IMLA Ethics and Professionalism
Conflicts of Interest
Savannah, Georgia - September 2005

Issues relating to conflicts of interest (COI) arise frequently in the municipal lawyer's practice. Most often they are questions either sent to the law department by others or noted in the routine review of contracts or litigation concerning the propriety of conduct of city officials or employees. Failure to recognize and properly address potential conflicts can have unfortunate consequences for the municipality and its officials. I recommend consideration of the following four general propositions whenever ethics issues are considered by law directors.

Law Directors and Lawyer Officials Elected and appointed municipal lawyers are held to two separate sets of ethical standards governing their conduct. They must abide by the Code or Rules of Professional Conduct governing all lawyers, and the ethics statutes governing all public employees and officials, which vary depending on their jurisdiction. Both sets of rules may have specific provisions that impact on municipal attorneys differently than public employees or lawyers in general.[1] Thus, a cardinal rule of conflict analysis for municipal attorneys: review the proposed conduct or action for compliance with both.

City Officials and Employees Public officials and employees may be generally familiar with state ethics laws but unaware of the fine points. Intuitively they should know, for example, that public employees cannot accept money or gifts from those they are supposed to be regulating. Unfortunately, reliance on intuition is rarely sufficient preparation for navigating the complex rules of public officials' ethics.[2] Frequently the genesis of ethics violations is found in the dual or even multiple roles of public employees and officials. Members of council, for example, are also taxpayers and citizens and usually property owners in the jurisdiction in which they have duties and responsibilities as public officials. Frequently they are also lawyers or business owners with offices or facilities in the jurisdiction. Unpaid members of boards and commissions are sometimes surprised to learn that they too may be restricted in whom they can accept gifts from or do business with.

Imputed Conflicts Our colleagues in the private sector know that most conflicts of interest that affect members of their firms are imputed to all of the other members. The conflicts of interest of individual lawyers in municipal law departments may be imputed to others in the department and cause the disqualification of the entire department, depending on the jurisdiction and nature of the conflict.

[1] e.g. Ohio's EC 7-13 and 7-14 distinguish the special responsibilities of public prosecutors and government lawyers to seek justice and refrain from conduct that is unfair to opposing parties.
[2] Ohio's governor recently plead no contest to misdemeanor ethics charges for failing to disclose on annual filings that he had received certain "gifts", primarily greens fees for weekend rounds of golf played at his hosts' country clubs. Many of the "gifts" were valued at less than $100.00, and the hosts were longtime political friends.

Client Consents Client consents, the common remedy for many conflicts of interest in the private sector, may not be possible in the public sector. Due to the nature of the municipal lawyers' clients and the matters in which conflicts may arise there may not be anyone capable of giving informed consent.

The following items from recent cases or advisories may be of interest and lead you to helpful authority the next time you are called on to render an ethics opinion. Some illustrations do not involve public lawyers but could have application to the kinds of cases and controversies with which you might expect to encounter as counsel for cities and villages.

Negotiations/ Advocacy

Hernandez v. Paicius, 109 Cal. App. 4th 452, 134 Cal. Rptr. 2d 756 (4th Dist., Div. 3, 2004).
Medical malpractice trial. Defense counsel permitted to cross plaintiff's expert witness/physician even though her firm (by another office) represented the expert in defense of his medical license. Defense counsel denied that she had access to confidential information and insisted everything she used to cross examine was available in the public record, and the trial judge agreed overruling motions to disqualify defense counsel and for mistrial. Judgment for defendant reversed, remanded with instructions to assign to a new judge for retrial and ordering the clerk to serve a copy of the court of appeals opinion on the California equivalent of Disciplinary Counsel. Court found defense counsel's conduct egregious, pointing out that issue was not confidentiality but loyalty. Clients are entitled to undivided loyalty of their lawyer and her law firm.

Akron Bar Assn. v. Holder, 102 Ohio St. 3d 307, 2004-Ohio-2835.
Lawyer found guilty of revealing a confidence or secret of a client, using a confidence or secret of client to the disadvantage of the client, and using a confidence or secret of a client for the advantage of himself or of a third person. Lawyer had falling out with client in the course of business and legal dispute. At various times he represented an individual and the entity with which the individual was associated. Ultimately, he found himself adverse to the individual and ended the attorney client relationship. In the course of continuing representation of the entity lawyer sent a letter to an agency of the state detailing the individual's criminal record. All information was in the public record and had been revealed to lawyer in course of a deposition, not in confidence. Court determined that the information, nonetheless, constituted "secrets" as defined by DR 4-101.

Conflict Imputed to Office

Ohio Supreme Court, Board of Commissioners on Grievances and Discipline, Opinion 2003-5, Issued October 3, 2003
It is improper for a law director or an assistant law director to act as an advocate in a trial in which another attorney in the law director's office will testify as a witness on behalf of the city unless permitted under one of the exceptions in DR 5-101(B)(1) through (4), or under compelling and extraordinary circumstances recognized by a court.

People v. Gordon Eubanks, et al., 14 Cal.4th 580 (1997)
District attorney's entire office disqualified from indicting and prosecuting trade secrets case where alleged victim contributed about $13,000.00 to the cost of the district attorney's investigation. Conflict of interest for the prosecutor that called into question his undivided loyalty to the interests of justice.

State of Tennessee v. Donald L. Culbreath, et al., No. W1999-01553-SC-R11-CD, October 20, 2000
District attorney general and entire staff disqualified from pursuing obscenity and nuisance actions against adult bookstores because of violation of due process by utilizing highly skilled lawyer investigator loaned and paid for by special interest group, Citizens for Community Values, Inc.

Personal Conflicts

Mezihov v. Allen, No. 03-3973 (6th Cir. June 16, 2005) Attorney Leaves First Amendment Rights at Courthouse Threshold. As a matter of first impression in the circuit, the Sixth Circuit has ruled that an attorney retains no personal First Amendment rights when representing a client in courtroom proceedings. Mezibov, a criminal defense attorney, brought a Section 1983 claim of retaliation against Allen, a county prosecutor, alleging that Allen made defamatory comments about him in retaliation for Mezibov's pursuing his First Amendment right to "fil[e] motions and rais[e] legitimate defenses" on behalf of his clients in the courtroom. The court dismissed, finding that (1) the activity that Mezibov claimed subjected him to retaliation was not a constitutionally-protected activity, and (2) even if it were, a criminal defense attorney of ordinary firmness would not have been chilled from engaging in the activity as a consequence of Allen's adverse action. The court noted that trial participants – jurors, bailiffs or onlookers – with the possible exception of an actual party to the case, had no First Amendment right to speak up or otherwise present a point of view in the courtroom. "More fundamentally, by choosing to represent a client in court, the attorney assumes a role that is in absolute conflict with his exercising free speech." See http://caselaw.lp.findlaw.com/data2/circs/6th/033973p.pdf

Notopoulos v. Statewide Grievance Committee, Connecticut Law Tribune, 10-13-2003.
No First Amendment protection for lawyer rants against judge.

Disciplinary Counsel v. Gardner, 99 Ohio St.3d 416, 2003-Ohio-4048.
Lawyer suspended for accusations against judges in appellate brief.

Mississippi Comm. on Judicial Conduct v. Connie Glen Wilkerson, Miss., No. 2002-JP-02105-SCT, 12/13/02.
Mississippi judge's letter to the editor and television interview in which he expressed the opinion that homosexuality is an illness which merited treatment, and gays and lesbians should be put in some type of mental institute, did not merit sanctions - protected by the First Amendment.
In re Riehlmann, La., No. 04-B-0680, 1/19/05, 21 Law Man. Prof. Conduct 61.

Lawyer reprimanded for failing to report former prosecutor's barroom confession that he once suppressed exculpatory evidence. Prosecutor had been diagnosed with terminal colon cancer and died before Riehlmann connected the event with a death row inmates efforts to reverse his conviction due to withheld blood evidence. Lawyer contacted defens attorneys and new prosecutor and gave affidavit used in *habeas* proceedings but failed to notify disciplinary authorities for five years. Not required to report mere suspicions or to conduct investigations. But where supporting evidence is such that a reasonable lawyer under the circumstances would form a belief that the conduct in question had more likely than not occurred must report.

Beck v. Phillips, Iowa, No. 76/03-0645, 8/11/04, 20 Law. Man. Prof. Conduct 427.
Police officer permitted to go forward with defamation action against prosecutor who wrote letter to officer's supervisors stating that he would not prosecute cases in which the officer might testify. Prosecutor's absolute immunity did not extend to letter writing not intimately associated with the judicial phase of the criminal process. Officer's wife had died of overdose. Prosecutor concluded that officer lied to investigators but could not prove it. No charges filed. Prosecutor succeeded in getting officer fired from two police jobs.

State ex rel. Oklahoma Bar Ass'n v. Downes, Okla., No. SCBD-4885, 5/10/05, Law. Man. Prof. Conduct 260.
Lawyer suspended for one year for consensual sex with divorce client and then threatening opposing counsel with lawsuit when she threatened to report his misbehavior.

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