Final

Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-10
Issued October 16, 2024

FACTS

The inquiring attorney serves as the town solicitor for a certain municipality. His or her duties include representing the municipality's Town Council in various capacities. The inquiring attorney reports that one of the Councilors has repeatedly publicly expressed his or her displeasure with the inquiring attorney's representation of the Town Council, including that he or she distrusts the inquiring attorney, lacks confidence in the inquiring attorney's work, and routinely disapproves of the inquiring attorney's advice. Nonetheless, the Town Council recently renewed the inquiring attorney's contract.

The inquiring attorney currently represents the Town Council in an ongoing civil action in which opposing counsel has sought to depose the Councilor in his or her official capacity. The Councilor met with the inquiring attorney prior to the deposition date to prepare without incident. Once at the deposition, however, the Councilor surprised the inquiring attorney by stating on the record his or her opinion that the inquiring attorney inadequately represents him or her and refused to proceed without the presence of an associate attorney from the inquiring attorney's firm. The deposition was suspended without any questions being asked or answered.

Thereafter, the inquiring attorney reports, the Councilor has engaged in various "ultra vires" conduct including, but not limited to, making misrepresentations to the Town Council regarding the inquiring attorney's representation in the civil suit, communicating with opposing counsel on his or her own initiative (including informing them that the inquiring attorney no longer represents him or her and asking them to reschedule the suspended deposition until after the next local election), obtaining a potentially fraudulent medical note to avoid sitting for the suspended deposition, and refusing to speak with the inquiring attorney.

In addition, the Councilor filed a motion for a protective order in the Superior Court pro se without informing the inquiring attorney. At the initial hearing, a transcript of which the inquiring attorney has reviewed, the Councilor was apparently untruthful to the court in one instance. The inquiring attorney is concerned that in light of the foregoing events, the Councilor may perjure him or herself or engage in other conduct at the next hearing resulting in the imposition of sanctions against the Councilor and/or the Town Council, and, thereby, potentially exposing the inquiring attorney to ethical liability.

The inquiring attorney reports that despite the public nature of the Councilor's behavior, the Town Council has not moved to address the issue. In this vein, the Town Council has denied the councilor's request that a separate attorney be retained to represent him or her.

ISSUE PRESENTED

The inquiring attorney asks for advice on how to proceed in accordance with the Rules of Professional Conduct.

OPINION

It is the Panel's opinion that pursuant to Rule 1.13, the inquiring attorney should advise the Councilor to retain separate counsel to represent his or her interests in the ongoing civil action against the Town Council. The inquiring attorney may also, if he or she reasonably believes that the Councilor's expected conduct at the upcoming Superior Court hearing is reasonably certain to result in substantial injury to the Town Council, disclose information relating to his or her representation of the Councilor at the hearing to the limited extent necessary to forestall injury to the Town Council.

REASONING

Rule 1.13 of the Rules of Professional Conduct pertains to an attorney's representation of an organization:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (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 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.
>
> (a) Except as provided in paragraph (d), if:
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
>
> (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an

> alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
>
> (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
>
> (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
>
> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13 encompasses a lawyer's representation of governmental organizations like a town council. <u>See</u> Rule 1.13, Comment [9] (recognizing that "[t]he duty defined in this Rule applies to governmental organizations"). In applying this Rule, the Panel has consistently reasoned that town solicitors represent the municipality and its constituent bodies, not individual Town Council members. <u>See</u> Rhode Island Ethics Advisory Panel Op. 2002-02; Rhode Island Ethics Advisory Panel Op. 92-41; <u>see</u> <u>also</u> Rule 1.13, Comment [2].

In this case, the Councilor's conduct as described by the inquiring attorney has materially interfered with the inquiring attorney's representation of the Town Council in the ongoing civil action. Such conduct includes refusing to sit for a deposition without the presence of an associate attorney from the inquiring attorney's firm thereby causing the suspension of the deposition, obtaining a potentially fraudulent medical note to continue to avoid sitting for the suspended deposition, communicating with opposing counsel to influence the timing of rescheduling the suspended deposition, making misrepresentations to the Town Council about the inquiring attorney's representation in the civil suit, filing a motion for a protective order in the Superior Court as a <u>pro</u> <u>se</u> litigant without informing the inquiring attorney, and making an untruthful statement to the court at the initial hearing. Based on these events, the inquiring attorney believes that the Councilor is likely to behave in manner at subsequent Superior Court hearings that will cause the court to levy sanctions against him or her and/or the Town Council.

The Panel finds that these facts, taken as a whole, implicate the inquiring attorney's duty under Rule 1.13(b) to "proceed as is reasonably necessary in the best interest of the organization." This duty is triggered whenever a lawyer knows that a member of the organization he or she represents "intends to act . . . in a matter related to the representation that is . . . a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization . . . ." The inquiring attorney's fear that the Councilor is likely to draw sanctions from the Superior Court that could redound to the Town Council fits within this paradigm. See Rule 1.13, Comment [4] (noting that "[i]n determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations").

In seeking to redress the risk so identified, Rule 1.13(b) directs that the lawyer consider "refer[ring] 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." This remedy becomes more imperative "[i]f [the] constituent persists in conduct contrary to the lawyer's advice . . . ." Rule 1.13, Comment [4]. Here, the appropriate "higher authority" to which the inquiring attorney should report the Councilor's conduct is the Town Council. However, the inquiring attorney states that the Town Council is aware of the Councilor's behavior—and has been aware of his or her animus toward the inquiring attorney for years—but has not acted to resolve the situation. The risk of harm to the Town Council as identified by the inquiring attorney therefore remains live and, as such, the inquiring attorney's concomitant duty to act reasonably in the best interests of the Town Council remains undischarged.

Under such circumstances—where "the organization's interest [is] adverse to those of one or more of its constituents," a lawyer "should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation." Rule 1.13, Comment [10]. In doing so, the lawyer must take care "to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged." Id. Thus, the Panel finds that the inquiring attorney should inform the Councilor that in light of the events described herein, his or her interests are adverse to those of the Town Council such that the inquiring attorney no longer represents the Councilor in the civil action and the Councilor should retain separate counsel for him or herself. The inquiring attorney should also inform the Councilor—and ensure that the Councilor understands—that any discussions they may have pertaining to the civil action are no longer privileged.

Relatedly, Rule 1.13(c) permits an attorney to disclose information relating to the representation that would otherwise be confidential under Rule 1.6 if the organization's highest authority refuses or fails to act to remedy "a threatened or ongoing action" that is "clearly a violation of law" and the inquiring attorney "reasonably believes that the violation is reasonably certain to result in substantial injury to the organization." See Rule 1.13(c), Comment [6]. Such disclosure may only be on topics and to the extent the lawyer "reasonably believes necessary to prevent substantial injury to the organization." Rule 1.13(c); see also Rule 1.13, Comment [6] (noting that the violation in question must be "related to the lawyer's representation of the organization"). The suitability of such disclosure is enhanced in the governmental organization context due to the important, public nature of the client and its business. See Rule 1.13, Comment [9] (observing that "in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved"). Accordingly, the Panel finds that should the Town Council persist in failing to act here, the inquiring attorney may find it necessary to disclose certain information relating to his or her representation of the Councilor in the underlying civil action to address the risk of sanction against the Town Council engendered by the Councilor's conduct at the upcoming Superior Court hearing. In choosing to invoke this option, the inquiring attorney must remain mindful of the limitations on disclosure imposed by Rule 1.6.