

# *When to Speak up or Shut up* *Role of City Attorney in* *Meetings*

**Texas Municipal League**  
**Annual Conference**  
Texas City Attorneys Association  
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# 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?

# Scenario #1

- 3 Councilmembers (out of 11) show up in your office and request guidance on Robert's Rules and Council Rules on conduct of public meetings.
- The 3 officials inform you of their intent to filibuster so that City's annexation plan does not get approved. You provide guidance on Robert's Rules and Council conduct rules.
- Councilmembers request that you keep the matter confidential from Mayor and the rest of the Council. (*They say they have at least 2 other colleagues who support their position, but do not yet have a majority*).
- The next day, the Mayor contacts you and tells you he has heard rumors about a filibuster on the annexation issue at the next council meeting and wants guidance. You again provide guidance on Robert's Rules and Council conduct rules.

# 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, in the situations described in paragraph (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.

# General Rule

- The lawyer represents the city as a whole, acting through its officials.
- Eighth Circuit ruled that the White House lawyers DO NOT represent President as an individual 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.

# 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?
  - What do you do when the perfect storm happens during a council meeting?

# Judgment

- Have policy making it clear that City Attorney represents the entity first then officials and employees in their **official capacity**.
- Policy should state that the attorney-client privilege applies to the entity (majority of council) and not any individual official or employee.
- No confidentiality from other officials and/or employees.
- Only exception is seeking ethics guidance.
- 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 majority of Council give you direction

# 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.

# Scenario #2

- **Commenting on Liability Exposure**
- During an open session discussion of a park project, Council member Smith complains about the poor condition of a bike path and asks you (the City Attorney) if the city would be liable if a child playing in the vicinity were injured.

# Texas Disc. R. Prof. Conduct 1.03, 1.05

- 1.03 (Communication) (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- 1.05 (Confidentiality of Information) (b) a lawyer shall not knowingly: (i) Reveal confidential information of a client or a former client to: (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

# Speak up or Shut up?

- **Red Flag:** speculating on City's liability exposure in public
- Speak up: "I would be happy to discuss this potential liability question with the council in executive session."
- Training: let Council know in advance what your response will be if questioned in public
- Principles Governing City Attorney's Legal Advice
  - New council orientation
  - Annual reminder

# Scenario #3

- **Disclosure of Confidential Information**
- A council member routinely passes along the contents of attorney-client information to third parties, such as potential legal adversaries. You are about to enter another executive session on the same topic.

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# Speak up or Shut up

- **Red Flag:** Disclosure of confidential information that could be detrimental to the city's legal or financial interest
- **Speak up:** A frank reminder at beginning of executive session about the reasons and importance of maintaining confidential information

# Speak up earlier

- Training: Advance work educating council members that disclosure of confidential information discourages candid discussion among the council members, staff and legal counsel
- Memo on reasons for executive session included in new council orientation discussions
- [Texas AG Op. JM-1004](#) exclusion of school board member suing board from school board executive session when board discussing the litigation

# Scenario #4

- Your city is considering participating in an economic development transaction with a developer to build a multimillion dollar community venue. During an executive session posted for economic development negotiations, the City's financial advisor proposes different ways to finance the project, one of which includes the use of credit default swaps. The advisor tells the council there is little or no risk in using such a device.

# Texas Disc. R. Prof. Conduct 1.03 Controls

- 1.03 (Communication) (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# Judgment

## Red Flags:

- A Financial Advisor [or anyone] saying there is “no risk.”
- Use of undefined jargon.
- This is the first you are hearing of innovative [untested] financing.
- What’s the basis for this in executive session?

# Speak up or Shut up

- If straying from topic of executive session, “Mr. Mayor, I’d like to remind the council this matter is posted as \_\_\_\_\_ and we have stepped a bit away from that. We can discuss the methods of financing in the public session.”
- All risks must be disclosed to Council to make an informed decision. But this is the first you are hearing of it.

# Speak up earlier

- Advance work: meet with management to understand complete context of topic for executive session prior to agenda posting.
- Ask management, “What are you presenting? What do you need Council direction on?” Then advise on limits of what can be discussed in executive session.

## Texas Disc. R. Prof. Conduct 1.12 Comment

6. Decisions by Constituents. When constituents of the organization make decisions for it, **the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.** Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer's responsibility, that the organization is **likely to be substantially injured by the action of a constituent** that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, **the lawyer must take reasonable remedial measure.**

# Scenario #5

- **Impromptu conflict of interest determinations**
- Just as a vote is cast by a council member, she asks you if she has a conflict regarding a matter she has never revealed or discussed with you.

# Judgment

- **Red Flag:** If she's asking, there is a problem.
- **Speak up:** If no chance to talk privately, state “If you have a question in your mind whether this has a special economic effect, then out of an abundance of caution I recommend you file the affidavit and abstain from voting.”
- **Training:** New council orientation on both state law and Charter or ordinance.

# Speak up earlier

- Arlington Disclosure Statement circulated before every meeting.
- [TX AG LO-98-052](#) (caution to consider this carefully, considering the criminal penalty)