

THE SUPREME COURT OF TEXAS
PROFESSIONAL ETHICS COMMITTEE
Opinion No. 567

February 2006

QUESTION PRESENTED

May a lawyer who represents a city render legal advice to an ethics board appointed by the city council regarding the investigation and determination of a complaint against a majority of the members of the city council?

STATEMENT OF FACTS

A lawyer in private practice represents a city as its city attorney. The city charter provides that the city attorney serves at the discretion of the city council, receiving such compensation as may be fixed by the council, represents the city in all litigation and legal proceedings, and performs other duties prescribed at the direction of the city council. The city council subsequently enacts an ethics ordinance that establishes an ethics board with powers to review and investigate complaints alleging ethics code violations made against employees or officials of the city. The ordinance specifically provides that the city attorney shall have the responsibility to render legal advice to the ethics board. A citizen then files a complaint against a majority of the members of the city council asserting claims of ethics code violations. The city attorney is called upon to provide legal advice to the ethics board concerning the complaint.

DISCUSSION

The city attorney does not represent the individual city council members. Therefore, in representing the ethics board concerning charges against city council members, the city attorney will not violate Rule 1.06(b)(1) of the Texas Disciplinary Rules of Professional Conduct, which provides that, unless the requirements of Rule 1.06(c) (discussed below) can be met, a lawyer shall not represent a person if the representation “involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer....” Although representation of the ethics board may be materially and directly adverse to the interests of the members of the city council against whom the complaint has been filed, those city council members are not clients of the city attorney.

However, Rule 1.06(b)(2) is applicable to the proposed representation of the ethics board with respect to this complaint. Rule 1.06(b)(2) provides in pertinent part that, unless the requirements of Rule 1.06(c) (discussed below) can be met, a lawyer shall not represent a person if the representation “reasonably appears to be or become adversely limited....by the lawyer’s own interests.” The city charter provides that the city attorney serves at the discretion of the city council and receives such compensation as may be fixed by the city council; therefore, representation of the ethics board against a majority of the members of the city council at least “reasonably appears” to be adversely

limited within the meaning of Rule 1.06(b)(2) by the city attorney's own interests in his position as city attorney.

Rule 1.06(c) provides that a lawyer may represent a client in the circumstances described in Rule 1.06(b)(2) if under Rule 1.06(c)(1) the lawyer "reasonably believes" that the representation of the client will not be materially affected and under Rule 1.06(c)(2) each "affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." In this case the "affected or potentially affected" clients would be the ethics board and the city. Comment 7 to Rule 1.06, in discussing Rule 1.06(c)(1), states that when a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, " the lawyer should not ask for, or provide representation on the basis of, client consent. Under Rule 1.06(c)(1), given the inherent conflict between the ethics board's responsibility to investigate and determine the complaint against a majority of the members of the city council and the personal employment interests of the city attorney, the city attorney should not ask for consent to the proposed representation of the ethics board with respect to this complaint.

CONCLUSION

In the circumstances presented, a lawyer who represents a city may not render legal advice to a city ethics board concerning the investigation and determination of a complaint against a majority of the members of the city council.