

- **ATTORNEY CLIENT PRIVILEGE**

L E G A L

MEMO

DEPARTMENT

To: Assembly Member Marko Dapcevich
From: Clifford J. Groh, II, City and Borough Attorney
Subject: Attorney-Client Privilege Between City and Borough Attorney and
Assembly Member
Date: December 11, 2001

How does the attorney-client privilege apply between the City and Borough Attorney and an Assembly Member?

The client of the Attorney for the City and Borough of Sitka is the City and Borough of Sitka itself, not any single official or employee.¹ The City and Borough cannot act except through its “constituents” or “representatives,” who are its Administrator, the Assembly Members, and the City and Borough employees.² When one of the City and Borough’s representatives—which would include an Assembly Member—communicates with the City and Borough Attorney, the communication is protected by the ethical rule that protects a client’s confidences and secrets.³ Five important points of clarification need to be made here:

- ▶ The **communications** are protected, but the **facts** in those communications are not. Put another way, a client representative cannot bury a fact known to others by telling the organization’s attorney.
- ▶ A client representative can **waive** confidentiality by revealing the confidence or secret to others besides the organization’s attorney.
- ▶ The attorney’s first duty is to the client—the organization. If the interest of the client representative becomes **adverse** to those of the client (the organization itself), the

¹Alaska Rule of Professional Conduct 1.13(a); and Comment to Rule 1.13 entitled “The Entity as the Client.”

²Alaska Rule of Professional Conduct 1.13(a); and Comment to Rule 1.13 entitled “The Entity as the Client.” Although the Rule uses the term “constituents,” to avoid confusion in the governmental context this memorandum shall use the term “representatives” to refer to the same group of persons.

³Comment to Alaska Rule of Professional Conduct 1.13 entitled “The Entity as a Client”; Alaska Rule of Professional Conduct 1.6; and Comment to Alaska Rule of Professional Conduct 1.6.

attorney must take steps to advise that client representative (such as an Assembly Member) that (a) the attorney cannot represent the client representative and (b) discussions between the lawyer and the Assembly Member may not be privileged based on the facts of the case.⁴

- ▶ An attorney for an organization—including a governmental organization—“shall proceed as reasonably necessary” to prevent a client representative from **committing a violation** of a legal obligation to the organization or a violation of law which reasonably be imputed to the organization if such violation is likely to result in substantial injury to the organization.⁵ “[W]hen a client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved....[I]n a matter involving the conduct of government officials, a government official may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.”⁶
- ▶ Other legal process—such as **court orders** served on the attorney—can result in the piercing of the attorney-client privilege.⁷

cc: Mayor Nelson
All Members of the Assembly
A.E. Zimmer, Administrator

⁴Alaska Rule of Professional Conduct 1.13; and Comment entitled “Clarifying the Layer’s Role” to Alaska Rule of Professional Conduct 1.13.

⁵Alaska Rule of Professional Conduct 1.13(b).

⁶Comment entitled “Government Agency” to Alaska Rule of Professional Conduct 1.13.

⁷Comment entitled “Disclosures Otherwise Required or Authorized” to Alaska Rule of Professional Conduct 1.6 (“The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.”)