

LEGAL ETHICS OPINION 1422

CONFLICT OF INTEREST - MULTIPLE REPRESENTATION – GOVERNMENT ATTORNEY: COUNTY ATTORNEY AS GENERAL COUNSEL FOR REGIONAL TRANSPORTATION DISTRICT COMMISSION, ONE MEMBER OF WHICH IS THE COUNTY, WHILE SIMULTANEOUSLY PROVIDING LEGAL SERVICES TO THE COUNTY.

You have indicated that the county [County] for which you serve as county attorney is a member of a Regional Transportation District Commission [Commission], along with one other county and three cities. You indicate that, at the request of the County's Board of Supervisors, your office drafted the founding documents to create the Commission (which originally consisted of your County, one other county, and one city), has served as legal counsel for it in all matters except bond counsel services, has negotiated and drafted numerous contracts, and has provided substantial written and oral advice on behalf of the Commission. Furthermore, you indicate that the great majority of those legal services have been provided by the current Deputy County Attorney [Deputy], with the Commission members and all relevant entities and individuals clearly understanding that the County was the actual employer of the Commission's counsel.

You advise that, after approximately four years of such operations and upon negotiations being conducted prior to an additional city [City] assuming membership on the Commission, that applicant City sought to condition its membership, in part, upon the Commission's obtaining independent legal counsel. That condition was rejected by the then-current membership of the Commission; however the City ultimately resolved to join the Commission and accepted a letter from the Commission stating that it would begin the process of obtaining independent counsel once a particular major transportation project began service, projected for the fall of 1991.

Furthermore, you indicate that, when a draft agreement was presented to the Commission by which the principal operating responsibility for a specific transportation project would be transferred from your individual County to the Commission, the City again voiced its dissatisfaction at not having independent counsel. You advise that the Executive Director of the Commission conceived and negotiated the agreement to transfer the project, following which the Executive Director was advised that the Commission either could continue to utilize the legal services of the Deputy, while effecting a "Chinese Wall" between the County Attorney and the Deputy, or could obtain outside counsel. The Commission's Executive Director chose to continue utilizing the services of the Deputy and no immediate objection was raised by the City. Subsequently, however, you indicate that the City's Commission member reiterated his concerns for the propriety of the provision of legal services to the Commission by the County member's Deputy County Attorney.

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You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for members of a county attorney's office to provide general counsel services to the [regional] Commission of which the county is a member. In addition, you ask the Committee to consider the propriety of the Deputy County Attorney providing legal representation to the [regional] Commission with regard to a specific agreement for transfer of a project between the Commission and the County where a "Chinese Wall" has been effected between the county attorney and the Deputy providing services to the Commission.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(B) and (C), which mandate that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client except if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure; and DR:5-105(E), which requires that, if a lawyer is required to decline employment or to withdraw from employment under DR:5-105, no partner or associate of his or his firm may accept or continue such employment. (emphasis added) Further guidance is available in Ethical Consideration 5-15 [ EC:5-15] which provides:

[i]f a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

In addition, EC:5-18 exhorts that:

[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

Assuming, from the facts you have presented, that the [regional] Commission is being represented as a single entity, one member of which is the County, the Committee is of the opinion that it would not be proper for members of that county attorney's office to provide to the Commission either general counsel services or specific legal services related to an agreement between the Commission and the County, while simultaneously providing legal services to the County. The Committee believes that the potentially differing interests, and thus the foreseeability of future conflicts between the County and the Commission of which it is a member, preclude the county attorney from meeting the threshold test of DR:5-105(C), i.e., it must be "obvious that [the lawyer] can adequately represent the interest of each". Furthermore, the Committee believes that, since the

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ripening of any such differing interests and future conflicts would mandate withdrawal from representation of both the County and the Commission, all doubts should be resolved against the propriety of continuing the multiple representation and in favor of retaining undivided loyalty to the initial client, the County, as encouraged by EC:5-15. See also Utah State Bar Op. 81 (Feb. 20, 1987) (a lawyer may not be employed as both a county attorney and as a city attorney for a municipality within the same county boundaries due to the potential for divided loyalties, improper use of confidential information, and the appearance of impropriety.)

Having reached the conclusion that the continued multiple representation as you describe would be improper, and since your inquiry provides no factual description of any such device, the Committee specifically refrains from opining as to the viability of a "Chinese Wall"/screen between the county attorney and the Deputy County Attorney. See also LE Op. 1020.

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**Legal Ethics Committee Notes.** – Rule 1.7(a)(1) follows a subjective “reasonably believes” standard rather than the old Code’s objective “obvious” standard.