New York State Bar Association
Committee on Professional Ethics

Opinion 1153 (5/24/2018)

Topic: Conflicts of Interest: County attorney's service on the board of a county-sponsored community college

Digest: Whether a county attorney may also serve on the board of a county-sponsored community college may raise legal issues that overtake ethical concerns. If such dual service is legally permissible, then a lawyer occupying these roles must assess, in each instance when the interests of the county and community college overlap, whether a reasonable lawyer would conclude that the two positions create a significant risk that the lawyer's duty to one will adversely affect the lawyer's duty to the other. If the lawyer determines that such a condition exists, then the lawyer must decide whether the conflict is subject to waiver and, if so, whether the affected client(s) may give informed consent, either for the lawyer or another lawyer in the county attorney's office. In all events, the lawyer must assure that the affected client(s) is or are aware of the potential risk to evidentiary privileges that the lawyer's dual roles occasion.

Rules: 1.0(f), (h), (j), (q) & (r); 1.6(a) & (b); 1.7(a) & (b); 1.10(a) & (d).

FACTS

1. A county legislature in New York appointed the inquiring lawyer, who is admitted in New York, as county attorney. In this particular county, the county attorney is a full-time position overseeing a staff of assistant county attorneys. Section 501 of the County Law provides that a county attorney "shall be the legal advisor to the board of supervisors [or legislature] and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature. The county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors [or legislature] and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law." These duties engage the county attorney in representing the county, its officials, its agencies, and its personnel in litigated matters and administrative proceedings; preparing contracts between the county and others; drafting legislation; and generally acting as legal advisor to the county, its officers, its legislature, and its agencies. The county legislature sets the compensation of the county attorney.

2. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board. Section 6306.1 of the Education Law says that a community college "shall be administered by a board of trustees" consisting, with exceptions not applicable here, of nine members serving seven-year terms, five of whom the legislature names, which may include one member of that body; and four of whom the governor names from among county residents. (A tenth member must be a student, elected by the student

body for a one-year term.) Trustees receive no compensation for their service as such. Community college personnel are paid, at least in part, out of county funds.

3. Section 6306.2 of the Education Law directs the community college board to appoint a college president and to adopt curricula, in each case "subject to approval by the state university trustees." The board must also prepare an annual budget, which must be submitted to the local legislative body for adoption, and must discharge such other duties as may be appropriate under the "general supervision of the state university trustees." Section 6306.4 of the Education Law authorizes the community college board, among other things, to acquire by deed or lease any real or personal property to carry out the purposes of the college, subject to county legislative appropriation, and apply any proceeds to college purposes subject to the regulations of the state university trustees. Under the same section, title to personal property thus acquired vests in the board of trustees, while title to any real property vests in the sponsoring county. The county and the community college may be parties to other college-related contracts, either between each other or, together or separately, with third parties. The county legislature has the right to audit the community college's expenditures.

4. As the statutory arrangement evinces, the governance of a community college is triangular. Although a county (or, in less-populated areas, a group of counties) sponsors a community college, the county does so in coordination with and only upon approval of the state university system. Section 355 of the Education Law prescribes that the state university trustees shall provide standards and regulations for the organization and operation of community colleges, which the state university trustees have done (*see* 8 N.Y.C.R.R. §600 *et seq.*). Sections 202 and 207 of the New York State Education Law repose ultimate authority over state and community college programs in the New York Board of Regents. By law, then, the county, the community college, and the state university system each plays a role in running the community college.

5. We are told that, in any litigation involving the community college, its board, or its staff, the county attorney's office represents the community college and its constituents, either through the office's own staff attorneys or by selecting outside counsel. The county attorney's office supplies other legal services to the community college as well.

6. The inquirer's appointment as county attorney post-dated the inquirer's appointment to the community college board and election as its chair. The inquirer wishes to know whether ethical issues arise from remaining on the community college's board of trustees while acting as county attorney.

QUESTIONS PRESENTED

7. Does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer's ethical obligations to each?

OPINION

Introduction

8. The jurisdiction of this Committee is limited to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not opine on issues of law. The current inquiry potentially raises legal issues under, among others, the County Law, the Education Law, the Public Officers Law, the Rules and Regulations of the New York State University Trustees, the Governance Rules of the Board of Regents, the County Ethics Code, and any ethics regulations of the community college. We note, too, that the so-called "doctrine of incompatibility" – in brief summary, disallowing dual public offices when the holder of one government position has a right to interfere with or subject to audit and review the holder of another government position – is embedded not only in specific statutes, *see, e.g.*, N.Y. County Law §411 (elected county officer may not serve in any other elected county or municipal office or as county supervisor); N.Y. General City Law § 3 (member of common council may not hold appointed city office), and but also more generally in the common law, *see, e.g., People ex rel. Ryan* v. *Green,* 58 N.Y. 295, 304-05 (1874) (state legislator could not serve as court clerk); *Dupras* v. *County of Clinton*, 213 A.D.2d 952, 953 (3d Dep't 1995) (county legislator could not serve as senior clerk on board of elections); *Held* v. *Hall,* 191 Misc.2d 427, 432 (Supreme Ct., Westchester Co. 2002) (county legislator could not serve as police chief); Informal Op. 1039, 1999 N.Y. AG 45 (1999) (under common law, Town Supervisor could not serve as Town Librarian). Questions concerning the effect of any of these or other legal issues on the proposed conduct is best directed to persons with the statutory authority to render advice on such matters, such as the Attorney General of New York or the New York Joint Commission on Public Ethics. If the inquirer's proposed action does not comply with an applicable law or regulation, then the question to this Committee is moot because applicable laws or regulations take precedence over the Rules. *See* Rule 1.7(b)(2) (disallowing a representation prohibited by law when a concurrent conflict of interest is present). Here, we address solely whether the inquirer's proposed action gives rise to a conflict of interest or other concerns under the Rules.

9. Considerable literature exists on the wisdom of lawyers serving simultaneously as counsel for a corporate entity and as a member of the entity's governing board. *See, e.g.*, Okray, *Lawyers as Corporate Board Members: A Paradigm Shift*, Fed.Lwy. 12 (Mar 2013); Litov, Sepe & Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, (Feb. 25, 2013) (available at ssrn.com/abstract=2218855); Frievogel, *An Ethics Primer for Business Lawyers* 8-9 (June 2009) (available at apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf); C. Wolfram, Modern Legal Ethics 738-40 (1986). Although debate on the wisdom of such service is robust, nothing in the Rules, in the ABA Model Rules of Professional Conduct (the "Model Rules"), or, as best we can determine, in any state ethics rules, prohibits the practice. *See* Restatement (Third) of the Law Governing Lawyers §135, Cmts. d and e (Am. Law. Inst. 1998). Nevertheless, common to all analyses is an acknowledgement that conflicts and confidentiality issues inhere in the occupation of two roles that implicate the lawyer/director's duties of care and loyalty to the organization.

10. In N.Y. State 589 (1988), we examined these issues under the predecessor of the Rules, the New York Code of Professional Responsibility (the "Code"). There, consistent with opinions from other jurisdictions we cited, this Committee said that no *per se* bar exists to

concurrent service as a lawyer for an organization and service as a member of its board. We then identified three principal concerns, one of which – that a lawyer may not use board membership improperly to solicit matters for the lawyer's firm – is inapposite here in the context of a full-time government lawyer heading an office the purpose of which is to represent the organization. The other two concerns are applicable here, namely, the risk to the lawyer's exercise of independent professional judgment arising out of the lawyer's role as a director, a risk heightened, we said, when the lawyer serves as board chair; and the risk of loss of evidentiary privileges, in particular the attorney-client privilege. *See* ABA 98-410 (1998) (stating similar concerns under the Model Rules).

Conflicts of Interest

11. N.Y. State 589 was decided under DR 5-105 of the Code, which is the forerunner of Rule 1.7(a). The language of DR 5-105 differs somewhat from Rule 1.7(a), but we do not regard the differences as meaningful to our analysis. Rule 1.7(a) says in part that, subject to Rule 1.7(b), "a lawyer shall not represent a client if a reasonable lawyer would conclude either" that the representation "involves the lawyer in representing differing interests" or that the representation poses 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." Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer a client, whether it be a conflicting, inconsistent, diverse, or other interest." Here, the inquirer's position on the community college board, acting solely in the capacity as trustee, is a personal interest that may differ from or adversely affect the inquirer's legal representation of the county and the county's constituents.

12. A Comment accompanying Rule 1.7 describes the potential conflicts arising from the dual roles of lawyer and director:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the trustees. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

Rule 1.7, Cmt. [35].

13. We can envision a variety of circumstances when a reasonable lawyer (on which more below) would conclude that "differing interests" may be involved in the lawyer's dual roles or that a "significant risk" may exist that the county attorney's obligations to the county, its board, and its officials will be adversely affected by the inquirer's personal interests as a member of the community college board. By way of illustration, the community college board must submit any proposed acquisition or leasing of real property to the county board. As a fiduciary of the community college, the inquirer owes a duty to the community college to promote the real estate plan as adopted by the community college board the inquirer chairs, while at the same time

owing the county a fiduciary duty to exercise professional judgment in advising the county on that same matter. Whether the terms of any real estate transaction, in which the community college board chair presumably plays an active part in negotiating, accords with the county's interests, with title being vested in the county, is an issue on which the county is entitled to uncompromised independent judgment. The circumstances become more problematic if, as a board member, the inquirer opposed the transaction, yet as board chair must defend a decision to the county board which the inquirer personally disfavors. We have no difficulty determining that, in circumstances like these, a reasonable lawyer would conclude that a significant risk is present that the lawyer's interests as a community college board member imperils the lawyer's independence as attorney for the county.

14. The inquirer must make this determination in each instance in which the interests of the county and the community college intersect. The exercise is necessarily a case-by-case analysis, including, but not limited to, budget matters, audits, contract matters in which the two entities are co-parties or counter-parties, state-directed mandates, or in the event that the inquirer is personally named in any litigation or other proceeding against the community college trustees. This last event may create special tension: When the subject is the potential liability of the college board or one or more of its members, the lawyer must assure that the lawyer can render independent professional judgment, free of overt or subtle influences that the lawyer's own potential exposure or the lawyer's collegial relationships with other board members may incite.

15. In any circumstance, if the lawyer determines that the conditions of Rule 1.7(a) appear, then the lawyer must decide whether, in the particular instance involved, the conflict is subject to waiver by informed consent under Rule 1.7(b), which says that, notwithstanding "the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent represent to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Waiver of Conflicts

16. "The requirements of informed consent are set forth in Rule 1.0(j)." N.Y. State 1055 ¶ 12 (2015). We have previously opined that a lawyer may accept "consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and 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." *Id.*; N.Y. State 629 (1992). The inquirer should not participate in the decision whether to consent or advise the county or community college on this issue of consent. *See* N.Y. City 1988-5 (1988) (an attorney who is a member of a cooperative apartment board may not participate in "any decision of the [board] that will reasonably affect the lawyer's own personal" interests as counsel to the board).

17. There remain the other three elements of Rule 1.7(b). As we have said, if the law prohibits the representation under Rule 1.7(b)(2), then no ethics issue need be considered, for the law transcends the Rules. If no law erects a barrier to the representation, then, under Rule 1.7(b)(1), the lawyer must reasonably believe, that is, both subjectively and objectively, that the lawyer is able "to provide competent and diligent representation to each affected client." *See* Rule 1.0(r) (defining reasonable belief); Rule 1.0(q) ("When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation"); N.Y. State 1048 ¶ 20 (2015) (Rule 1.7(b)(1) "has both a subjective and an objective component"). Situations may occur in which, despite the existence of a disqualifying "significant risk" under Rule 1.7(a), a disinterested lawyer could well conclude that the lawyer is able to provide the representation that Rule 1.7(b)(1) requires. In other instances, the facts may preclude such a conclusion, in which event the remedy of informed consent is unavailable.

18. In the latter instance, the question arises whether a lawyer in the county attorney's office other than the county attorney may represent the county or community college in the matter in which a conflict prevents involvement of the county attorney. Rule 1.0(h) includes a "government law office" as a "law firm" within the meaning of the Rules. Rule 1.10(a) says that, while lawyers are associated in a law firm, "none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" by, among other things, Rule 1.7. Thus, if Rule 1.7 disqualifies the county attorney based on a conflict, then the conflict is imputed to all other lawyers in the county attorney's office who are aware of the conflict. Rule 1.10(d), however, says that a "disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client" under the conditions set forth in Rule 1.7. This means that, though the disqualification of the county attorney is imputed to the entire county attorney's office, the applicable entity (whether the county, the community college, or, more likely, both) may consent to representation by another attorney in that office notwithstanding that attorney's knowledge of the conflict. N.Y. State 968 ¶ 25 (2013). Otherwise put, if that other attorney reasonably believes that the attorney may "provide competent and diligent represent to each affected client," then the attorney may proceed with the informed consent of the affected client(s), confirmed in writing.

19. One situation may not allow informed consent no matter the foregoing. Rule 1.7(b)(3) forbids a lawyer to represent a client in "the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal." A county and a community college may find themselves in litigation opposed to each other. We leave for a later resolution, on concrete facts, whether circumstances may exist in which the county attorney or a member of the county attorney's may appear with informed consent in such a dispute or whether the parties would have no recourse but to retain separate independent counsel. *See* N.Y. State 968 ¶ 28 (leaving open the question whether consent is possible in comparable circumstances).

Protection of Confidential Information

20. The other major risk identified in N.Y. State 589 is the preservation of a client's evidentiary privileges, especially the attorney-client privilege. The county attorney acts as counsel to the county and to the community college, but does not represent the community

college merely by reason of membership on the college board. Although evidentiary privileges are questions of law beyond our purview, N.Y. State 789 ¶ 4 (2005), Rule 1.6(a) forbids a lawyer to reveal "confidential information" – the definition of which in that Rule includes information "protected by the attorney-client privilege" – unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by Rule 1.6(b), the elements of which need not detain us here. Our concern – one resonant in the literature to which we alluded at the outset – is that the multiple roles may create confusion about, and threaten the ability to assert, the attorney-client privilege.

21. The Comment to Rule 1.7 is again instructive:

> The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of trustee might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a trustee or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.7, Cmt. [35].

22. We do not trespass the limits of our jurisdiction to recognize that, ordinarily, an attorney's confidential communications with a client in pursuit of legal advice are subject to a claim of attorney-client privilege, whereas communications by one board member with fellow board members on matters of corporate policy are not. When the board member communicating on matters of organizational policy is also the lawyer for that organization, the communication is pregnant with potentially perplexing privilege problems – that is, whether the lawyer is communicating as a lawyer to a client or to fellow policymakers as a board member. The consequence is that, when the attorney is also serving as a board member, a danger exists that the attorney-client privilege may not protect the attorney's communications with the board on legal matters. This may be so even if the lawyer is explicit in distinguishing between the lawyer's provision of legal advice and business advice as a board member, because others (such as courts) may disagree.

23. Juggling the competing responsibilities and overlapping roles of government lawyer and board member thus demands acute alertness to the capacity in which the lawyer is acting in a particular setting and to the audience's understanding of the lawyer's communications. Among other things, the lawyer should advise the other members of the community college board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity as trustee might not be protected by the attorney-client privilege, and a parallel disclosure is required when the lawyer is acting as county attorney before county officials in matters involving the community college. At every meeting and during every discussion, clarity is essential on whether the lawyer is participating as counsel or as a board member. That the inquirer is chair of the board enhances this need. As we said in N.Y. State 589, owing to "the chair's more extensive involvement in decision-making concerning the management of the organization," it is possible "if not, indeed, more likely that the responsibilities of the two roles will conflict more frequently than in the case of a mere director." Hence, when the lawyer is participating as counsel, the lawyer must assure that precautions are taken to protect the client's

privilege, including safeguards against public disclosure of privileged communications in board minutes or the presence of third parties whose knowledge of the communication might endanger the privilege.

CONCLUSION

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that the dual roles do not involve a significant risk that the lawyer's interests as a board member would adversely affect the discharge of the lawyer's independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney's office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer's dual roles might imperil.

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