Ancel Glink | Diamond Bush DiCianni & Krafthefer

Ethical Dilemmas For Municipal Attorneys

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Presented by:
Scott A. Puma
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
175 E. Hawthorn Parkway, Suite 145
Vernon Hills, Illinois 60061
847.247.7400
847.247.7405 (fax)
spuma@ancelglink.com
www.ancelglink.com

A. TECHNOLOGY'S IMPACT ON PRIVACY AND CONFIDENTIALITY ISSUES

Prepared by: Scott A. Puma and Julie A. Tappendorf

Ancel Glink Diamond Bush DiCianni & Krafthefer, P.C.

I. INTRODUCTION

Social networking describes a new set of Internet tools that enable shared community experiences, both online and in person. These sites go beyond the more "passive" websites operated by governments and organizations. Each of the various social networking sites is tailored to a specific need and is designed to encourage active participation by both the member and his or her audience. For example, "Linked In" is marketed to businesses and professionals as a way to interact and form networks or "connections" with others. Facebook enables users to create a profile, update a status, include pictures, add "friends," and post comments on the "walls" of personal or friend pages. Twitter allows people to connect with (or "follow") a large number of users and post short notes of no more than 140 characters, called "tweets." Flikr, Instagram and YouTube allow users to post photos or videos, respectively, to share with others.

The growth of social media applications in the government context places an expectation on lawyers in the public sector to not only advise their organizations on the impact of the use of social media, but also about the increasingly information-hungry general public. However, the general benefits of the use of these new technologies must be weighed against the potential drawbacks, such as truthfulness and accuracy of posted information, the source of the posted information, and the longevity of inaccurate information in cyberspace. Additionally, there are a number of professional ethical considerations for lawyers (and public officials) who choose to utilize social networking tools.

Social networking forums such as Facebook, MySpace, and Twitter all share information with a large number of Internet users. One-half of American adults have a profile page on a social networking site, a number that has doubled since 2008 and is in stark contrast to a 2005 study where only 5% of adults used social networking sites. A 2011 survey conducted by the Nielsen Company revealed that Internet users spend nearly one quarter of their time on these sites, more than double from 2008.

Moreover, many citizens rely on the Internet and social media for much of their

information gathering and communications, replacing more traditional media sources such as newspapers and television news reports with online options. Almost one in five adults say that they use social media to get information about their local community, and this number will surely grow in the future, as more younger users tend to rely much more heavily on the Internet—including social media—to get information. However, this reliance on social media is also growing in older populations as well. 70% of individuals ages 35-49 now use social media websites, and are 4 percent more likely to visit a social networking site than any other website.

A 2010 study by the American Bar Association found that 56 percent of lawyers are members of at least one social networking site and 10 percent indicated actually receiving one or more clients from the use of social networks or other online communities.

II. ETHICS AND USE OF SOCIAL MEDIA BY ATTORNEYS

In a recent study, the American Bar Association found that almost half of lawyers are members of at least one social networking site. Lawyers and law firms benefit from social media sites for the same reasons other businesses benefit – the dissemination of information about the firm and its attorneys and marketing the firm and its attorneys to potential clients. Many of the same legal issues that apply to government entities, organizations, and private companies also apply to lawyers and law firms, including copyright concerns, employment usage, and civility.

While social media use is relatively new for lawyers and law firms, there have already been a number of ethical issues that have arisen from attorney use of social networking. A general discussion of the types of ethical issues that have arisen in the field of social media use by attorneys may be helpful to provide some guidance on these issues.

A. Solicitation and Advertising

A lawyer may advertise services through written, recorded, or electronic communication, including public media. However, a comment to ABA Model Rule 7.2 cautions against real-time electronic solicitation of prospective clients. Thus, emails are probably acceptable, but not instant messaging or participation in chat rooms. RPC 7.3 prohibits soliciting employment from a prospective client by "real-time electronic contact". Other forms of online solicitation may also be a violation of the prohibition of in-person, telephonic, or real time electronic solicitation. RPC 7.3 also requires electronic communications where a lawyer is soliciting employment from a prospective client to say "Advertising Material" at the beginning and ending of the message.

B. Practice and Specialization

A lawyer may not mislead or misrepresent his or her practice nor may a lawyer state or imply that he or she is certified as a specialist in a particular field of law. RPC 7.4. Lawyers should avoid providing legal advice in areas of the law where they are not experienced and should be careful not to misrepresent their practice area expertise and experience. In addition, some jurisdictions prohibit attorneys from self-identifying as an "expert" or "specialist" in a particular field of law. This rule can be tricky to follow on certain social media sites, such as LinkedIn, that ask for "specializations" in their profile forms.

C. Jurisdiction

Lawyers are only authorized to practice in jurisdictions where they are licensed. Social media sites, blogs, listservs, and similar sites can make this difficult for an attorney with exposure to people across the country looking to the attorney for guidance on state-specific legal issues. A lawyer should be careful not to provide legal advice on these state-specific legal issues unless he or she is licensed in that particular jurisdiction.

D. Attorney-Client Relationship

Just as attorneys must be careful not to inadvertently create an attorney-client relationship at a cocktail party, over the telephone, on an airplane, by email, and through a law firm's "question and answer" page on its website, attorneys must also be careful not to create an attorney-client relationship when using social networking sites. An attorney-client relationship might be formed when an individual "reasonably relies" on an attorney's advice through a blog entry, listserv, or social networking site.

E. *Ex Parte* Communications

Lawyers should be aware that judges also participate in social networking and may have access to a lawyer's communications that might implicate the prohibition on *ex parte* communications on pending matters. For example, listservs may have thousands of participants and a harmless "inquiry" about a pending matter could be read by the judge who is assigned to that pending matter.

F. Contact with Witnesses and Represented Parties

Social media can provide lawyers with a bonanza of valuable personal information from other users, which, in turn, lawyers can use when preparing for litigation or

settlement discussions. This can lead to many ethical complications which lawyers may not anticipate during their investigations. When using social media to investigate another party, lawyers must be careful not to engage in deceitful behavior, such as asking a paralegal or co-workers' to use their account to gain access to information about that witness. The Philadelphia, San Diego County, and New York City Bars have all issued opinions to place restrictions on lawyers seeking to "friend" potential witnesses.

Even when a lawyer uses their true identity to "friend" or follow another party through social media even more ethical concerns can arise. Ethical rules place restrictions on the communications lawyers make with third parties who are represented by counsel. For example, a lawyer cannot communicate about the proceeding with a represented party unless they have the consent of that party's lawyer or a court order. This is the case even if the person consents to the communication—i.e., even if they accept, respond, or engage any friend requests or messages sent.

III. EMPLOYEE USE OF SOCIAL MEDIA

A. Hiring Decisions

Never has so much information about so many been available with the click of a mouse. Every prospective employer is interested to know everything that they can about a job applicant. And every employer knows that they might find something on the Internet which the applicant is reluctant to divulge in an interview. It may not be a matter of finding out "dirt" on the candidate, but just learning more about their likes, dislikes, lifestyle, thoughts and beliefs which may provide greater insight into their potential suitability as an employee. Nevertheless, the question arises as to what information from the Internet an employer can use when making hiring decisions.

Reliance on Internet information has become so common that we often forget that not all information obtained in Internet searches is completely accurate. Anyone can post information on the Internet and no assurance exists that it is all truthful. We have all heard about altered photos and intentionally planted misinformation which causes problems for an individual, to say nothing of the problems of those with common names or the same name as someone with a negative reputation. If searching for information on job candidates on the Internet, always remember that the information may not be truthful, accurate or reliable.

While it is not illegal to review public information about job candidates, it is advisable that candidates know of this possibility ahead of time. If candidates are aware that searches of social network and other Internet sites is part of the candidate review

process, a decision based in whole or part on this information will not be inconsistent with their expectations. Thus, they will be less likely to claim that an adverse decision was the product of discrimination or other illegal basis.

Prospective employers can make employment decisions on any basis that is not an illegal basis. Examples of illegal considerations are those such as race, gender, and religion. Off duty conduct can be a relevant job qualification depending on the position for which the employee applies. Considerations of character are relevant to all hiring decisions.

Finally, given the potential for inaccurate information gathered from social networks or other Internet sites, it may be advisable to allow a candidate to provide explanation to any information gathered from these sources to ensure that a decision is not based on false information.

B. Discipline of Current Employees

Evidence of misconduct related to work performance that is gathered from social network sites may be an appropriate basis for action against current employees. Employees are generally at will in Illinois.

Employers are struggling with critical social media posts by employees. Can an employer terminate or discipline a worker for complaining about his or her boss or company on Facebook? Will social media policies protect an employer? The answers to these questions are not yet clear, because there is little case law on this issue. However, the National Labor Relations Board (NLRB) has been active in this area recently. While the National Labor Relations Act does not apply to local government employees, the NLRB rulings can provide government employers with some guidance.

In one case, the NLRB ruled that a nonprofit employer unlawfully discharged five employees who had posted comments on Facebook relating to allegations of poor job performance that had been previously expressed by one of their coworkers. The workers were found to be engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow co-workers on Facebook. In this case, the discussion was initiated by one worker in an appeal to her coworkers on the issue of job performance, resulting in a "conversation" on Facebok among coworkers about job performance. The NLRB ruled similarly in a number of other cases.

In another case, however, the NLRB ruled that a reporter's Twitter postings did not involve protected concerted activity. Encouraged by his employer, a reporter opened a

Twitter account and began posting news stories. A week after the employee posted a tweet critical of the newspaper's copy editors, the newspaper informed the employee he was prohibited from airing his grievances or commenting about the newspaper on social media. The reporter continued to tweet, including posts about homicides in the City and a post that criticized an area television station. The newspaper terminated the reporter based on his refusal to refrain from critical comments that could damage the goodwill of the newspaper. The NLRB found that the employee's conduct was not protected and concerted because it (1) did not relate to the conditions of employment and (2) did not seek to involve other employees on issues related to employment. The NLRB issued a similar ruling in a case involving a bartender who posted a Facebook message critical of the employer's tipping policy, finding the posts mere "gripes" that are not protected.

Two recurring themes have come out from recent NLRB rulings. First, individual gripes or venting by employees is not protected and employers can discipline, and even terminate, employees for this conduct. Second, the NLRB is taking a very narrow view of social media policies and striking down a number of policies for being overbroad where the policies could be interpreted to prohibit protected conduct.

Employers must be cautious in disciplining or terminating employees for critical posts on social media sites. An employer should ask itself whether the posts are "protected and concerted activity" or merely constitute "gripes" about an employer that are not protected? Secondly, an employer should review its social media policy to make sure it is not overbroad in prohibiting protected activities. Finally, an employer should be careful not to enforce social media policies in an arbitrary or discriminatory manner.

C. Employer Requests for Social Media Passwords.

It has become common practice for public and private employers to review the publicly available Facebook, Twitter and other social networking sites of job applicants as part of the vetting of candidates in the hiring process. However, because many social media users have privacy settings that block the general public (or non-friends or followers) from viewing their complete profile, some employers began asking candidates to either turn over their passwords or log on to their social media accounts during the interview.

Because an applicant can decide not to apply for a particular job, it is arguably neither an invasion of privacy nor a violation of constitutional rights to ask for this information during the hiring process. And if applicants refuse to provide the requested information, employers are free to drop their consideration for hire. Nevertheless, the ACLU and others argue that this practice violates a candidate's right to privacy, and the Illinois legislature agreed.

The new statute, 820 ILCS 55/10, was effective on January 1, 2013 and provides as follows:

> (b)(1) It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website.
> (2) Nothing in this subsection shall limit an employer's right to:
> (A) promulgate and maintain lawful workplace policies
> governing the use of the employer's electronic equipment, including policies regarding Internet use, social networking site use, and electronic mail use; and
> (B) monitor usage of the employer's electronic equipment and the employer's electronic mail without requesting or requiring any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website.
> (3) Nothing in this subsection shall prohibit an employer from obtaining about a prospective employee or an employee information that is in the public domain or that is otherwise obtained in compliance with this amendatory Act of the 97th General Assembly.
> (4) For the purposes of this subsection, "social networking website" means an Internet-based service that allows individuals to:
> (A) construct a public or semi-public profile within a bounded system, created by the service;
> (B) create a list of other users with whom they share

> a connection within the system; and
> (C) view and navigate their list of connections and those made by others within the system.
> "Social networking website" shall not include electronic mail.

IV. USES OF SOCIAL MEDIA BY LOCAL GOVERNMENTS

Despite the growth and overall positive reports of how the public sector has embraced social media, there are a growing number of legal issues that governments will face in their use of social media.

A. Timely and Cost Effective Communication

Social media is a time and cost-effective communication tool for both governmental agencies and their constituents. Social media allows the public a direct link to government. People who receive their information online may not have to spend their time calling and stopping into government offices for information, completing Freedom of Information requests, or attending community meetings and workshops. In turn, government agencies spend less time dealing with requests from the public, and can communicate on any common concerns of their constituents in a more efficient manner.

The public can obtain information at virtually no cost as long as they have access to both a computer and the Internet. Similarly, government realize savings, because they can use social media platforms to collect and distribute information about upcoming projects in a more cost effective manner than the traditional methods of postage and paper for newsletters, newspaper notices, community mailings; as well as finding space for community meetings and workshops.

B. Open Meetings Act

The policy behind the Open Meetings Act is that government decision-making and legislation should be made openly, and not in secret or closed-door session, so that the general public can be fully informed and provide input regarding the proposed actions of the decision-making body. To this end, the Open Meetings Act requires that all meetings of decision-making bodies provide notice and be open to the public (with certain statutorily provided exceptions).

Communications which take place on a social media platform have the potential to run

afoul of open meeting laws. Without realizing it, these communications: "friending," "tweeting," "messaging," "blogging—all considered informal by most people's standards—can constitute a "meeting" under most open meeting law regimes.

Because of the "newness" of social networking by government officials, there is little guidance from the courts. The Florida Attorney General, however, has issued an opinion that a municipal social media site would likely implicate the state open meetings requirements, among other sunshine laws. Given the potential for criminal penalties in some states' open meetings laws (Illinois, being one example), government officials should be advised to avoid contemporaneous discussions or debates of public business (such as the benefits or impacts of a particular development proposal) on social networking sites or in chat rooms, and should ensure that their social networking interactions comply with applicable open meetings laws.

C. Freedom of Information Act and Records Retention Laws

Communication via a government-sponsored or maintained website or social media site (including comments and other postings) is likely to be subject to public records laws if it concerns government business. While the Illinois Freedom of Information Act does not specifically mention social media records, other states that have encountered this issue have determined that these records are subject to FOIA. For example, the Florida Attorney General has opined that information on a government social networking site would be subject to public disclosure and records retention laws if the information was made or received in connection with the transaction of official business by or on behalf of the public agency. Thus, governments must be aware that state law may require that these records be retained indefinitely or that permission must be sought prior to destroying them under public records law, and that the records must often be provided upon request. A good rule of thumb is that governments should avoid creating new material on social networking sites and instead use existing material that is already maintained for local records law compliance.

D. First Amendment

One of the most useful features of social media is the ability for interaction between the public and the government. However, this interactive aspect can quickly become a potential minefield of legal issues for public sector employees, particularly where comments and speech are involved. As this area of law is yet undeveloped, the public sector should proceed, if at all, with caution so as to avoid running afoul of the First Amendment.

Whether a site is considered a public forum (or a limited public forum) is an open

question, raising concerns as to whether a government can remove allegedly objectionable Facebook comments without implicating First Amendment protections. Other legal issues may arise in allowing persons to post comments and other information on local government social networking sites, such as revealing confidential or proprietary company information.

By completely restricting the general public's ability to comment and communicate through a social media page or website, a governmental agency has created a nonpublic forum and the agency is not liable for First Amendment repercussions so long as its restrictions on the content of the site are viewpoint neutral (if the government allows an issue to be presented, it cannot limit the presentation to only one view), and reasonably related to a legitimate government purpose.

However, if the government agency does allow others to comment or post information on a social media page, a designated public forum has arguably been made. If a designated public forum were created, then the organization cannot exclude or delete material based on its content unless the restriction is "narrowly drawn to effectuate a compelling state interest;" content-neutral restrictions can be placed on comments so long as they are narrowly tailored, serve a significant government interest, and leaves open alternative channels of communication.

On the other hand, if a government agency only allows certain groups to comment on certain topics, it has created a limited public forum. This would likely be the case for those agencies who maintain a certain type of Facebook page, where the public user can only post comments after "friending" or "liking" the agencies page. In a limited public forum, a government entity can restrict comments as long as these restrictions are reasonable and viewpoint neutral. Governments that moderate comments and remove those that are objectionable should be careful to remove only content that is vulgar, completely out of context, or that targets or disparages any ethnic, racial, or religious group. Content that is simply politically unfavorable or negative in the context of the conversation should be allowed to remain. The more a social media platform mirrors a public meeting (e.g., the more participatory it becomes), the stronger the case a government entity has in upholding its restrictions, as government entity meetings have been found to be a limited public forum.

E. Access and the ADA

Governments who use social media must be aware of, and address the fact that some people are unable to access the Internet for a variety of reasons. Although this can stem from many situations, governmental agencies need to make sure that they are not using social media, as well as the Internet, in a manner that actually hampers the access

of information from certain subset groups of people.

A variety of statutes affect governmental agencies which use social media, including the Americans with Disabilities Act and the Rehabilitation Act. Government bodies are obligated by law to provide disabled individuals with "equal access" to information posted on social networking sites, unless it would "pose an undue burden" or that doing so would "fundamentally alter the nature of the provider's programs." Thus, governments who use social networking sites should have an alternative way to provide the information to disabled individuals, such as sending it through mail or reporting it by phone.

Furthermore, governmental agencies must also take care not to overuse social media, and perhaps incidentally alienate segments of the populations which do not traditionally use social media. Data shows that there is a discrepancy in the use of the Internet by income, race, age, and education level, raising concerns that the use of social networks to share information and solicit input on government issues and projects might reach a less diverse group of people. If government officials are using social networking sites as the only means to get information and receive input, a significant number of citizens may be underrepresented.

F. Copyright Issues

Governmental entities also need to be careful about what they post on social media pages to avoid potential copyright liability, as well as protect their own original work-product. Photos and video should be produced by the organization or individual who posts the media. If copyrighted materials are used, the poster should make sure it obtains and maintains physical records of the copyright licenses. All users of social media sites should also be aware that some social networking sites (such as Facebook) have terms of use in place that state that by posting intellectual property Facebook, an individual grants Facebook a "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content" that is posted. Consequently, users should be cautious and sensitive to the content uploaded on these sites.

V. IMPORTANCE OF A SOCIAL MEDIA POLICY

Anyone who uses any form of online communication should develop, implement, and enforce a website and social networking policy. That policy should include a well-defined purpose and scope for using social media, identify a moderator in charge of the site, develop standards for appropriate public interaction and posting of comments, establish guidelines for record retention and compliance with public records and meetings laws, and include an employee access and use policy. Finally, employers

should train their employees regarding appropriate use of social networking and how use might impact the employer.

In crafting a social media policy, an employer should be careful not to implicate the First Amendment rights of its employees nor violate any applicable federal or state employment laws protecting employees. An example of this type of situation involved a settlement between the National Labor Relations Board and an ambulance service in Connecticut that fired an employee in 2009 for venting about her boss on Facebook. The ambulance company argued that the employee's Facebook criticism violated the company's social media policy barring workers from disparaging the company or their supervisors. The NLRB argued that the National Labor Relations Act protects an employee's discussion of conditions of his or her employment with others and that co-workers comments on the employee's Facebook page implicated those protections. As part of the settlement, the company stated it would change its policy so it did not restrict employees from discussing work and working conditions when they are not on the job.

A government might also consider providing examples of acceptable or unacceptable conduct in both employee and public usage of social media to illustrate the type of conduct that is regulated and why a particular regulation is in place.

Finally, all employees should be required to sign a written acknowledgement that they have received, read, understand, and agree to comply with the social media policy.

B. WHO IS A LOCAL GOVERNMENTAL ATTORNEY'S CLIENT?

Prepared by Scott A. Puma and Stewart H. Diamond

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.

In representing local government entities, we as attorneys sometimes find ourselves stepping back and asking, "Who is the Client?" This is an especially perplexing question for attorneys who represent governmental bodies and it is an even more difficult question for attorneys who serve that role as independent contractors, and who frequently represent many governmental bodies and many types of governmental bodies. It is estimated that Illinois has approximately 7,000 local governmental bodies. Even excluding counties, that number includes cities, villages, towns, townships, elementary, high school and consolidated school districts, community colleges, park districts, special recreation districts, library districts, library boards, fire protection districts, sanitary districts, drainage districts, mosquito abatement districts and many others. In addition, some sub-units of local governments such as boards of fire and police commissioners and police and pension boards often have their own independent attorneys.

The 1870 Illinois Constitution, as a reaction, in part, to financial excesses by governmental bodies after the Civil War, placed a constitutional restriction on the borrowing power of local governments. Even with overwhelming voter approval, no Illinois local government or school district, could, between 1870 and 1970, borrow amounts greater than 5% of the then-current assessed valuation of the governmental body. Although from time-to-time statutory grants and judicial decisions slightly eroded that restriction, it remained almost impossible for general purpose governments to fund the capital costs of special services, which the public either demanded or at least was willing to pay for. As a result, when a municipality could not afford, under its own taxing or borrowing power, to provide fire protection or park district services, the answer was to seek a citizens' petition to create a separate fire protection district or a park district. This happened many times so that residents of a municipality may find a list of 10 or more public bodies which share in their combined real estate tax bill.

Most of these governmental bodies found that they required the services of a part-time attorney. That attorney generally also maintained a diverse private practice, although, over time, some attorneys and law firms began to concentrate their practice and attention to local governmental issues.

All attorneys must function under a set of external rules which have been codified for us by the Illinois Supreme Court in its 2010 Rules of Professional Conduct. A review of those Rules finds only brief mention of governmental attorneys, and no mention of attorneys for local governments. When reviewing these rules in the context of a local governmental practice, a series of issues emerges.

Every ethical question begins with an analysis of who is the client being served. Although there are obligations to courts and other tribunals, to some third parties and to individuals under disability, most of the obligations of an attorney are owed to one's client. Depending upon the manner in which a local governmental attorney is hired, and how the course of that representation continues, there are a variety of answers, all acceptable and leading to different implications, to the question of the identity of the local governmental client. Among Illinois governmental bodies, there are a variety of ways in which a local governmental attorney is selected. In the context of most municipalities, the attorney is chosen by the Mayor or Village President in all municipalities except those which have adopted the Manager system by referendum. In a statutory Manager form of government, the Manager chooses all department heads and appears to be entitled to select the municipal attorney. In all but the largest municipalities in the State, most communities do not have a "Legal Department." That is also true in most other local governmental bodies and school districts. In addition, the attorney generally serves not as an officer or employee of the governmental body, but, rather, as an independent contractor.

In spite of this distinction, the courts which have dealt with this issue have concluded that the chief administrative officer of the municipality, be that the Mayor, Village President or statutory Village Manager, possesses the authority to choose the municipal attorney. Pechous v. Slawko, 64 Ill. 2d 576 (1976). In almost all other governmental bodies, the legislative body, be it a school board, park board or township board, collectively select the attorney for the governmental body. In many instances, that Board will strongly consider or directly take the advice of a chosen administrative officer such as a superintendent of a school district, or of an influential appointed leader such as the president of a park district.

Is it proper for an attorney to undertake "Executive Representation" rather than viewing the client as the legislative body or the public at large. We wish to propose not that Executive Representation is the best form, but simply, for ethical purposes, an acceptable path. The far extreme of this type of representation would be the selection as municipal attorney by a Mayor or Village President, who was almost constantly opposed by all six Aldermen or Trustees. Illinois law grants to such a courageous or

beleaguered elected official the right to choose his or her own attorney. While that attorney is required to follow the lawful enactments of the legislative body, he or she is ethically entitled to provide legal services to and to follow the proper direction of the elected Mayor or Village President. Could the attorney refuse to draft ordinances requested by the legislative body and refuse to do research projects which the Village President disfavors? The answer is probably. However, such a minefield must be negotiated very carefully. Over the past few years, there has developed a technique which a legislative body can use under those circumstances to procure its own independent legal advice. That device, known as "Legislative Counsel" is generally commenced by an ordinance creating such a position, not constituting an office, which the Village Board or City Council can itself select.

That ordinance is often vetoed by the Mayor or President and then passed over the Mayor or President's veto. In that manner, a legislative body can receive independent legal advice. The creation of legislative counsel also sometimes solves the problem of attorneys getting paid. If the legislative body is unwilling to pay for a municipal attorney, which it feels is generally unresponsive and a Mayor is unwilling to sign the check for legislative counsel, the dispute may be happily resolved by all lawyers being paid. In some instances, the presence of legislative counsel may actually make the operations of government more effective, because even a lawyer providing Executive Representation may be directed by the Mayor to give perfectly correct answers to the legislative body on non-controversial issues. The general concurrence of a qualified legislative counsel, with the views of the regular municipal attorney may allow the government to go forward without every item being a matter of contention.

However, most local governmental attorneys prefer to be consensus choices, where the new lawyer is welcomed into the governmental circle by all or all but one of the board members. An attorney who is employed by a governmental body under these circumstances knows that the client can be defined as all members of the corporate authorities and each of the carefully chosen and highly competent staff members. In such a situation, the attorney is expected to answer all reasonable questions posed by all of these officials, and to do so without being an advocate for any particular philosophy or approach to governance.

Because of political difficulties, many local governmental attorneys see their role as an advocate for the majority. Unlike the situation where the attorney most frequently expresses the views and seeks a legal path for the philosophy and ambitions of a beleaguered mayor, the attorney as advocate tends to see as his or her client as a generally consistent majority or super majority of a quorum. In that case, the attorney takes the quite appropriate position that the electors of the governmental body have

shown their confidence in an executive and a board majority, and the principal task of the attorney is to provide legal advice to those officials who have the power to pass legislation and to see to its implementation. In that situation, the attorney must consider his or her role as to the minority board members and it is important that both by personal inclination and ethical requirements, that he or she will not deceive them or provide inaccurate information.

If asked to prepare an ordinance for the majority, or to do legal research for them, the attorney may be required to tell them that he or she has been simply told not "to waste the money of the community to provide advice on matters which will never be implemented." Hopefully, an attorney in that situation may be able to convince the board majority that providing some information to the board members in a political minority may actually lessen their antagonism, allow them to offer constructive suggestions, and perhaps ultimately win some of them over (at least occasionally) to the side of the majority. In a very practical sense, over time, the political minority may become the political majority. Attorneys who are skillful in the role of "advocate" may sometimes produce for themselves a long-time position advising the governmental body when the former minority members achieve power and conclude that the attorney could also be an effective advocate for their views.

Because the political and practical situation in each local governmental client may differ, attorneys can carry out their ethical responsibilities even if their representation model may differ from client-to-client. In each case, however, there is always the super-client of the citizens of the governmental body. Another issue is the potential conflict of interest brought about by the representation of governments which may have competing roles and which, since the 1970 Illinois Constitution, are allowed and encouraged to intergovernmentally cooperate.

Looming over this entire range of attorney roles is the overall ethical obligation to the ultimate client: the citizens of the governmental body. While many of the ethical rules may not seem pertinent to the position of an attorney for local governmental bodies, some of them are applicable.

C.

HYPOTHETICAL QUESTIONS

METHODS AND PURSUIT OF EMPLOYMENT

1. Can a call be initiated to a Mayor in a new municipality to tell him about our firm if we have no prior relationship with that official?
   RPC 7.3(a): *A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.*

2 If a newspaper article indicates that a government is looking for a new attorney, can we initiate contact with that government if we have no prior relationship with it?
   RPC 7.3(c): Every written, recorded or electronic communication from a lawyer soliciting professional from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, …

OPEN MEETINGS ACT

1. Can a municipal attorney meet with elected officials in groups of twos to discuss a controversial matter and report the views of one group to another group?

2. Can an attorney solicit over a short period of time the views of public officials regarding a pending subject through e-mail inquiries?

3. Can an attorney meet with a majority of a quorum of a governmental body composed of newly-elected officials?

4. Can an attorney meet with a majority of a quorum of a sitting government to discuss election strategy?

5. If a municipal attorney learns that the municipal clerk has lost a recording of a closed session meeting, is the attorney obligated to report that fact to anyone, and if so, to who?
   RPC 1.13:(b) *If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a crime, fraud or other violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.*

6. Can a Park District attorney go out for cocktails with four members of the Park District Board following a board meeting?

FREEDOM OF INFORMATION ACT

1. Is it ethical for a local governmental attorney to provide false or misleading information to the press?
   RPC 4.1: *In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact to a third person…*
   RPC 8.4: *It is professional misconduct for a lawyer to …(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation….*

2. What legal opinions can be made available to the public under the Freedom of Information Act?

3. Is it ethical for an attorney to frequently put both “Confidential” and “Not Subject to the Freedom of Information Act” on opinions to public clients?

4. What is the obligation of an independent contractor governmental attorney to turn over records under a FOIA request?

5. How should an independent contractor attorney respond to a Freedom of Information Act request served on the attorney?

6. A newspaper reporter asks a municipal attorney to comment on a sexual harassment claim that has just been filed by a Village employee. What can that attorney say in response?
   RPC 1.6: *A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…*
   RPC 1.13(a): *A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.*
   RPC 3.6(a) *A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of a public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter. Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.*

ECONOMIC AND GIFT ISSUES

1. Can a municipal attorney receive a finder's fee from Developers who purchase land in the community the attorney represents in areas for which no special zoning is required?
   RPC 1.7: *Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:…(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer….*

2. Can a municipal attorney who introduces a business owner to the municipality receive a percentage of sales tax receipts or tipping fees paid by the business, once established, to the municipality? Can the attorney do this if no charge is made for any of the legal services provided regarding advice on relocating or zoning, except for the contingent share of public funds received?
   RPC 1.5(a): *A lawyer shall not make an agreement for, charge, or collect an unreasonable fee…*
   RPC 1.8(a): *A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms on which the lawyer*

acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

3. Can a local governmental attorney give a $1,000 wedding present to the daughter of an elected official in a governmental body he or she represents?

4. Can a local governmental attorney invite a local governmental official and that officials' spouse to spend the week-end at the attorney's sumptuous beach house?

5. Can a local governmental attorney make a $1,000 gift to an elected official's favorite charity?

6. Can a local government attorney receive free tickets worth $500 from the Mayor to a Bears' game? Conversely, can that same attorney give $500 tickets to the Mayor of a municipality that he represents?

7. Is a municipal attorney who is an independent contractor required to file a yearly ethics statement?

CONFLICTS OF INTEREST

1. Can a law firm hire a child of a public official as a law clerk, or as a lawyer? Are there any limitations, duties or compensation for such an individual?

2. Can a governmental attorney go out for drinks with elected officials after a board meeting?

3. Is it ethical for a local governmental attorney to discuss the personality and general position of Board members with an attorney representing a client seeking an approval from the governmental body?

4. Can a municipal attorney or a law firm take contrary positions in different communities?

5. Is it ethically permitted for a municipal attorney to own land within a represented community and seek a zoning change?

6. Can a Village Prosecutor, who handles only misdemeanors, traffic offenses and DUIs represent a defendant in a criminal felony case where there is no pending local charge against the prospective client?

ELECTIONS & CAMPAIGNS

1. Can a local government attorney contribute to the campaign of an elected official in a community the attorney does not represent if that official indicates that he or she will employ the attorney upon being elected?

2. Can a local governmental attorney contribute to the political campaign of candidates in local governmental entities the attorney represents, and, if so, are there any limits to the amount of the contributions?

3. Can a local governmental attorney, currently representing the government, financially support candidates opposed to the current administration in an election?

4. Can a local governmental represent both Democrat and Republican candidates in election contest matters?

5. Can a local governmental attorney represent a prospective candidate who appears to live outside of the governmental jurisdiction?

6. Can a local governmental attorney seek to invalidate entire petitions when to do so would invalidate the signature of persons who personally committed no error or fraud?

7. If the governmental attorney believes that an elected official has moved out of the jurisdiction, is the attorney obligated to report this to anyone? If so, to whom should it be reported?

8. How involved should a local governmental attorney be in the political life of the community?

9. Can a local government attorney circulate nominating petitions for officials he or she represents?

10. Can an attorney provide thousands of dollars of free legal advice to a candidate seeking office in a governmental body the attorney does not represent? What about in a governmental body the attorney does represent?

11. Can a local governmental attorney give thousands of dollars of free legal advice to an existing elected official on public matters?

12. Can a local governmental attorney loan firm funds to an elected official in a community the attorney represents at prevailing interest rates? What about a loan from the attorney's personal funds?

13. Can a local governmental attorney, who has prepared a document for one client, bill other clients for the preparation of a similar document for a similar problem encountered in another local government?

14 Is it ethical for a local governmental attorney to write political speeches for an elected official and bill for the time?

15. If you have a relative or friend who provides some business service that could be useful to a client, can you recommend that person, and if so, do you need to disclose your relationship?

16. Can you receive a commission from a vendor whose services you recommended to a client and who was retained to provide those services?

17. What does a local governmental attorney do if told that a $2,000 contribution to the client's centennial celebration is expected?

18. Can a governmental client be billed at a higher hourly rate for evening or week-end work?

DAY-TO-DAY MATTERS

1. Is it ethically proper for an attorney to write a memo in support of the position of the majority of elected officials, when the attorney believes a contrary position is called for?
   RPC 1.2(b): *A lawyer's representation of a client…does not constitute an endorsement of the client's political, economic, social or moral views or activities*
   RPC 1.*16(b): [A] lawyer may withdraw from resenting a client if:… (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists*

upon taking a course of action the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

2. Is it ethically proper for an attorney to represent a municipality which denies a license or permit to a proper applicant anticipating that a court, rather than the government, will take the heat for the eventual required issuance of that license or permit?

3. If a municipal attorney discovers that an annexation petition was not signed by all property owners, is the attorney obligated to report this fact to the missing property owner?

4. What should a local governmental attorney do if the attorney feels that the governmental staff is being too hard or too lenient on citizen's requests?

5. What should the local governmental attorney do if the attorney feels that governmental staff is incompetent?

6. How involved should a local governmental attorney be in the selection of administrators, managers or department heads?

GENERAL LEGAL ETHICS

1. Can a local governmental attorney be involved in a romantic relationship with an elected official in a community that attorney represents?

   RPC 1.8(j) *A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. Who is the client?*

2. How should you respond to a businessman who approaches you at a governmental function to tell you about an application he has pending for one of your client governments and asks whether there isn't "something I could do for you to help expedite this matter?"

   RPC 8.4 *It is professional misconduct for a lawyer to:… (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law*

3. If you are representing a Developer over a disagreement with a municipality, it is ethical to join a meeting with the Developer and the Mayor of the municipality even if the municipal attorney is not present?

   RPC. 4.3 *In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.*

4. If a group of citizens come to a Village Board meeting and criticize the municipality for allegedly failing to enforce its zoning ordinance, is the municipal attorney ethically obligated to inform them of a statutory section permitting them to file a lawsuit on their own?
   RPC 4.3 …*The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*

INTRA-BOARD DISPUTES

1. Is it ethical for a local governmental attorney to refuse to answer the questions of an elected official who takes a minority position on many issues?

2. Is it ethical for a local governmental attorney to tell such an official that he or she has no information about a matter when, in fact, such information is available?

3. Can an attorney file a lawsuit on behalf of a school district solely upon the direction of the School Board President?

4. Can a municipal board or council direct that a lawsuit approved by the Mayor be dismissed and refuse to pay any additional legal fees for the work done on the case?

5. Can a municipality do the above through an ordinance, expressing the position of the municipality, which passes over the Mayor's veto?