

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 99-2

**May A Municipal Attorney Represent
A Quasi-Judicial Municipal Board
That Is Hearing A Disputed Matter
In Which The Municipality Is A Party To The Dispute?**

The Committee has been asked if a municipal attorney may represent a quasi-judicial municipal board hearing a disputed matter in which the municipality is a party to the dispute. The Committee concludes that the lawyer may do so, but only in accordance with Alaska Rule of Professional Conduct 1.7.

In the facts presented, the municipality employs a very small staff of attorneys. The attorneys provide general legal advice to municipal agencies and represent the municipality in disputed matters. On occasion, the municipality is a party in a disputed hearing heard by a quasi-judicial board comprised of citizen volunteers. One municipal attorney sits at counsel table and advocates for the municipality's position (the "advocate"). Another municipal attorney sits with the board and provides it with procedural advice (the "neutral"). The attorneys do not discuss the matter with each other outside the hearing room, intending to be separated by what is colloquially known as an "ethical screen."

This phrase refers to an imaginary barrier between lawyers in the same office preventing communication about the matter. *E.g.*, Stevens, "Can the State Attorney General Represent Two Agencies Opposed in Litigation," 2 Georgetown Journal of Legal Ethics 757, 797 (1989). Ethical screens, or "Chinese Walls," are meant to protect against conflicts of interest much as "the Great Wall served ancient Chinese emperors, an elaborate and extraordinary, yet effective and impregnable, barrier against transgression." C. Wolfram, *Modern Legal Ethics*, § 7.6.4, at 401 n. 65.¹

¹ Of course, as a matter of historical fact, wave upon wave of invaders swept into ancient China, starting with the Hsiung-Nu and ending with the Mongols. These invaders were neither deterred nor delayed by the "Great Wall," and routinely and repeatedly breached it. J. K. Fairbanks, *A New History of China* (Cambridge: Harvard U. Press, 1994). Increasingly, courts view ethical barriers as equally ineffective in preventing breaches of attorneys' ethical responsibilities. *E.g.*, *Cardonna v. General Motors Corp.*, 942 F.Supp. 968, 977-978 (D.N.J. 1996); *Towne Development of Chandler, Inc., v. Arizona Superior Court*, 842 P.2d 1377 (Arizona, 1992).

As an initial matter, the Committee notes that lawyers representing government entities are subject to the Rules of Professional Conduct in the course of representing their client. ABA Formal Opinion 97-405.² Among these are the rules relating to conflicts of interest. *Id.*, at 4 (“it seems clear that the general conflict of interest provisions of the Model Rules serve to protect the interests of a government client just as they protect the lawyer’s private clients”). Alaska Rule of Professional Conduct 1.7 provides:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client ~~in the same or a substantially related matter*~~, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation [...].

(*Publisher’s Revision: This ethics opinion was drafted prior to the January 15, 1999 amendment to ARPC 1.7(a). This strikethrough shows the language removed by the amendment.)

Rule 1.7 is primarily based on the duty of loyalty owed to the lawyer’s clients and the duty to preserve client confidences. *Comment*, Annotated Model Rule of Professional Conduct 1.7 (Chicago: ABA, Third Ed. 1995), at 19. The rule “applies both when the representation of a client is directly adverse to another client and when representation of one client would

² “While lawyers who serve as public officers or employees are singled out for special treatment under a few rules, *e.g.*, Rule 1.11 (‘Successive Government and Private Employment’) and 3.8 (‘Special Responsibilities of a Prosecutor’), it has generally been assumed – correctly in our view – that such lawyers are in most other respects subject to the same obligations in representing their government client that apply to lawyers representing private clients.” *Id.*, at 4. n. 1 (citations omitted).

be materially limited by other interests or responsibilities of the lawyer.” Id. (citations omitted).

Many commentators have concluded that different agencies within a government entity should be considered separate clients when they have opposing positions in matters in controversy. Josephson & Pearce, “To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict,” 29 Howard Law J. 540; Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978), at 768. The authorities recognize, however, that the attorney-client relationship is “subtly different” for government attorneys as compared to the private bar. *Humphrey v. McLaren*, 402 N.W.2d 535, 542 (Minn. 1987). The attorney general, for example, has a “dual role as representative of a state agency and guardian of the public interest.” *Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Calif. 1981). State courts have allowed the attorney general to concurrently represent conflicting interests within the government, when the attorney general “can ensure independent representation for the competing parties.” *Hawai’i v. Klattenhoff*, 801 P.2d 548, 604 (Hawaii 1990).

Adversity and independence are the issues. In the facts presented, the municipal agency and the citizen board are not directly adverse. Thus, Rule 1.7(a) (adversity) does not squarely apply. However, the roles of the two municipal attorneys participating in the hearing differ substantially. The advocate attorney argues for the municipal agency’s position. The neutral attorney provides advice to the citizen board on its options. While the advocate acts in a conventional role, the neutral is in a more complex position, and the concerns of Rule 1.7(b) (independence) are implicated.

The municipality, a party to the proceeding, employs the neutral attorney. The neutral has personal interests in maintaining good relations with the municipality as an employer, the municipal agency as a client, and the “advocate” municipal attorney as a colleague or possibly a supervisor. Regardless of the temporary assignment to the board, the neutral owes a duty of loyalty to the municipality:

Simply put, an attorney must be loyal to her client and ensure that every professional decision she makes on behalf of the client is in the client’s best interest.

Freund v. Butterworth, 117 F.3d 1543 (11th Cir. 1997).

The facts presented involve a very small law office, where the attorneys are in daily contact, as compared to a larger governmental law office

with “a large staff which can be assigned in such manner as to afford independent legal counsel and representation to the various agencies.” *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1204 (SJC Maine, 1989), quoting, *Allain v. Mississippi PUC*, 418 So.2d 779, 784 (Miss. 1982).

Even with the best intentioned ethical screen in place, the neutral attorney may be reluctant to give advice to the board that goes against the municipality’s interests, that undercuts the arguments of the municipal staff or that contradicts the arguments of her colleague or supervisor, the advocate. The neutral is in a position of potentially conflicting loyalties, and her ability to independently represent the board may be questioned:

Loyalty to a client is [...] impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

Comment, ARPC 1.7(b); cf., *Smiley v. Director, Office of Workers Compensation*, 984 F.2d 278, 282 (9th Cir. 1992), citing, former DR 5-105.³

In these circumstances, the Committee believes that the neutral attorney’s representation of the board will likely be “materially limited” by her responsibilities and loyalties towards the municipality. Rule 1.7(b). The neutral has an obligation to examine very closely the propriety of her representation of the board under Rule 1.7(b)(1) and (b)(2) before proceeding further.

Under Rule 1.7(b)(1), if the neutral attorney believes that representation of the board will be “adversely affected” by her responsibilities to the municipality or any other relevant consideration, such as her personal interests, the neutral must decline the representation. Under Rule 1.7(b)(2), even if the neutral believes that her representation of the board “will not be adversely affected” by her other responsibilities, she must nonetheless consult both clients and obtain their informed consent before proceeding. Cf. ABA Formal Opinion 97-405, at 5 (“In such a case the lawyer could continue the

³ Although the “neutral” attorney’s advice to the board may be intended to be limited to procedure, the Committee notes that decisions on procedural matters frequently have substantive impacts on the outcome of any case.

representation only if she reasonably believes it would not be adversely affected, and even then only if she obtained consent of the affected clients.”).⁴

A final consideration, in addition to those of Rule 1.7, is public confidence in the legal system. Alaska lawyers have “a special responsibility for the quality of justice.” Preamble, Alaska Rules of Professional Conduct. It is sometimes said that a government attorney has “the public interest” as a client. *E.g., EPA v. Pollution Control Board*, 372 N.E.2d 50, 53 (Ill. 1977). It is assuredly in the public interest for government attorneys in Alaska to take whatever steps are required to preserve public confidence in the “quality of justice” at all levels of Alaska’s legal system.

In these facts, parties appearing before the municipal board may not understand the role played by the neutral municipal attorney in a proceeding where another municipal attorney appears as an advocate, and may not believe they are being treated fairly. Both attorneys should be cognizant of their duty to maintain public confidence in the legal system, and should take whatever steps they believe appropriate under the circumstances of the matter. In some cases, maintaining public confidence in the fairness of the legal system may require a board to have independent counsel. As a routine matter, however, the Committee does not believe independent counsel to be required in the circumstances presented here.⁵

Approved by the Alaska Bar Association Ethics Committee on December 3, 1998.

Adopted by the Board of Governors on January 15, 1999.

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⁴ The Committee’s discussion centers on the neutral attorney because of the facts presented in the opinion request. The advocate attorney has the same responsibilities under Rule 1.7(b) towards the municipality as the neutral attorney has towards the board. If the circumstances demand it, the advocate must act accordingly.

⁵ The Committee does not express any opinion on the due process issues presented by this fact situation.