-examine other providers and whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact such as an administrative law judge). Both questions involve issues of fact or law that are beyond our jurisdiction to determine. But if the representations here are prohibited by law, or if the planning board is a tribunal and the zoning application is a claim by one client against another client, then the conflict here is nonconsentable.

21. It does not matter that we lack power to resolve the issues raised by the second or third circumstances of Rule 1.7(b)(3), because Rule 1.7(b)(1) settles the question. A municipal zoning or planning board performs important functions which ordinarily involve public hearings. Typically, the advocate of any zoning change (here, presumably the counsel for the Owner) outlines the proposed change, while counsel for the board (here, a lawyer affiliated with the Owner's advocate) has the duty to question the proposal, raise concerns, and perhaps engage in direct negotiations with the party advocating the proposed change. During those negotiations, either the Owner or the Town may need to compromise or yield points. In addition, because the hearings are public, affected citizens – to whom the Town's counsel may owe duties – may voice their concerns about the proposed zoning change. The planning board must be neutral and free from bias when carrying out its duties. In these circumstances, lawyers from the same law firm who are representing potentially opposing parties could not reasonably conclude that each can provide competent and diligent representation to his or her client. This is especially true where

the town attorney holds the heightened duties of counsel to the public, and the public will suffer if he provides anything less than competent and diligent representation to the Town.

22. For all these reasons, we believe the conflict here is nonconsentable.

CONCLUSION

23. A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters while another lawyer in the same law firm seeks to represent an applicant before the Town's planning board.

(15-17)