

Succotash of City Attorney Ethics



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What is a Succotash?

- A food dish consisting of a little bit of everything.



- As City Attorney, you have to know a little bit of everything...

Who is the Client?

- An attorney working as outside or in-house counsel for a city must ask who he or she represents. Is it:
 - The egomaniacs (elected officials);
 - The downtrodden (city staff);
 - The people who pay our salaries (general public);
 - The entity as a whole;
 - A combination of the above?
- Why is client identification important?

Who is the Client?

- The city attorney doesn't represent the mayor, the city manager, or even the city council.
- According to the *Texas Disciplinary Rules of Professional Conduct*, the city attorney has one client and one client only—the city as a whole.
- It is the city attorney's duty to act in the best interests of the city as a whole.



Analeslie Muncy

General Rule

- The city attorney represents the city as a whole, acting through its officials.
- Eighth Circuit ruled that the White House lawyers DO NOT represent President and First Lady as individuals but represent White House and the officials in their official capacity. *WHITEWATER CASE*
- The entity approach is consistent with Texas Disciplinary Rules of Professional Conduct ([Rule 1.12](#)) and ABA Model Rules ([ABA Rule 1.13](#))
- Both rules limit the representation of entity officials & employees conducting official city business.

Texas Disc. R. Prof. Conduct 1.12 Controls

(a) A lawyer employed or retained **by an organization represents the entity**. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents...

(b) the lawyer shall proceed as reasonably necessary in **the best interest of the organization** without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

Why is issue important?

- The identity of the client is vital to determine certain issues, including:
 - Who shall I take direction from? What if its conflicting direction?
 - Whose interests am I charged with protecting? What if the interest of individual official conflicts with the interest of the City?
 - Whose confidences am I obligated to protect?
 - Will I lose my job if I don't' help the Mayor out of a jam?



Scenario #1

- Councilmember requests guidance on Robert's Rules of Order and Council Rules on conduct.
- Councilmember informs you that he intends to filibuster so that City's annexation plan does not get approved.
- Councilmember requests that you **keep the matter confidential** from Mayor and other Councilmembers. *(Has a few other colleagues who support his anti-annexation position, but does not have a majority).*
- Mayor contacts you and tells you he has heard rumors about a filibuster and wants guidance on how to overcome the filibuster.
- What do you do?

Texas Disc. R. Prof. Conduct 1.12 Comment

4. ...the lawyers 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... Care should be taken 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 insofar as that individual is concerned.

Judgment

- Have policy making it clear that City Attorney represents, officials and employees in their official capacity.
- Policy should state you represent any official or employee in their official capacity acting within the course and scope of employment.
- If no policy, city attorney has to figure it out.
- Do not commit to confidentiality!
- If internal conflict exists between officials and/or employees & attorney is receiving conflicting directions:
 - Go to highest authority (Mayor or City Manager); or
 - Have the Council vote to give you direction
 - Do not get caught playing with the bull...

Conflicting Interests

- **It will happen!** You represent a city and a city employee's or councilmember's personal interest differ from those of the City.
- If a city attorney learns that a particular city official has committed misconduct, the attorney may have a duty to report that misconduct to the authorities.
- If misconduct can harm the interest of the city as a whole, the rules discipline provide that *“a government lawyer may have authority to question conduct more extensively than that of a lawyer for a private organization in similar circumstances.”*

Scenario #2

- City Attorney is representing City staff before the Board of Adjustment (BOA).
- Prior to the BOA hearing, the City Attorney advises city staff that the interpretation of the ordinance which led to the applicant's denial for a building permit and now a request for a variance is in error. City staff admits to the error but ignores City Attorney advice and proceeds with the denial of the variance recommendation.
- During the hearing, the BOA asks the City Attorney for advise on the interpretation of the ordinance.
- **What should the City Attorney do?**

Dual Internal Representations

- Issue arises when City Attorney represents the decision maker and is an advocate on behalf of city staff.
- **Example:**
 - Appeal to Board of Adjustment (BOA) as a result of City Staff action and advises the BOA on the ordinances and assists staff to assist in their interpretation

Dual Internal Representations

- General Rule: Due process only requires impartial decision maker, overlapping duties of attorney do not automatically amount to constitutional violation.
Withrow v. Larkin, 421 U.S. 35.
- Problem can arise if same attorney doing both.
- Non adversary proceedings, no constitutional issue for same attorney to represent both. (i.e.. BOA)
- Adversarial proceedings, when same attorney represents both, due process problems likely. (i.e. Ch. 143 Civil Service Hearing)

Dual Internal Representations

- What if different attorneys in the same office?
- Disciplinary appeal to Civil Service Commission and Assistant City Attorney advises the Commission on procedural matters any other legal issues that may arise.
- Another Assistant City Attorney represents the City Department and presents testimony, documents to support the discipline.
- Is there a conflict of interest?

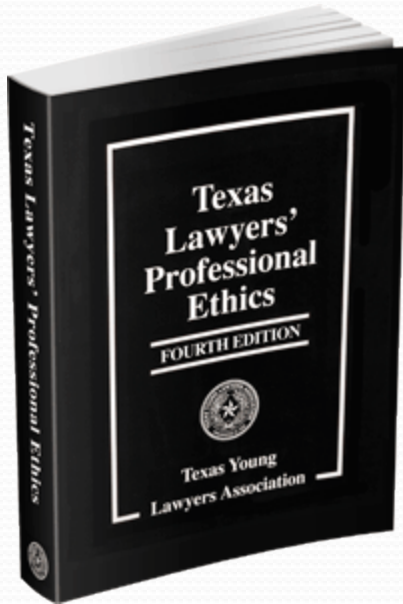
Client Confidentiality

- General Rule: An attorney shall not, without the consent of client, reveal any confidences relating to representation of a client or advise given to a client. [Texas Disc. R. Prof. Conduct 1.05](#)
- The general rule is applicable to a City Attorney.
- Rule applies not only to legal advice, but to any communication between an attorney and the client.
- Exception:
 - Furtherance of a crime or regarding the contemplation of a future crime;
 - Court order
 - Waived by the client; or

How far does the Privilege Go?

- Privilege applies if the city employee making the communication is in a position to provide necessary information to the attorney that is within the scope of the employees' duties.
- Privilege extends to only protect confidential communications.
- Information should be provided to anyone in the City that is part of the decision making process.
- The city attorney owes the privilege only to the city and not individual city official.
- The city attorney might have an obligation to affirmatively disclose what he or she has been told by certain officials, depending on the nature of the conversation.

Texas Rules of Professional Conduct



- Rule 1.05 Confidentiality of Information
- Rule 3.07 Trial Publicity
- Rule 4.01 Truthfulness in Statements to Others

Rule 1.05 Confidentiality of Information

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so ...

(2) When the client consents after consultation.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

Rule 3.07 Trial Publicity

- (a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if *the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.*

Rule 4.01 Truthfulness in Statements

- In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person...
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or *knowingly assisting a fraudulent act perpetrated by a client.*

Scenario #4

- You are handling the investigation of questionable financial transactions.
- You meet individually and as a group with a employee, immediate supervisor and Finance Director to discuss the transactions.
- Are discussions with the employees privileged?
- Yes. Any employee who is necessary part of the process to make an appropriate decision should fall under the protection.
- No, if during investigation employee admits to improper activity.
- City attorney should let them know about the limitations of the privilege.

Waiver by City

- The attorney/client privilege is the privilege of the client alone! It may be waived by client.
- Waiver must be distinct and unequivocal.
- Actions and discussion by client may waive the privilege.
- Inadvertent waiver may not lose the privilege unless no precautions taken.
- Must look at steps taken to keep confidential; how long to remedy release; extent of disclosure; and who released it.

Scenario #5

- Council conducts an Executive Session under Attorney/Client consultation regarding legal theory and strategy of case.
- Councilmember releases information to press. Does this release constitute a waiver?
- No. Privilege belongs to City not the individual councilmember who is acting out for his own interest.
- However, precautions taken and further public discussion by public officials will come into play and may lead to waiver.
- How can you keep executive session information confidential?

Scenario #6

- City employee approaches city attorney to conduct an investigation regarding an ethics violation of both the Mayor and City Manager.
- Employee alleges that city manager is sexually harassing female employees and the mayor has ignored his complaints.
- How should the city attorney proceed?

Conclusion

- Representing a City and its employees is much more difficult than representing one individual.
- You work in a fishbowl and your decisions will be scrutinized.
- Know your “**TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT**”
- You are not alone. When ethical issues arise, talk to colleagues, TML legal counsel or your priest/rabbi.
- Most importantly, keep your cool.

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