Ethics for Local Government Attorneys

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Moderator:
Scott P. Horton, Esq.
Horton Law PLLC
Chair, Municipal and School Law Committee

Speaker:
Bradley J. Stevens, Esq.
Goldberg Segalla

ERIE INSTITUTE OF LAW

Bradley J. Stevens
Associate

Direct — 716.710.5877
Fax — 716.566.5401
bstevens@goldbergsegalla.com

OFFICE

Albany
Buffalo

PRACTICE AREAS

General Liability
Construction

GOLDBERG SEGALLA

www.GoldbergSegalla.com

Bradley Stevens defends insured businesses, municipalities, and individuals in a variety of complex liability matters in state and federal trials and appeals throughout New York, and also represents clients before the New York State Division of Human Rights, the Equal Employment Opportunity Commission (EEOC), and Small Claims Court.

Brad's experience includes counseling and defending numerous municipalities and public entities in matters ranging from inmate confinement conditions to employment discrimination claims. He has successfully drafted and submitted motions for summary judgment resulting in dismissals in both state and federal court, assisted with and second-chaired trials in complex employment practices liability (EPL) matters, and drafted and argued winning appeals before the Third and Fourth Departments of the New York State Supreme Court Appellate Division. He has also handled toxic tort matters related to lead paint claims.

After graduating with a bachelor's in Business Administration from Elmira College, Brad earned an M.B.A. at St. Bonaventure University. He earned his J.D. at Albany Law School, where he served as Note and Comment editor for the *Journal of Science and Technology*. He graduated *cum laude*, and was also the Karen C. McGovern Senior Prize Trial Competition Champion. Before entering private practice, Brad gained experience in several legal internships, including with the New York State Attorney General's Office Litigation Bureau.

Admitted to Practice

- New York
- U.S. District Court for the Northern District of New York

Education

- Albany Law School, J.D., *cum laude*, 2013
- St. Bonaventure University, M.B.A., *magna cum laude*, 2009
- Elmira College, B.S., *magna cum laude*, 2008

Bradley J. Stevens, Esq.

Goldberg Segalla

716.710.5877 | bstevens@goldbergsegalla.com

Ethics Update for Local Government Attorneys

Preserving the attorney client privilege

Initially, when looking at the attorney client privilege from a municipal attorney's standpoint it is essential to identify who exactly the client is. For a county or city attorney that client is the county or city. Rule 1.13 of the model rules of professional conduct reads as follows:

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

Obviously when representing a municipal entity a lawyer will be speaking with various employees to defend the case throughout the course of the litigation. However, the lawyer must remember that they are the lawyer for the entity and not any individual employees, even if such employees are being defended by the municipality.

In today's technological age it is vital to know the limits and how to protect the attorney client privilege as we communicate in a number of different fashions from emails to text messages. The Second Circuit addressed the issue of the attorney-client privilege relating to emails sent between a government lawyer (with no policy making authority) and a public official assessing the legality of a certain policy as well as proposing alternative ones. *Pritchard v. County of Erie*

(In re County of Erie), 473 F. 3d 413 (2d Cir. 2007). This case involved emails between an assistant county attorney and the County Sheriff's office pertaining to the legal analysis and recommendation of policies regarding the search of inmates at the County jail upon admission and classification. While the district court held that such emails were administrative in the aspect of policy recommendations, the Second Circuit reversed this decision finding the emails to be protected by the attorney-client privilege.

The main question to be asked after *Pritchard* is what is the function of the information sought from or provided by the attorney? When a lawyer is asked to assess legal compliance or provides legal advice, such communications are privileged. However, when the attorney is not responding in their capacity as an attorney or asked for their opinion in a non-legal matter, then the communications are not privileged.

Further, when dealing with emails we need to look at who is included as a recipient of such emails. The *Pritchard* case again went back up to the Second Circuit to determine if privilege was waived when several other people were copied on an email containing such legal advice. *In re County of Erie*, 546 F.3d 222 (2d Cir. 2007)(Pritchard #2). In this scenario the Second Circuit held that the emails were communicated to others who had a legitimate need to know about the policy and therefore did waive any privilege. Furthermore, the advice contained in the emails was seen as irrelevant as the county was addressing a defense of qualified immunity, which is an objective standard based upon well settled law.

Another aspect when addressing the nature of the attorney-client privilege (in emails or in text messages) is the confidentiality of information or reasonable expectation of privacy. Addressing this issue is Rule 1.6 of the model rules of professional conduct and reads as follows in its entirety:

RULE 1.6: CONFIDENTIALITY OF INFORMATION

a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Essentially, when communicating with a client the lawyer must take reasonable precautions to prevent the disclosure of the message to unintended recipients. This includes protecting against the unauthorized access of such messages by third parties. When assessing the “third parties” that may access such materials we have to consider how almost all electronic information is stored somewhere, whether that be with a cell phone provider or an email server. These two providers

can have subtle differences. For example, the attorney client privilege is not waived merely because it is communicated over text message and thus a third-party (cellular provider) may hold a record of such message. The provider is merely providing a service to transmit messages, much like the postal service does with letters (which of course have not been seen as any waiver of privilege). Yet, when discussing emails it does depend on the nature of the computer and email address used by the sender. For instance, while emails sent between a county employee and a county attorney (from county equipment and on county email addresses) involving litigation discussions would be protected, however a county employee's email to their personal attorney from their county email or computer would not be protected. This is because there is no expectation of privacy when the county employer maintains records of any such emails sent. This situation is beneficial in the municipal sense but not pertaining to a municipal employee's personal interests. *Legal ethics of Text Messages*, Presented by: National Business Institute & West LegalEdcenter.

Conflicts of interest pertaining to new sexual harassment law requirements

When reviewing potential conflicts of interest under the new sexual harassment related amendments to the New York Public Officers Law, it is important to recognize the framework prior to such amendments. While the amendments were made to Public Officers Law §§ 17 and 18, these section essentially mirror each other with §17 being directed at state agencies and §18 applying to local public agencies (such as counties and towns etc.). The relevant portion of Public Officers Law § 17 reads as follows:

> The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, or shall pay such judgment or settlement; provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage

resulted from intentional wrongdoing on the part of the employee. Public Officers Law § 17, 3(a)

Notably, this section states that the state (or local agency under Public Officers Law §18) will hold harmless its employees and pay judgments for actions committed within the scope of the employees employment. Such protection will not attach if the harm resulted from intentional wrongdoings of the employee. This standard has been routinely held by the courts that an employee is not provided this protection solely from their role as an employee, but the court considers the conduct and the scope of the employee's duties. For example a correction officer was not entitled to indemnification from the state when his actions of opening a prisoner's cell to allow two other officers to assault the prisoner did not fall within the scope of his employment to avail the protections under Public Officers Law § 17. *Cf. Spitz v. Coughlin,* 161 A.D.2d 1088, 1089, (3d Dep't 1990). Further, even in a prior sexual harassment case, the employee's harassing conduct was not seen as being taken in the discharge of his duties or doing his employer's work. *Ierardi v Sisco*, 119 F.3d 183, 188-89 (2d Cir. 1997). As such the employee was not offered the previously discussed protections from his employer.

Turning to the amendment to the Public Officers Law, the legislature has now added language specifically directed towards the instance in which a municipal employee has been subject to a judgment of sexual harassment reading as follows:

> Notwithstanding any law to the contrary, any employee who has been subject to a final judgment of personal liability for intentional wrong-doing related to a claim of sexual harassment, shall reimburse any state agency or entity that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment, for his or her proportionate share of such judgment. Such employee shall personally reimburse such state agency or entity within ninety days of the state agency or entity's payment of such award.

Public Officers Law § 17-a(2)

While still carrying a similar overtone from Public Officers Law §17 that would make municipal protection inapplicable to intentional torts and those done outside the scope of employment, §17-a focuses on judgments entered against an employee for sexual harassment. Notably, it is only judgment that an employee would have to reimburse the municipality for, not any settlement agreements. While the draft bill included the employee to be personally liable for any settlements; this portion of the bill did not make it into final legislation. However, this dichotomy of making an employee responsible for judgments but not for settlements creates the potential for conflicts of interest when representing a municipality and an employee in the defense of sexual harassment claims.

The most obvious first impression is that the employee may want to settle early or be more aggressive in settling so as to not be personally liable for any judgment that potentially could be entered against the employee. The apparent legal conflict exists for the municipality's legal counsel in their duty to defend both the employee and municipality. Even if an investigation when reviewing the claims made against the employee reveals that the employee acted appropriately, there is always a chance that when taken to a trial or administrative agency that a judgment could be entered of sexual harassment against the employee. This conflict regarding one party who would pay a settlement (the municipality) and the party who would pay a verdict (the employee) can affect the strategy of handling the case, defending the claim, and settlement negotiations. Further too is what notification needs to be given to the employee about the potential of having to personally pay for any judgment.

When resolving this issue, it is helpful to refer to Rule 1.7 of the model rules of professional conduct regarding conflicts of interest: current clients. Rule 1.7 states that a lawyer may represent a client with a conflict if (1) the lawyer can provide competent and diligent

representation; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client; and (4) the client gives informed written consent. As it relates to Public Officers Law §17-a (and 18-a), the legislature clearly did not prohibit a municipal attorney from representing both the entity and employee. The proper thing would appear that if the lawyer feels that they are able to represent both clients to have the employee give written consent as to a potential conflict. While we do not know how such conflicts will or should be resolved with the enactment of the sexual harassment amendments to the Public Officers law, reading such amendments together with Rule 1.7 of the model rules of professional conduct provides a good starting point.

Counseling competing elected officials

When a situation arises where various county officials have competing interests or competing goals it is important to remember that under Model Rule 1.13 that it is the municipal entity that is the client. Of course this does not mean that you do not discuss issues or counsel various municipal employees, but recognizing the fact that what may be beneficial to one employee, may not be beneficial to the client – municipal entity. In expanding upon who the client is we look at Model Rule 5.2 regarding the responsibilities of a subordinate lawyer, which reads as follows:

> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

A municipal lawyer does not escape repercussions for violating the model rules simply because they were acting at the behest of someone above them. This can include another lawyer

or county official. When balancing the issues of counseling competing officials or even conflicts between various municipal agencies it is important to refrain from such direct conflicts in accordance with Model Rule 1.7 pertaining to conflicts of interest.

Thus two such common conflicts a municipal lawyer may face deal with the conflicts between officials and conflicts between agencies. The lawyer must remember that their focus is to the municipality who is the client. For example, when a municipal employee is fired or an official removed from office, the lawyer must focus on the best interest of the municipality, not the employee or political party of the ousted official. The nature of work for elected officials partly deals with campaigning to obtain or hold on to such position. However, a municipal employee may not spend municipal time campaigning for an official when he/she should be doing such municipal work. In fact, an abuse of such time is seen as misconduct justifying termination. *In re Oberman*, 143 A.D.3d 1022 (3d Dept. 2016). If such a situation occurs, a municipal attorney should keep the interests of the municipality in the forefront to protect their interests. When an employee or official is ousted some with political motivations may seize to either protect or further inflict harm to the ousted person. Should the ousted employee seek to sue the municipality the government attorney must ensure the preservation of all related documents that may be tampered by those with a political agenda. The lawyer must remain independent to uphold the goals of the municipality as it is the main client.

Finally, as it pertain to inter agency conflicts as stated in paragraph 18 of the preamble and scope of the American Bar Association's Model Rules of Professional Conduct "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships." While others contend that each agency should be

seen as a separate client and thus bar representation of competing interests, a government lawyer can initially attempt to mediate a resolution based upon the common interests of the agencies. If such a resolution does not appear possible then it may be best to obtain further counsel.