
E-75-19 Confidences of the client; Police legal advisor counsels individual members of the department; Primary relationship with chief; Conflict of interest

A city police department has employed an attorney-police legal advisor who essentially is in-house counsel for the department, and who directly reports and is responsible to the police chief. However, in some instances the police legal advisor consults with and advises other members of the department concerning possible violations of departmental policies and regulations, search and seizure laws and other legal requirements. In fact, he counsels individual officers who are attempting to correct errors in performance of duty.

This inquiry raised the issue as to where the attorney-client relationship lies under the above facts, with the additional questions as to whether the police legal advisor can communicate information to the police chief which the advisor elicited from a police officer who desires that such discussion be held in confidence. The companion question concerns the ethical obligation of the legal advisor who during consultation with a police officer receives information which would be basis for a disciplinary charge against such officer, under facts in which the police chief learns of such conduct and requests that the police legal advisor institute and enforce disciplinary action against the officer.

Canon 4 of the Code of Professional Responsibility requires that an attorney should preserve the confidences and secrets of his client. DR 4-101(B) prohibits a lawyer from revealing a confidence or secret of his client, or using such confidence or secret of his client, or using such confidence to the disadvantage of that client, or using the confidence for his own advantage or for that of a third party.

From this description of the police legal advisor function and his responsibility to the police chief, it is the opinion of the committee that the attorney-client relationship is between the legal advisor and the police chief. One may raise the question as to whether he may have an additional attorney-client relationship with the individual police officers with whom he consults and advises.

One must look to the Disciplinary Rules under Canon 5, DR 5-101, which prohibits an attorney from representing multiple clients where the interests of one will conflict with those of the other client or if the lawyer cannot exercise independent professional judgment in behalf of both clients.

Since the police legal advisor reports and is primarily responsible to the police chief, it is clear that the attorney-client relationship is established at that level, and there would appear to be a serious conflict of interest for him to counsel with the police officers under conditions in which he would receive confidential information which ought to be supplied to the chief or would be the basis for disciplinary charges.

In fact, if the police legal advisor is to be available to counsel with and advise individual police officers, they should be given clear warning that their communications cannot be treated as confidential, but that the advisor has an obligation to take up personnel and disciplinary matters with the police chief. Without such warning to the police officers, the legal advisor is placed in the untenable position of having totally conflicting ethical obligations to two separate clients, in the event of disciplinary action or charges against an individual officer.

ABA Informal Ethics Opinion 1282 relates to an almost identical conflict problem. The city corporation counsel had an obligation to represent both the city government and police department, while at the same time a state statute imposed the added obligation of representing police officers on civil claims arising from their duties. Subsequently, the city brought an action against one or more police officers on disciplinary grounds. After discussing the conflicts involved with a corporation counsel attempts to represent the city after obtaining information from the officers, the opinion concluded that a lawyer paid by and employed by the city to represent the individual defendant officers would place such lawyer in the position in which the exercise of his professional judgment in their behalf will likely be adversely affected by his continuing attorney-client relationship with the municipality. Accordingly, such continued representation would be in violation of DR 5-101(B).

Clearly, if a city attorney or police legal advisor consults with an individual officer in an attorney-client context and in such relationship obtains confidential or secret information, he would be prohibited from communicating such information to the police chief or otherwise using such information to the detriment of the officer, as previously stated. Such municipal attorney or police legal

advisor would be foreclosed from representing the municipality in an action against the officer and using such confidential or secret information in the suit.

To reiterate, from the description of his functions and responsibilities, it would appear that the police legal advisor has his primary responsibility to the police chief and the attorney-client relationship is established at that level. Any consultation or advice to individual police officers would not be protected by the attorney-client privilege or rule of confidentiality, and the police officers should be properly warned. To hold otherwise would clearly lead to serious conflicts of interest and an infringement on the independent professional judgment of the attorney.