Coates' Canons Blog: Ethics and the Role of the Local Government Attorney

By Chris McLaughlin

Article: https://canons.sog.unc.edu/ethics-and-the-role-of-the-local-government-attorney/

This entry was posted on October 09, 2014 and is filed under Ethics & Conflicts, Professional Responsibility For Government Attorneys

Following up on Frayda Bluestein's excellent post about the appointment of new city and county attorneys, I offer answers to frequently asked questions about the proper role of a local government attorney.

As always, my advice is guided by the North Carolina Revised Rules of Professional Conduct. For local government attorneys, the most relevant of those rules is likely Rule 1.13, "Organization as Client." While not aimed specifically at government attorneys, the rule helps local government attorneys answer the key question about their representations: *Who is my client?* The answer determines where the attorney's ethical obligations lie.

Other rules worth reviewing are Rule 1.6, the basic confidentiality obligation that covers all information obtained by the attorney during a representation, and Rule 1.11, the special conflict of interest provisions for government attorneys.

We'll touch on these rules and other ethical considerations as I answer some FAQs about LGAs (local government attorneys).

Who is the client?

Let's start with the biggest question of all. A local government attorney's client is . . . [drumroll] . . . the local government, of course. But what does that really mean? Rule 1.13(a) states that an organization's attorney represents the organization "acting through its duly authorized constituents." Well, a local government can act through its voters, its elected governing board, its elected officials, and its employees. To which of those groups does the attorney owe her duties of loyalty, confidentiality, and communication?

Ultimately, a local government attorney's ethical obligations flow toward the local government's governing board because that is the "highest authority that can act on behalf of the organization." See Comment 5 to Rule 1.13.

This conclusion may sound obvious and easy to apply, but that's not always the case in practice. LGAs will work closely with the individuals who make up that government. Close relationships developed with those individuals may make it difficult for the attorney to place the interests of the governing board over the interests of those individuals.

If a LGA leads an employee to believe that the attorney represents the employee individually, the local government may lose control over confidentiality and privilege decisions concerning the attorney's conversations with that employee. See this blog post about the scandal at Penn State for a lesson in what can go wrong when an organization's attorney muddles her professional loyalties between the organization and its employees.

The same concerns can arise with individual board members. Assume one of the county commissioners visits the office of the county attorney, closes the door, and says, "I've got something important to tell you. Can we keep this just between you and me?" As much as that attorney might want to agree, his ethical obligations should prevent him from promising to keep the conversation confidential. The attorney owes an ethical duty to the board as a whole, not to individual board members. If the board member tells the attorney something that affects the interests of the county, then the attorney likely has an obligation to share that information with the board in order to protect the county's interests.

What if a newly elected council member demands that the city attorney reveal what occurred in a closed session between the attorney and the "old" council last year? Again, the attorney's duty of confidentiality runs to the council as a whole. The attorney has an obligation not to disclose information relating to her representation of the city—even to a member of

the city council—without approval from a majority of the council. One would hope that the council would not mind if new members are briefed on past confidential discussions with the city attorney, but that's a decision for the council to make and not the attorney.

What conversations are covered by a local government's attorney client privilege?

We know the attorney client privilege exists for governments under state law, in part because the legislature made specific reference to it in G.S. 143-318.11(3) when defining one of the exceptions to open meeting requirements.

But we don't know the scope of that privilege because state courts have yet to tackle the issue. Under federal law, the attorney client privilege for organizations extends beyond the "control group" (in other words, the governing board) to cover employees authorized to act on behalf of the organization in connection with the matter being discussed. It's reasonable to assume that our state courts would apply a similar interpretation of the privilege for governments and other organizations, but they've yet to do so.

Keep in mind that state public records law takes a very narrow view of attorney-client privilege by making confidential only documents concerning litigation or other claims sent from the attorney to the governing board. (Trial preparation materials are exempt from disclosure under a separate provision.) Correspondence between the attorney and the manager or other employees is not exempt from public records law disclosure requirements, despite the fact these documents would fall under the traditional definition of attorney client privilege.

See this blog post for more on the government attorney client privilege in North Carolina. This post talks more about client files and public record laws.

May the LGA advise different agencies or departments within one local government?

At first glance this seems like a dumb question. While big cities and big counties may have large legal staffs, most local governments in North Carolina have one or two attorneys providing legal assistance for all of its departments and employees. All of those departments and employees are part of the same client so there aren't any conflict issues to worry about, right?

That's usually true, but not always. Consider a situation in which the attorney is asked to advise a government official on a particular decision and later asked to advise the board charged with reviewing that decision. The attorney's involvement with the decision and the review of that decision could raise both conflict and due process concerns. See this blog post for more.

Must the attorney answer inquiries from any of the government's employees? How about questions from the general public?

That's up to the governing board. The client has the right to determine how its attorney spends her time. Some governing boards want as much legal transparency as possible and encourage their attorneys to do their best to answer all questions regardless of source. Other boards tightly control communication with their attorneys so that they can limit legal costs and maximize government efficiency. There's no one-size-fits-all answer to the question of who should be able to get answers from a local government attorney. Attorneys are wise to raise this issue with their boards at the beginning of their representation so that everyone's expectations are similarly aligned.

May an attorney represent more than one local government?

Yes. Plenty of attorneys represent multiple cities and counties. But attorneys must be wary of potential conflicts that could arise between those clients. See this blog post for more details.

How will the attorney's representation of a local government affect her representation of private clients?

The standard conflict rules created by Rule 1.7 apply to attorneys representing governments: the attorney may not represent clients directly adverse to that government nor may the attorney accept any representation that would "materially limit" the attorney's efforts on behalf of the government. For example, a part-time town attorney could not also

represent a criminal defendant if town police officers will be prosecuting witnesses against that defendant. See N.C. R.P.C. 73, available here.

Rule 1.11 creates special conflict of interest rules for attorneys who move in and out of government service. Current government attorneys may not participate in matters in which the attorneys "participated personally and substantially while in private practice" without government consent. The same rule applies in reverse for an attorney who previously represented a government; without consent, that attorney may not represent a private party on a matter in which the attorney participated "personally and substantially" while representing the government. For example, an attorney who advised the city zoning administrator on a particular zoning decision could not later represent a private party in litigation against the city about that zoning decision.

May an attorney serve on the board of one local government while representing another local government?

Yes, but conflict concerns are present here too. See this post for more details about issues that may arise when a lawyer serves as an elected official.

Links

- canons.sog.unc.edu/?p=7877
- www.ncbar.com/rules/rpcsearch.asp
- canons.sog.unc.edu/?p=7735
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.11
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1.1
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1.9
- canons.sog.unc.edu/?p=1194
- canons.sog.unc.edu/?p=475
- canons.sog.unc.edu/?p=2817
- canons.sog.unc.edu/?p=2085
- www.ncbar.com/ethics/index.asp
- canons.sog.unc.edu/?p=7525