

46**MUNICIPAL ATTORNEY, REPRESENTATION
OF DEFENDANTS ***

Adopted February 20, 1971.

Revised May 18, 1996.

Introduction and Scope

The Ethics Committee of the CBA (“the Committee”) has been asked to provide guidance to lawyers and their firms concerning the ethical propriety of a lawyer’s defense of clients in municipal court, and in other litigation which might affect the interests of the municipality when that lawyer is also employed as a municipal attorney or on retainer to represent the municipality. This opinion only addresses the ethical issues raised by the Colorado Rules of Professional Conduct (“the Rules”) and does not address the applicability of the Colorado Code of Ethics, C.R.S. §§ 24-28-101, *et seq.*, or any conflict of interest rules a government entity or agency may have promulgated.

Syllabus

1. A lawyer employed as a municipal attorney or on retainer to represent a municipal government may not ethically represent a criminal defendant who is being prosecuted in the municipal court.

2. A lawyer employed as a municipal attorney, reasonably believing that his or her representation will not be affected by responsibilities to another client or a third person, or by the lawyer’s own interest, and after consultation with and consent by the municipal entity and the client, may represent a criminal defendant in a non-municipal court case in which an employee of a municipality will appear as a witness for the prosecution.

3. In rare situations, a lawyer employed as a municipal attorney, reasonably believing that his or her representation will not be affected by his responsibilities to another client or a third person, or by his own interest, and after consultation and consent by his or her municipal entity and the client, may represent a client in litigation under circumstances where such representation may require the lawyer to take a position which could adversely affect the validity of a law or ordinance governing the municipality.

Facts

Many attorneys engaged in private practice within Colorado are also employed by municipalities within the geographical area of the lawyer’s practice. In some instances this employment by the municipality is on a part-time basis with the fees set in response to the work done. In other instances, a monthly retainer is paid for the attorney’s services by the municipality. The nature of the fee arrangement is immaterial in respect with the ethical considerations, and the controlling factor is the continuing employment of the lawyer as a representative of the municipality and his or her public identification with that role.

Opinion

Rule 1.7(b) and (c):

- (b) A lawyer shall not represent a client when the representation of that client may be materially limited by the lawyer’s responsibility to another client or to a third person, or by the lawyer’s own interest, unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation . . .
- (c) For the purposes of this Rule, a client’s consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of a particular situation.

Further, Rule 8.4(e) provides:

It is professional misconduct for a lawyer to:

- (e) State or imply an ability to influence improperly a judge, judicial officer, government agency or official; . . .

A lawyer employed as a municipal attorney or on retainer to represent a municipal government has obligations and responsibilities to that municipal government. *See* comments to Rules 1.7 and 8.4. Those responsibilities will be hampered if the lawyer is permitted to defend clients in the municipal court since (1) the government's interests are antagonistic to the client's interests, (2) the lawyer will be materially limited by the obligations and responsibilities he or she owes to the municipality, and (3) there is a great risk that the lawyer's conduct implies that the lawyer is able to improperly influence a governmental agency or official.

Lawyers employed by municipalities must be ever mindful of the public's perception of their ability to influence government. A lawyer is not permitted to engage in conduct which implies that the lawyer is able to improperly influence the government agency or official, in this case the municipal court. Under these facts, where a lawyer is employed by or on retainer to a municipality and proposes to act as a defense attorney acting on behalf of a client in the matter before the municipal court, a great risk exists of public mistrust and public belief that improper influence has or will occur because of the lawyer's dual roles.

As stated by the Iowa Supreme Court and as referenced in Opinion 97 of this Committee, the problem is the lawyer's: ". . . conflicting loyalties when acting as a public servant as well as a private advocate (and) . . . the real potential for public misunderstanding and mistrust when attorneys serve in those dual roles."¹

For these reasons the Committee concludes that it would be improper for the lawyer to represent clients in the municipal court and therefore a violation of Rules 1.7(b) and 8.4(e).

While the lawyer must always be aware of the proscriptions of Rule 8.4(e), the Committee is of the opinion that a lawyer may, in appropriate situations, represent a criminal defendant in a non-municipal court case in which an employee of the municipal government will appear as a witness for the prosecution. Further, in exceptional circumstances, a lawyer may represent a party in litigation if that representation may require the lawyer to take a position which could adversely affect the validity of any law or ordinance governing the municipality. In either situation, such representation requires compliance with Rule 1.7(b).

Even where consent is obtained pursuant to Rule 1.7(b),² the lawyer must be ever mindful of the provisions of Rule 1.7(c), since, while it may be possible to obtain consent from the affected parties, a disinterested lawyer could conclude that the client or clients could not agree to the representations under the circumstances of a particular situation. This is especially true in the situation where a lawyer is called upon to take a position which could adversely affect the validity of any law or ordinance governing the municipality, since the Committee believes it unlikely that a disinterested lawyer could conclude that consent would be approved under most circumstances. While Rule 1.3 is not directly on point in this regard, the comment to said Rule should be considered.

It provides in part that: "A lawyer should act with commitment and dedication to the interest of the client and with zeal and advocacy on the client's behalf."

NOTES

1. Iowa Ethics Opinion 91-49, p. 324.
2. The comment to Rule 1.11 recognizes that statutes and government regulations "may circumscribe the extent to which [a] government agency may give consent" in potential conflict situations.

* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion. The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).