LEGAL ETHICS OPINION 1836

CONFLICTS OF INTEREST INVOLVED WHEN CITY ATTORNEY PROVIDES LEGAL SERVICES TO MULTIPLE CONSTITUENTS WITHIN AN ORGANIZATION.

You have presented hypothetical situations in which a City Attorney operates under a government structure in which a Mayor, popularly elected in a citywide election, serves as the chief executive officer of City. In addition, the Mayor appoints a Chief Administrative Officer to administer the day-to-day operations of the City government. Pursuant to the City's Charter, the City Attorney represents the City, as an organization, and its constituents. The General Assembly approves the City's Charter, and any amendments thereto, which take effect upon the Governor's signature. The Charter's language in Section 4.17 regarding the City Attorney's role reads:

> The city attorney shall be the chief legal advisor of the council, the mayor, the chief administrative officer and all departments, boards, commissions, and agencies of the city in all matters affecting the interests of the city. The city attorney shall perform particular duties and functions as assigned by the council. The city attorney shall be appointed by the council, shall serve at its pleasure, and shall devote full time and attention to the representation of the city and the protection of its legal interests. The city attorney shall have the power to appoint and remove assistants or any other employees as shall be authorized by the council and authorize any assistant or special counsel to perform any duties imposed upon him in this charter or under general law. The city attorney may represent personally or through one of his assistants any number of city officials, departments, commissions, boards, or agencies that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, commission, board or agency. In matters where the city attorney determines that he is unable to render legal services to the mayor, chief administrative officer, or city departments or agencies under the supervision of the chief administrative officer due to a conflict of interests, the mayor, after receiving notice of such conflict, may employ special counsel to render such legal services as may be necessary for such matter.

In your analysis, the next to the last sentence in the foregoing paragraph roughly parallels language in Virginia Code § 2.2-507 (A) concerning the Attorney General's provision of legal services to agencies of the Commonwealth of Virginia.[1]

Before addressing the issue you raise, the Committee believes it is important to discuss the role of an attorney representing a local governmental entity. Without deciding the issue, the Committee accepts your conclusion that the City Attorney has one organizational client, the City, which acts through various constituents (Mayor, CAO, Council, etc.)[2]. Whether a constituent

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[1] Virginia Code §2.2-507 (A) states in pertinent part: "The Attorney General may represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity. Upon request of the local attorney for the Commonwealth, the Attorney General may provide legal service in civil matters for soil and water conservation district directors or districts.

[2] This opinion is based on the City Attorney's construction of the Charter that, absent other specific factual circumstances, the City Attorney has only one client—the City—and that his representation of the City does not automatically create an attorney-client relationship with the Mayor, Council or other constituents of the City. However, the first sentence in Section 4.17 of the Charter reads: "The city attorney shall be the chief legal advisor

may also become a "client" of the City Attorney is a question of law beyond the purview of this Committee.[3] Generally, under Rule 1.13 of the Virginia Rules of Professional Conduct, a lawyer representing an organization does not, simply by virtue of his status as lawyer for the organization, represent the organization's constituents. Rather, "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13 (a).

Hypothetical A

At the request of a Council member, the City Attorney drafts a proposed resolution, which if adopted, would request that the General Assembly make specific amendments to the City Charter. The City Attorney employs a legislative drafting practice used by the Virginia Division of Legislative Services, under which the City Attorney does not disclose a legislative drafting assignment received from either the City Administration[4] or a member of Council until the legislation is introduced at a Council meeting.[5] All parties normally learn about the existence of proposed legislation upon its introduction at a Council meeting. However, the Administration believes that it should be advised of the contents of any proposed legislation, in advance of the Council meeting, where such proposed legislation, if enacted by the General Assembly, would weaken or dilute the powers of the Mayor.

At the request of a Council member, the City Attorney prepares an ordinance which, if adopted, would establish certain parameters and regulations under which all commissions or similar entities established by Council or the Mayor would operate. Like all ordinances and resolutions introduced before the Council, the proposed draft bears on its face this text: "Approved as to form and legality by the City Attorney" and, in the City Attorney's opinion, is legal. After the proposed ordinance is introduced before the Council, the Administration issues a memorandum opining that the provisions of the ordinance, as applied to the Mayor, are both unconstitutional and in violation of the Freedom of Information Act. The Administration believes that the City Attorney either should have advised the Council member that the proposed ordinance was illegal or informed the Administration of the Council member's intent to introduce the proposed ordinance.

Questions Presented

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of the council, the mayor, the chief administrative officer and all departments, boards, commissions, and agencies of the city in all matters affecting the interests of the city." While statutory construction is beyond the purview of the committee, the committee is concerned that the quoted language can be read as creating multiple clients for the City Attorney. If that were the case, the conflicts analysis in this opinion would be materially different.

[3] While a lawyer for an organization is said generally to have one client—the organization—there may be circumstances when a lawyer for an organizational client also establishes separate attorney-client relationships with individual constituents of the organization (officers, employees, directors, etc). Whether an attorney-client relationship is created between the City Attorney and a constituent is a legal issue beyond the committee's purview. Rule 1.13 (e) acknowledges that a constituent may be personally represented by the organization's lawyer, but then cautions that the lawyer is subject to the requirements of Rule 1.7 governing the concurrent representation of multiple clients. In dealing with a constituent, the City Attorney must remind the constituent that he represents the City, and not the constituent, if it is apparent that the City's interests are adverse to the constituent with whom the City Attorney is dealing. Rule 1.13 (d). In the final analysis, whether an organizational lawyer will be treated as having acted as a lawyer on behalf of a constituent will be based on the constituent's reasonable belief that the organization's lawyer was acting in such a capacity.

[4] The City Administration consists of the Mayor, the Chief Administrative Officer and all of the City employees that report to the Mayor and the Chief Administrative Officer.

[5] The Committee assumes the City Attorney's practice of not giving advance notice of a proposed ordinance is pursuant to a properly adopted policy or directive of the organization. However, if this is not the case, the practice may be inconsistent with the City Attorney's communication obligation under Rule 1.4 .

1. Where an attorney represents a governmental organization and also designated constituents of that organization, does the attorney have an ethical obligation to maintain as confidential information obtained from one constituent while concurrently providing legal services to another constituent? Conversely, is the attorney required to reveal information obtained in the course of performing legal services for one constituent to other constituents within the organization?

Answer

Under the circumstances presented, the City Attorney does not have any ethical obligation to withhold from one constituent information obtained from another constituent within the organization, unless the organization has directed otherwise.[6] Conversely, there may be situations in which the City Attorney is required to reveal information obtained in the course of providing legal services to one constituent to other constituents within the organization.[7]

Discussion

Your first question asks whether the City Attorney may ethically disclose or withhold information obtained from one constituent when it is hostile to a different constituent. When one of the constituents of an organization communicates with the organization's lawyer in that person's organizational capacity, the communication is protected under Rule 1.6. *See* Rule 1.13, Comment [2]. However, this duty of confidentiality is owed to the "client," i.e., the City, and not to the "constituent" with whom the City Attorney is communicating. Rule 1.6 prohibits the City Attorney from revealing information protected under the attorney-client privilege; however, this privilege belongs to the organizational client, not its constituents.

One of the most fundamental ethical duties a lawyer owes to a client is the duty to keep the client reasonably informed about matters which the lawyer is handling for the client. Rule 1.4 (a). In order to discharge this ethical duty, and competently represent the interests of the City, the City Attorney may need to disclose information obtained from a constituent within the organization to others. Also, there may be situations where the City Attorney cannot honor a request that information obtained from a constituent be kept confidential, where disclosure within the organization is necessary to prevent or mitigate severe injury to the organization or to address an action or omission or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization. Under those circumstances, a lawyer must proceed as is reasonably necessary in the best interests of the organization, including the disclosure of information to other constituents or higher authority within the organization. Rule 1.13 (b).

However, if the organization's adopted policy is to not provide advance notice of a proposed ordinance, then the City Attorney is obligated to follow the directions of the organization. Rule 1.2 (a) requires a lawyer to abide by the client's decisions regarding the representation. In the absence of direction from the organization, the City Attorney's communication duties are governed by Rule 1.4 (a), which requires that a lawyer keep a client reasonably informed; and Rule 1.13 (d), requiring an organization's lawyer to clarify his role when communicating with a constituent if the lawyer believes that interests of the organization and the constituent have become adverse. Absent an organizational policy, the City Attorney's decision to disclose to the Administration the proposed ordinance must be guided by the City Attorney's independent

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[6] Rule 1.2 (a). The hypotheticals presented in this opinion do not present an internal investigation of the type addressed in Rule 1.13, Cmt. [2]. All the constituents in the hypotheticals are members of a governing body.

[7] "Constituents" considered in this opinion are limited to those presented in the hypothetical posed and do not include constituents which may be involved in other jurisdictions such as a school board, department of social services, etc.

professional judgment acting in accordance with what he reasonably believes to be in the best interests of his client, the City. Such a factual and/or legal determination cannot be made by this Committee and is beyond its purview.

The City Attorney must also consider the conflict of interest created by working on a proposed ordinance that creates direct adversity between a constituent, such as a Council member or Mayor, and the organization. These circumstances may trigger the City Attorney's duty to ask the Council Member or Mayor to engage independent counsel. The Committee observes that this would be consistent with the City Attorney's ethical duties under Rule 1.13 as expressed in Comment [10]:

> When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict of interest, that the lawyer cannot represent such a constituent, and that such person may wish to obtain independent representation.

2. Where an attorney represents a governmental organization, including a council of elected officials as a constituent, does the attorney have an ethical obligation to reveal to or withhold from one member of that council confidential information provided or requests for legal services made by another member of that council?

Answer

The City Attorney does not have an ethical duty to withhold information obtained from one member of Council, but the City Attorney may have an ethical duty to disclose to the other members of Council information obtained from a Council member if disclosure is necessary for the City Attorney to carry out the representation of the City.

Discussion

The discussion and analysis in response to your first question applies equally to your second question. An individual member of an elected body (i.e., Council) is a "duly authorized constituent" of that public body. This does not make the individual Council member a "client" of the City Attorney. The City Attorney has no ethical duty to keep confidential information obtained from a single Council member. In fact, the City Attorney may believe that disclosure of such information to others within the organization is authorized or required in order to diligently and competently carry out his representation of the City.

3. Does the City Attorney have an ethical duty to disclose to the Administration the proposed ordinance?

Answer

As discussed above, if the organization's adopted policy is to not provide advance notice of a proposed ordinance, then the City Attorney is obligated to follow the directions of the organization. Rule 1.2 (a) requires a lawyer to abide by the client's decisions regarding the representation. In the absence of direction from the organization, the City Attorney's communication duties are governed by Rule 1.4 (a), which requires that a lawyer keep a client reasonably informed; and Rule 1.13 (d), requiring an organization's lawyer to clarify his role when communicating with a constituent if the lawyer believes that interests of the organization and the constituent have become adverse. If there is no organizational policy, whether the City Attorney must disclose to the Administration the proposed ordinance must be guided by the City Attorney's independent professional judgment acting in accordance with what he reasonably

believes to be in the best interests of his client, the City. Such a factual and/or legal determination cannot be made by this Committee and is beyond its purview.

Hypothetical B

Pursuant to the Charter, the legal services of the City Attorney are available upon request to all constituents of the City organization, including the Council, the Mayor, the Chief Administrative Officer, and all agencies, boards, commissions and departments of the City government.[8] While the Council and the agencies, boards, commissions, and departments of the City government regularly avail themselves of these legal services, the Mayor and the Chief Administrative Officer do so only infrequently.

The Mayor has expressed to the City Attorney that he has a lack of trust in the City Attorney and therefore a need for the Mayor to have the benefit of his own ongoing legal counsel. The City Attorney has offered to the Mayor one of his assistants to serve as ongoing legal counsel to the Mayor. However, the Mayor has rejected this offer, insisting that the Charter specifically designates the City Attorney as the chief legal advisor for the Mayor. Notwithstanding the Mayor's lack of trust in the City Attorney, the Mayor, from time to time, chooses to confide in the City Attorney, but requests that the City Attorney not share with the Council any information the City Attorney obtains while representing the Mayor. In addition, the Mayor has requested that the City Attorney designate *two* assistants, rather than the City Attorney, to represent the interests of the Council.

The City Attorney has responded to the Mayor that he is willing to make himself available to provide legal services to the Mayor and that his policy is to make all resources of his office, including attorneys with concentration and expertise in different practice areas, available to all of the constituents the Charter obligates him to represent. However, the City Attorney has advised the Mayor that he cannot agree to maintain the confidentiality of individual constituents, in advance and without knowledge of the substance of the information, due to the requirements of Rules 1.4 and 1.6 of the Virginia Rules of Professional Conduct. The City Attorney has further advised the Mayor that, as between constituents the privilege does not attach.[9] In addition, the City Attorney advised the Mayor that he cannot agree to represent the Mayor, to the exclusion of the Council, because of the Charter's language requiring the City Attorney to represent all of the constituents of the City government, including the Council.

Questions Presented

This hypothetical raises a number of questions for which you seek guidance since the City Attorney is charged by a special law enacted by the General Assembly (the Charter) to represent all constituents of a governmental organization.

4. May the City Attorney designate subordinate attorneys from his office to represent Council and the Administration under an arrangement where those separate attorneys do not share with their supervisors or any other attorney in the office confidential information obtained from the constituent during the course of the representation?

Answer

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[8] "Constituents" considered in this opinion are limited to those presented in the hypothetical posed and do not include constituents which may be involved in other jurisdictions such as school boards, Departments of Social Services….

[9] *See* Rule 1.7, Comment [30].

Absent authorization or direction from the organizational client, in the arrangement described the City Attorney may not avoid his Rule 1.4 obligation to keep his client reasonably informed by assigning specific lawyers in his office to work with designated constituents. The organization is the client, not the constituents, and all the attorneys in the City Attorney's office represent the City. It seems highly unlikely that the City Attorney could get the needed authorization or direction from the client because of the specific wording of this charter. Further, assuming the Mayor and Council are directly adverse on a particular issue, Rule 1.7 would require the organization's informed consent to erect a "screen" between lawyers in the same office representing the Mayor, on one hand, and Council on the other.

Discussion

Although an organization may adopt appropriate procedures for managing internal conflict issues; the screening procedure proposed here is not provided for under the charter nor has it been authorized by the client. An informational screen, such as you have proposed, would only be ethical if all constituents consented to such a screen after full disclosure and consent. Full disclosure, in order to gain the appropriate consent, is at the heart of the problem since full disclosure negates the screening of the information.

However, if there is direct adversity between constituents then Rule 1.13(e)[10] allows the City Attorney to employ the conflicts analysis of Rule 1.7[11] to determine whether or not he can proceed in representing adverse constituents. Pursuant to Rule 1.7, the City Attorney could provide representation to directly adverse constituents if he believes his office can provide competent and diligent representation to each constituent and the client consents to the representation after consultation. When the constituents are directly adverse, disclosure is easier to obtain in that the adversity is already apparent. The authorization must then come from the organizational client through its authorized constituents.

The charter does authorize the Mayor to employ special counsel when the City Attorney determines that, due to a conflict of interest, he in unable to render legal services to a constituent, including the Mayor and Chief Administrative Officer.

5. May the attorney continue to represent two constituents when they disagree on legal or policy issues?

Answer

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[10] Rule 1.13(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[11] Rule 1.7 Conflict of Interest: General Rule

(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 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 third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) the consent from the client is memorialized in writing.

The City Attorney may continue to represent constituents even when they disagree on legal or policy issues unless the conflict materially limits the City Attorney's representation of the City's interests or interferes with the City Attorney's exercise of independent professional judgment on behalf of the City.

Discussion

The mere fact that the Council or Mayor disagree on policy or legal issues does not necessarily create a conflict of interest for the City Attorney, precluding him from continuing to serve as their chief legal advisor under the Charter. It is not unusual for organizational constituents to disagree with one another. In such a case, the attorney's ethical obligation is to the organization, and the organization must resolve its conflicts through its own procedures. However, when the interest of one constituent becomes or may become adverse to that of the organization, then the lawyer should counsel that constituent to obtain separate representation. Rule 1.13, Comment [10].

The hypothetical presents some instances of mere internal disagreement and other instances of organizational adversity to a constituent. The City Attorney may continue to represent the organization in the first instances, but he must counsel the adverse party to obtain separate counsel in the latter.

6. Does an ethical conflict arise when one constituent believes that the attorney's legal conclusions favor another constituent and disagrees with those conclusions?

Answer

An ethical conflict does not arise because one constituent disagrees with the City Attorney's advice. The City Attorney owes his ethical duties to the organization, the City, and not its constituents.

Discussion

Rule 2.1 requires the City Attorney, as an advisor, to exercise independent professional judgment and render candid advice. Comment [1] to Rule 2.1 recognizes that such advice may be unpleasant to the client and the lawyer should not be deterred from giving such advice by the prospect that the advice will not be palatable to the client. The City Attorney, in his role as chief legal advisor to the City and the constituents named in the Charter, may render legal opinions or conclusions with which a constituent might strongly disagree or perceive as favoring another constituent. The provision of such legal advice would be consistent with the City Attorney's role as lawyer for the entire organization and would not be a conflict of interest. Moreover, an attorney serving in his role as an advisor may be ethically driven to candidly tell his client things the client does not want to hear.

This opinion is advisory only, based on the facts presented and not binding on any court or tribunal.

Committee Opinion
May 6, 2008