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May 31, 2013

VIA EMAIL & MESSENGER
PERSONAL & CONFIDENTIAL
Attorney Timothy E. Hawks
Hawks Quindel, S.C.
222 E. Erie St., Ste 210
Milwaukee, WI 53202-0442

Re: Our File No. 17148

Dear Mr. Hawks:

This follows our office conference with your colleague Mr. Saks and several phone conversations with you in recent days. You have requested a legal ethics opinion concerning an engagement proffered by the Milwaukee County Board. Thank you for thinking of me in connection with your questions. My partners, Christopher Kolb and Jeremy Levinson, both of whom have extensive experience in the field of lawyers' professional responsibility, helped with this opinion.

Circumstance:

The Milwaukee Board has asked your law firm to undertake its representation in opposition to efforts by Milwaukee County Executive Chris Abele to restrict the Board's powers and budget. You represent a number of other clients, including individuals and unions comprised of county employees, in matters opposed to Milwaukee County.

Issue:

Would a conflict of interests result from your work in these several capacities?

Short Answer:

No.

Discussion:

Under these unique circumstances you would be working on behalf of the Milwaukee County Board (only) in opposition to the Milwaukee County Executive. You would not, in so doing, be undertaking representation of the County as a whole – notwithstanding that the County Board is a constituent part of that entity whose interests are, under ordinary circumstances, congruent with those of the County as a whole.

The Official ABA Comment to Model Rule 1.7 (Conflicts of Interest) says, in relevant part: "When a lawyer is employed by a government entity, analysis of conflicts depends upon identifying precisely which government entity is the client. "

The Official ABA Comment to Rule 1.13 says:

> *Identifying Government Client*
>
> *"Precisely defining the identity of a governmental client can be difficult; as Comment [9] notes, depending on the circumstances, the client may be a specific agency, a branch of government, or "the government as a whole."*
>
> ...
>
> *See, e.g., Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp 2d 276 (S.D.N.Y. 2001) (law firm that represented limited number of state agencies on limited number of issues under contract with state department of budget did not represent state government as a whole).*

Wisconsin's comments to these rules are in accord.

Moreover, ALI, Restatement 3rd, The Law Governing Lawyers, p. 46 says:

> c. *Identity of a governmental client. No universal definition of the client of a governmental lawyer is possible. For example, it has been asserted that governmental lawyers represent the public, or the public interest. However, determining what individual or individuals personify the government requires reference to the need to sustain political and organizational responsibility of governmental officials, as well as the organizational arrangements structured by law within which governmental lawyers work. Those who speak for the governmental client may differ from one representation to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed.*

With respect to the specific service you have been asked to render, the Board's interests and those of the County as advanced by its Executive Branch diverge, at least insofar as those interests are conceived differently by these respective governmental units.

There is ample support in the legal ethics rules (SCR 20:1.13 and SCR 20:1.7) for a recognition that individual governmental departments have separate identities, often conflicting powers and prerogatives and are distinct for purposes of analysis of conflicts of interest, notwithstanding that each may ultimately be in service of the same public interest and even though each is part of the same, over-arching governmental body. In *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F. Supp. 153 (1996) the court observed:

> *"... in a situation where government agencies are in conflict, the agency, not the government as a whole, is to be regarded as the client.*
>
> *... if the governmental entity as a whole is the client, anytime one agency of government sues another an irreconcilable conflict would arise under Rule 1.7. See Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, s. 1.3:107 (Supp. 1996). This scenario demonstrates the absurdity that can result from treating the entire government as the client of an agency lawyer."*
>
> [p. 159, 160]

There is likewise support for this principle in the Wisconsin Statutes, its Constitution and the rules of Milwaukee County governance.

None of your work on behalf of the County Board is likely to diminish your loyalty or zeal on behalf of your other clients. Neither will any client confidences be compromised by this undertaking. If your engagement is properly limited to the requests articulated, I see no reason to fear that this work will compromise the interests of your other clients, or vice versa.

Suggestion:

Notwithstanding the absence of a conflict of interests, because these circumstances are unique, we think it would be best practice, though not obligatory, to alert your clients to this situation so that, in the event they have any questions or misgivings, they may raise them at this time, either with you or independent consultants. This notice is likely redundant in the case of the County Board, since I assume its members are all aware of your work on behalf of parties opposed to the County. We recommend it nonetheless and also recommend you make clear that your engagement by the Board is on behalf of the Board alone in this matter only and does not constitute retention by other bodies, individuals or interests. Lastly, we suggest you monitor developments for unforeseen events that might affect this analysis.

Again, thank you for thinking of us for this work. You have requested our opinion on short notice. Notwithstanding, all opinions expressed are to a reasonable degree of certainty in the field within which we profess expertise. A copy of my C.V. relating to my credentials as a legal ethics consultant is enclosed.

I hope this proves helpful. Kindly let me know if you have other questions, require clarification or want access to any of the material we consulted in preparing this opinion.

Very truly yours,

HALLING & CAYO, S.C.

Richard J. Cayo
rjc@hallingcayo.com

Enclosure
RJC:ajw