

No. 2017-1. What are the ethical considerations in serving as a town attorney and as county commissioner of the county in which the town is located?

Facts

In your request, you state you are a town attorney and you are considering running for election to the office of county commissioner of the county that includes the town.

Issues

Your inquiry concerns the implications of holding the dual roles simultaneously, more specifically, whether potential conflicts of interest arise from the dual roles. You have acknowledged needing to recuse yourself from any “actual or perceived conflicts between the Town and the County.” Finally, you identified an obvious conflict of interest—i.e., that the town contracts with the county for police protection by the sheriff’s office—and you stated that you plan to recuse yourself from that transaction.

Analysis and Conclusions

From the outset, the Committee notes that you would not have two clients by being the town attorney and a county commissioner simultaneously. That is, the county would not be your client. Nevertheless, the Committee concludes that the following rules provide appropriate direction.

Under Rule 1.7, a “lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” Such a conflict exists where (1) the representation of one client is directly adverse to another, or (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.” Colo. RPC 1.7(a)(1)–(2). This latter consideration will likely impact your continued representation of the town in your position as county commissioner. The limitation based on a “third person” would be impacted by your responsibilities to the county, just as the limitation based on “personal interests” would apply to your responsibilities as county commissioner. Continued representation would require diligence on your part.

A lawyer may nevertheless represent a client notwithstanding the existence of a concurrent conflict of interest, provided the following all occur:

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

Colo. RPC 1.7(b).

Several comments to Rule 1.7 provide useful guidance. Comment 3 states that a conflict of interest may exist “before representation is undertaken,” in which case the representation either must be declined or the lawyer must obtain the informed consent¹ of each client as required under Rule 1.7(b). Comment 4 states that conflict can arise “after representation has been undertaken,” in which case the lawyer again must either withdraw or obtain the informed consent of each client. And Comment 8 advises scrutinizing “the likelihood that a difference in interests will eventuate,” as well as that difference’s impact on the lawyer’s representation.

Comment 28 reiterates that “a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic,” but suggests that such representation may be “permissible where the clients are generally aligned in interest.” *See also* cmt. [23] (“[C]ommon representation of persons having similar interests in civil litigation is proper if the requirements

of paragraph (b) are met.”). However, Comment 16 counters that some government agencies have limitations on the ability to consent to conflicts.

Additional rules governing conflicts of interest with current clients can be found in Colo. RPC 1.6, 1.8, 1.9, and 1.11. Collectively, these rules address the duties of loyalty and client confidentiality, including to former clients; require the lawyer’s continued exercise of independent judgment; and recognize that duties to former clients or personal interests may limit the lawyer’s ability to continue representation.

Several formal ethics opinions discuss conflicts of interest. CBA Comm. on Ethics, Formal Op. 48, “Representation of Public Body, Conflict of Interest” (1972) (rev. 1997) highlights that a “county attorney has the same ethical responsibilities as a public official.”. And CBA Comm. on Ethics, Formal Op. 68, “Conflicts of Interest: Propriety of Multiple Representation” (1985) (rev. 2011) addresses scenarios of multiple representation, emphasizing caution in doing so in the strongest terms.

However, the rules, comments, and opinions discussed above do not end the inquiry. Additional considerations guide this inquiry. The first is a legal one, originating in the fiduciary duties owed by public officers and government officials, as set forth in “Standards of Conduct” for state government public office, CRS §§ 24-18-101 et seq. The Committee trusts you are familiar with these rules and will conduct yourself accordingly; however, as any application of these rules involves a legal question, specific application of these rules is beyond this Committee’s scope.

The Committee notes that the conflict-of-interest rules under the Colo. RPC, and ethics opinions addressing the same, apply to you only as town attorney because it is only in this capacity that you represent a client. In contrast, the statute articulating your fiduciary duties applies to your role as county commissioner. Consequently, a related concern is the interplay between your fiduciary duties and your ethical obligations in representing the town while also performing your role as county commissioner. This dual relationship between the town and county may impact your ability to work for both effectively.

For example, you will no doubt be called upon to allocate resources on a county-wide basis that may negatively impact the town or simply not benefit the town in a manner the town would prefer. Or the town may request that you, as town attorney, pursue a legal matter that would conflict with your role as county commissioner. The Committee further foresees instances where your role as county commissioner will require not allocating resources in a manner that would

directly benefit the town, or, in the alternative, where your role as county commissioner could either suggest the ability to award un-merited resources to the town or present such an opportunity where those resources could arguably be better allocated elsewhere.

Because these are not present conflicts and because the Rules do not encompass the appearance of impropriety as conflicts, the Committee does not opine on such latent issues that may arise. Suffice it to say, however, that these will trigger both your ethical and fiduciary responsibilities that may not be reconcilable while holding both offices. In this respect, because there are numerous situations where recusal could be required, informed consent by the town may be required. The likelihood of a non-waivable conflict looms large.

In addition, the nature of your personal interests, apart from acting as county commissioner, are unknown to the Committee. However, as county commissioner, your role would carry responsibilities that potentially could implicate both your personal interests and as-yet-unknown third-party interests in a way that your role as the town's attorney has not. Similarly, your role as county commissioner could impact your personal interests in a way potentially in conflict with your responsibilities as the town attorney. The Committee would strongly caution you to exercise continuing diligence in acknowledging any such conflicts consistent with your obligations under the rules of professional conduct. If a conflict cannot be consented to, recusal would be required. *See Restatement (Third) of the Law Government Lawyers*, § 122. *See also* Colo. RPC 1.7, and cmts. [16], [28].

You have proposed to recuse yourself from transactions where your role as the town's attorney would conflict with your role as county commissioner. Under the Colo. RPC, as well as prior opinions from this Committee, this is a prudent course of action. *See, e.g.*, Colo. RPC 1.7, cmt. [7]. In addition, you must stay vigilant as to how your role as county commissioner may impact both third-party interests and your own personal interests. Provided you exercise diligence and professional judgment in assessing potential conflicts, the Committee does not see a problem with your dual roles as town attorney and county commissioner.

1. "Informed consent" requires the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information[.]" Colo. RPC 1.0(e).