Who really is your client?

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Introduction

Lawyers have ethical responsibilities to the profession, society and to their client. Some consider the duty owed by a lawyer to their client to be paramount over all others:

> An advocate, in the discharge of his or her duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty.[1]

Since the duties outlined in the Rules of Professional Conduct (the "Rules") are those that are largely owed to our clients, knowing who your client is and understanding the particular lawyer-client relationship is of particular importance.

Usually it is clear who your client is. However, in the case of a lawyer acting for a large public institution such as a municipality the lawyer-client relationship can become complex and opaque. When a lawyer acts for a municipality, it is common for the lawyer to communicate with a variety of individuals: the in-house counsel (if there is one), members of council, the mayor, the CAO or city manager, the clerk, the chief building official, the municipal planner, or other municipal staff. Different silos of a municipality may often fail to speak in one harmonious voice, or have conflicting views or interests. This can give rise to a variety of complex and difficult ethical situations.

This paper will explore the professional ethical considerations of the lawyer-client relationship where a lawyer, as outside counsel, acts on behalf of a municipality. Drawing on the Rules, scholarly work, case law and practical experience this paper will demonstrate that carrying out the ethical duties of a municipal lawyer can be complex, leaving a lawyer to ask "who really is your client?"

The Basics: The Rules of Professional Conduct

The Law Society of Ontario has created the Rules of Professional Conduct[2] to assist in the lawyer-client relationship. Chapter 3 concentrates on the Relationship to Clients. Of particular importance is Rule 3.2-3 which states:

> Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when lawyer is employed by an organization, including a corporation, in exercising the lawyer's duties

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[1] *R v. Neil* [2002] 3 SCR 631 at para 12.

[2] Although this paper deals primarily with Ontario law, many of the points of law in this paper are applicable across Canada. In part, this is because many municipal statutes are similar to Ontario's *Municipal Act, 2001* SO 2001, c. 25. Additionally, most provincial codes of professional conduct for lawyers are based on the Model Code of the Federation of Law Societies of Canada.

> and in providing professional services, the lawyer shall act for the organization.

Rule 3.2-3 may be difficult to apply in practice.

As outlined in subsection 4(1) of the *Municipal Act, 2001*[3] a municipality is a corporation.[4] Yet, a municipality is far different from a business corporation. As set out in section 2 of the *Municipal Act, 2001*:

> Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.

Pursuant to subsection 5(1) of the *Municipal Act, 2001*[5] the powers of a municipality shall be exercised by its council. Yet, a lawyer acting for a municipality does not simply receive instructions the municipal council.

In reality, municipalities are truly unique creatures of the province with many different roles and functions. Therefore, it is not surprising that when a lawyer acts for a municipality, the lawyer will be in contact with many different people within the corporation. It is not uncommon for the lawyer to communicate with and receive instructions from: in-house counsel (if there is one), the CAO, the clerk, the chief building official, the municipal planner, other members of staff, the mayor, and members of council. These individuals may possess a variety of opinions and may have different interests. The challenge is that silos of a municipality may often fail to speak in one harmonious voice.

The Rules attempt to provide further assistance by offering clarification in the commentary. Rule 3.2-3 commentary [1] reminds the lawyer that:

> A corporate client has a legal personality distinct from its shareholders, officers, directors, and employees… [further] the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

This is sound advice, but it is not all that practical in terms of resolving day-to-day challenges of being immersed in the municipality you represent.

Adam Dodek, Dean of University of Ottawa law school and author of the Canadian textbook "Solicitor-Client Privilege", discusses the difficulties faced by lawyers in the context of working for the Crown, although his words may be equally applicable in the municipal realm:

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[3] SO 2001, c. 25.
[4] "**4 (1)** The inhabitants of every municipality are incorporated as a body corporate."
[5] "**5 (1)** The powers of a municipality shall be exercised by its council."

> The manner in which legal advice is provided in government makes the idea of the ultimate decision maker as client not particularly helpful in theory or in practice… In many circumstances, it becomes difficult to designate an official as "the client" with any exactitude." [6]

Dodek further explains that the difficulty in identifying a client is exacerbated where "the individual or group providing instructions to government lawyers on a matter is different from the individual or group who may make decisions about waiver of solicitor-client privilege."[7] This can be the case when advising a municipality. Although the lawyer may take instructions from one person, as a matter of law it is council who likely retains the ability to waive privilege. This is expanded on below through a review of the interlocutory decisions of *RSJ Holdings Inc. v. The Corporation of the City of London*.[8]

Who May Instruct The Lawyer

Professional obligations related to client identification are set out in the Law Society of Ontario By-law 7.1. These rules require a lawyer to follow certain steps and obtain certain documentary proof that the client is who they say they are.

A lawyer acting for a public body, including a municipality, is exempt from many of these requirements pursuant to By-law 7.1 subsection 22(4)[9]. However, pursuant to subsection 23(1) of the same By-law, a lawyer acting for a municipality must still obtain basic information: the "name, position and contact information for the individual who gives instructions with respect to the matter for which the licensee is retained". The mandatory step of identifying the individuals within a municipality who provide instructions may provide some clarity to a lawyer. A lawyer is required to think critically about who is giving instructions.

By-law 7.1 does not require that a lawyer investigate whether an instructing individual is truly authorized by a municipality to provide instructions. However, as noted above, Rule 3.2-3 commentary [1] highlights that it is advisable for the lawyer to act with reasonable prudence in that regard.

Further guidance can be found in Part VI sections 224-229 of the *Municipal Act, 2001*. This part sets out the respective statutory functions of different municipal actors. Those actors are Council, Head of Council, Officers and Employees, Clerk, and CAO. The powers outlined for each of these enumerated actors are broad. The act of instructing a lawyer could, depending on the subject matter, reasonably fall within the ambit of

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[6] Adam Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) Dalhousie Law Journal 33:1 at pg. 13.
[7] *ibid* at pg. 13.
[8] 10 M.P.L.R. (4th) 106, leave to appeal refused.
[9] By-law 7.1 subsection 22(4)

> **Client identification**
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> (4) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23 (4) in respect of any of the following clients: 1. A financial institution. 2. A public body. 3. A reporting issuer.

authority for any of the aforementioned. That said, an individual acting well outside their statutory function in the context of instructing a lawyer should raise concern.

The municipality may also play a role in helping to clarify who is authorized to instruct a lawyer. As noted above, section 5 of the *Municipal Act, 2001* provides that the powers of a municipality shall be exercised by its council by by-law. Further, section 23.1 of the *Municipal Act, 2001* provides that a municipality may delegate its powers and duties by by-law. A municipality that creates a by-law clearly delegating who may instruct a lawyer will help set the boundaries of the lawyer-client relationship. Such a by-law would ideally also provide that a retained lawyer can report directly to council in certain circumstances. This particular feature would satisfy some of the concerns raised by Dodek as discussed above. A by-law like this would establish a process whereby council becomes the party with the clear and ultimate authority to instruct outside counsel.

Dealing with Conflicting Instructions and Avoiding Conflicts of Interest

Notwithstanding the lawyer's duty to identify the instructing client under the Rules, and a lawyer's own reasonable prudence, the fact remains that there may be any number of individuals in a municipality who provide instructions to the lawyer. Ideally, all instructions provided to a lawyer will be in harmony. However, where multiple individuals are authorized to instruct the lawyer on behalf of the municipality, or where multiple individuals take on the role of instructor, it is possible that conflicting instructions may arise.

In the event of conflicting instructions, it is advisable for the lawyer to first and foremost exercise his or her common sense. A lawyer should first document the instructions provided by both parties for his or her own records, followed by reasonable inquiries. The Rules impose no duty on a lawyer to maintain confidentiality between two parties who are both authorized to instruct the lawyer. Therefore, a tactful conversation between the instructing parties may clarify what instructions are proper.

In the event that there is a *bona fide* disagreement between instructors, the lawyer must be careful to avoid acting in a conflict of interest.

A lawyer may personally prefer one set of conflicting instructions over another set of instructions. Similarly, a lawyer may feel personally obligated to one instructor over another. But a lawyer must remember; when retained by a municipality, *the municipality* is the client. The municipality has a distinct legal personality from its officials. For all intents and purposes, the person providing the lawyer with instructions may *feel* like the client, and may conduct themselves like the client (consider the activist mayor, for instance). However, the Rules explicitly state that this is not the case. The lawyer's duties and loyalty is owed to the corporation and not the individual.

The duty of loyalty to the municipal client requires that a lawyer strictly avoid conflicts of interest. A conflict of interest is defined in section 1.1-1 of the Rules as:

> the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

Rule 3.4-1 clearly identifies that "[a] lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section."[10]

Favoring the interests of one set of instructions over another could theoretically create a situation where a conflict of interest arises. Often, a well-intentioned lawyer may not realize that his or her obligations have actually been compromised. In the event that the lawyer receives two sets of irreconcilable instructions as a best practice the lawyer should contact the Law Society Practice Management Helpline, if time permits. Alternatively, if a lawyer is faced with a conflict of interest between an instructor and the municipality, the lawyer should consider consulting with the municipal council in order to resolve the conflict. Ultimately if the conflict cannot be resolved the lawyer should consider withdrawing in accordance with the Rules.

Case Study: *RSJ Holdings Inc. v. The Corporation of the City of London*

Although the Rules of Professional Conduct provide guidance to a lawyer acting for a municipality, in practice the Rules leave something to be desired. Real-world situations can be far more complex than the Rules account for. An on-point case study in this regard is the case of *RSJ Holdings Inc. v. The Corporation of the City of London*. [11]

In this case the City of London (the "City") passed an interim control by-law which effected a one-year freeze on all land development along a specific corridor. The appellant RSJ was one of the affected land owners. RSJ applied to the Court for an order quashing the by-law for illegality on the grounds that City Council discussed and decided to pass the by-law at two *in camera* meetings. Ultimately the Supreme Court of Canada ruled in favour of RSJ and quashed the by-law for illegality. This case, particularly the decisions from the interlocutory motions, raise some very interesting ethical considerations.

One of the more fascinating aspects about this case is the fact that two councillors provided affidavits to RSJ's lawyer which ultimately formed much of the evidentiary foundation for RSJ's proceedings. In these affidavits, the two councillors deposed that a

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[10] Section 3.3.

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless:

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by Rules 3.3-2 to 3.3-6.

[11] 10 M.P.L.R. (4th) 106.

vote on the interim control by-law was taken during an *in camera* meeting, a direct contravention of the *Municipal Act, 2001*.[12]

By providing these affidavits the two councillors appeared to be acting directly against the municipality's legal interests. In this case, the City brought a motion before the Court to strike the affidavits, taking the position that the affidavits revealed confidential and privileged information. The City also brought a motion to have RSJ's lawyer removed from the record for conflict of interest, on the grounds that the allegedly confidential affidavits placed the lawyer in a conflict of interest situation.

Justice Kennedy of the Superior Court dismissed these motions, an order which was upheld on appeal. Justice Kennedy held that the two councillors did not divulge any confidential or privileged information. As a result, RSJ's lawyer could not be acting in a conflict.

However, it is worth considering the counter-factual: What if the two councillors had divulged privileged information?

In a lawyer-client relationship, privileged information belongs to the client. This is why, as set out in Rule 3.3-1 (a), one of the few circumstances where disclosure of confidential information is permitted is on the consent of the client. What is quite striking about this situation is that one might be tempted to think that as councillors, the deponents were the client. And the client has the right to divulge privileged information!

As mentioned above, section 5 of the *Municipal Act, 2001* provides that Council possesses ultimate authority with respect to the municipality. As such, the *Municipal Act, 2001*, grants council the power to waive solicitor-client privilege through a by-law or resolution. Therefore, the context of the legal advice provided to council certainly matters; legal advice provided to council as a whole does not "belong" to a single particular councillor. This is consistent with the decision of Justice Kennedy, where he determines that members of council, with the exception of the mayor, "are independent legislators discharging the public duty which they were elected to perform by voting in a matter that independently they were each empowered to deal with."[13]

Had the two councillors divulged privileged information, they would have fallen under the ambit of the Code of Conduct, which Justice Kennedy refers to in his decision.[14] Yet, as Justice Kennedy points out, the Code of Conduct is only triggered on a resolution of council.[15] Absent the council triggering the code of conduct, a political mechanism, a councillor could reveal privileged information with virtually no consequences – as if the information belonged to them.

Discussion Questions

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[12] "**239 (1)** Except as provided in this section, all meetings shall be open to the public."
[13] *Supra* note 11 at para 20.
[14] *Supra* note 11 at para 23.
[15] *Supra* note 11 at para 25.

In the case of *RSJ Holdings* it was the City Solicitor who provided advice to Council during the impugned closed session. However, a similar situation could have taken place where external counsel was retained to provide advice to city council. *RSJ Holdings* is just one illustration of how a municipal lawyer may be required to navigate unique situations that are fraught with ethical implications.

Consider a hypothetical: Imagine that a lawyer is retained as external counsel to provide advice to a City with respect to interim control by-laws. The City holds a closed meeting to consider and vote on the by-law. Right after the meeting, two City councillors reveal to the lawyer that they intend to depose an affidavit for a developer containing information that is confidential, and potentially privileged.

The lawyer retained by the City has an obligation to the municipality, and not to individual councillors. Further, councillors are not permitted to divulge privileged information, as per the Code of Conduct.[16]

Does the retained lawyer have a duty to inform council?

Rule 3.2-8 commentary [5] obligates a lawyer who knows that an organization has acted dishonestly, fraudulently, criminally or illegally to report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. Does the above described scenario meet the threshold of dishonesty, fraud, crime, or illegality? If so, does a councillor acting in a certain way equate to an organization acting in a certain way within the scope of this rule? Is council as a whole, “up the ladder” in this situation? What if council chooses not to trigger a code of conduct investigation?

An additional difficulty is raised in the event that the councillors who intend to disclose information ask the external council for legal advice. The lawyer may feel compelled to advise the councillors of their duties and their options. However, this may run the risk of creating a conflict, given that the lawyer is engaged as counsel to the municipality and not the individual councillors.

An alternative hypothetical engages similar ethical considerations. Imagine that the CAO in good faith instructs an externally retained lawyer to take a course of action that the lawyer believes will harm the municipality. Imagine further that the CAO specifically instructs the lawyer not to inform council.

Does the lawyer then have a duty to inform council?

In this situation, there is no dishonesty, fraud, crime, or illegality. Therefore, the “up the ladder” principle does not apply. However, a lawyer’s duty of loyalty, and a lawyer’s fiduciary obligation to the municipal client may require the lawyer to inform council despite the contrary instructions from the CAO. Practically speaking, this would be a

[16] In the case of the *RSJ Holdings*, the Code of Conduct for the City Councilors did prohibit any disclosure of confidential information. This is not necessarily the case for all Codes of Conduct.

challenging situation for a lawyer. On its face it appears that the CAO's instructions put the lawyer in a conflict situation.

There is no clear answer to these questions. Although the Rules may seem straightforward, the ethical challenges faced by lawyers when retained by a municipality may be far from simple. Earlier in this paper the concept of an 'external counsel delegation by-law' was discussed. Although this by-law would not be a silver bullet solution to all ethical quandaries, it would certainly make life easier for a lawyer retained by a municipality.

Of course, in a pinch, one can always call the Law Society Practice Management Helpline.

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