ETHICS OPINION

RO-2005-01

[redacted]

QUESTION:

A municipal judge, and an attorney whose law firm represents the municipality in civil matters only, have both submitted opinion requests concerning the conflict of interest the attorney, and the other attorneys in his firm, would have if they undertake to defend criminal clients in Municipal Court. The following opinion is a joint response to both requests. The city attorney acknowledges that he and his firm would have a conflict, however, the mutual inquiry from both the attorney and the judge is whether, and subject to what conditions, this conflict may be waived.

ANSWER:

It is the opinion of the Office of General Counsel that this conflict situation is so fraught with potential ethical pitfalls that the advisability of waiver and consent appears to be, at best, highly questionable. However, this office will not go so far as to hold this conflict to be absolutely unwaivable, despite the many ethical concerns discussed below.

DISCUSSION:

The general rule governing conflicts of interest is Rule 1.7 of the Rules of Professional Conduct. This Rule prohibits an attorney from simultaneously representing two clients whose interests are adverse. It provides, in pertinent part, as follows:

> "Rule 1.7 Conflict of Interest:
> General Rule
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, 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."

It is obvious that the interests of the city and the interests of a criminal defendant being prosecuted by the city are "directly adverse" within the meaning of paragraph (a) of the above-quoted Rule. It is equally obvious that an attorney who simultaneously represents the city and a criminal defendant being prosecuted by the city would be "materially limited" in his ability to represent both clients within the meaning of paragraph (b). Such representation creates an archetypical concurrent conflict of interest situation for the lawyer and his firm. However, Rule 1.7 also obviously provides for a waiver of conflicts. If an attorney can make a good faith determination that the representation of one client will not "adversely affect" the representation of the other client, then the attorney may, in most instances, ask both clients to consent to the representations.

However, the Comment to Rule 1.7 discusses the fact that there are some situations in which waiver and consent is neither a prudent nor ethically advisable option.

"Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on

> representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The conflict which confronts this law firm comes very close to falling within that category of conflicts described in the Comment. By virtue of the firm's representation of the city, the attorneys in the firm are in a position to use the attorney-client relationship as leverage to persuade the city to accord their clients more favorable treatment than would be afforded the clients of other attorneys. No waiver, regardless of how it is worded, can change this fact.

This office does not suggest that the attorneys in the firm would take advantage of the firm's position or use their leverage with the city improperly. However, assurances, no matter how sincere, that they would not do so would be insufficient to overcome the perception of impropriety which would prevail, not only in the legal profession, but perhaps more significantly, on the part of the public.

On the other hand, the client of a city attorney who gets convicted may well feel that the city attorney did not oppose the prosecution, or cross-examine city police officers, as aggressively as would an attorney whose firm did not represent the city. The attorney could be open to the accusation that his representation of the client was "materially limited", within the meaning of Rule 1.7(b), by his, and his firm's, "own interests". The perception by the client, and by the public, could well be that the attorney was reluctant to employ an aggressive defense which might antagonize city officials and jeopardize his firm's continued employment.

Such a contention could easily provide the basis for a post-conviction motion alleging ineffective assistance of counsel. While waiver on the part of the client might provide an arguably persuasive defense to such a motion, it is equally possible that the waiver could be found ineffectual, particularly if obtained from an uneducated and unsophisticated client.

Both opinion requests raise questions concerning the extent to which the involvement of city police officers impacts upon the conflict. When a police officer testifies as a prosecuting witness the city attorney, if he is to do the best possible job

for the defendant, is placed in the almost untenable position of undermining the credibility and discrediting the testimony of his own client. However, police testimony only goes to the degree, not the existence, of the conflict. The attorney's representation may be "materially limited" to a lesser degree when the prosecution is not dependent on police testimony but the underlying basis for the conflict is no less. The fact that a police officer testifies obviously exacerbates the conflict but it is not the basis for the conflict. In other words, the elimination of police testimony from the equation would by no means eliminate the conflict because the city attorney is still simultaneously representing two clients whose interests are "directly adverse" to each other.

If waiver and consent is sought from the city, it must be executed by someone with authority to act on behalf of, and unquestionably bind, the city and its governing body. In most instances, a blanket or standing waiver covering all cases defended by the firm will probably be sufficient. However, there may be certain cases in which the conflict is of such a nature and extent that a fact specific waiver should be required. Such a determination would lie within the sound discretion of the Municipal Court. The consent from the criminal defendants should be couched in readily understandable language easily comprehensible by a layperson of no more than average intelligence.

Finally, it is the opinion of this office that in any case in which the city police, or other city official, decide to dismiss the criminal charges against a defendant represented by a city attorney, the court should carefully scrutinize the reasons for dismissal in order to minimize the appearance of impropriety. The court would, of course, have discretion to disqualify the city attorney and/or appoint a special prosecutor if the court were of the opinion that the ends of justice so require.

In summation, it is the opinion of the Office of General Counsel that this conflict situation is so fraught with potential ethical pitfalls that the advisability of waiver and consent appears to be, at best, highly questionable. However, this office will not go so far as to hold this conflict to be absolutely unwaivable, despite the many ethical concerns discussed herein.

LGK/vf

9/20/05