

**NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW**

**REQUEST FOR QUALIFICATIONS FOR SPECIAL COUNSEL FOR
NATURAL RESOURCE DAMAGES LITIGATION, 2018**

RESPONSE TO QUESTIONS

August 29, 2018

QUESTION: What situations would the State deem to be a conflict of interest in the first place?

ANSWER: Section III of the *Outside Counsel Guidelines* requires that counsel be free of any conflict of interest. Under the Rules of Professional Conduct, this includes both direct conflicts of interest that representation of the New Jersey Department of Environmental Protection pose with respect to other firm clients, and to positional conflicts that may arise from the firm's advocacy on behalf of other clients. The Division of Law has included, in Section III.B of the *Outside Counsel Guidelines*, specific descriptions of impermissible State agency conflict and other circumstances that would undermine the public's confidence if your representation continued. In particular, they prohibit Special Counsel from:

(1) Representing private parties before that State agency (or its officers) in adversarial, transactional or non-adversarial proceedings. By way of example and not limitation, outside counsel are prohibited from representing any private party before a client agency in connection with applications for government approvals, as well as in quasi-judicial and/or quasi-legislative proceedings before that client agency. Outside counsel also may not, on behalf of a private client, lobby a State agency they represent.

(2) Representing private parties in any matter in which the State agency also is a party, if the private party has interests adverse to the State agency.

(3) Representing the State agency in a matter involving a private party, if the firm concurrently represents that private party in other matters.

(4) Being adverse to the State agency the firm represents on behalf of a private client (i.e., within the meaning of RPC 1.7).

(5) Representing another client if that representation would present a substantial risk that outside counsel's responsibilities to the State agency would limit its ability to provide independent advice or diligent and competent representation either to the State agency or the other client.

(6) Representing another client where the outside counsel's knowledge of the State's legal positions or strategy, derived from its representation or prospective representation of the State agency, could be used to the advantage of the other client or the disadvantage of the State.

QUESTION: What is the State's position as to whether, and if so to what extent, a firm might be able to continue to represent clients adverse to the New Jersey Department of Environmental Protection and related State entities under the Rules of Professional Conduct, even if the firm

were simultaneously representing the New Jersey Department of Environmental Protection solely on certain selected litigations pertaining to natural resource damages? Would the firm be precluded from all such other matters? Would the firm be precluded from any of them? Would the firm be allowed to continue representations in all of them? What are the State's criteria for distinguishing between any such representations that may or may not be allowed, in the State's judgment? Would the fact that the firm would be engaged as special counsel to the State, as directly supervised by the Division of Law, have any adverse effect on the firm's ability to represent other clients on matters where the Division of Law could also be adverse to the firm as respective counsel for different clients?

ANSWER: To the extent that a firm represents private clients adverse to the New Jersey Department of Environmental Protection and related State entities that are "in but not of" the Department of Environmental Protection, such representations are not consistent with the specific descriptions of impermissible State agency conflict described in Section III.B of the *Outside Counsel Guidelines*. Such representations of private clients would preclude the firm from satisfying the conflict of interest requirements in the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation. The engagement of a firm acting as outside counsel to the New Jersey Department of Environmental Protection would prevent that firm from representing other clients on matters where the Department of Environmental Protection and related State entities that are "in but not of" the Department of Environmental Protection are adverse to the firm.

QUESTION: To what extent would a firm's representation of the New Jersey Department of Environmental Protection in the prosecution of natural resource damages claims against other persons or companies be preclusive of the firm's ability to continue to represent other clients on any other matters that do not involve natural resource damages at all but are still against the New Jersey Department of Environmental Protection or other environmentally related agencies? If the State believes there would be such preclusion, what is the ethical basis for that belief and are there any exceptions to the preclusion?

ANSWER: Under the *Outside Counsel Guidelines*, a firm's representation of the New Jersey Department of Environmental Protection in the prosecution of natural resource damages claims would preclude the firm from representing other clients against the New Jersey Department of Environmental Protection and related State entities that are "in but not of" the Department of Environmental Protection, even if the other matters do not involve natural resource damages. There are no exceptions to this prohibition.

QUESTION: What is the State's position regarding a firm's ability to defend other clients in other matters in which some demand for natural resource damages recovery, directly or indirectly, may be at issue? This question assumes that the firm could not simultaneously defend Client X in an ongoing natural resource damages litigation brought by the New Jersey Department of Environmental Protection as to Site X in which a Deputy Attorney General or other outside law firm is plaintiff's counsel and also act as special counsel for the New Jersey Department of Environmental Protection in its separate prosecution of a natural resource damages claim against Entity Y as to Site Y. Despite the fact that the two actions may not be directly related and may involve different locations and different natural resource damages claims, the firm

might gain inside information through the firm's representation of New Jersey Department of Environmental Protection in the one natural resource damages matter that could be prejudicial to the State if the firm then used that same information, even inadvertently, in defending against a natural resource damages action brought by the State as to a different site and client. However, could a firm defend Client Z as to Site Z in an unrelated federal action that does not involve the New Jersey Department of Environmental Protection or State law natural resource damages claims and which is brought by the U.S. Department of Justice on behalf of one or more of the federal natural resource damages trustees and the U.S. Environmental Protection Agency?

ANSWER: A firm selected to represent the New Jersey Department of Environmental Protection could not represent the firm's client in any of the circumstances described, including any action regarding any site located outside the State of New Jersey whether or not New Jersey natural resources are involved.

QUESTION: Could a firm represent Client B in defense of a third party contribution claim brought against the firm's client in State court where the New Jersey Department of Environmental Protection has sued Entity A for natural resource damages at a large, multi-party site and Entity A maintains that, if it is liable, it is entitled to contribution from numerous third party defendants, including the firm's Client B?

ANSWER: A firm that represents the New Jersey Department of Environmental Protection as special counsel could not represent a private client in defense of a third party contribution claim in the same action where the New Jersey Department of Environmental Protection has sued another party for natural resource damages.

QUESTION: Would a firm's representation of the New Jersey Department of Environmental Protection as special counsel in response to the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation be completely preclusive of a firm's ability to become involved in any and all other natural resource damages matters that involve different sites in New Jersey, or are there exceptions to this that would not be deemed by the State to be a conflict? If so, what would be the basis under the Rules of Professional Conduct to draw whatever distinctions may be drawn?

ANSWER: Yes, a firm's representation of the New Jersey Department of Environmental Protection as special counsel in response to the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation would preclude the firm from becoming involved in any other natural resource damages matters that involve different sites in New Jersey. There are no exceptions to this prohibition.

QUESTION: Are there any other relevant thoughts or considerations that the State feels should be called to a firm's attention before the firm considers providing a response to the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation?

ANSWER: No, the relevant considerations are included in the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation and the references therein, and these Responses to Questions on the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation.

QUESTION: Is the Request For Qualifications For Special Counsel For Natural Resource Damages Litigation intended to cover PFOA (perfluorooctanoic acid) related claims?

ANSWER: The Request for Qualifications for Special Counsel for Natural Resource Damages Litigation is intended to cover any contaminants that have been discharged into the environment and have damaged the State's natural resources, including but not limited to PFOA.