

RPC 73

April 13, 1990

Editor's Note: This opinion was originally adopted as RPC 73 (Revised).

Conflicts of Interests Involving Attorneys for and on Governing Bodies

Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county board of commissioners, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

Inquiry:

In RPC 63, decided in April 1989, the Ethics Committee discussed potential ethical restrictions imposed upon Lawyer L, who serves as a county commissioner. The Committee held, in part, that Lawyer L should not represent criminal defendants in cases where the county's law enforcement officers are prosecuting witnesses, if the commissioners are responsible for hiring, firing, promoting, or setting the salaries of the officers. CPRs 189 and 233 were cited in support of this opinion. The Committee held, however, that Lawyer L's associates would not be so disqualified, citing CPR 252.

CPR 252, decided on September 27, 1979, held that the partners and associates of an attorney who served on a governing board such as a city council were not automatically disqualified from representing a party to litigation, civil or criminal, in which a police officer of the governmental unit would be a witness, if the governing board is not directly involved in the hiring, firing or setting of salaries of the police officers of that governmental unit.

In April 1989, the Ethics Committee approved an ethics advisory provided to Attorney B, who serves as town attorney and occasionally advises members of the town police department. The advisory provided that no member of Attorney B's firm could represent criminal defendants if members of the town police would be prosecuting witnesses.

In light of CPR 252 and RPC 63, may members of Attorney B's firm represent criminal defendants in cases in which members of the town police force will be prosecuting witnesses?

Opinion:

No. CPR 252 and RPC 63 hold that an attorney who has some potential influence on the salary or employment prospects of a law enforcement officer ought not be put in the position of cross-examining that officer. The problem created by this situation is the threat that the law enforcement officer might not feel free to testify truthfully and fully in the face of such an opponent. Presumably, the lawyer's partners and associates, who are not members of the governing board, would have no influence on the law enforcement officer's salary or employment and thus, the disqualification need not extend to them.

The decision rendered in April 1989 to Attorney B and his firm addresses a different factual situation and a different ethical problem. In the problem addressed in the advisory, Attorney B is not a member of a governing board with financial power over law enforcement officers, but is the attorney for a governing body. Under the facts presented, Attorney B advises the police department and, in effect, represents the policemen. If Attorney B undertakes to represent criminal defendants arrested by town police, he is, in effect, simultaneously representing clients with adverse interests. It is presumed that the conflict created by this simultaneous representation is so fundamental that it cannot be waived by consent of the clients. Further, this disqualification is extended by Rule 5.11 to the other members of the attorney's firm. Therefore, the attorney's associates may not represent criminal defendants who were arrested by members of the police force.

If, however, Attorney B represents a governing body but does not represent the police department in criminal matters, neither he nor his partners would be disqualified from representing criminal defendants in cases where police officers are prosecuting witnesses.