

Representing Municipalities

Ethical Issues When the Municipality is the Client

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Topics

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- Who is the client?
 - Vermont Rule of Professional Conduct 1.13 – Representing an organization
 - Conflicts of interest
 - Giving legal advice - confidentiality, open meetings laws, advice to employees or municipal panels.
 - Hypotheticals
 - Questions?

Who is the Client

- *Handverger v. City of Winooski*, 2011 VT 134.
- The Municipality Only.
- No personal attorney-client relationship with municipal staff members unless attorney enters such a relationship with the staff member as an individual
- No fiduciary duty – fiduciary duty arises when there is a duty to act for or give advice for the benefit of another. Unless municipal charter establishes a duty to act on behalf of the employee personally or the attorney enters this role voluntarily then no fiduciary duty is owed by the attorney to a municipal employee.

Vermont Rule of Professional Conduct 1.13

- Rule 1.13(a) – lawyer represents the organization acting through its duly authorized constituents.
- Rule 1.13(b)-(e) – disclosure of confidential information
- Rule 1.13(f) – “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” – Avoid *Handverger* - be clear with municipal employees and officials who the client is.
- Rule 1.13(g) – Representation of both an employee and the organization may be allowed, subject to the ethical rules governing conflicts of interest.
- Comment 9 – Rule 1.13 applies to governmental organizations. The comment also recognizes the difficulty in defining precisely the identity of the client, making it more difficult to determine the lawyers obligations. With regard to disclosure of confidential information Comment 9 recognizes that a different balance may be required for governmental organizations because public business is involved.

Conflicts of Interest

- Rule 1.13 allows for an attorney to represent both an employee and the organization where Rule 1.7 (concurrent conflict of interest) allows it.
- A conflict exists when there is a significant risk the representation will be materially limited by the lawyer's responsibility to another client, a former client, or by the attorney's personal interests.
- If a conflict exists the attorney must determine that he or she can provide competent and diligent representation to both clients, it does not involve a claim by one client against the other, and each client gives written informed consent.
- Conflicts between the Selectboard and an other municipal panel – *treated the same as conflicts between the municipality and an employee. The municipal attorney represents the municipality and not the DRB, the Zoning Administrator, the Town Manager, or any other person or panel.*

Giving Legal Advice

- Vermont Open Meeting Law – Executive Sessions 1 V.S.A. § 313(a)(1)(F) provides that a public body may enter executive session to consider “confidential attorney-client communications made for the purpose of providing professional legal services to the body”
- Confidentiality – communications with the town body may not be disclosed by individual members without the authorization of the body.

Hypotheticals:

- 1. The Planning Commission is re-writing the Town's zoning bylaws. The Commission is not working well with the zoning administrator who staffs the commission. The two appear to have reached an impasse, and the bylaw update has effectively stalled. The selectboard does not care, who is "right," they just want bylaws. They order you to assist both sides. Assuming that both sides come from a legally proper point of view, Who is your client? What should your role be? What advice can you give to either side? Can you keep information from one side? Should you take sides?

Hypotheticals:

2. The newly elected town treasurer wants to adopt his own accounting method that he "learned from his father." It does not comply with GASBY accounting methods and appears to use the computer system that the town has purchased as a backup rather than a primary record of accounts. The Selectboard does not like this. They charge you to "fix it." There is no intimation of wrongdoing, and the system, while old fashioned and awkward appears to work. What can you, as the Town Attorney do?

Hypotheticals:

- 3. You get a call from the selectboard chair. She asks if you have read the latest edition of the Lower Valley News. In it, a selectboard member details a discussion between board members that occurred in executive session. The Chair is furious. She wants to remove the member or bring legal action against him. What is your advice to her? What action would you recommend? Would your advice be different if the executive session had concerned a presentation of legal advice from you to the Board?

Hypotheticals

- 4. You have written an opinion letter on the legality of a proposed bylaw. Your analysis calls into question the legality and constitutionality the bylaw. Following delivery of your opinion, the selectboard votes to adopt the bylaw. In the process, the selectboard chair states that they are doing this against the opinion of the town attorney. The other members nod their head in agreement. When a lawsuit is filed, there is a discovery request for your opinion. Has the client waived the privilege? Is the letter discoverable? Has your ability to represent the client been compromised?

Hypotheticals

- 5. Your client has asked to write a legal opinion letter on a town issue that has divided the electorate. The client has all but stated that the Board will make your letter public at the next selectboard meeting when they vote on the issue. What do you need to do in drafting this letter to protect your client? What do you need to do with this letter to protect yourself?

Questions?
