



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-07
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Subject: Conflict of Interest; Government Representation; Prosecutors

Digest: A lawyer may not serve concurrently as a municipal prosecutor and as an administrative hearing officer for that same municipality.

References: Illinois Rules of Professional Conduct 1.7, 1.12, and 1.0.

Illinois Supreme Court Rules 62 and 63 (Illinois Code of Judicial Conduct).

Girot v. Keith, 212 Ill. 2d 372 (2004).

In re Heirich, 10 Ill. 2d 357, 384 (1956).

Bd. of Educ. v. Ill. Educ. Labor Relations Bd., 165 Ill. App. 3d 41 (4th Dist. 1987).

Gigger v. Bd. of Fire & Police Com'rs of City of East St. Louis, 23 Ill.App.2d 433 (4th Dist. 1959).

People ex. rel. Myers v. Haas, 145 Ill.App. 283 (1st Dist. 1908).

65 ILCS 5/1-2.1-1, *et seq.*

5 ILCS 100/10-25, 10-35 (2012).

ISBA Op. Nos. 03-02, 12-12, and 12-13.

Conn. Informal Op. No. 00-17.

FACTS

An attorney contracts with a municipality for the purpose of prosecuting local ordinances for that municipality. The attorney also acts as that municipality's administrative hearing officer at its administrative hearings for offenses such as parking tickets, building code enforcement, or red light enforcement. For example, in this situation, the municipal attorney may prosecute a defendant for a speeding ticket in court one week, and the next week, the same attorney may adjudicate the defendant's parking ticket in an administrative hearing for the same municipality.

QUESTION

Is there a conflict of interest for an attorney to be the municipal prosecutor and act as an administrative hearing officer for the same municipality?

OPINION

This inquiry raises the question of whether a lawyer who serves in a dual role as prosecutor for a municipality and administrative hearing officer for that same municipality, albeit in connection with different matters, has a disabling conflict of interest. The answer is yes.

Rule 1.7 of the Illinois Rules of Professional Conduct provides in relevant part as follows:

- (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.

In the situation presented here, the lawyer does not have a conflict under Rule 1.7(a)(1) because the lawyer does not represent *clients* with adverse interests. The only attorney-client relationship is between the lawyer and the municipality in the lawyer's role as prosecutor. As a hearing officer, the lawyer does not represent either the municipality or any other party. Thus, Rule 1.7(a)(1) does not apply.

However, that does not end the inquiry because the lawyer clearly has a concurrent conflict under Rule 1.7(a)(2). A concurrent conflict may exist under Rule 1.7(a)(2) where "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.*" It is the latter two possibilities that create a concurrent conflict – that is, the lawyer's responsibilities to a third party (the public) and his or her own personal interests in retaining the municipality as a client. As the Comments to Rule 1.7 make clear, a lawyer's independent judgment is an essential element of the relationship to a client.

In the role of administrative hearing officer, the lawyer acts in a quasi-judicial capacity. A hearing officer is an "authorized official[] of the municipality," with the power and duty to (1) hear testimony and accept evidence; (2) upon the request of parties or their representatives, issue subpoenas for witnesses to appear and testify at hearings; (3) preserve and authenticate a record; (4) issue a determination in writing of whether a code violation exists; and (5) impose penalties consistent with the applicable code provisions. (65 ILCS 5/1-2-4(b) (2012)).

A fundamental premise of the American jurisprudence system is that litigants are entitled to fair and impartial hearings before fair and impartial tribunals. As the Illinois Supreme Court held in *In re Heirich*, a "classical principle of jurisprudence" is that "no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case." *In re Heirich*, 10 Ill.2d 357, 384 (Ill. 1956) (holding that proceeding to revoke an attorney's license was improper because a member of the tribunal was not completely disinterested. In *Girot v. Keith*, 212 Ill. 2d 372 (2004), the Supreme Court reaffirmed this "classical principle":

A fundamental principle of due process, applicable to administrative agencies and commissions, is that no person who has a personal interest in the subject matter of a suit may sit in judgment on that case. A personal interest or bias can be pecuniary or *any other interest that may have an effect on the impartiality of the decisionmaker.*

212 Ill. 2d at 380-81 (finding due process violation where member of election board was also witness in matter and ruling on credibility). Moreover, a "personal" interest "as referred to in this sense need not be pecuniary; it need only be that 'which can be viewed as having a particularly debilitating effect on the impartiality of the decisionmaker.'" *Bd. of Educ. v. Ill. Educ. Labor Relations Bd.*, 165 Ill. App. 3d 41, 47 (4th Dist. 1987).

The principle of impartiality is embedded in Illinois Supreme Court Rules governing judicial conduct, as well as in court rulings. The Illinois Code of Judicial Conduct, for example, expressly requires judges to conduct themselves in ways that "promote[] public confidence in the integrity and impartiality of the judiciary." Ill. Sup. Ct. R. 62(A). Similarly, Supreme Court Rule 63 provides that judges "should be unswayed by partisan interests, public clamor, or fear of criticism." It requires that a judge disqualify himself or herself in any proceeding where the judge's impartiality "might reasonably be questioned." Ill. Sup. Ct. R. 63(A)(1), 63(C)(1). This Committee has previously concluded that a judge should be disqualified under Rule 63 from presiding over matters in which the judge had previously participated as a public defender or assistant state's attorney. ISBA Op. No. 03-02.

The Illinois Code of Judicial Conduct, by its terms, applies only to "circuit and associate judges and judges of the appellate and supreme court." However, the principle of judicial

impartiality reflected in those rules has wider application. For example, the Illinois Appellate Court held in *Gigger v. Bd. of Fire & Police Com'rs of City of East St. Louis* that hearings before administrative law judges are to be impartial and not partisan:

[A] hearing before an administrative agency *should not be a partisan hearing* with the agency on one side arrayed against the individual on the other. Instead, it should be an investigation instituted for the purpose of ascertaining and making findings of fact.

23 Ill. App. 2d 433, 438 (4th Dist. 1959) (citation omitted) (emphasis added) (holding that individual had not received a fair and impartial hearing before the Board of Fire and Police Commissioners because the Board's attorney had served as both a prosecutor and judge in the same proceeding). A lawyer holding a dual role of prosecutor and administrative law judge employed by the same municipality violates the premise of impartiality by "compell[ing] a litigant to submit his controversy to a tribunal of which his adversary is a member" and "makes his antagonist his judge." *Gigger*, 23 Ill. App. 2d at 439 (citation and internal quotation marks omitted).

Although *Gigger* applied the principle of impartiality to an administrative law judge, there is no reason to conclude that municipal hearing officers would not also be held to the same standards of impartiality. Administrative hearing officers, like administrative law judges, perform the same quasi-judicial functions of, among other things, hearing testimony and issuing rulings. Compare 65 ILCS 5/1-2-4(b) (municipal hearing officers) with 5 ILCS 100/10-25, 10-35 (administrative law judges). Indeed, as the Supreme Court held in *Heirich*, the obligation to be impartial applies equally to "administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office as it is to those who are technically judges in the full sense of the word."

The fact that, unlike in *Gigger*, the lawyer here would not be acting as a prosecutor and hearing officer in the *same* proceedings also does not alter the conclusion that the lawyer's representation of the municipality as prosecutor may be materially limited by the lawyer's obligation to be a fair and impartial decisionmaker in his or her role as a hearing officer in ruling on ordinance violations for the same municipality. The issue is whether the dual role "will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." RPC 1.7 (comment 8). That is the case here. For example, the dual roles may lead to positional conflicts. In one proceeding, the lawyer, acting as a zealous advocate for the municipality, may take positions that in a second proceeding the lawyer, acting as an impartial hearing officer, would (or should) reject. And, as outlined in the facts of this inquiry, the same lawyer may prosecute a defendant one week for a speeding ticket, and the next week be adjudicating a parking ticket against that same defendant. Even if the lawyer, as hearing officer, could act impartially, a defendant in that situation may not believe that the lawyer could do so, undermining the core principle of judicial impartiality.

The Supreme Court expressly noted in *Heirich* that its conclusion that a proceeding was tainted because one of the commissioners was not disinterested was not based on a finding of

actual bias: “In so doing [concluding that the proceeding was tainted] we need not in law, nor do we in fact, hold or intimate that this particular commissioner was infected, consciously or unconsciously, with prejudice or affected by other motivation against respondent.” The same is true here. By its conclusion that a lawyer cannot serve as a prosecutor and administrative hearing officer for the same municipality, the Committee does not mean to intimate that such a lawyer would necessarily act in a biased manner. But, the Committee is of the opinion that there is a significant risk that the dual role would materially limit the lawyer’s ability to provide independent professional judgment in performing his or her role as prosecutor for the municipality while providing fair and impartial services as its administrative hearing officer, thus creating a concurrent conflict under Rule 1.7(a)(2).

A related concern is the lawyer’s own inherent personal interests, which may also interfere with the representation of the municipality as prosecutor. On the one hand, the lawyer has an obligation to be fair and impartial as a hearing officer. On the other hand, the lawyer has a natural, perhaps subconscious, interest in issuing decisions that are favorable to his client, the municipality, in order to ensure continued employment as prosecutor. Those competing interests create a significant risk that the lawyer’s representation of the municipality will be materially limited by the lawyer’s responsibilities to the public to be impartial.

RPC 1.12(b) reflects these same concerns and provides an additional basis for the Committee’s conclusion that a lawyer may not serve in the dual role of prosecutor and hearing officer for the same municipality. Rule 1.12(b) expressly prohibits a lawyer from “negotiate[ing] for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer.” Comment [1] confirms that Rule 1.12 applies to lawyers serving as hearing officers. Thus, Rule 1.12 bars a lawyer from serving as an administrative hearing officer while also negotiating for continued employment with parties appearing before him or her. Implicitly, if a lawyer serving as a hearing officer would be prohibited from negotiating his or her future employment with a municipality who appears as a party before him or her, that lawyer is also prohibited from negotiating with the municipality over his or her concurrent employment as a prosecutor.

The Committee concludes, therefore, that serving as prosecutor for the municipality while also serving as an administrative hearing officer for the same municipality creates a concurrent conflict of interest.

Notwithstanding a concurrent conflict of interest, RPC 1.7(b) permits a lawyer to represent a client if, among other things, (i) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, (ii) the representation is not prohibited by law, and (iii) each affected client gives informed consent. However, some conflicts are so severe that they cannot be waived by informed consent. The Committee believes that the conflict presented by this inquiry falls into the category of non-waivable conflicts.

Any doubt that the conflict is not consentable should be allayed when one considers what representations the lawyer would have to make to the municipality, the only “affected client”

here – in order to assure the municipality that it need not be concerned by the conflict and give “informed consent.” In essence, the lawyer would need to represent to the municipality, implicitly or explicitly, that the lawyer was willing to routinely violate or ignore the duty of impartiality that he or she owes as a municipal hearing officer to the parties appearing before the lawyer in order to satisfy the lawyer’s duties of loyalty and independent judgment owed to the municipality. And, by consenting to such an arrangement, it is likely that the municipality would be breaching duties that it owes to the public it serves. Under these circumstances, where the client would be asked to consent to the lawyer violating duties he or she owes to others and likely violating its own duties, the conflict is clearly not waivable.

The Connecticut Bar Association addressed a variation of the conflict presented here in its Informal Op. 00-17. There, the issue was whether an attorney who was a member of the town council could represent a client in bringing an action against the town. In concluding that the conflict was not waivable, the Opinion focused on several factors that are equally relevant here:

“Will the lawyer stay his or her hand to preserve his or her public office, or, on the other hand, subordinate the importance of his or her public office to his or her client’s interests? Will the lawyer’s involvement expose the client’s matter to heightened public scrutiny, or to legal attack? ...No matter however willing the client may be to assume the risks of conflicts, Rule 1.7(b)(1) requires the lawyer to reasonably believe ‘the representation will not be adversely affected.’” Among the factors that a lawyer should consider when determining whether or not the representation may be materially limited by, and may be adversely affected, is the appearance of a conflict of interest that members of the public may discern or comment on if a town councilman represents a plaintiff suing a town employee and the town for personal injury.

Conn. Informal Op. 00-17. The same concerns are present here: Would the lawyer stay his hand or subordinate the importance of his public office as hearing officer in order to preserve his employment as a prosecutor for the municipality? Would serving in a dual role as prosecutor and hearing officer create an appearance of a conflict of interest to the public, thereby exposing the municipality to heightened public scrutiny, or to legal attack? Is the appearance of a conflict of interest that members of the public may discern or comment on if the town prosecutor also serves as a hearing officer for the town? Even if the lawyer sincerely believes that the answer to the first question is no, the answers to the other questions are most likely yes and therefore preclude seeking consent to the conflict.

The conflict may also not be waivable because the dual role runs afoul of the long-established doctrine of incompatibility under Illinois law. That doctrine prohibits a person from serving in dual government roles “when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other *and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and faithfully perform all the duties of the other office.*” *People ex. rel. Myers v. Haas*, 145 Ill.App. 283, 286 (1st Dist. 1908) (emphasis added). For the reasons discussed above, the lawyer’s duty to zealously prosecute ordinance violations on behalf of the municipality may, at least in some instances, prevent the lawyer from performing the duties of serving as an impartial hearing

officer hearing and ruling on ordinance violations for the same municipality.

CONCLUSION

For the reasons discussed above, the Committee concludes that a lawyer may not serve both as a prosecutor for a municipality and as an administrative hearing officer for the same municipality.

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