

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1992

ISSUE AND FACTS

The issue presented to the Legal Ethics Committee of the Indiana State Bar Association is whether, under the Indiana Rules of Professional Conduct (Rules), an Indiana attorney retained by a City Council is permitted to attend a Caucus of the members of a political party represented on that Council for the sole purpose of assuring that the members of the Caucus do not violate the Indiana Open Door Law during the meeting. The attorney presenting the inquiry did not provide any statement of facts. It is presumed for purposes of this Opinion that the attorney is not a full-time employee of the City, that he is paid for his services by the City and not the Caucus, and that he is not representing any other client which may have interests adverse to those of the City Council or of the Caucus. Also, while it might be relevant for a determination of the applicability of the Indiana Open Door Law whether the Caucus constitutes a majority of the Council, the status of the Caucus as a minority or majority is irrelevant for purposes of this Opinion. Also, no Opinion is expressed or implied herein with respect to the Indiana Open Door Law.

ANSWER

In the view of the Committee, the determination of the propriety of an attorney retained by a City Council also attending meetings of a Caucus of members of a political party represented on that Council for the purpose of rendering advice to the Caucus is subject to the rules on conflict of interest between parties. The interests of the City Council and of the Caucus may be adverse on the issue of the applicability of and compliance with the Indiana Open Door Law. However, based upon Rule 1.7, the attorney must determine whether his client is the Council or the Caucus, must disclose the capacity in which he is acting, must receive the consent of the Council after consultation, and should advise and receive the consent of the Caucus.

DISCUSSION

The Rules recognize that a government agency can be a client. See paragraph 3 of the Comment to Rule 1.11. The Comment to Rule 1.11 also makes clear, at paragraph 2 thereof, that the lawyer representing a government agency is subject to the Rules, including addressing the representation of adverse interests.

The initial question, then, is who is the attorney's client? In the

facts presented, it appears to the Committee that the client is the City Council and not the Caucus. The Committee has also concluded that the Caucus is separate from the City Council and not a subpart, as would be the case, for example, with a committee of the City Council. The attorney is being requested to render legal advice to a separate party, namely the Caucus, which is not his client. Thus, attention is directed to Rule 1.7 with respect to rendering advice to the Caucus.

Under Rule 1.7, an attorney may not represent a client where the interests are directly adverse to another client unless the attorney reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. Rule 1.7(a). Similarly, where directly adverse interests do not exist but may develop, the attorney can accept the engagement only if he or she reasonably believes the representation will not be adversely affected and the client in question consents after consultation. Rule 1.7(b). As indicated in the Comment to Rule 1.7, the question of conflict must be resolved as to each client when more than one is involved.

In the situation presented, it appears that the attorney is being asked to serve a dual role. The case law addressing the functions of government lawyers recognizes that government lawyers may serve dual functions from time-to-time. (See ABA/BNA Lawyers Manual on Professional Conduct, 1991:4101, et seq.) Attorneys have been limited in serving dual roles when there is an actual conflict or where there is an appearance of impropriety. ^{1/}

In the circumstances presented by the inquiring attorney, the potential exists for the interests of the Council and the Caucus to be adverse. The interests of the Council and the Caucus would seem to be compatible in reaching a determination regarding the Open Door Law and assuring compliance therewith. However, the attorney could be in a position to reach a determination that the Open Door Law is applicable, while the Caucus might take the position that it is not.

Thus, before the attorney can render advice to the Caucus, Rule 1.7 requires the attorney to obtain the consent of the Council after consultation regarding the implications of the dual role being played by the attorney.

The attorney must also remain cognizant of his responsibilities to maintain the confidences of the client. Communications offered to the attorney during the Caucus meetings are not subject to attorney-client privilege to the extent the Caucus is not the client. The attorney would not be restricted by the attorney-client privilege from disclosing information obtained by him at the Caucus meetings. If confidentiality is desired, the Caucus must take steps to assure that it establishes a privileged relationship with the attorney.

To the extent the Caucus is a subset of the City Council, issues regarding multiple clients are raised. Because of the Committee's conclusion that the client is only the City Council, these issues are not addressed in this Opinion.

The issues arising out of representation of multiple government units, such as the City Council, its committees, and agencies or departments of the city, are similar to, but distinct from, the issues discussed herein. They have been previously addressed in Opinion No. 7 of 1978 of this Committee.

It is also noted that there may be statutes or ordinances which address conflicts of interest on the part of City Attorneys. The Committee has not researched these possibilities and disclaims any Opinion with respect thereto.

Additionally, the Committee notes that the federal implications of such a question have been addressed by the Federal Bar Association through the promulgation of supplemental ethical considerations under the ABA Model Code. See Poirer, The Federal Government Lawyer and Ethics, 60 ABA Journal 1541 (1974). With respect to the issue of the City Council as the attorney's client, the Federal Bar Association Committee on Professional Ethics, in Opinion 73-1 (1973), has identified the client as the agency which employs the lawyer. This is consistent with the Committee's view that the attorney's client in the facts presented to and assumed by the Committee is the City Council.

FOOTNOTE:

- 1/ The committee recognizes that Rule 1.7 no longer contains the "appearance of impropriety" standard. This reference was used in the authority cited.

F. 2d 304. Thus, if the lawyer's statement means that unless the client comes up with additional money, he will not deliver competent representation, that is unethical and may even be illegal. There are means to obtain court funds for deposition expenses of experts, and it is equally unethical for the lawyer to solicit funds for that purpose.

According to a 1973 opinion of this committee, as an officer of the court, if the lawyer finds that the client becomes ineligible for pauper counsel, the lawyer should disclose to the court his knowledge of the

