

# Opinion No. 1 of 2006

## Conflict of interest where attorney represents client in front of governmental board or agency with which attorney has prior relationship

This formal opinion is disseminated in accordance with the charge of the Indiana State Bar Association Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the Association and does not carry the weight of law.

### Issue

Is the representation of a client in front of a governmental board/agency by an attorney a violation of the Indiana Rules of Professional Conduct if the attorney is also either: (i) a member of the board/agency or an official of its governing body; (ii) attorney for the board/agency; or (iii) where the attorney's law firm or a member of his law firm serves in such capacity?

### Conclusion

In certain situations the representation of a client in front of a governmental board/agency by an attorney may be a violation of the Indiana Rules of Professional Conduct if the attorney is also either a: (i) member of the board/agency or an official of its governing body; (ii) attorney for the board/agency; (iii) or where the attorney's law firm or a member of his law firm serves in such capacity. The purpose of this Opinion is to discuss several situations where such a violation may arise and the Indiana Rules of Professional Conduct as applied to such situations. This Opinion also addresses the issue of "informed consent confirmed in writing," which may be extremely important in the conflict analysis.

## Applicable rules

Rule 1.7 of the Indiana Rules of Professional Conduct reads:

### Conflict of Interest: Current Clients

(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:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by

one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(Emphasis added.)

Comment (1) to Rule 1.7 reminds the lawyer that "loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Conflicts of interest can arise regarding a current client, a former client (*see* Rule 1.9) or a prospective client (*see* Rule 1.18).

Resolution of such conflicts require the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict has arisen; 3) decide whether the representation may be taken despite the existence of a conflict, *i.e.*, whether the conflict is "consentable"; and 4) if the conflict is "consentable," then to consult with the clients and obtain each client's informed consent, which shall be confirmed in writing.

Absent such consent, pursuant

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to Comment (6) of Rule 1.7, the lawyer “may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.”

Directly adverse conflicts can arise not only in litigation, but also in transactional matters. Comment (7) to Rule 1.7 gives an example of this kind of conflict:

[I]f a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by a lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Rule 1.10(a) of the Indiana Rules of Professional Conduct reads:

Imputation of Conflicts of Interest: General Rule

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.9 or 2.2 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

The Commentary under Rule 1.10 (2) and (3), Principles of Imputed Disqualification, states, ...

(2) The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

(3) The rule in paragraph (a) does not prohibit representation where neither

*questions of client loyalty nor protection of confidential information are presented.*

(Emphasis added.)

**Applicable case law**

*In the Matter of Carlyle Gerde*, 634 N.E.2d 494 (Ind. 1994), Carlyle Gerde received a public censure because his simultaneous representation of Ms. Chrisman, a trustee facing criminal charges, and the trustee’s office, which had suffered from the trustee’s criminal actions, threatened to materially limit the representation of the trustee’s office. Gerde received a public reprimand despite the Indiana Supreme Court finding that Gerde did not act in bad faith, had never before been the subject of a disciplinary proceeding, and the attorney’s law firm representing the trustee did not receive information from the township for use in the trustee’s criminal defense.

The Indiana Supreme Court, citing Ind. Professional Conduct Rule 1.7, found that the facts clearly and convincingly established that the Respondent represented both Union Township and trustee Chrisman during a period of time when Chrisman’s personal interests were directly adverse to the interests of Union Township, since the township was the victim of criminal acts committed by Chrisman. Further, Respondent’s simultaneous representation threatened to materially limit his representation of Chrisman. “The mere possibility of adverse effect upon exercise of free judgment prevents a lawyer from representing clients with opposing interests.” *In Re: Lantz*, 442 N.E.2d 989 (Ind. 1982).

*In Re: Lantz, supra*, Jeffrey Lantz, a part-time prosecutor, received a public reprimand for representing both the state in a criminal matter against a defendant, and the same defendant in a

separate civil matter against the state. The Indiana Supreme Court stated, “[H]is dual and diametrically opposed duties to the State and to his client compromised his independent professional judgment.”

**Analysis and application**

There are many situations where an attorney may have a conflict of interest when the attorney or a member of his law firm serves as a board member for a governmental board/agency and also seeks to represent a client in an action in front of the same governmental board or agency.

As a threshold question, an attorney or a firm should consider who is the attorney’s or the firm’s client for purposes of protecting the attorney-client privilege. Is it an individual, such as a township trustee? Or is it an organization, such as the trustee’s office?

The second question to be asked is whether or not the dual representation involves a question of client loyalty or protection of confidential information on behalf of either client. If so, then the attorney or firm should not continue dual representation without the appropriate informed consent and waiver of the conflict of interest by each client. Such consent and waiver should be *confirmed in writing*.

Finally, the attorney should consider whether or not the attorney or the firm is acting in a legal capacity on behalf of two separate clients. Clearly there is a conflict when two attorneys in the same firm, in a legal capacity, represent two separate entities or clients with opposing interests where the opposing interests have not been disclosed to both clients and the proper consent has not been obtained (if it is a consentable conflict under Rule 1.7(b)). However, if one attorney is a board member, not acting in a legal capacity for the

board, and another attorney from the same law firm seeks to file suit against the board, there may not be a conflict of interest so long as the board retains independent legal counsel regarding the lawsuit.

**Hypothetical Fact Scenario I:**

Attorney A was recently elected a part-time County Commissioner. In this position, Attorney A is one of several locally elected officials who appoint members of various executive departments and quasi-independent boards or commissions. As a part-time County Commissioner, Attorney A is involved in the overall operation of the county, although Attorney A does not, *in a legal capacity*, represent the individual county agencies or boards at public hearings. Attorney A also maintains a full-time practice as a member of a law firm. May Attorney A, *in a legal capacity*, represent a client filing suit against a county governmental entity when Attorney A appoints members to the board of the same entity?

It is the opinion of the Legal Ethics Committee that it would be a conflict of interest for Attorney A, *in a legal capacity*, to represent a client filing suit against a county governmental entity when Attorney A appoints members to the board of the same entity. Under Rule 1.7(a), there is a significant risk that the representation of the client would be materially limited by the lawyer's responsibilities to the board. That same conflict of interest would extend to another attorney in the same law firm as Attorney A. For example, Attorney B, a partner in the same law firm as Attorney A, should not represent an individual in a lawsuit filed against the county governmental entity where Attorney A appoints members of the board.

It is possible that this conflict be waived pursuant Rule 1.7(b)

provided each affected party gives informed consent, confirmed in writing.

**Hypothetical Fact Scenario II:** The same fact scenario as Hypothetical Fact Scenario I applies except Attorney A only appoints members to the boards of various local agencies and does not appoint members to the defendant board. In addition, Attorney A does not act in a legal capacity for the board or the agencies. Is there a violation of the Indiana Rules of Professional Conduct?

It is the opinion of the Legal Ethics Committee that a conflict of interest would not exist where Attorney A simply appoints members to the boards of various local agencies, *but does not act in a legal capacity* for the board or the agencies. In such situation, the attorney should carefully examine the facts of the specific situation to ensure that the appropriate Rules of Professional Conduct have been applied to each situation.

In this scenario, Attorney A does not have a client since he/she is not acting in a legal capacity and

is simply a member of a board appointing members of various governmental agencies. Because there is not dual representation regarding two separate clients, there is no conflict regarding loyalty to two separate clients. In addition, Attorney A does not appoint members to the board itself so the lawyer is not limited by his responsibilities to a third party.

**Hypothetical Fact Scenario III:**

Attorney A represents a client before the City Planning Commission. Attorney B, a member of Attorney A's law firm, is the City Attorney. Is this a violation of the Indiana Rules of Professional Conduct?

It is the opinion of the Legal Ethics Committee that generally an attorney would be in violation of the Indiana Rules of Professional Conduct where the attorney represents a client before a City Planning Commission or similar city board if a member of the attorney's law firm is City Attorney. However, assuming the City Planning Commission

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has independent legal counsel, and Attorney A does not act as the commission's legal advisor, there should not be a conflict between Attorney A and Attorney B that would forbid Attorney B from representing individuals in filing suit against city governmental agencies while Attorney A and Attorney B practice in the same law firm.

In Hypothetical Scenario III, a conflict does exist if Attorney A acts as a legal advisor and not simply as a member of a county board or agency while Attorney B represents individuals filing suit against the same county board or agency. In this case, the conflict of interest could not be waived because the representation involves the assertion of a claim by one client against another client by the same law firm.

In Opinion No. 1 of 1982,\* the Indiana State Bar Association's Legal Ethics Committee addressed the issue of whether a member of a law firm could represent clients before the City Planning Commission, the City Board of Zoning Appeals, the City Board of Aviation Commissioner and the

City Park Board if a member of the same law firm was also the City Attorney.

The opinion stated that where the City Attorney is not the "head of the Department of Law," and the boards and commissions have hired independent counsel, and the City Attorney has been given no responsibility toward those entities, then there would be no conflict of interest if the City Attorney or a member of his firm would practice before those particular boards and commissions. However, if the City Attorney was eligible to practice before those boards and commissions, and there was not independent counsel, then it would be improper for members of the attorney's firm to represent persons before those boards.

The above opinion confirms the Committee's Opinion No. 1 of 1980, wherein the Committee concluded it would be improper for a attorney, who is the County Attorney, to have a member of his firm represent persons before the Area Planning Commission or the County Board of Zoning Appeals.

The Committee pointed out that this was a "potential" conflict of interest which should cause the law firm not to accept representation of the individuals before the local boards.

For instance, if the party would fail with the Zoning Commission and the Board of Zoning Appeals, assuming there is no legal recourse in the courts, the last alternative would be to attempt to change the Zoning Ordinance. This is where the conflict becomes obvious: The attorney is bound to do the best for his client, and it might very well require that he attempt to change the ordinance. Thus we would then have an attorney in the unenviable position of having his firm represent two different sides of the question. The County Attorney in his attempt to advise the County Commissioners should and must be impartial with his advice and input. This would be impossible if a member of his firm were representing the party who was a client of his firm in an attempt to change the zoning ordinance. The [Legal Ethics] Committee believes this would be an obvious conflict of interest. Lastly, there would be an appearance of impropriety because the general public might very well imply that this law firm had special influence upon the Zoning Appeals Board or the Planning Commission by virtue of having a member representing the County Commissioners.

### **Hypothetical Fact Scenario IV:**

May an attorney represent several different governmental units as legal counsel for each unit at the same time under the Indiana Rules of Professional Conduct?

It is the opinion of the Legal Ethics Committee that an attorney may be in violation of the Indiana Rules of Professional Conduct where the attorney represents several different governmental units as legal counsel for each unit at the same time. The answer would depend on the particular fact scenario at hand. The Legal Ethics Committee's Opinion No. 6 of

1978 addressed this issue and states in part, “It is possible for governmental units to have ‘differing interests’ both in litigation and non-litigation related matters. The ethical considerations are clear that a lawyer must carefully weigh the potential that his judgment may be impaired when requested to represent clients ‘having potentially differing interests.’”

Again, the attorney should consider whether or not the dual representation involves a question of client loyalty or protection of confidential information on behalf of either client. If so, then the attorney or firm should not continue dual representation without addressing Rule 1.7(b) and if applicable obtaining informed consent and waiver of the conflict of interest (or the potential conflict of interest) by each client. Such consent and waiver should be *confirmed in writing*.

**Informed consent confirmed in writing:** The issue of informed consent confirmed in writing may be pivotal when addressing each of these hypothetical conflicts. In a situation where an attorney seeks to have a conflict of interest, or a potential conflict of interest, waived by both parties, the attorney should carefully review the provisions of Rule 1.7(b) to insure it is a consentable conflict. Comment 20 to Rule 1.7 discusses the issue of obtaining the informed consent of a client, confirmed in writing.

Such a writing may consist of a document executed by a client. In the alternative, the lawyer shall promptly transmit a writing to the client confirming the client’s oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). *The require-*

*ment of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as the reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.* Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

(Emphasis added.)

A client may revoke the consent at any time. Whether a client revoking such consent precludes the lawyer from continuing representation of other clients “depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.” See Comment 20 to Rule 1.7.

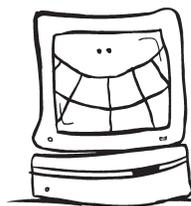
Consent to future conflicts is not discussed in this opinion but

may be found under Comment 22 of Rule 1.7 of the Indiana Rules of Professional Conduct.

### Final conclusion

Cases of this nature are extremely fact-specific. While this opinion is offered for guidance purposes, each attorney, or firm, in a similar situation, should examine the facts of his or her situation to avoid possible ethical conflicts. ☺

\* The published opinions of the Legal Ethics Committee are available online at the Indiana State Bar Association’s Web site, [www.inbar.org](http://www.inbar.org).



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