

Committee Opinion
May 11, 1992

LEGAL ETHICS OPINION 1464

COMMUNICATION WITH ADVERSE
PARTIES - CITY ATTORNEY: CITY
ATTORNEY PROVIDING PETITIONERS
WITH LEGAL ASSISTANCE WHILE
CONTINUING TO CARRY OUT DUTIES
TO THE CITY COUNCIL.

You have provided the Committee with two sections of the charter of a Virginia city, both of which are related to the duties of the individual employed as city attorney. The first of these sections delineates the role of the city attorney and indicates that he shall be the legal advisor of and attorney and counsel for the city, and for all officers and departments thereof in matters relating to their official duties.

The second section you provide indicated that

[b]efore any ordinance or amendment proposed by popular petition shall be submitted to the [city] council, it shall first be approved as to form, by the city attorney, whose duty it shall be to draft such proposed ordinance or amendment in proper legal language, and to render such other service to persons desiring to propose such ordinances or amendments as shall be necessary to make the same proper for consideration by the council.

You further indicate that where ordinances or amendments are proposed by popular petition, they universally seek to change policies or actions of the Council.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for the city attorney to provide petitioners with the legal assistance contemplated by the second charter provision cited while continuing to carry out his duties to the council.

The Committee cautions that it is not empowered to provide interpretations of statutes or other legal provisions. Nevertheless, the Committee is of the view that several disciplinary rules contained within the Virginia Code of Professional Responsibility are relevant to the question you raise. The appropriate and controlling disciplinary rules relative to your inquiry are DR:7-103(A)(2) which prohibits a lawyer from giving advice to a person unrepresented by counsel, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client; and DR:7-103(B) which mandates that, when dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested, and shall make reasonable efforts to correct any misunderstandings as to that role on the part of the unrepresented person.

Further guidance is available in Ethical Consideration 7-15 [EC:7-15] which states that, if an adverse party is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself,

Committee Opinion
May 11, 1992

except that he may advise him to obtain a lawyer. [emphasis added]

The Committee has repeatedly opined that in certain circumstances it is not improper for an attorney to prepare particular documents for use by an adverse party so long as such preparation is limited to an administrative function. See LE Op. 644, LE Op. 689, LE Op. 1112. The Committee has previously found, for example, that it is not improper for an attorney to obtain the endorsement of a consent order by an unrepresented defendant in a divorce matter, to draft and forward a separation agreement to an out of state unrepresented spouse, or to prepare a petition for the court's approval of a settlement on behalf of an unrepresented personal representative in a wrongful death action. See LE Op. 890, LE Op. 876 and LE Op. 1344. In each of those circumstances, however, the Committee found it to be imperative that the attorney providing those documents (a) refrain from offering any advice to the unrepresented party except the advice to consult with counsel, and (b) inform the unrepresented party that the attorney represents the interest of his client which may be adverse to those of the unrepresented party.

The Committee recognizes that the definition of "advice," particularly in the context of dealing with an unrepresented party, may be a fluid concept. In the circumstances you describe, the Committee is of the belief that the acts of approving ordinances and amendments as to form, drafting such proposed documents in proper legal language, and rendering other services so as to make them proper for consideration by the Council, without more, " do not amount to 'advice,' and are proper as long as the attorney does not engage in misrepresentation or overreaching." *Dolan v. Hickey*, 431 N.E.2d 229, 231 (Mass. 1982).

The Committee opines that where the city attorney is functioning as a scrivener for citizens of his jurisdiction, such service does not create an attorney-client relationship. Thus, since no such relationship arises, and where the city attorney has assiduously refrained from advising or misleading the unrepresented individuals for whom petition drafting has been performed as to the law or the facts, it would not be violative of the Code of Professional Responsibility for the city attorney to assist in the drafting of such petitions or ordinances.