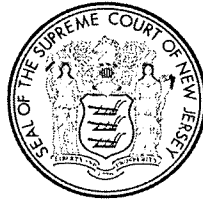


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July 9, 2024

David B. Rubin, Esq.  
450 Main Street  
Metuchen, NJ 08840

Re: ACPE Docket No. 07-2024

Dear Attorney Rubin:

The Advisory Committee on Professional Ethics considered your inquiry. You asked whether a school board lawyer may, consistent with the Rules of Professional Conduct, advise a school board about the potential unethical behavior of a school board member. You noted that the Disciplinary Review Board (DRB) issued a decision imposing discipline for a violation of RPC 1.7(a)(2) in this situation though the Supreme Court then dismissed the matter (without providing its reasoning). You stated that the reasoning in this DRB opinion ignores RPC 1.13(a) and has created uncertainty amongst school board lawyers about their ethical obligations to their clients.

Specifically, you noted that the DRB, in In re Christopher M. Supsie, Docket No. DRB-23-091 (October 23, 2023), imposed discipline on a school board lawyer who, as you put it in your inquiry, “advised the board’s majority concerning behavior by one of their fellow board members that he felt violated the New Jersey School Ethics Act.” You stated that the DRB did not discuss RPC 1.13(a) (Organization as the Client) or any precedent post-dating the adoption of the RPCs in 1984. You suggested that the DRB analyzed the matter as if the school board attorney represented not only the board but also the individual members of the board, so providing advice to the board about potential unethical behavior of another board member violated RPC 1.7, as it pitted one of the lawyer’s clients against another of his clients.

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You stated that there are disputes between individual members of boards that may require the lawyer for the board to take action. You presented, as examples, N.J.S.A. 18A:12-2 (removal of a board member who is “interested directly or indirectly in any contract with or claim against the board”) and N.J.S.A. 18A:12-3 (removal of board members who cease to reside in the district or fail to attend three consecutive meetings without good cause). You also stated that a board member’s conduct may be “so disruptive that the board, by majority vote, feels compelled to authorize the filing of a complaint with the School Ethics Commission.” You asserted that school boards may seek advice and counsel from its board lawyer in such situations.

You further noted that the DRB may have been swayed by the perception that the lawyer was providing services to the outgoing board president, not to the board, to further the president’s vendetta against another board member. But you found the DRB decision to be broader than necessary, implying that a lawyer for a board “may not advise or represent the board in any matter adverse to the interests of one of its members.”

The DRB issued its decision in Supsie on October 11, 2023. Supsie served as lawyer for the Lacey Township school district between 2015 and 2020. Slip op. at 3. The school district had a policy that specified that the Board of Education President and School Business Administrator were the “designated contact persons” to the Board lawyer for requests for legal services or advice. Slip op. at 4.

The Board President, Shawn Giordano, lost his bid for reelection in November 2019 and the day after this election, he contacted the Board lawyer, Supsie, and asserted that another Board member, Regina Discenza, had acted unethically during the Board elections. Slip op. at 5. Board President Giordano testified, at the underlying hearing, that “he had received the consent of four other [Board] members, via private discussions, to direct respondent to draft the memorandum.” Slip op. at 23. The potential ethics violations concerned Discenza’s efforts to support candidates who were competing against Board president Giordano and other sitting Board members. Slip op. at 5-6. Board lawyer Supsie then wrote a memorandum noting that the conduct of Discenza, in supporting other Board candidates in the election, may have violated school ethics law. Slip op at 7-9. Supsie submitted his memorandum to the Board – but did not provide Discenza, whose conduct was at issue, with a copy at that time. Slip op. at 5.

In December 2019, Board President Giordano and some other Board members filed a complaint against Discenza with the School Ethics Commission. Slip op. at 10. Discenza requested a copy of the Board lawyer Supsie’s memorandum and received it in January 2020.

Before the DRB, Board lawyer Supsie argued that he prepared the memorandum in response to a request by a “designated contact person” who is authorized to ask for legal services on behalf of the Board, and he was not representing Board President Giordano in his individual capacity. Slip op. at 20. He also stressed that a majority of Board members also supported the Board President’s request. Ibid. The District Ethics

Committee presenter argued that Board member Discenza was a client of Board lawyer Supsie and Supsie should not have engaged in a “secret” investigation of her conduct. Slip op. at 21.

The DRB, in its analysis, relied on older ACPE opinions for the principle that a lawyer who represents a municipal body represents that body and also its individual officers. Slip op. at 25, citing ACPE Opinion 174 (1970). The DRB stated that the lawyer violated RPC 1.7(a)(1) and (2) by representing “a majority of the [Board] members in connection with their inquiry into whether Discenza, their fellow [Board] member and political opponent, had engaged in any misconduct during an election season. Specifically, respondent violated his duty of loyalty to the [Board] as a whole by drafting the memorandum, on behalf of certain [Board] members, and without Discenza’s knowledge, detailing his research regarding her potential misconduct.” Slip op. at 26. The DRB noted that the preparation of the memorandum “was directly adverse to the interests of Discenza, who, along with the other [Board] members, respondent represented in their official capacities.” Slip op. at 26.

The DRB stated:

[R]espondent’s duty of loyalty was to the entire [Board], including each of the seven members in their official capacities. Moreover, respondent knew that Discenza and Giordano were political opponents and that Discenza was actively campaigning for a slate of candidates that were opposed to Giordano and his allies. Rather than advise all the [Board] members, including Discenza, regarding how to comport themselves with applicable laws and regulations during an election season, respondent violated his duty of loyalty to the entire [Board] by assisting a faction of members in their effort to harm Discenza, a sitting member who was deemed a political opponent. Compounding matters, respondent’s investigation of Discenza’s conduct, as a [Board] member, resulting in Giordano and his colleagues filing an ethics complaint with the [School Ethics Commission] against Discenza for the conduct described in the memorandum.

[Slip op. at 29-30.]

The DRB, relying on ACPE Opinion 174 (1970) and Opinion 226 (1972), found that the Board lawyer “represented the entire [Board] and, in doing so, represented each of the members, including Discenza, in their official capacities.” Slip op. at 39. These ACPE Opinions state that a lawyer for a municipality also represents the “individual officials of the municipality in the performance of their official duties.”

The DRB, by a 5-3 vote, decided to impose an admonition. The three dissenting members voted to dismiss. The Supreme Court, by order dated March 5, 2023, dismissed

the ethics complaint by order, without providing reasons. When the Court dismisses an underlying ethics complaint, the DRB decision in that matter has no precedential value.

The Committee hereby confirms that ACPE Opinion 174 (1970) and ACPE Opinion 226 (1972), which rely on the former Disciplinary Rules and state that a lawyer for an organization represents the organization as well as members or officers of that organization, are no longer good law. New Jersey adopted the Rules of Professional Conduct on July 12, 1984 (effective September 1, 1984); these Rules replaced the prior Disciplinary Rules. The Debevoise Commission had reviewed the American Bar Association Model Rules of Professional Conduct and recommended inclusion of then-new Rule of Professional Conduct 1.13 regarding lawyers for corporations or other organizations. Debevoise Report (June 24, 1983). The Supreme Court adopted this recommendation, noting that the Rule “has no [Disciplinary Rule] counterpart.” Supreme Court Administrative Determinations (July 12, 1984). The new Rule of Professional Conduct supersedes prior, inconsistent ACPE Opinions.

RPC 1.13, as adopted in 1984, provides in paragraph (a): “A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.” While lawyers for an organization do not represent members or officers of that organization, they “may” choose to undertake such representation, subject to the concurrent conflict of interest rule, RPC 1.7. RPC 1.13(e).

Hence, it is not a per se conflict for a lawyer for an organization to concurrently represent a board member of the organization as well as the organization, though a conflict could arise in such dual representation. Significantly, pursuant to RPC 1.13(a), the lawyer for an organization represents only the organization; though if a lawyer chooses to do so and provided there is no conflict of interest, the lawyer may engage in separate representation of a member of the organization.

In the DRB case, the school board lawyer represented the board and was asked by the Board President, his authorized contact person for legal requests, to assess the potential unlawful conduct of another school board member. While the school board lawyer asserted that the Board President’s request was supported by a majority of the board, the record is not clear on this point – the lawyer stated that he had private authorization from four other board members, slip op. at 5, but it appears that nothing was put in writing. There was no board vote to authorize the lawyer to undertake an investigation of the other board member. The lawyer’s memorandum was not even provided to the entire board until months later, after some members of the board filed a school ethics complaint against their fellow member. The DRB could have viewed the lawyer as doing the private bidding of the Board President rather than representing the best interests of the Board.

A request by a member of a board to the board’s lawyer to investigate potential wrongdoing by another member of a board is a delicate affair. The lawyer’s client is the

board and the lawyer's obligation is to further the best interests of that board.<sup>1</sup> But the board acts through people and the lawyer does not represent those people as clients unless the lawyer chooses to do so. There are circumstances where a board member or its president may feel that the board lawyer is their personal lawyer for board matters and the lawyer must disabuse those individuals of that notion.

A lawyer should not undertake representation of a member of a board they represent if that separate representation will conflict with their legal work for the board. Lawyers should be aware of developing personal relationships with certain members of an organization they represent that could give rise to a conflict of interest under RPC 1.7(a)(2) when advising the organization in a matter that would affect a member.


Potential unethical conduct by a sitting board member certainly could be the subject of an investigation by the board lawyer but the lawyer must consider whether such an investigation should be undertaken by the board lawyer or outside counsel, given the relationship between the lawyer and the board members. If the board lawyer undertakes such an investigation, the lawyer must be certain that the request is authorized and the lawyer must reasonably believe that they can provide competent and diligent representation in the matter. Of course, the lawyer's recommendation must be made to the entire board and not to only select members of the board.

In sum, pursuant to RPC 1.13(a), a school board lawyer represents the school board as distinct from its members. A school board lawyer may also represent members of the school board but must be cognizant of potential conflicts of interest between the member and the board when taking on such representation. RPC 1.13(e). The DRB decision in Supsie was incorrect on the law and the Supreme Court dismissed the case, rendering the DRB decision non-precedential.

Thank you for making this inquiry of the Committee.

Very truly yours,

ADVISORY COMMITTEE  
ON PROFESSIONAL ETHICS

  
Carol Johnston  
Committee Secretary/Counsel  
For the Committee

c: Ronald K. Chen, Chair (via email)  
Committee Members (via email)

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<sup>1</sup> If a lawyer for an organization “knows” that a member of the organization “is engaged in action . . . related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonable might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best of the organization.” RPC 1.13(b).