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*Standing Committee on Professional Ethics*

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## INFORMAL OPINION 16-02

### CONCURRENT CLIENTS – CONFLICT OF INTEREST-- MUNICIPAL TAX SALES

We are asked whether a lawyer who undertakes to represent a municipality (the “municipality”) in conducting a tax sale under Conn. Gen. Stat. § 12-157 must obtain the informed, written consent of a concurrent client (the “concurrent client”) whose lien on the same property will be extinguished by the tax sale. We have been asked to assume that the Lawyer’s representation of the concurrent client is regarding matters unrelated to the municipal tax sale. We are further asked to assume that the lawyer, after undertaking careful scrutiny of the specific circumstances, has determined that there is no significant risk that the concurrent client would have grounds to contest the priority or amount of the municipality’s lien or the municipality’s right to extinguish the concurrent client’s lien through the tax sale procedure.

It is our opinion that no conflict exists if, after careful scrutiny, the lawyer determines that there is not a significant risk that the municipality and the concurrent client would become directly adverse during the course of the tax sale proceedings. Therefore, informed consent, confirmed in writing by the municipality and the concurrent client, would not be required.

A tax sale under Conn. Gen. Stat. § 12-157 is a non-judicial foreclosure by a municipal entity for certain municipal delinquencies.<sup>1</sup> By statute, a municipality’s tax is a lien from the date of assessment that takes precedence over all other transfers and encumbrances affecting the delinquent taxpayer’s interest in the real estate. *See* Conn. Gen. Stat. § 12-172. The municipality is required to give notice by newspaper publication, land records recording, and to each mortgagee, lienholder and other encumbrancer of record whose interest is choate and will be affected by the sale, by return-receipt mail within specified time periods, both before and after the auction. Conn. Gen. Stat. § 12-157(a). After due notice, the Town conducts the auction and the sale proceeds are held in escrow. Unless the delinquent taxpayer, a mortgagee, lienholder or other encumbrancer of record whose interest is affected by the sale, redeems the property by

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<sup>1</sup> These include unpaid real property taxes, water and sewer assessments and usage charges, blight and demolition liens, and certain other assessments. *See* Conn. Gen. Stat. § 12-155 and § 12-157; *see also* Conn. Gen. Stat. §§ 7-254(b), 7-258(a), 7-328(a), and 12-169b.

paying the redemption amount<sup>2</sup>, the proceeds are applied to the delinquent taxes, interest, penalties, fees and costs on the same or any other property of the taxpayer, including personal property and motor vehicles. A deed is recorded in the name of the purchaser, extinguishing all other private interests in the real property. *See* Conn. Gen. Stat. § 12-172 and Conn. Gen. Stat. §§ 7-254(b), 7-258(a), and 7-328(a). The excess proceeds (if any) are deposited with the Superior Court for determination by the court of the interests of prior owners and lienholders to the excess proceeds. Conn. Gen. Stat. § 12-157(i). At this point, apart from recording an affidavit in the land records as evidence that the procedure was conducted correctly,<sup>3</sup> the municipality is no longer involved in the proceedings.

In a case where a lawyer also concurrently represents a junior lienholder in a matter unrelated to the real estate subject to the tax sale, the issue presented is whether representation of the municipality in the tax sale proceeding is a conflict of interest within the scope of Rules of Professional Conduct Rule 1.7, and, if so, must the lawyer obtain the informed written consent of the municipality and the concurrent client under Rule 1.7 (b)(4)?

Rule 1.7 provides:

A concurrent conflict 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 ...

(Emphasis added.)

We note that a municipal tax sale is an *in rem* procedure in which the timing of the events and the rights of the parties are fixed by statute. The tax collector is performing ministerial duties with almost no discretion in their application to the parties.<sup>4</sup> Thus, unless the concurrent client has grounds to contest the priority or amount of the municipality's lien or the municipality's right to extinguish their lien through the tax sale procedure, there would be no opportunity for the municipality and the concurrent client to become directly adverse to each other.

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<sup>2</sup> The redemption amount is the amount of taxes, interest and charges owed at the time of the sale, plus 18% interest on the total purchase price paid by the purchaser, plus any taxes and debts owed to the municipality that were not recovered by the sale, as well as any fees and costs of the tax collector under Conn. Gen. Stat. § 12-140. *See* Conn. Gen. Stat. § 12-157(f).

<sup>3</sup> *See* Conn. Gen. Stat. § 12-167a.

<sup>4</sup> *Associates Fin. Servs. of Am., Inc. v. Sorensen*, 46 Conn.App. 721, 726-27 (1997). The collector, however, does have the discretion, for any reason, to adjourn the sale from time to time. Conn. Gen. Stat. § 12-157(b).

The first question we address is whether following the statutory tax sale procedure set forth in Conn. Gen. Stat. § 12-157 puts the lawyer in a position “directly adverse” to the concurrent client. While some differences exist, we find the circumstances of this request to be directly analogous to those the Committee considered in Informal Opinion 2014-06, When Client Consent is Necessary in Limited Scope Representation of Chapter 7 Bankruptcy Debtor. As is the case with the filing of a Chapter 7 petition in bankruptcy, a lawyer following the statutory tax sale procedure set forth in Conn. Gen. Stat. § 12-157 is not, using the terminology of the Commentary to Rule 1.7, advocating the municipality’s rights in a manner that is “directly adverse” to the lawyer’s concurrent client.

Even if there is no direct adversity, however, Rule 1.7(a)(2) provides that a concurrent conflict of interest may exist if “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 . . . .” Again, we find the analogy to Informal Opinion 2014-06 is appropriate. If, at the inception of the municipal tax sale representation, the lawyer, after careful scrutiny, determines that there is not a significant risk that a concurrent client will contest the priority or amount of the municipality’s lien or the municipality’s right to extinguish the concurrent client’s lien through the tax sale procedure, or that some other situation will arise in which the lawyer’s obligations to one of the clients will be limited by his or her obligations to the other client, the lawyer may undertake the representation of the municipality without first obtaining informed, written consent from the municipality or the concurrent client.

In conclusion, a lawyer who undertakes to represent a municipality in conducting a tax sale under Conn. Gen. Stat. § 12-157, who also represents a concurrent client in an unrelated matter, whose lien on the same property will be extinguished by the tax sale, need not obtain the informed, written consent of the municipality or the concurrent client. The lawyer must, however, undertake careful scrutiny of the specific circumstances, and must determine that there is no significant risk that the concurrent client would have grounds to contest the priority or amount of the municipality’s lien or the municipality’s right to extinguish the concurrent client’s lien through the tax sale procedure, or that some other situation will arise in which there will be direct adversity between the municipality and the lawyer’s concurrent client.

In giving this opinion, we have drawn heavily on the rationale of our Informal Opinion 2014-06, When Client Consent is Necessary in Limited Scope Representation of Chapter 7 Bankruptcy Debtor.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY 

Kate Stith, Vice-Chair