Coates' Canons Blog: Client-Related Records and the Public Records Law

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When local governments retain attorneys who are in private practice, when are records held by the attorneys subject to the public records law and therefore open to public inspection? The court of appeals has ruled on this issue in a case involving attorneys representing a city, but one rationale given by the court would extend the ruling only to county attorneys. The subsequent rationales, however, would also reach attorneys for school boards and for special purpose agencies such as water and sewer authorities.

The case is *Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1 (2007), in which the newspaper sought a variety of records associated with oceanfront condemnations undertaken by the town; these included records related to engineering, surveying, and other professional services rendered in connection with the condemnation litigation. The town argued these were not public records because they were in the possession of the town's attorney, a law firm engaged in private practice, and therefore were not subject to the public records law. The court rejected the argument, setting out three alternative rationales for its decision.

First, the court reiterated earlier holdings that a city attorney is a public officer, because the position is created by statute. (G.S. 160A-173 provides that the city council "shall appoint a city attorney to serve at its pleasure and to be its legal adviser.") Because the public records law extends to records in the possession of any public officer, these records were therefore public records. This specific rationale would reach records held in the private law offices of persons or firms designated as city attorney or as county attorney (G.S. 153A-114 requires appointment of county attorneys), but attorneys who represent school boards and other local government entities are not mentioned by statute and therefore do not appear to be public officers. Therefore this first rationale would not reach these other attorneys.

Second, the court looked to the rules of professional conduct applicable to an attorney's files, which the court summarized, on page 13 of the reporter, by saying that "[i]n North Carolina, anything in a client's file, which is in the hands of the client's attorney, belongs to the client, with the exception only of the attorney's notes or work product." Therefore, the court went on, the client town, not the law firm town attorney, owned the contested documents. Obviously, this rationale reaches beyond city and county attorneys to any attorney who represents a local government entity in a specific transaction or specific litigation.

Third, on page 14, the court pointed out the policy implications of a contrary result:

Allowing defendants to prevail on their argument that these documents were the private property of the Town Attorney, and not property of the Town itself, would be permitting the Town to place documents such as these in the hands of a so-called independent contractor in order to escape the public records disclosure requirements. If an argument such as this were to prevail there would be nothing to prevent municipalities and other governmental agencies from skirting the public records disclosure requirements simply by hiring independent contractors to perform governmental tasks and to have them retain all documents in conjunction with the performance of those tasks that municipalities and agencies chose to shield from public scrutiny.

This third rationale might easily be extended beyond attorneys to other professionals performing work for local governments; how far it can be extended will have to await future litigation.

David Lawrence is retired from the faculty of the School of Government. For questions about the subject of this blog post, please refer to our **list of faculty expertise** to identify the appropriate faculty member to contact.

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