

1 Rule 63(A)(1)(a). On January 18, 2010, the Court entered the *Scheduling Order*, setting forth
2 the timelines and procedures, which the parties should adhere during the pendency of the
3 administrative review process. In response, the petitioners submitted the administrative record
4 on January 26, 2010. *See HCN R. Civ. P. 63(D)*.

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6 The respondent, Ginny Stenroos, by and through her attorney Kenneth J. Artis, filed a
7 *Notice of Retainer and Answer to Complaint* on February 1, 2010.² The petitioners filed their
8 *Brief in Support of Appeal* on February 15, 2010. On March 10, 2010, the respondent, The Ho-
9 Chunk Nation Grievance Review Board (hereinafter GRB), by and through its attorney, William
10 F. Gardner, filed a *Notice of Entry of Appearance, Motion to Dismiss, Brief in Support of Motion*
11 *to Dismiss and Motion for Expedited Consideration*. Subsequently on March 12, 2010, the
12 respondent, Ginny Stenroos also filed a *Motion to Dismiss*. On March 16, 2010, the Court
13 granted the GRB's *Motion for Expedited Consideration*, and suspended the January 18, 2010
14 *Scheduling Order*.

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17 The Court scheduled a *Motion Hearing* for March 25, 2010. The Court mailed *Notice(s)*
18 *of Hearing* to the parties on March 19, 2010, informing them of the date, time and location of a
19 *Motion Hearing*. The Court convened the *Hearing* on March 25, 2010 at 9:00 a.m. CDT. The
20 following parties appeared at the *Motion Hearing*: DOJ Attorney Wendi A. Huling, petitioners'
21 counsel; Attorney Kenneth Artis, counsel for the respondent, Ginny Stenroos; and Attorney
22 William Gardner, counsel for the respondent, GRB. At the *Hearing*, the petitioner requested the
23 Court make a determination as to the respondent, Ginny Stenroos' objection to the petitioners'
24 counsel's appearance due to a conflict of interest, which was included in the *Motion to Dismiss*,
25 prior to proceeding on any other issue. *Motion Hr'g* (LPER, Mar. 25, 2010, 09:07:36 CDT). The
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Pet. for Admin. Rev., at 1, 6-7. Furthermore, the Court found that the petitioners' January 18, 2010 *Certificate of Service* indicated that it was a *Petition for Administrative Review*.

1 Court required the parties to submit briefs on the issue of conflicts of interest on or before April
2 9, 2010. *Id.*, 09:48:12 CDT. Subsequently, on April 9, 2010, all parties filed their respective
3 briefs.
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5 **APPLICABLE LAW**

6 DEPARTMENT OF JUSTICE ESTABLISHMENT AND ORGANIZATION ACT OF 2001, 1 HCC § 8
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8 4. Functions. The Department of Justice shall:

- 9 a. Defend the sovereignty of the Ho-Chunk Nation.
- 10 b. Provide expert legal advice and competent representation for all Branches of the
11 Nation on those matters that concern the Nation's interests and welfare.
- 12 c. Represent the Nation in Tribal, State, and Federal forums.

13 RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS (adopted Aug. 31, 1996)

14 SCR 20:1.7 Conflicts of interest current clients

15 (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation
16 involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- 17 (1) the representation of one client will be directly adverse to another client; or
- 18 (2) there is a significant risk that the representation of one or more clients will be
19 materially limited by the lawyer's responsibilities to another client, a former client or a third
20 person or by a personal interest of the lawyer.

21 (b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer
22 may represent a client if:

- 23 (1) the lawyer reasonably believes that the lawyer will be able to provide competent
and diligent representation to each affected client;
- 24 (2) the representation is not prohibited by law;
- 25 (3) the representation does not involve the assertion of a claim by one client against
26 another client represented by the lawyer in the same litigation or other proceeding before a
27 tribunal; and
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² *Supra* note 1.

1 (4) each affected client gives informed consent, confirmed in a writing signed by the
2 client.

3 SCR 20:1.11. Special conflicts of interest for former and current government officers and
4 employees.

5 (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public
6 officer or employee:

7 (1) is subject to SCR 20:1.7 and SCR 20:1.9; and

8 (f) The conflicts of a lawyer currently serving as an officer or employee of the government
9 are not imputed to the other lawyers in the agency. However, where such a lawyer has a conflict
10 that would lead to imputation in a nongovernment setting, the lawyer shall be timely screened
11 from any participation in the matter to which the conflict applies.

12 DECISION

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14 The HO-CHUNK NATION DEPARTMENT OF JUSTICE ESTABLISHMENT AND ORGANIZATION
15 ACT OF 2001 (hereinafter DOJ ESTABLISHMENT ACT) states that the Department of Justice shall
16 “provide expert legal advice and competent representation for all branches of the Nation on those
17 matters that concern the Nation’s interests and welfare.” DOJ ESTABLISHMENT ACT, 1 HCC §
18 8.4b. The Ho-Chunk Nation (hereinafter HCN or Nation) Supreme Court previously indicated
19 that the HCN GRB is an “agency within the [HCN] Department of Personnel,” an executive
20 department with principal offices located at HCN Headquarters. *Janet Funmaker v. Libby*
21 *Fairchild, in her capacity as Executive Dir. at HCN Dep’t of Pers., et al.*, SU 07-05 (HCN S. Ct.,
22 Aug. 31, 2007) at 4; *see also* CONSTITUTION OF THE HO-CHUNK NATION, ART. VI § 1(b). The
23 petitioner indicates that “[t]he unique nature of DOJ representation includes and is not limited to
24 ‘departments, boards, committees and commissions’ as well as other ‘tribal interests’ and
25 protection” *Petitioner’s [sic] Br.* at 3-4 (citation omitted).
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1 The HCN Supreme Court adopted the State of Wisconsin *Rules of Professional Conduct*
2 *for Attorneys* (hereinafter *Professional Conduct Rules*) on August 31, 1996.³ The *Professional*
3 *Conduct Rules*, SCR 20:1.11, entitled *Special conflicts of interest for former and current*
4 *government officers and employees*, specifies that a lawyer currently serving as a public officer
5 or employee is subject to SCR 20:1.7. SCR 20:1.11d(1). Furthermore, SCR 20:1.7 handles
6 conflicts of interest for current clients. Specifically, “a concurrent conflict of interest exists if the
7 representation of one client will be directly adverse to another client” or “there is a significant
8 risk that the representation of one or more clients will be materially limited by the lawyer’s
9 responsibilities to another client, a former client or a third person or by a personal interest of the
10 lawyer.” SCR 20:1.7a(1-2). The law regarding conflict of interest questions, as they affect
11 government attorneys, is very complex and undeveloped in outside jurisdictions, and has never
12 been addressed by the Nation or its judiciary.

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15 Within the March 12, 2010 *Motion to Dismiss*, the respondent, Ginny Stenroos, raised an
16 objection, based upon the *Professional Conduct Rules*, indicating that “[i]t is a conflict of interest
17 for counsel for the petitioner, who has also represented the Grievance Review Board, a
18 respondent, to proceed without the consent of the GRB.” *Mot. to Dismiss*, CV 10-07 (Mar. 12,
19 2010) at 5. The petitioner indicated that a conflict of interest does not exist when an attorney
20 represents different tribal entities in subsequent litigation. *Petitioner’s [sic] Br. In Resp. to*
21 *Conflict of Interest Issue* (hereinafter *Petitioner’s [sic] Br.*), CV 10-07 (Apr. 9, 2010) at 2.
22 However, the respondents argued that a conflict does in fact exist and it is not a waivable
23 conflict. *Br. of Ginny Stenroos in Supp. of Non-Waiver of Att’y Conflict* (hereinafter *Stenroos*
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28 ³The Supreme Court adopted the Wisconsin *Rules of Professional Conduct for Attorneys*, SCR 20 pending “full adoption of the Ho-Chunk Nation *Rules of Professional Conduct for Attorneys*.” *In re Adoption of Rules of Professional Conduct for Att’ys* (HCN S. Ct., Aug. 31, 1996).

1 Br.), CV 10-07 (Apr. 9, 2010) at 2; *HCN GRB Brief Regarding DOJ Conflict of Interest*
2 (hereinafter *GRB Br.*) (Apr. 9, 2010) at 3.

3 The petitioner wrote, “[t]here is no ‘concurrent’ conflict when I do not and have not
4 represented the GRB.” *Petitioner’s [sic] Br.* at 5. However, the GRB noted that Attorney Huling
5 has represented the GRB before the HCN Trial Court and Supreme Court. *GRB Br.* at 3. In some
6 cases, the DOJ represents the administrative agency. *See id.*; *Daniel Topping v. HCN GRB*, SU
7 09-08 (Attorney Wendi A. Huling authored the *Brief of Appellee*); *Cheryl Brinegar v. HCN*
8 *GRB*, SU 09-09 (HCN S. Ct., Apr. 12, 2010) at 1 (indicating that Attorney Alysia E. LaCounte
9 appeared on behalf of the Appellee); *Diana Wolf v. HCN GRB*, CV 09-48 (HCN Tr. Ct., May 7,
10 2009) at 2 (indicating that Attorney Wendi A. Huling appeared for the respondent). However, in
11 other cases, it appears that the DOJ represents both the administrative agency and the
12 department. *See Kerry Funmaker v. HCN GRB, et al.*, SU 09-04 (HCN S. Ct., Mar. 29, 2010) at
13 1 (indicating that Attorney Alysia E. LaCounte appeared for the appellants); *Tracy Cole v. HCN*
14 *GRB, et al.*, CV 08-39 (HCN Tr. Ct., June 30, 2009) at 2 (indicating that Attorney Alysia
15 LaCounte appeared for the respondents).

16 In other instances, the DOJ appoints outside counsel to represent the administrative
17 agency. *Wayne Falcon v. Liz Haller et al.*, SU 09-05, -07 (HCN S. Ct., May 20, 2010) at 1
18 (indicating that Attorney Michael P. Murphy appeared on behalf of the appellants and Attorney
19 William Gardner appeared on behalf of the GRB); *Sharon Williams v. HCN Ins. Review*
20 *Comm’n*, SU 08-01 (HCN S. Ct., Oct. 29, 2008) at 1 (indicating that Attorney Michael P.
21 Murphy of Whyte Hirschboeck & Dudek, S.C. appeared on behalf of the HIRC); *Kenneth Lee*
22 *Twin v. HCN GRB et al.*, CV 08-79 (HCN Tr. Ct., Mar. 31, 2010) at 4 (indicating that Attorney
23 Michael P. Murphy of Whyte Hirschboeck & Dudek, S.C. appeared on behalf of the respondent,
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1 department and Attorney William Gardner on behalf of the respondent, GRB); *HCN et al., v.*
2 *Kenneth Lee Twin et al.*, CV 08-83 (indicating that Michael P. Murphy of Whyte Hirschboeck &
3 Dudek, S.C. appeared on behalf of the petitioner, departments and Attorney William Gardner
4 appeared on behalf of the respondent, GRB).

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6 From the cursory review of recent and ongoing administrative review cases, it appears
7 that the petitioners' counsel represented the GRB previously and concurrently with departments.
8 *Daniel Topping v. HCN GRB*, SU 09-08; *Diana Wolf v. HCN GRB*, CV 09-48 (HCN Tr. Ct.,
9 May 7, 2009) at 2; *HCN et al. v. HCN GRB et al.*, CV 10-07. The petitioner indicated "[t]he
10 [HCN] Department of Justice currently has five (5) litigating attorney[s] on staff supervised by
11 the Attorney General of the Ho-Chunk Nation whom [*sic*] adhere to the responsibilities as
12 described with [*sic*] Ho-Chunk Nation . . . law and required job descriptions." *Id.* at 3. The Court
13 is sympathetic that the petitioners' counsel's duties are essentially assigned to her and she
14 undoubtedly possesses a great deal of expertise regarding employment matters, but the Court
15 cannot condone an apparent violation of applicable rules of practice, regardless of the intentions
16 of the attending actor. *Id.* at 2. The petitioners' counsel is the only current attorney that handles
17 litigation for employment matters with varying or competing client concerns. Therefore, the
18 Court does not advance the petitioners' argument that an equivalent concern impacts "all
19 litigation and legal representation that Ho-Chunk Nation Executive and Legislative Attorney's
20 [*sic*] have been involved in and they themselves committed a 'conflict of interest' violation under
21 SCR 20:1.7" *Petitioner's [sic] Br.* at 5.

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25 Concurrent conflicts of interest can arise from the lawyer's responsibilities to another
26 client, a former client, a third party, or from the lawyer's own interests. SCR 20:1.8, 1.9, 1.18. In
27 order for an attorney to determine whether a conflict of interest exists, the lawyer must clearly
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1 identify the client or clients; determine whether a conflict of interest exists; decide whether the
2 representation may be undertaken despite the existence of a conflict, i.e., whether conflict is
3 consentable; and if so, consult the clients and obtain their informed consent in writing. SCR
4 20:1.7 ABA Comment 2. The preventative path was not followed.
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6 Nonetheless, in this instance, the petitioners' counsel cannot overcome the conflict,
7 because "a concurrent conflict of interest exists if the representation of one client will be directly
8 adverse to another client." The GRB indicates,

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10 the conflict of interest is the type that cannot be consented to by the GRB. If
11 Attorney Huling is to advance the interests of the D[epartment o]f H[ealth], she
12 will need to vigorously argue the development of an [*sic*] 'non-conforming'
13 administrative appeal process for the D[epartment o]f H[ealth] to attack the GRB
14 Decision that does not exist under the Employment Relations Act . . . each client
15 of the DOJ would be directly aligned against each other if this matter were to
16 proceed before this tribunal.

17 *GRB Br.*, at 7. Courts have generally adopted a prima facie prophylactic rule that prohibits
18 attorneys from simultaneously representing clients with adverse interests, even in unrelated
19 matters. *Chadwick v. Superior Court*, 106 Cal. App. 3d 108 (Cal. Ct. App. 1980); *Civil Service*
20 *Commission of San Diego County v. The Superior Court of San Diego County*, 163 Cal. App. 3d
21 70 (Cal. Ct. App. 1984). This prohibition stems from a lawyer's relations with his or her client,
22 which must include loyalty and independent judgment.

23 Loyalty to a current client prohibits undertaking representation directly adverse to
24 that client without that client's informed consent. Thus, absent consent, a lawyer
25 may not act as an advocate in one matter against a person the lawyer represents in
26 some other matter, even when the matters are wholly unrelated. The client as to
27 whom the representation is directly adverse is likely to feel betrayed, and the
28 resulting damage to the client-lawyer relationship is likely to impair the lawyer's
ability to represent the client effectively. In addition, the client on whose behalf
the adverse representation is undertaken reasonably may fear that the lawyer will
pursue that client's case less effectively out of deference to the other client, i.e.,
that the representation may be materially limited by the lawyer's interest in
retaining the current client. . . .

1 SCR 20:1.7, ABA Comment.

2 Finally, the Court neither finds that “all attorneys of the DOJ may suffer under the same
3 disqualification based upon SCR Rule 20:1.10,” nor that “the duty of loyalty requires
4 disqualification of the Attorney General and the [DOJ attorneys].” *GRB Br.* at 7 n.4; *Stenroos Br.*
5 at 2. The aforementioned rule, SCR Rule 20:1.10, which addresses the general rule regarding
6 imputed disqualification does not apply to conflicts of interest for current government officers
7 and employees. *See* SCR 20:1.11 (ABA Comment). *Special conflicts of interest for former and*
8 *current government officers and employees* specifies that
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10 [t]he conflicts of a lawyer serving as an officer . . . are not imputed to the other
11 lawyers in the agency. However, where such a lawyer has a conflict that would
12 lead to imputation in a nongovernment setting, the lawyer shall be timely
13 screened from any participation in the matter to which the conflict applies.

14 SCR 20:1.11d(1), f. However, in this instance, the petitioner did not explain or articulate any
15 current procedural mechanisms utilized for screening purposes. Other jurisdictions have erected
16 “screen devices,” “Chinese walls,”⁴ “insulation walls,” “ethical walls,” “screens,” “zones,”
17 “cones of silence,” “confidentiality screens,” or “fire walls.” These measures cure conflicts of
18 interest when the conflict is indirect and the affected clients have given their consent.
19 Presumably, if a screening procedure existed, then the petitioners’ attorney would not have had
20 represented clients with adverse interests. Nevertheless in this instance, the petitioners’ did not
21 allege any “screening devices,” which are or were utilized by the DOJ.

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23 The black letter of Rule 1.11(f) provides that screening must be implemented in a timely
24 manner, and that all affected parties must be notified. While the conflicts of current government
25 lawyers are not imputed to other associated government officers or employees, the commentary
26 states that “ordinarily it will be prudent to screen such lawyers.” SCR 20:1.11 ABA Comment.
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1 Therefore, absent such “screening devices,” the DOJ is also unable to represent such departments
2 in subsequent matters.⁵

3 **BASED UPON THE FOREGOING**, the Court finds that neither Attorney Huling, nor
4 the DOJ may represent the parties involved in this matter due to a nonwaivable conflict of
5 interest under SCR 20:1.11, *Special conflicts of interest for former and current government*
6 *officers and employees*. The parties retain the right to file a timely post-judgment motion with
7 this Court in accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or*
8 *Order*. Otherwise, “[t]he time for taking an appeal shall begin from the date the judgment is
9 filed with the [Trial Court] Clerk [of Court].” *HCN R. Civ. P. 57*. Since this decision represents
10 a non-final judgment, “[a]n appeal from [this] interlocutory order maybe [*sic*] sought by filing a
11 petition for permission to appeal with the Supreme Court Clerk within ten (10) calendar days
12 after the entry of such order with proof of service on all other parties to an action.” *Ho-Chunk*
13 *Nation Rules of Appellate Procedure, Rule 8.*⁶

14 **IT IS SO ORDERED** this 9th day of June 2010, by the Ho-Chunk Nation Trial Court
15 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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22 Honorable Amanda L. Rockman
23 Associate Trial Court Judge
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26 ⁴The Court neither condones any racial or ethnic animus, nor tolerated the presence of animus in this terminology,
27 which has regrettably passed into common legal parlance.

28 ⁵The DOJ and its attorneys should recognize the potential violation in other cases, involving multiple client
representation, and apply the aforementioned ethical principles to all of its pending cases, while the DOJ implements
the appropriate screening procedures.

⁶ Parties can obtain a copy of the applicable rules by contacting the Ho-Chunk Nation Judiciary at (715) 284-2722 or
(800) 434-4070 or visiting the judicial website at www.ho-chunknation.com/government/judicial/cons_law.htm.

