

January 4, 2010

John P. Worcester, Esq.
City Attorney
The City of Aspen
130 South Galena Street
Aspen, Colorado 81611-1975

Re: Inquiry of September 23, 2009

Dear Mr. Worcester:

This letter is provided by the Ethics Committee of the Colorado Bar Association in response to your inquiry dated September 23, 2009.

FACTS

You are the City Attorney for the City of Aspen (the “City”), Colorado. Section 7.1 of the City of Aspen Home Rule Charter states that the City Attorney “shall be the legal representative of the City and shall advise the council and city officials in matters relating to their official powers and duties and perform such other duties as council may prescribe by ordinance or resolution.” The Mayor and the City Council manage the affairs of the City. They direct your activities and you answer to them as City Attorney.

From time to time you also advise the City of Aspen Election Commission (the “Election Commission”). The Election Commission is responsible for elections in the City. The City Council of the City appointed the Election Commission pursuant to the City of Aspen Home Rule Charter. The Election Commission is comprised of the City Clerk and two “qualified and registered electors” of the City, who are appointed by the City Council. C.R.S. § 31-10-105, which is part of the Colorado Municipal Election Code, states that an election commission “has all the powers and jurisdiction and shall perform all the duties provided by this article with respect to clerks and governing bodies. . . .”

Certain matters related to the “conduct of the [May 2009] municipal election that elected two of the four members of the City Council and the Mayor” have been brought to the attention of the Election Commission. The Election Commission has not sought your advice in these matters, and has determined that it cannot do so, based on its conclusion that you have a conflict of interest in “advising the Election Commission on matters relating to the commission’s authority and jurisdiction.” As one member of the Election Commission put it, “It would be problematic if the Election Commission, tasked with reviewing citizen complaints about the election, is relying on the legal opinions of the City Attorney, whose employment status and salary and budget are at the mercy of the City Council members, whose elections to office are now under review. The City Attorney reports to the City Council—i.e., the very people who were the beneficiaries of the past election.” This same member also stated that sixty percent of the City Council was elected in the disputed election.

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You have framed the issue for this committee as follows: “Does the City Attorney for the City of Aspen have an inherent conflict of interest in advising the Aspen Election Commission on its authority, powers, and jurisdiction?” You and a member of the Election Commission, Christopher D. Bryan, Esq., have submitted to the committee memoranda expressing different answers to this question.

Although your inquiry uses the term “inherent conflict”, the appropriate analysis under the Colorado Rules of Professional Conduct focuses rather on whether you have a “concurrent conflict of interest” under Colo. RPC 1.7: “A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (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.”

Mr. Bryan asserts that you have a conflict of interest under Colo. RPC 1.7 that prevents you from advising the Election Commission in these matters and requires the City to appoint and pay for independent counsel for the Election Commission. Mr. Bryan reasons that, unlike other City advisory boards whose decisions are subject to review by the City Council, the Election Commission is an independent body whose powers with respect to election issues are “equal to, or co-extensive with, City Council.” Mr. Bryan assumes that the City Attorney has an attorney-client relationship with both the City and the Election Commission.¹

You, on the other hand, do not believe that you have an “inherent” conflict of interest. You reason that the City is your only client. The Election Commission is an “authorized constituent” of the City within the meaning of Colo. RPC 1.13(a), you state, and the members of the Election Commission are “city officials” within the meaning of the City of Aspen Home Rule Charter. You also note that the Election Commission has not asked for your advice to date and that if and when it does so you will “take appropriate action” to determine if there is a conflict of

¹ Mr. Bryan raises a variety of concerns going beyond your inquiry, including whether the City Attorney could advise the Election Commission regarding the review of election procedures developed by the City Attorney’s office; whether the City Attorney could be called as a witness regarding these procedures in any future litigation about the May 2009 election; whether the City Attorney could advise both the Election Commission and the City if the Election Commission found wrongdoing by election officials or City staff; whether, if the Election Commission wished to obtain a temporary restraining order to enjoin the City from destroying ballots or other election materials, the City Attorney could both sue and defend the City; and whether the City Attorney could both advise the Election Commission and advise witnesses if the Election Commission conducted a hearing on various election issues. The Ethics Committee will not address these concerns in this letter because they go beyond your inquiry and are hypothetical in nature. Nor will the Committee address Mr. Bryan’s argument that the City is required to appoint and pay for independent counsel for the Election Commission. It, too, goes beyond your inquiry, and presents an issue of law, not legal ethics.

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interest.

ISSUE

Does the City Attorney for the City of Aspen have an “inherent conflict” of interest in advising the Aspen Election Commission on its authority, powers, and jurisdiction?

DISCUSSION

1. *Applicable Conflicts of Interest Rules*

Lawyers employed by organizations, including government organizations, are generally subject to the same conflicts of interest rules as are other lawyers. *See* Colo. RPC 1.11(d)(1) (“Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: (1) is subject to Rules 1.7 and 1.9”). Colo. RPC 1.7 is the rule that deals with conflicts of interest among current clients. We agree with you and Mr. Bryan that Colo. RPC 1.7 is relevant, though not necessarily applicable, as discussed below.

Colo. RPC 1.7 addresses two different types of conflicts of interest. Subsection (a)(1) deals with conflicts of interest in which “one client will be directly adverse to another client.” Your inquiry does not state that the City and the Election Commission are directly adverse to one another in any matter. Therefore, Colo. RPC 1.7(a)(1) is inapplicable here.

Rather, your inquiry is governed by subsection (a)(2). This subsection deals with conflicts of interest when 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.” Colo. RPC 1.7(a)(2). The Comment to Colo. RPC 1.7 states that the lawyer should consider the risk to the lawyer’s “ability to consider, recommend or carry out an appropriate course of action. . . .” Cmt. [8], Colo. RPC 1.7. The Comment goes on to state that the “mere possibility of subsequent harm does not itself require disclosure and consent,” and that the “critical questions are the likelihood that a difference of interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” *Id.*

In your inquiry, the putative “client” whose representation may be materially limited is the Election Commission. Your inquiry does not state that the City Council or Mayor have expressed concern that your representation of the City may be materially limited by your responsibilities to the Election Commission. Therefore, for Colo. RPC 1.7(a)(2) to apply, the Election Commission must be a “client” of the City Attorney whose representation is subject to a

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“significant risk” of material limitation by the City Attorney’s “responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” ²

Whether the Election Commission is a “client” of the City Attorney, as opposed to an unrepresented constituent of the City, is a question of law. *See* Cmt. [5], Colo. RPC 1.11 (“The question of whether government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules.”); Cmt. [9], Colo. RPC 1.13 (“Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.”); *see also* Cmt. [34], Colo. RPC 1.7 (“A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”) ³

The Ethics Committee generally declines to answer questions of law and does so here. For this reason, you will be required to answer the question of whether the Election Commission is a client of the City Attorney.

2. *If the Election Commission is not a Client of the City Attorney*

If the determination of this question of law is that the Election Commission is not a client of the City Attorney, then the City Attorney’s only client would be the City. In that event, Colo. RPC 1.7(a)(2) would be inapplicable because the City Attorney’s representation of the City is not a matter of concern in your inquiry. Generally a lawyer is required to abide by decisions made by the constituents of an organization. *See* Cmt. [3], Colo. RPC 1.13 (“When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations,

² You also should consider whether there is a significant risk that your representation of the City may be materially limited by (a) your obligations to a “third party,” including the Election Commission; (b) your obligations to another client or former client of yours; or (c) by your personal interests. You have not articulated in your inquiry whether these circumstances exist.

³ In the revised version of the Colorado Rules of Professional Conduct effective January 1, 2008, the Colorado Supreme Court deleted the passage you cite from *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), in which the Colorado Supreme Court quoted the pre-2008 version of the Rules as stating that government lawyers may have authority to represent the “public interest.” Preamble, Scope and Terminology, Scope, Colo. RPC (2007). This deletion followed the ABA’s deletion of that passage in the Model Rules of Professional Conduct. Explaining the deletion, the ABA referred to the “public interest” sentence as an “inaccurate statement of the responsibilities of government lawyers, who do not ordinarily represent ‘the public interest’ at large.” ABA Reporter’s Explanation of Changes, Scope, ¶ 18, <http://www.abanet.org/cpr/e2k/e2k-preamblerem.html> (last visited November 18, 2009).

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including ones entailing serious risk, are not as such in the lawyer's province.”).

3. *If the Election Commission is a Client of the City Attorney*

Alternatively, we will now assume that you have determined that the Election Commission is a client of the City Attorney. If so, Colo. RPC 1.7(a)(2) is applicable. You must then consider whether there is a “significant risk” that your representation of the Election Commission will be materially limited by your “responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” This consideration is dispositive of your inquiry, because if a significant risk does exist, this conflict of interest could be overcome only with the Election Commission's consent, among other conditions.⁴ We feel safe in assuming that the Election Commission would not consent.

Your inquiry contains few concrete facts from which to assess this risk. It is unclear, for example, whether the matters before the Election Commission involve alleged irregularities in the conduct of the election by election officials or alleged misconduct on the part of the Mayor or the two new members of the City Council.⁵ Mr. Bryan expresses a concern that the City Attorney could “strategically advise [sic] the Election Commission that it has a very narrow, or circumscribed, scope of jurisdiction and thereby significantly curtail the Election Commission's authority and ability to address and resolve the various citizen complaints and petitions submitted to the Election Commission.” In this way, the City Attorney would “spare the City any embarrassment or liability for possible election violations.” Mr. Bryan also suggests that you might be compelled to give such advice by the fact that your “employment status and salary and budget are at the mercy of the City Council members.”

The City's interest in avoiding liability and negative publicity implicates that portion of Colo. RPC 1.7(a)(2) that requires you to consider whether there is a significant risk that your

4 Colo. RPC 1.7(b) (emphasis added) states as follows:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*
- (4) *each affected client gives informed consent, confirmed in writing.*

⁵ Mr. Bryan states that the “complaints brought to the Election Commission involve ‘serious charges of wrongdoing by those in control of the organization [i.e., the City]. . . .’” (Brackets in original.). It is unclear whether those alleged to have engaged in wrongdoing include the Mayor or the two new members of the City Council.

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“responsibilities to another client”—the City—will materially limit your representation of the Election Commission. Similarly, your employment and budget interests implicate that portion of Colo. RPC 1.7(a)(2) that requires you to consider whether there is a significant risk that your “personal interest” will materially limit your representation of the Election Commission. We will address these issues in reverse order.

We are not persuaded that your employment and budget interests present a significant risk of a material limitation in your representation of the Election Commission. Lawyers employed by organizations both public and private routinely represent the organization and one or more of their constituents in the same or unrelated matters even though they are dependent on the organization for “employment status and salary and budget.”

Whether there is a significant risk that the City’s interest in avoiding liability and negative publicity over alleged election violations may materially limit your representation of the Election Commission is hypothetical and therefore not addressed in this opinion. The answer to this question is entirely dependent on the circumstances. We cannot reach an opinion on this subject from the facts given in the inquiry.

4. *Appearance of Impropriety*

Finally, Mr. Bryan argues that there is a “significant risk that the City Attorney’s advice to the Election Commission would very likely create an appearance of impropriety. . . .” The appearance of impropriety standard did not survive the 1993 adoption of the Colorado Rules of Professional Conduct. Therefore, it is irrelevant to our analysis.

* * * * *

This letter is issued for advisory purposes only and for the limited purpose of providing guidance on the issues raised in your inquiry. Our response is not in any way binding on the Colorado Supreme Court or the Office of the Attorney Regulation Counsel.

The committee may select this letter opinion for publication as an anonymous abstract summarizing the subject matter. In that event, you will be provided a copy of the final draft of the abstract and an opportunity to advise the committee if you believe that the abstract reveals the identity of the parties involved.

Very truly yours,

s/

Henry R. Reeve
Chair, Colorado Bar Association Ethics Committee