



New York State Bar Association

Committee on Professional Ethics

Opinion 1191 (05/26/2020)

Topic: Duty to Municipal Organization; Conflicts of Interest

Digest: Counsel for a municipal corporation owes a duty solely to the municipal corporation. Upon learning information of serious allegations by municipal employees injurious to the municipality, corporation counsel should report the information to higher authorities within the municipal unit, including, if need be, to the highest authority. A prior or current representation of the employees in their official capacities does not relieve the corporate counsel of this duty.

Rules: 1.6, 1.7, 1.9, and 1.13

FACTS

1. The inquirer is a New York attorney who is chief counsel to a New York municipal corporation. The corporation counsel's office is responsible for representing the municipality and its employees when sued in an official capacity. If a conflict exists between the municipal corporation and one or more employees, the counsel's office retains outside counsel.
2. The corporation counsel's office is responsible as well for reviewing and investigating allegations of wrongdoing by municipal employees. Recently, the corporation counsel has learned of serious and credible allegations against certain employees, including supervisory employees, who may have engaged in the misappropriation of municipal funds of substantial injury to the municipality. The allegations concern the misuse of funds for work that the employees did not discharge.
3. As corporation counsel, the inquirer has represented some of the alleged wrongdoers in their official capacity, either currently or in the past.

QUESTIONS

4. The inquirer's questions are best reduced to two:
 - (a) What are the obligations of a municipal counsel when faced with serious and credible allegations of wrongdoing by municipal employees adversely affecting the municipal corporation?
 - (b) What are the municipal counsel's duties when the counsel's office has previously represented, or continues to represent, the alleged wrongdoers, in their official capacities?

OPINION

5. Rule 1.13 of the N.Y. Rules of Professional Conduct (the “Rules”) governs this inquiry. “The duties defined in this Rule apply to government organizations.” Rule 1.13, Cmt. [9]. Under that Rule, the inquirer’s client is the municipal corporation and not any of its constituents. Rule 1.13(a) says:

When a lawyer employed or retained by an organization is dealing with the organization’s directors, officers, employees, members, shareholders or other constituent, and it appears that the organization’s interests may differ from those with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of its constituents.

Rule 1.13 (b) continues:

If a lawyer for the organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

6. The legal rights and duties of a municipal corporate counsel may vary by municipality, so we are in no position to establish a general standard of conduct in all circumstances. If, however, the municipal corporate counsel reaches the conclusions set out in Rule 1.13(b), and lacks authority to act on the his or her own power without violating Rule 1.6 on the protection of confidential information owned by the municipal corporation (such as a reference to a county District Attorney), then Rule 1.13(b)(3) permits the lawyer to refer the matter “to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.” The “applicable law” is beyond our jurisdiction to decide, but for purpose of this inquiry we assume that the highest authority in a municipality is its chief executive (a mayor or town executive) or its governing body (a town committee, a village board, etc.).

7. Accordingly, if the inquirer concludes, as the facts suggest, that municipal employees are engaged in conduct that violates the employees’ duties to the municipal corporation, may result in liability to that municipal corporation, and may result in substantial injury to the municipal corporation, then Rule 1.13 obligates the corporate counsel to report the conduct to a higher authority such as the municipality’s chief executive or governing body. Whether the corporate counsel may disclose the information if the municipal officials do not act on the disclosure depends on whether disclosure is permitted under Rule 1.6(b), including whether disclosure is “required” by law. Not able to opine on legal questions owing to limits on our jurisdiction, we offer no view on whether the corporate counsel may disclose the municipality’s confidential information to third persons, with some confidence that disclosure to the higher authorities may excite some action.

8. That the corporation counsel may have previously represented one or more of the affected employees in their official capacity but in unrelated matters does not affect this duty. Rule 1.9 prohibits a lawyer from representing another person in “the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Nothing in the inquiry suggests that any prior representation of the affected employees was in any way related to the allegations of wrongdoing that corporate counsel currently confronts. Absent circumstances in which the corporate counsel acquired personal (as opposed to municipal) confidential information from the employees – and no such indication exists here – then Rule 1.9 poses no barrier to revealing wrongdoing by a person previously represented in an official capacity.

9. If the corporate counsel’s office currently represents an individual employee in an official capacity in a pending matter, and that employee is among those who are alleged to have engaged in wrongdoing, then, again assuming that the corporate counsel has not acquired personal (as opposed to municipal) confidential information from the employee, the corporate counsel should withdraw from the representation consistent with the dictates of Rule 1.16, including, if need be, permission of the tribunal before which the office appears on behalf of the individual. Such is the requirement of Rule 1.7, governing current conflicts of interest, which prohibits a lawyer from a representation that “will involve the lawyer in representing differing interests.” On the facts here, the interests of the municipality and the official plainly diverge, and hence a conflict exists.

10. Our parentheticals concerning the acquisition of personal confidential information as opposed to confidential information owned by the municipality are intended as an alert of the perils inhering in any corporate representation – that a lawyer for an organization, including a municipal corporation, must be careful to be clear that the lawyer is counsel for the corporation and not for any of its constituents, including employees.

CONCLUSION

11. Counsel for a municipal corporation who learns of information that municipal employees have breached a legal duty to the municipality that may be imputed to the municipality or otherwise is likely to result in substantial injury to the municipality should report the information to the municipal authorities and may disclose the information outside the municipality if required by law. A prior representation of the affected employees is no obstacle to this disclosure if unrelated to the alleged wrongdoing, and a lawyer may withdraw from a current representation of an affected employee consistent with the rules of the tribunal.

(31-19)