

# Advisory Opinion 2002-1

July 13, 2002

**TOPIC:** Limitations on lawyer/elected official to represent clients

**RULES IMPLICATED:** 16-107(B), conflict of interest; 16-111(B), elected officials; 16-305, impartiality and decorum of the tribunal, 16-402, communication with persons represented by counsel; 16-403, dealing with unrepresented persons; 16-404, respect for third persons; 16-804(D), misconduct or engaging in conduct that is prejudicial to the administration of justice; and 16-804(F), misconduct by a stated or implied ability to influence improperly a government agency or official.

**QUESTION PRESENTED:** Whether a lawyer who is an elected member of the city council may represent defendants in municipal court proceedings, or parties in any other matter in which any city officer or board member may exercise discretion.

**SHORT ANSWER:** A lawyer should refrain from representing clients before municipal tribunals over which the lawyer as a public official has direct oversight or fiscal influence. The lawyer's obligations as a city councilor would not necessarily create an impermissible conflict with representation of clients adverse to the municipality, but may be so problematic that the best course of action likely will be to refrain from such representation.

**FACTUAL BACKGROUND:** A lawyer was retained to represent two defendants in municipal court. Thereafter, the lawyer was elected to the city council of the municipality where the clients' cases were pending. The lawyer is concerned representing clients in municipal court or before any other municipal tribunal or agency may violate the rules of professional conduct.

**ANALYSIS:** The Committee recognized the potential for improper influence of judges and government officials, improper use of confidential government information, conflicts of interest, and other practical concerns which may arise if a city councilor who is a lawyer represents clients before municipal tribunals and agencies.

**Improper Influence.** The Committee members noted that, based on their experiences, some municipal judges are appointed by city councils or mayors, and others are elected. If the judge in the municipality where the lawyer is a council member is appointed by or approved by the council, the lawyer's advocacy before the judge may compromise the independence of the judiciary. Similarly, an elected judge whose salary and budget are controlled by the City Council would be no less compromised. Rule of Professional Conduct 16-804(D) provides an attorney must not "engage in conduct that is prejudicial to the administration of justice." Rule 16-305 provides a lawyer shall not "seek to influence a judge, juror, prospective juror or other official by means prohibited by law, these rules or the Code of Judicial Conduct." Rule 16-804(F) provides it is misconduct to "state or imply an ability to influence improperly a government agency or official." The administration of justice may be prejudiced to the extent the lawyer has employment or monetary influence over the judge.

**Confidential Government Information.** A lawyer who is a public official also has a unique duty to preserve confidential government information. Rule 16-111(B) provides "A lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public official or employee may not represent a private client whose interests are adverse to that person in any matter in which the information could be used to the material disadvantage of that person." The lawyer who is an elected official must determine whether the lawyer has factual information which would create a conflict of interest pursuant to this rule. Also, Rule 16-404 provides a lawyer shall not "use methods of obtaining evidence that violate the legal rights" of third persons. A lawyer/public official must guard against obtaining evidence about a person, disclosure of which would violate the person's rights, even if the evidence would benefit the lawyer's client.

**Conflict of Interest.** The lawyer must also consider whether the lawyer's representation of a client before a municipal tribunal or agency in a matter adverse to the municipality creates a conflict with his own interests pursuant to 16-107(B). The Committee determined that the lawyer's obligations as a city councilor would not necessarily create an impermissible conflict with clients adverse to the municipality. Nevertheless, the lawyer must make the 16-107(B) determination whether the representation of the client "may be materially limited," by the lawyer's own interests as a public official, and if so, whether the representation reasonably will not be adversely affected, and the client consents after consultation.

**Other Concerns.** Other rules the lawyer should consider include 16-402, communication with persons represented by counsel, to the extent the lawyer/public official may constantly be in contact with other municipal officers who are adverse

to the lawyer's clients' interests, and who are represented by counsel. Care must be taken to not improperly communicate with these persons about matters relevant to the representations. To the extent other government workers whose interests are adverse to the lawyer's clients are not represented, Rule 16-403 provides the lawyer shall make reasonable efforts to ensure the unrepresented persons understand the lawyer's adverse role.

**CONCLUSION:** A city councilor who is a lawyer should refrain from representing clients before municipal tribunals or agencies, due to the numerous ethical and practical concerns referenced above.