



**ETHICAL DILEMMAS WITH
ADVISING CITY OFFICIALS**

Slater C. Etza
Matt Wade
Audie Sciumbaro
Underwood Law Firm, P.C.
P.O. Box 9158
Amarillo, TX 79105




THINGS I LEARNED:

- ▶ My topic is too broad.
- ▶ Every idea had already been done very well.
- ▶ Ethics in the theoretical is no fun.
 - Lets talk about our clients.



ONE HOUR OF ETHICS IN ONE SLIDE:

- ▶ Life – Do unto others as you would have done to you.
- ▶ City Attorney – A lawyer employed or retained by an organization represents the entity.
- ▶ A lawyer shall proceed as reasonably necessary in the best interests of the organization.
 - Texas Disciplinary Rules of Professional Conduct 1.12.



WHY IS THIS SO HARD?

- ▶ An organizational client of any kind is just bricks and property and walls and ceilings.
- ▶ Most organizations have a chain of command that works its way through full time supervisors and bosses.
- ▶ Cities are ultimately run by a collection of men and women with little training, less experience and ultimate control.
- ▶ On any given day we are working with intermediaries who are often guessing what our client would want.



HOW CITIES WORK:

- ▶ My best client – Total trust in their city manager, who prepares the agenda and tells them how to vote – without questions or discussion.
- ▶ My scariest client – total trust in their city manager who prepares the agenda and tells them how to vote – without questions or discussion.
- ▶ My most frustrating client – only job is to vote against the other member(s) they can't get along with.



KEEPING THINGS ON TRACK:

- ▶ A lawyer representing a city must take reasonable remedial actions when she/he learns that:
 1. An officer, employee, or other person associated with the city has committed or intends to commit a violation of a legal obligation to the city or a violation of law which reasonably might be imputed to the city;
 2. The violation is likely to result in substantial injury to the city; and
 3. The violation is related to a matter within the scope of the lawyer's representation of the city.



THE ATTORNEY-CLIENT PRIVILEGE

- ▶ The attorney-client privilege “is the oldest of the privileges for confidential communication known to the common law.”
- ▶ The privilege is there to encourage full and frank communications between attorneys and clients.
 - To promote broader public interests.
 - To enhance the observance of law and administration of justice.
- ▶ Applies the same to governmental agencies as to any other entity.



INTERNAL INVESTIGATIONS

- ▶ Can be essential to client’s business.
- ▶ Can be essential to a client's potential lawsuit.
- ▶ If not properly structured and conducted, can lead to significant problems for attorney and client.



INTERNAL INVESTIGATIONS

1. Purpose of the investigation;
2. Need for attorney-client privilege protection;
3. Acts or omissions of the attorney;
4. Relationships with the attorney; and
5. Political concerns.



INTERNAL INVESTIGATIONS

- ▶ Will investigation need to be introduced at trial?
- ▶ Will report be subject to open records request?
- ▶ Essential that everyone involved understands the role of any attorney as investigator.
- ▶ If the City Attorney is acting as a fact finder, she/he is likely not acting as an attorney, and any claim of privilege is suspect.



INTERNAL INVESTIGATIONS

- ▶ Acts or omissions of attorney – if a City Attorney's acts or omissions could come into play; they cannot be part of the investigation.
- ▶ Relationships with attorney – prior and existing relationships between officials, employees and witnesses can have impact on investigation must be considered.

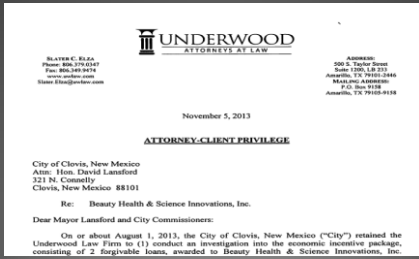


INTERNAL INVESTIGATIONS

- ▶ If you hire or employ an attorney to conduct an investigation, it can be political suicide to keep it secret.
- ▶ How do we make the results credible?
- ▶ How do we use the investigation to solve problems, and not create new problems?



HOW DO WE MAINTAIN ATTORNEY-CLIENT PRIVILEGE?



CONCERNS WITH IN-HOUSE LAWYERS

- ▶ Courts tend to hold in-house lawyers to a higher standard when analyzing the attorney-client privilege.
- ▶ 1998 saw the transition in Texas from the control group test (employee conducting investigation must have the authority to seek and act on legal advice) to the subject matter test (employee makes or receives a confidential communication at the direction of the corporation.)



CONCERNS WITH IN-HOUSE LAWYERS

- ▶ Dual role as legal and business advisor is at the heart of this distinction.
- ▶ Attorneys serving in dual business and legal capacities can jeopardize privilege.
- ▶ Client communications must be for the primary purpose of soliciting legal advice.
- ▶ It can be difficult to determine whether mixed advice is primarily legal.



TRAPS FOR THE IN-HOUSE LAWYER TO AVOID:

- ▶ Mark written communications "confidential".
- ▶ Limit which people are copied on privileged communications. Copying the attorney is not enough.
- ▶ Have written direction setting out role of the attorney; client should make express requests for legal advice.
- ▶ Have communication focus on request for, and provision of, legal advice.



TRAPS FOR THE IN-HOUSE LAWYER TO AVOID:

- ▶ Burden is on the entity to prove the privilege applies.
- ▶ Make sure you can articulate how the advice given was done in a legal capacity.
- ▶ Communications must be made for the primary purpose of obtaining legal advice.
- ▶ Be careful about designating in-house counsel as corporate representative at trial, or even in depositions.



BEST PRACTICES

1. Lawyer must be involved to receive any protection.
2. Clarify the goal of the investigation.
3. Position the investigation for maximum work-product protection.
4. Ensure lawyers oversee outside consultants.
5. Limit disclosure of any part of investigation.



IN RE: KELLOGG BROWN AND ROOT, INC.

- ▶ Former employee filed a False Claims Act complaint against the company.
- ▶ Argued that Kellogg defrauded the government by inflating costs and accepting kickbacks.
- ▶ Employee sought discovery of Kellogg's internal investigation that was overseen by internal counsel.
- ▶ Employee argued internal investigation records were result of normal business practices arising out of contractual and statutory obligations.



THE DISTRICT COURT

- ▶ Kellogg did not show that the communication would not have been made "but for" the fact that legal advice was sought.
- ▶ Mixed purpose investigations would not be protected from attorney-client privilege.
- ▶ Scared the tar out of anyone representing any entity.



THE COURT OF APPEALS

1. It is not required that an internal investigation be directed or conducted by outside counsel;
2. Interviews can be conducted by non-attorneys working at the direction of in-house attorneys;
3. Entity is not required to use "magic words" letting employees know that this is a legal department driven investigation; and



THE COURT OF APPEALS

- 4. Attorney-Client privilege still exists in a mixed motive investigation, so long as the obtaining or providing of legal advice was a primary purpose of the investigation. It also applies even if the internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.
- Attorneys will be taking this holding and trying again.



YOU SUED WHO?

- ▶ Conflict among city council members seems to have increased dramatically in recent years.
- ▶ Conflict sends all sides running to the City Attorney for validation of their position.
- ▶ Attorneys are still bound by Rules of Professional Conduct.



YOU SUED WHO?

- ▶ Always confirm employees know you represent the city council, and not them individually.
- ▶ Always let them know you will share with others what you learn from them.
- ▶ Do not ever relay your thoughts based on only part of the story.
- ▶ Remember to analyze situation for potential violation of legal obligation or violation of the law (Tex. Disc. R. Prof. Conduct 1.12(b)).



HELP THEM UNDERSTAND THEIR ROLE

- ▶ Everyone comes in with a mandate.
- ▶ Everyone comes in with motivation and wants to make a difference.
- ▶ Nobody comes in with much training or experience.
- ▶ Imperative that we help them understand their role (including limitations).
 - Done through Board Training and making sure they know the resources available.



HELP THEM UNDERSTAND THEIR ROLE

- ▶ They are not employee supervisors.
- ▶ They are not citizen/employee complaint responders/resolvers.
- ▶ They have no independent or individual power.
- ▶ They are entitled to be kept in the loop by city staff on important developments.



THE TEN COMMANDMENTS OF CLOSED MEETINGS

- I. Thou Shalt Obey the Open Meetings Act Exceptions.
- II. Though Shalt Give Proper Notice.
- III. Thou Shalt Not Vote in a Closed Meeting.
- IV. Honor Thy Lawyer.
- V. Thou Shalt Not Take the Name of Your Employee in Vain.



THE TEN COMMANDMENTS OF CLOSED MEETINGS

- VI. Thou Shalt Not Ignore a Valid Request for an Open Meeting.
- VII. Thou Shalt Follow All Proper Procedures, Lest Grievous Harm Befall You.
- VIII. Though Shalt Know Who May Come into Your Presence.
- IX. Thou Shalt Not Blab.
- X. Though Shalt Not Get Dragged into Court.





Scott A. Say
Lamb County & District Attorney
100 6th Drive, Room 111
Littlefield, Texas 79339
(806) 385-4222 • 208 Fax (806) 385-6485

Rickie C. Redman
Assistant County & District Attorney
Laney Dickey
Victim Assistance Coordinator

Office of the County & District Attorney
October 1st, 2013

Slater Elza
Littlefield City Attorney
Underwood Law Firm
500 S. Taylor, Ste. 1200, LD233
Amarillo, Texas 79101
slater.elza@uwlw.com

Re: Texas Open Meetings Act Violation Complaint

Mr. Elza:

My office has received a written complaint alleging a violation of the Texas Open Meetings Act during the Littlefield City Council meeting on Monday, September 30th, 2013 by the following individuals: Council persons Michael Rameel, Lonnie Spencer, Eric Turbin and Johnny Williamson.



KEEP YOUR CLIENT'S OUT OF JAIL

- ▶ Closed meetings are allowed, not required.
- ▶ Complete list of closed meeting exceptions in the Texas Government Code.
- ▶ Too many cities do not pay attention to details.
- ▶ Conflict amongst council and conflict with citizens give rise to complaints.
- ▶ Law can be violated maliciously or inadvertently.
- ▶ Lawyers ethical obligation to his client to keep them on course.



COMMON MISTAKES

- ▶ City Council wants to discuss merits of potential contract.
 - See Op.Tex.Att’y. Gen. No. JC-233 (2000).
- ▶ City Council wants to discuss a class of employees.
 - See Op.Tex.Att’y. Gen. No. H-496 (1975).
- ▶ City Council wants to discuss selection of or complaints about independent contractors.
 - See Op.Tex.Att’y. Gen. No. MW-129 (1980).
- ▶ City Council must meet as a quorum in open meeting before conducting a closed meeting.



COMMON MISTAKES

- ▶ You can't hire the attorney to be there so you can discuss other matters you want to keep private.
- ▶ Presiding officer must publicly (1) announce that a closed session will be held and (2) identify the section or sections of the act under which the closed meeting will be held.
 - See Tex. Gov't Code § 551.101
- ▶ Keep a certified agenda or official recording of each closed meeting.
 - Except for the City Council's private consultation with attorney
 - See Tex. Gov't Code §§ 551.074 and 551.103(a)



COMMON MISTAKES

- ▶ Make sure certified agenda or recording of a closed meeting is available for inspection and copying only under a court order.
- ▶ Make sure only employees and officers whose participation is necessary to the matter under consideration are included in closed meeting.
 - See Op.Tex.Att’y. Gen. No. Ga-511(2007).
- ▶ A city council member with a "substantial interest" is discouraged from attending a closed meeting.
 - See Op.Tex.Att’y. Gen. No. GA-334(2005).
- ▶ City council may not admit an adversary or individual whose presence would prevent the establishment of the attorney-client privilege.
 - See Op.Tex.Att’y. Gen. No. JC-506 (2002)



IT'S A CRIME

- ▶ Unauthorized closed meeting – no *mens rea*.
 - Fine of \$100-\$500;
 - County jail for one to six months; or
 - Both.

- ▶ Failure to record a closed meeting.
 - Fine not to exceed \$500.



IT'S A CRIME

- ▶ Disclosing a certified agenda.
 - Fine not to exceed \$2,000;
 - County jail not to exceed six months; or
 - Both.

- ▶ Circumventing the Act.
 - Fine of \$100-\$500;
 - County jail for one to six months; or
 - Both.



SLATER C. ELZA
 MATT WADE
 AUDIE SCIUMBATO
 UNDERWOOD LAW FIRM, P.C.
 P.O. BOX 9158
 AMARILLO, TX 79105
 PHONE: 806-376-5613
 FAX: 806-379-0316
SLATER.ELZA@UWLAW.COM