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Thursday, February 28, 2008

Opinion

Did Detroit lawyers violate state rules?

Decisions by city's attorneys cast doubt on whether they acted ethically

Larry Dubin

The Michigan Supreme Court got it right. So did Wayne County Circuit Court Judge Robert Colombo Jr. as well as the Michigan Court of Appeals. The documents that the city of Detroit argued for concealment should indeed be publicly disclosed.

The lawyers for the city of Detroit have been misguided in acting as though their only client in this case has been Mayor Kwame Kilpatrick. The mayor's personal interest in wanting to avoid public embarrassment or disclosure of possible criminal conduct in the text messages and the deposition with plaintiff attorney Michael Stefani does not legitimize the city's attorneys' determination that those interests are consistent with the best interests of Detroit.

A basic issue that I discuss with law students in my professional responsibility class is that a lawyer must identify who the client is. Had that question been properly asked and answered, this settlement and the subsequent appeals would likely not have occurred because the client is the city of Detroit.

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Applying rules of conduct

The Michigan Supreme Court requires lawyers to comply with the Michigan Rules of Professional Conduct. A violation of these ethics rules can subject a lawyer to professional discipline.

One conduct rule states, "A lawyer employed or retained to represent an organization represents the organization as distinct from its employees." The Michigan Supreme Court further explains that this duty "applies to governmental organizations."

Once the lawyers for the city of Detroit decided to undertake the representation of the mayor's personal interests, they ran afoul of the conflict of interest rule, which states: "A lawyer shall not represent a client if the representation of that client

will be directly adverse to another client."

This potential violation became apparent when the City Council had to hire its own lawyer to represent its interests in opposing corporation counsel's appeal to the Michigan Supreme Court.

The Detroit City Council was required to vote on approving the \$8.4 million settlement agreement between the police officers and the city of Detroit in the whistle-blower case. The lawyers for the city breached fiduciary duties owed to City Council by presenting incomplete information for an informed judgment to be made. One rule of professional conduct requires a lawyer "to keep a client reasonably informed about the status of a matter" and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

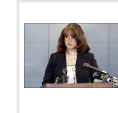
Council's interests undercut

It appears that the city lawyers bargained away their duty of loyalty to City Council in favor of serving the mayor's private interests by concealing the real motives for seeking approval of the settlement agreement. This lack of candor appears to fall short of the diligent representation required by Michigan conduct rule 1.3 and perhaps also reflects knowing assistance of a client in illegal or fraudulent conduct in violation of Michigan conduct rule 1.2.



Detroit General Counsel Sharon McPhail and other city lawyers unsuccessfully appealed a Wayne County Circuit judge ruling to disclose text messages from city-issued pagers by Mayor Kwame Kilpatrick and former chief of staff Christine Beatty. (Ankur Dholakia / The Detroit News)

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After public exposure of the real reasons for the settlement, city attorneys continued to argue that the requested public documents related to private matters and shouldn't be publicly disclosed under the Freedom of Information Act. Wayne Circuit Judge Colombo advised the city not to appeal his order for disclosure of the documents. Perhaps the judge believed that such an appeal would be frivolous since there was no basis in law to support the city's position.

Nevertheless, Detroit's attorneys appealed the matter to the Court of Appeals and the Michigan Supreme Court. There may be an issue about whether the rule that prohibits "frivolous" positions to be advocated has also been violated.

Finally, when did the attorneys for the city learn that the mayor gave false sworn testimony during the police officers' trial?

If the mayor's false testimony was known before he testified, that would be a serious violation of the rule that a lawyer shall not knowingly offer false evidence. However, if the false testimony was learned after the testimony was given but prior to the conclusion of the proceedings, the lawyers should have informed the trial judge about the false testimony. A lawyer's duty of confidentiality would not be a legitimate reason for keeping that information from the trial judge.

I applaud the courts that have ruled in this case. The public has the right to learn the real reasons for why this case was settled. Kilpatrick and the lawyers representing the city of Detroit may have to answer some tough questions from the media, the Wayne County prosecutor, the Michigan Attorney Grievance Commission and the public.

Larry Dubin is professor of law at the University of Detroit Mercy School of Law and a former chair of the Michigan Attorney Grievance Commission. Please mail letters to The Detroit News, Editorial Page, 615 W. Lafayette, Detroit, MI 48226, fax them to (313) 222-6417 or e-mail them to letters@detnews.com.

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