Conflict of Interests Involving Private Practitioners Representing Cities and Counties

Introduction

"[A] Lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Attorneys who represent city or county governmental bodies are particularly vulnerable to this ethical charge. Many municipal and county governments are legally represented, not by full-time, in-house counsel, but by elected or appointed attorneys whose obligation to the city or county government co-exists with the continued maintenance of a private law practice. In these situations, the attorney is generally free to maintain his past attorney-client relationships. At times, however, the co-existence of these obligations leads to the representation by the attorney of the interests of a private client which are adverse to those of the governmental unit by which the attorney is employed (and vice versa). This dual representation is one of the primary sources of potential conflict of interests situations.

The American Bar Association Code of Professional Responsibility advises the attorney confronted with potentially adverse

2. The federal government attorney, although subject to the same professional considerations, is not considered here, since the federal government attorney is also subject to federal statutes and regulations not applicable to city and county representatives. The federal conflict of interest statutes may be found in 18 U.S.C. § 207.
3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, [hereinafter cited as ABA Code] Disciplinary Rule [hereinafter cited as DR] 5-105(A) provides:
   A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of proffered employment, or if it would be likely to involve him in representing differing interests . . . .
   DR 5-105(B) provides:
   A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to involve him in representing differing interests . . . .
employment to refuse to accept such employment. The attorney already involved in a conflict of interests situation is advised to withdraw from the representation. Refusal of or withdrawal from employment, however, operates on a somewhat voluntary basis. When the ethical objectives propounded by the Code fail to operate, judicial involvement, in the form of an attorney’s disqualification from representing the case, public censure, or suspension from practice, becomes necessary.

The cases involving conflict of interests in this area can generally be grouped into three broad categories: 1) the simultaneous representation of adverse public and private interests; 2) the subsequent representation of a public interest adverse to the interests of a former client; and 3) the subsequent representation of a private interest adverse to a previously represented public interest. The situations in which the representation of competing interests demonstrate a clear abuse of a fiduciary duty have been easily resolved by the courts. In those situations in which there is no clear abuse, however, the findings have not been as uniform. This comment will examine some of the cases involving adverse representation by city and county attorneys in an attempt to facilitate the recognition of potentially conflicting employment.

**Simultaneous Representation of Adverse Public and Private Interests**

The simultaneous representation of adverse interests places the attorney in a situation in which he owes his undivided loyalty to two different clients with potentially conflicting interests. Not only is the possibility of improper use of disclosed confidences great, the potential for public misunderstanding is also strong enough to justify a strict prohibition of such representation by the courts.

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5. Id.
6. Id.
7. The ABA Code, Canon Four, provides that the lawyer should preserve the confidentiality of disclosures made to him by his client. The representation of differing interests creates a situation in which the attorney may be unable to fully and competently represent one client because he cannot disclose information obtained from another client.
8. The ABA Code, Canon Nine, provides that the lawyer should avoid the appearance of impropriety. The representation of differing interests may create an impression of wrongful conduct in the mind of the public.
The use of the attorney’s public position to secure personal gain and a favorable settlement on behalf of a private client is one situation in which disqualification and suspension are required. The defendant, attorney LaPinska, in In re LaPinska,\textsuperscript{9} represented the city in a complaint filed by Kutella, a buyer, against a real estate broker for the quasi-criminal violation of a zoning ordinance. In response to the lenient treatment given the broker at the municipal hearing, Kutella retained attorney LaPinska to represent him in a civil action against the broker. Since the zoning act in question provided for continuing violations, LaPinska, on behalf of the city, brought daily violation complaints against the broker. He informed the broker that the city would bring no further complaints against him in the event of a settlement with Kutella in the pending civil action. The court found that LaPinska had intentionally used his power as city attorney for private gain and suspended him from the practice of law for one year.

Disqualification and suspension may also be imposed when the attorney’s position as city representative is used to the disadvantage of the private client. In State ex rel. Nebraska Bar Association v. Nelson,\textsuperscript{10} the defendant attorney was employed by the city to commence tax foreclosure actions on certain real property, the taxes upon which had not been paid. In carrying out the foreclosure actions, the attorney filed several voluntary appearances for the defendant-owners of the property involved, often without their consent and caused default judgments to be entered against the owners and their property. The Court found a conflict of interest in the dual representation, and the attorney was suspended from practice for a period of time.

The potential for abuse of public office, as well as the likelihood of public misunderstanding, have been cited as policy considerations underlying the finding of a prima facie conflict of interest in the New Jersey cases concerning the simultaneous representation of a municipality and a land developer operating within that municipality. Defendant attorneys in the leading case of In re A and B,\textsuperscript{11} while representing the municipality, undertook to represent certain land developers operating within the municipality. The Court stated that:

\textsuperscript{9} 72 Ill. 2d 461, 381 N.E.2d 700 (1978).
\textsuperscript{10} 147 Neb. 131, 22 N.W.2d 425 (1946).
\textsuperscript{11} In re A. and B., 44 N.J. 331, 209 A.2d 101 (1965).
the subject of land development is one in which the likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the bar should not represent a developer operating in a municipality in which the member of the bar is the municipal attorney or the holder of any other municipal office of apparent influence.

... [S]uch dual representation is forbidden even though the attorney does not advise either the municipality or the private client with respect to matters concerning them.19

There is no indication that the New Jersey rule concerning the representation of land developers has been ruled upon in other jurisdictions. For the reasons stated in the opinion, however, such representation should be undertaken with care.

At least one court has held that the mere fact of simultaneous representation of conflicting interests is itself sufficient to justify disqualification and/or censure. It is not necessary that the public attorney have intentionally brought the privilege or power of his position to bear upon the outcome of the particular suit.13 In In re Truder,14 the action charged, among other things, that the defendant attorneys, after filing a criminal prosecution against an accused in their role as district attorneys, filed a civil suit against that same party on behalf of a private client, offering to dismiss the criminal proceeding in the event of a favorable settlement. The attorneys admitted that they were proceeding against the defendant in their public as well as private capacities. The court placed little emphasis on the alleged intent to dismiss the criminal suit; the fact of the dual representation was sufficient to justify censure. The court stated that “[t]he incompatibility of public duty and private interest and employment is too plainly illustrated in this case to require discussion. It scarcely aggravates the case to show that one of the [attorneys] actually uttered the suggestion which is implied in the situation itself. . . .”15

Although the Truder decision was not based upon the ABA Code of Professional Responsibility, the apparent rationale upon

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12. Id. at ___, 209 A.2d at 103. The court declined to censure the attorneys on the ground that such dual representation was widespread, and this action was the first to be filed before the court.
14. Id.
15. Id. at ___, 17 P.2d at 952.
which the Court decided the case is the same as that expressed in Canon Nine of the Code: the avoidance of the appearance of impropriety. Uncertainty as to the proper application of this policy has led to a lack of uniformity among the cases dealing with the simultaneous representation situation. While some courts have required disqualification or censure of the attorney involved without finding an ethical violation per se, others have attempted to limit what they consider to be an overly broad principle by requiring something more in the way of a "conflict of interest." It is clear, however, that the principle embodied in Canon Nine should be considered in appraising the propriety of the simultaneous representation of conflicting interests.

Subsequent Representation of a Public Interest Adverse to that of a Former Client

The cases discussed under this heading are similar in form to those cases previously mentioned. They are nevertheless distinguishable by the fact that the attorney's representation of the private client has been terminated, either by conclusion of the action, or by withdrawal from the case.

In Wilson v. Wahl, a practicing attorney, Wahl, represented a private client in a damage action against the city. The next year

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17. In re Truder, 37 N.M. 69, 17 P.2d 951 (1932). Accord, Alpha Inv. Co. v. City of Tacoma, 13 Wash. App. 532, 536 P.2d 674 (1975)(although there was no violation of DR 9-101(B), a former deputy prosecuting attorney of county was disqualified from representing plaintiff in a subsequent action against the city).


the mere appearance of impropriety will not always require the disqualification of an attorney, for counterbalancing it is the Code's own requirement that "[w]hile a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism." Canon 9, Code of Professional Responsibility, Exhibit A to Rule 16 of the Rules of the Supreme Court of Hawaii.

Id. at 295, 554 P.2d at 1136.

Wahl was requested to assist the city attorney in the defense of the action previously filed by Wahl as private counsel. He accepted the position, and withdrew as counsel for the private client. The Court found no intentional wrongdoing on the part of the attorney, but nevertheless ruled that Wahl should not have accepted employment with the city in defense of the damage action. The decision was apparently based on the view that in situations of this kind, the mere possibility of conflict is sufficient to mandate disqualification. The Court stated that "[w]hen confronted with such a situation, and doubt exists in the mind of an attorney as to the proper course to follow, the doubt always should be resolved in favor of not accepting the employment."  

It is not necessary that the attorney have fully and unconditionally agreed to represent the private client. At least one court has found that a lesser relationship will be sufficient to require the withdrawal or disqualification of the attorney from subsequent representation of an adverse interest. Attorney Forsyth, in State v. Leigh, 21 who was then a candidate for county attorney, conferred with the defendant concerning the attorney's undertaking the defense of the action. Forsyth was subsequently elected to the office of county attorney and appeared as prosecutor of the same action. Although no retainer had been agreed upon, and there was dispute as to whether or not Forsyth had actually agreed to represent the defendant, it was held that "if an attorney . . . voluntarily listens to [a proposed client's] statement of the case preparatory to the defense, he is thereby disqualified from accepting employment" 22 as prosecutor for the other side. The Court stated that:

an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter, even though, while acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent, adverse employment, and this rule applies not only to civil, but criminal cases. 24

20. Id. at ___, 322 P.2d at 810.
22. Id. at ___, 289 P.2d at 777.
23. But cf. Sowder v. Board of Police Comm'rs, 553 S.W.2d 525 (Mo. App. 1977)(no conflict found because previous relationship with client constituted mere nominal employment; no evidence that attorney obtained confidential information).
24. 178 Kan. at ___, 289 P.2d at 777.
Again, the appearance of unethical practice, and not the actual violation of the prohibition against representing conflicting interests, justifies the result.

In cases involving subsequent election to the city or county prosecutor’s office, the offending attorney and the prosecutor’s office with which he is affiliated may be disqualified from handling the case. In State v. Chambers,26 the attorney represented the defendant in a case pending before the county court. Three months before the trial, the attorney was appointed assistant district attorney for the county, and he withdrew as counsel for the defense. Ruling upon a motion by the defendant, the court held that the county district attorney’s office should be precluded from prosecuting the case. The basis of the decision was the avoidance of the appearance of “evil.”26 Even though there was no allegation of a disclosure of confidential information, the county prosecuting officials ought to be above suspicion.27

At least one court has refused to disqualify the district attorney’s office on the sole grounds that one member of the staff was involved in a potential conflict situation. The court in In re Willie L.,28 recognizing that it was sometimes necessary to disqualify a private law firm because of the adverse representation by one of the partners, declined to extend that precedent to the district attorney’s office. The court stated that “any analogy between a private law firm and the district attorney’s office is tenuous at best . . . .”29 The size and structure of the office, and the lack of any evidence that information flowed freely between members of the office, justified the result.

It should be noted that in the situations described above—the subsequent election to a public office—a conflict of interest requiring censure or disqualification will arise only if the duties of the office to which the attorney is appointed or elected are reasonably capable of coming into conflict with the area of private representation. Thus, in In re Advisory Opinion of Kentucky Bar Associa-

26. Id. at , 524 P.2d at 1004 (citing State v. Detroit Motors, 62 N.J. Super. 386, 272 N.E.2d 669 (1971)).
29. Id. at , 132 Cal. Rptr. at 843.
It was held not improper for a county attorney to represent a client before the Workmen’s Compensation Board, even though there was a remote possibility that the attorney would some day be called upon to represent the Board in actions against it. The statute involved in that case provided for representation of the Board by one of three people, so that the possibility of the county attorney being required to so represent the Board was slim.

Subsequent Representation of Private Interest Adverse to Prior Public Interest

The Code of Professional Responsibility has expressly addressed the ethical problems of the former public attorney returning to fulltime private practice in DR 9-101(B): “[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.” The policy considerations behind the fairly strict language include:

- the treachery of switching sides,
- the safeguarding of confidential governmental information from future use against the government,
- the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment . . . ,
- and the professional benefit derived from avoiding the appearance of evil.

Under this ethical mandate, it is not necessary that there be an express finding of a disclosure of confidences or an abuse of public office. The rationale frequently used by the courts is the “access to information” rule, which requires that, if “it can reasonably be said that in the course of former representation the attorney might have acquired information related to the subject matter of the subsequent representation, the attorney should be disqualified.”

The language of DR 9-101(B) makes the provision explicitly

30. 526 S.W.2d 306 (Ky. 1974).
31. ABA Code, DR 9-101(B).
32. ABA Committee on Professional Ethics, Opinions, No. 342 (1975).
33. See Alpha Inv. Co. v. City of Tacoma, 13 Wash. App. 532, 536 P.2d 674 (1975) (even though there was no violation of DR 9-101(B), a former deputy prosecutor of county was disqualified from representing plaintiff in subsequent action against city).
34. Id. at ___ , 536 P.2d at 677.
35. Id. at ___, 536 P.2d at 676.
applicable to situations in which the same or similar subject matter is involved in both instances of representation.\textsuperscript{36} The court, in \textit{State v. Lucarello},\textsuperscript{37} has defined the meaning of "substantial responsibility"\textsuperscript{38} to extend beyond the specific charges underlying the suit at hand. In that case, the attorney, who had previously acted as county prosecutor, sought to represent a defendant on criminal charges arising out of transactions that occurred three years after the attorney left public office. The court nevertheless found the attorney to be in direct violation of DR 9-101(B). Although the specific acts with which the defendant was charged arose after the attorney had left office, a good bit of the information upon which the charge was based was gathered by investigations conducted while the attorney was still in office. The disciplinary rule extends "to any matter which originated in the office with which the attorney was connected where he was in a position of confidence and actually knew or had the opportunity to know facts because of his position in said office."\textsuperscript{39}

The New Jersey court has specifically dealt with the nature and extent of "substantial responsibility" as stated in DR 9-101(B) in \textit{In re Advisory Opinion on Professional Ethics No. 361}.\textsuperscript{40} Noting that any "substantial responsibility" in a case while he was in public office would automatically prohibit the attorney from representing a private client in that same case, the court stated that "the attorney's participation in the state's investigation [need not] be of a substantial nature."\textsuperscript{41} There must, however, be some relationship between the investigation and the attorney's duties while in office:

\begin{quote}
[T]he language that disqualification follows 'even though the attorney had played no part in the investigation and prosecution' or because the case 'had originated while he was con-
\end{quote}

\textsuperscript{36} ABA Code, DR 9-101 (B): A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.


\textsuperscript{38} ABA Code, DR 9-101(B).

\textsuperscript{39} State v. Lucarello, 135 N.J. Super. 347, 343 A.2d 465, 468 (1975) (citing New Jersey Advisory Committee on Professional Ethics, Opinion 111, 90 N.J.L.J. 361 (1967)).

\textsuperscript{40} 77 N.J. 199, 390 A.2d 118 (1978).

\textsuperscript{41} Id. at 120.
nected with that office' is somewhat overbroad. Of course, actual responsibility for or participation in any aspect of the proceeding is . . . disqualifying. And where the attorney because of his or her status becomes aware of any information or material on a matter pending in the prosecutor's office, then he or she should refrain from related private employment, even though no other responsibility had existed. [citations omitted] But where each of these factors is missing, then a conflict of interest does not exist.42

At least one court has held that if there is no relationship between the action represented by the former public attorney as private counsel and the attorney's duties while he was still in office, then there is no justification for disqualification. In In re Allen,43 the defense attorney in the pending litigation had previously, as county attorney, prosecuted the defendant for an unrelated crime. It was held that there was no ethical violation requiring disqualification involved, since the prosecution of the defendant had been completed many years before the present suit arose.

The Allen case, however, appears to be in conflict with other cases involving the prosecution of criminal offenses. The New York Supreme Court, in 1924,44 stated the general view that "it is a very dangerous practice for any member of the bar, who has been connected with the Attorney General's office, engaged in the prosecution of persons charged with criminal offenses, to thereafter appear for said defendants in subsequent proceedings of a criminal nature."45 The bar opinions and statutory rules of each state should be examined before undertaking employment of this nature.

Conclusion

It should be clear from the foregoing discussion that conflict of interests are particularly prevalent in situations involving a present or former city or county attorney. The Code of Professional Responsibility, particularly Canons Four, Five, and Nine, provide the attorney with general guidelines by which to determine the proper course of conduct. These guidelines do not, however, suffi-

42. Id. at 390 A.2d at 121.
45. Id. at 203 N.Y.S. at 442.
ciently describe the situations in which conflicts may arise, with the result that much of the determination of "ethical" conduct in these situations is left to the discretion of the individual attorney. It is hoped that, by a reading of some of the types of cases involving conflicts of interest, familiarization with the pertinent bar association opinions, and attention to the rules and statutes in force in one's particular jurisdiction, the public attorney will be able to effectively examine potentially adverse employment situations and decide the proper course of conduct.

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