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Advisory Committee on Professional Ethics
Appointed by the Supreme Court of New Jersey

Opinion 702
Advisory Committee on Professional Ethics

Developer Rule; Conflict of Interest: Concurrent Representation of Municipality and Developer of Projects Elsewhere Not Adverse to the Municipality

The inquirer asks whether the long-standing "developer rule" has effectively been abolished by virtue of the New Jersey Supreme Court's elimination of the appearance of impropriety provision in the Rules of Professional Conduct. More specifically, the inquirer questions whether *RPC* 1.7 or 1.8 are violated if a municipal attorney represents a developer owning property in the same municipality, assuming the firm limits its representation of the developer to matters outside and not adverse to the municipality.

What has become known as the developer rule was first enunciated in *In re A & B*, 44 *N.J.* 331 (1965). There, municipal attorneys were charged in a county ethics committee proceeding with representing developers whose projects were located in the same municipality. The Court was unable to conclude that the attorneys directly represented developers in their dealings with the municipality, which would have been a direct violation of then Canon 6. Nonetheless, in a *per curiam* opinion the Court went on to state:

> . . . 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. We all know from practical experience that the very nature of the work of the developer involves a probability of some municipal action, such as zoning applications, land subdivisions, building permits, compliance with the building code, etc.
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> It is accordingly our view that such dual representation is forbidden even though the attorney does not advise either the municipality or the private client with respect to matters concerning them. The fact of such dual representation itself is contrary to the public interest.

In re A & B, supra, 44 *N.J.* at 334-335.

In practice, this language has been interpreted to bar a municipal attorney with a developer client operating in his or her town from contemporaneously representing that developer not only in that town but also in other municipality, irrespective of whether there is an actual conflict. This prohibition would also apply to the municipal attorney's firm.

The Court's precise basis for this conclusion was not expressly articulated. It may have been premised in common law, but it is also possible that it was based, at least in part, upon the appearance of impropriety doctrine. The present inquirer suggests that with the abrogation of the appearance doctrine, the developer's rule is no longer viable. Because the Court's decision was not expressly grounded in the prior canons, and may have been based in common law, this committee does not view itself as empowered to draw such a conclusion. It can, however, offer its analysis as to how the "developer rule" situation would fare under the current Rules of Professional Conduct.

RPC 1.7 states in part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Further, *RPC* 1.8(k) states:

> A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client
> .

RPC 1.7 proscribes dual representation where there is an actual conflict of interest – where the representation of one client is directly adverse to another client, or where there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client. Furthermore, *RPC* 1.7(b)(1) precludes consent by a public entity where such a conflict exists.

Arguably, this constitutes a more just result from the client's standpoint, as the client is

not deprived of what may be a firm's longstanding representation simply because one of its attorneys begins representing a municipality where the developer operates or owns property. Such a result also probably reflects the reality that any perceived advantage to the client resulting from his attorney's municipal solicitorship in a given municipality has little if any practical influence over decision makers in other municipalities. At bottom, the concerns expressed by the Court in *A & B* grow out of a realization of the more intimate relationship which can exist among attorneys and elected or appointed officials within a single municipality. By contrast, an analysis under *RPC* 1.7 does not support a *per se* bar where a firm represents a municipality as well as a private client developing property in another town.

In each case, the particular facts will determine the outcome. Situations will arise in which an actual conflict exists requiring disqualification, not only of the municipal attorney under *RPC* 1.7, but of all attorneys in the firm under *RPC* 1.10. For example, a municipal solicitor or a planning board attorney involved in a master plan review mandated by the Municipal Land Use Law may well be called upon to evaluate changes in the master plan which might have a beneficial or detrimental impact upon a client owning property in an adjoining municipality. Under those circumstances, the attorney cannot escape the conclusion that his actions may have an impact not only upon land owned by his client in the adjoining municipality, but also in the municipality where the attorney serves as municipal or planning board solicitor. Similar disqualifying circumstances can arise in the face of competing local demands for scarce water and sewer capacity resources, where decisions made by the municipality with the advice of counsel will have an impact upon the solicitor's clients who are also clients of the firm.

In summary, an analysis pursuant to the present Rules of Professional Conduct, subsequent to the deletion of the appearance of impropriety doctrine, does not support a *per se* bar along the lines of the *A & B* developer rule. Nonetheless, because *In re A & B* can be interpreted as announcing a common law rule, this committee does not view itself as possessing the authority to declare a decision of the Supreme Court to be without further applicability. The inquirer or other affected parties may petition the Court for review of this opinion and question pursuant to *R.* 1:19-8. If the developer rule were found to no longer have vitality as a matter of common law, current ethics rules dictate that while an actual *RPC* 1.7 conflict will continue to disqualify both the municipal attorney and his firm from representing a private developer in other municipalities, *RPC* 1.7 will not automatically preclude the municipal attorney and his firm from such representation under a *per se* developer rule.