

# Advisory Opinion 1990-1

## MUNICIPAL ATTORNEY - CONFLICT OF INTEREST

In a home rule community with a commission-manager form of government, the commission also sits as a personnel board for the purpose of reviewing personnel actions taken by management and hearing employee grievances. In its capacity as personnel board, the commission is authorized to affirm, modify or reject the decision of the municipal manager, who has general authority to hire and fire. Municipal ordinances provide that the municipal attorney shall be the legal advisor of the city and shall render advice on all legal questions affecting the city, whenever requested to do so by any official. The position of the municipal attorney is a full-time staff position. In these circumstances, a potential conflict may be presented when a grievance is filed with respect to a personnel action taken by the city management and the grievance is ultimately heard by the commission in its capacity as personnel board. The municipal attorney is customarily consulted by management of the city in arriving at its decisions on personnel matters; and for this reason, arrangements are generally made for outside counsel to provide separate or independent advice to the commission in its capacity as personnel board during grievance hearings. In general, the questions are presented whether it is permissible for the municipal attorney to represent management at a hearing before the commission in its capacity as personnel board notwithstanding that the municipal attorney regularly provides advice to the commission when acting in capacities other than as personnel board. To what extent must outside counsel be retained in these proceedings.

Two issues are presented for review: the first is whether to advise the commission/board during personnel hearings when the municipal attorney has previously advised management and the second is whether the municipal attorney may continue to appear before the commission/board on personnel matters when the municipal attorney regularly advises that body when it sits in other capacities. A third issue raised is whether the municipal attorney can still render day-to-day personnel advice to management.

We do not perceive the first issue to be as much of an ethical problem as a legal problem. What we mean by that is that we do not believe any ethical prohibition would be violated if the municipal attorney both advised management to fire a particular employee, for example, and then advised the commission/board to the same effect. This situation may present due process problems concerning the fairness of the employee's hearing before a supposedly neutral decision maker and, to that extent, we believe it is a wise choice to advise the city to arrange for outside counsel for the commission/board in grievance hearings. We believe that it is particularly appropriate for the personnel board to be advised by outside counsel when the municipal attorney appears before it as an advocate for management. This will avoid any potential for conflict as well as any appearance of impropriety that might otherwise attach due to the role as advisor to management.

The second issue presents potential ethical problems in light of SCRA 1986, 16-111(G), prohibiting a lawyer in private practice from appearing as an advocate before a governmental body he or she represents. It is our opinion, however, that this prohibition does not apply. As the committee comment to the rule indicates, the purpose of the rule is to prevent a lawyer from exploiting public office for the advantage of a private client. Because the municipal attorney does not represent private clients, this behavior does not violate the spirit of the rule.

Paragraph G of the rule was not part of the ABA draft. It was added when the rule was enacted in New Mexico to deal with the problem of lawyers leaving the legal division of the State Engineer's Office and being on contract with the State Engineer to continue handling some of the complicated water cases begun when they were on staff at the same time they are representing private clients before the State Engineer in other matters. Because some of these matters in which the lawyers represent private clients are matters in which two private parties are vying for the same water rights, it gives the appearance of an unfair advantage to allow lawyers who represent the State Engineer on Monday to advocate on behalf of private citizens in front of the State Engineer on Tuesday. These considerations are simply inapplicable to this case. The roles of the city attorney and the municipal attorney do not change. Moreover, to the extent the municipal attorney may be giving the appearance of being unfairly able to influence the commission/board, we believe that considerations of municipal or government economy may override that appearance.

The third issue raised is whether the municipal attorney may continue to advise management on day-to-day matters. As this appears an important part of the duties and because an arrangement has been made for outside counsel to represent the board in its decision making capacity, we see no problem in the municipal attorney continuing to advise management. Finally, in advising the city commission, the city manager, the commissioners individually, the city management, and the city staff, in that order, the municipal attorney should refer to the enabling ordinance and SCRA 1986, 16-113, a new rule dealing with an organization as a client.