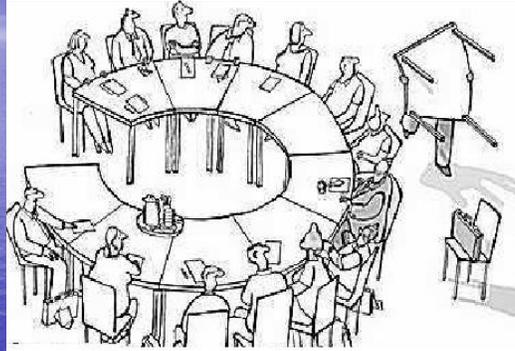


ETHICS

A HOUSE DIVIDED



A Presentation to the Attendees of the
TCAA South Padre Conference
June 12, 2009

Introduction

- A City Attorney represents a client that they can never meet.
- This challenge is compounded when the representatives of the City do not speak with one voice.
- While Lincoln may have said, “A house divided upon itself cannot stand,” we see it all too often.

Introduction Cont..

- When ethical issues arise in entity representation, the Rules offer some guidance.
- The rules however, are not a panacea, nor are they an instruction booklet for every situation. The Rules merely serve as guideposts along way.

Method

- In preparation for this presentation, a number of interviews were conducted.
- Attorneys were asked a variety of questions regarding ethical questions and hypotheticals.
- To protect the innocent, all names, and situations have been altered.

Method 2

- Many questions elicited identical responses from all interviewees
- Some questions brought forth a wide range of answers. It is these situations that have become the focus of the rest of the presentation.

Rule 1.12

- THE rule related to entity representation
- 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.

Rule 1.12 Cont...

- **(b)** A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:
 - **(1)** an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
 - **(2)** the violation is likely to result in substantial injury to the organization; and
 - **(3)** the violation is related to a matter within the scope of the lawyers representation of the organization.

Rule 1.12 Comment 1

- In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

Rule 1.12 Comment 4

- There are times when the organizations interest may be or become adverse to those of one or more of its constituents. In such circumstances, 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, and that such person may wish to obtain independent representation.

Rule 1.05

- This rule states in part:
 - a lawyer shall not knowingly:
 - **(1)** Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information

Rule 1.03

- A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Example 1

- The City has a certain fund that can only be expended for certain purposes. The City has sought your advice regarding whether it is permissible to expend the funds on a certain project. You have concluded that such a project is outside of the permissible purpose for which that money may be lawfully expended.

Example 1 Cont...

- Moreover, you have advised the Council that the expenditure of such funds would be a misdemeanor. However, a majority of the council votes to spend the money anyway. What are your ethical obligations?

Example 1 Cont...

- This is THE example tailor made for Rule 1.12
- Under Rule 1.12(b), we know that the City intends to commit a violation of a legal obligation.

Example 1 Cont...

- We know that the violation is likely to result in substantial injury to the City, and the violation is within the scope of our representation.
- Furthermore...

Example 1 Cont...

- We know that we must take remedial action.
- Rule 1.12(c) shows us how we go about taking such remedial actions.
- We must first attempt to resolve the situation internally. Asking reconsideration, and/or drafting a separate legal opinion are both reasonable remedial actions.
- If such actions do not remedy the situation (i.e. cause the City to change its mind about the expenditures), the lawyer must then determine whether to withdraw from representation, or disclose the information to an outside party.

Example 1 Cont...

- Rule 1.05(c)(7) allows a lawyer to reveal confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- In our example, the City Attorney has already determined that the expenditure at issue would be criminal.

Example 1 Cont...

- Withdrawal from representation is governed by Rule 1.15.
- In this case, a lawyer may withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent.

Example 2

- In an effort to reduce legal bills, the City Council has adopted a rule that only the Mayor, City Manager, or City Secretary may speak with the City Attorney to seek legal services. However, an employee of the City has called to tell you of potentially criminal wrongdoing by one or more of those three.

Example 2 Cont...

- Rule 1.03 is particularly on point with this scenario. “A lawyer shall keep a client reasonably informed...”
- The only **WRONG** answer to this scenario would be to ignore the employee simply because he was not authorized to discuss the matter with the City Attorney.

Example 2 Cont...

- If, for example, the complaint is regarding the City Manager, a telephone call to the Mayor to discuss the matter would be a good first step.
- In all likelihood, an executive session will be needed to discuss the matter.

Example 2 Cont...

- If however, your initial communication with either the Mayor or City Manager is not well received, and they ask you to drop the issue, your obligation is not at an end.
- Under the first comment to Rule 1.12, as the City Attorney, you must be concerned with whether the intermediary legitimately represents the City.

Example 2 Cont...

- If, as City Attorney, you are asked to simply drop the issue of potential criminal wrongdoing by a high ranking City official, at the very least, one should draft a legal memorandum detailing your conversation with the City employee, as well as your recommendation that the City Council address the issue.

Example 2 Cont...

- Regarding the issue of payment, it is entirely possible that the City will not pay you.
- However, a City Attorney's ethical obligations under the Rules are not contingent upon payment for services rendered.

Example 3

- During an executive session under section 551.071 (Advice of Legal Counsel), several members of the council use the opportunity to deliberate about the matter. You have cautioned them against doing so in the past, but they are ignoring your advice.

Example 3 Cont...

- First, what is a violation of section 551.071?
- Many attorneys took the position that any deliberation amongst council members was a violation of section 551.071.
- Others took a more liberal view of the exception, noting that so long as the discussions were on point and generally facilitated the exchange of information and legal advice, it was legal.

Example 3 Cont...

- While the exact line between a permissible closed session and an impermissible closed session may remain somewhat blurry, from an ethics perspective, once a closed session has crossed that line, what are the ethical obligations of the City Attorney?

Example 3 Cont...

- First, the City Attorney has an obligation to caution the council members again and explain that there are criminal consequences for their actions.
- If the council members continue to ignore the advice of counsel, the City Attorney can threaten to walk out of the closed session, or ask the council to come out of executive session.

Example 3 Cont...

- If the council refuses to come out of executive session, the only immediate recourse for the City Attorney is to leave the meeting.

Example 4

- In a closely divided council, you receive conflicting directions about the same project from the Mayor and City Manager, who are aligned with the minority faction, and the Mayor Pro Tem, who is aligned with the majority faction.

Example 4 Cont.

- Question 1, What is the nature of the conflict?
- If the two factions are asking you to do completely different things (i.e. file a lawsuit vs. draft a letter), that is one thing...
- However, if the conflict arises because both sides are seeking a different legal conclusion in your analysis of a particular issue, that is entirely another matter.

Example 4 Cont...

- If the two factions are asking for entirely different things, the easiest way to clear up any confusion is to take the matter to the council.
- While this option may not make you popular with either faction, it will ensure that you do what your client, the City, actually wants.

Example 4 Cont...

- If, on the other hand, both factions are simply hoping for a different legal conclusion on an issue that you are researching, the solution is relatively simple.
- The legal conclusion of a City Attorney should not change regardless of who is asking the question.
- If a particular faction does not like that advice, they can seek a second opinion.

Example 5

- The Mayor contacts you by telephone with concerns regarding the City Manager. The Mayor has gathered a great deal of information on various complaints regarding the City Manager, as well as independent confirmation of wrongdoing on the part of the City Manager. The Mayor e-mails you this information and asks that you review the information and advise him regarding what he should do. After reviewing the submitted information, you conclude that there may be something to these allegations, and an investigation is warranted.

Example 5 Cont...

- You contact the Mayor and state that this matter should be brought to the council as a whole so that the City may determine what it wants to do. At this point, the Mayor states that he does not want to disclose this information to the Council. He further states that the information submitted to you was gathered by the Mayor in his personal capacity, and that he does not consent for you to disclose this matter to the council.

Example 5 Cont...

- In this example, we know that there is information concerning the City Manager that the Council is entitled to know about under Rule 1.03.
- We also know that the Mayor is not consenting to the release of this information to the rest of the council. Under Rule 1.05 we may not reveal confidential information of a client.
- So, we must ask ourselves, “who is our client?”

Example 5 Cont...

- Certainly the City is our client.
- The more interesting question is whether, through our conduct, the Mayor as an individual has become a client.
- As the attorney for the City, it was not the intent of the City Attorney to take up the representation of the Mayor as an individual.
- However, the subjective intent of a lawyer is irrelevant to determine whether an attorney/client relationship has been formed.

Example 5 Cont...

- The duty to keep information confidential attaches earlier than most other duties.
- Courts have found that the duty of confidentiality attaches to pre-representation conferences, even if no subsequent attorney/client relationship is formed.
- However, in this case, the Mayor did not express any intent to be represented separately from the City until after the Mayor found that the City Attorney intended to inform the council.

Example 5 Cont...

- In the end, the determination of whether the duty of confidentiality attached to the communications from the Mayor would be determined by a court.
- If the City Attorney can show that he or she clarified the status of the representation at that time, the likelihood of the City Attorney getting into trouble would be greatly reduced.

Example 5 Cont...

- Since we have no evidence that the Mayor intended to be represented separately until after the information at issue was given to the City Attorney, the proper course of action would be to clarify the status of the representation with the Mayor, and then release the information to the rest of council.
- Rule 1.03 is clear that a client must be kept informed. Information of the nature described by the example is highly relevant to the operation of the City, and must be disclosed to the rest of Council.

Example 6

- The Mayor and Mayor Pro Tem have the same personal agenda, which is to promote their political careers. Both see every issue that comes before the Council primarily in the light of how it can be used to further their political ambitions. They always have the vote of one other council member, and often that of another, who is the swing vote.

Example 6 Cont...

- As City Attorney, it is obvious to you how a particular issue should be decided in the way that is most beneficial to the City, but that is the opposite of the way it will benefit the Mayor and Mayor Pro Tem. The swing vote council member calls you with questions about the issue, seeking input and guidance on the possible results of voting one way or the other.

Example 6 Cont...

- As City Attorney, you may be in the very best position to decide the direction the City should move in (or you may believe you are).
- Yet a City Attorney is not a policy maker, but a counselor and advisor.
- At the same time, the City Attorney's knowledge and experience is not limited to statutes and cases read or ordinances drafted.

Example 6 Cont...

- The totality of the City Attorney's experience should be offered and shared with the client.
- Thus, while the City Attorney must not get involved in political matters or take sides with particular council members on matters for which the outcome is legal either way, he or she must also exercise a certain degree of politics in providing advice.

Example 7

- The City Manager and City Attorney are attending a highly contested and emotionally charged settlement conference with a former employee. The former employee has alleged wrongful termination, and the City Manager is adamant that the termination was proper. As City Attorney, you have reviewed the case and believe that there is significant exposure to the City if these negotiations fail. The City Council has empowered the City Manager to settle the case up to a specified amount.

Example 7 Cont...

- Much to your surprise, the negotiations, while difficult, are going well. The terminated employee has finally submitted an offer to settle that is well below the maximum settlement set by the Council and is otherwise in the City's best interests. As the City Manager is reviewing the offer, your phone rings. The Police Chief calls with additional information regarding the case. Apparently the terminated employee had previously stated a number of derogatory and defamatory statements about the City Manager.

Example 7 Cont...

- These statements are so outrageous that you believe the City Manager may actually have a claim for defamation. However, you also know that if you inform the City Manager of these statements, he will not accept the offer of the employee due to his personal anger and this matter will most likely proceed down a long road of expensive litigation. Can you temporarily withhold this information from the City Manager?

Example 7 Cont...

- While in the vast majority of circumstances, Rule 1.03 dictates that the client (and representatives of the client) must be kept reasonably informed...
- There is one exception.

Example 7 Cont...

- The Comment states to rule 1.03 states as follows:
- In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication... A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.

Example 7 Cont...

- In this case, it appears that the City Attorney reasonably believes that the City Manager would react imprudently to the defamatory communications, thus increasing the liability of the City.
- Furthermore, withholding the information at issue would not serve the lawyer's own interest or convenience, but rather, would protect the City from the potentially rash decision of its City Manager.

Example 7 Cont...

- Under the facts of this hypothetical, it would appear that the City Attorney could temporarily withhold information, in the interest of the City.
- I would certainly caution any City Attorney from using this Comment in anything other than extreme circumstances, since neither clients, nor the State Bar look kindly on an attorney withholding information.

Example 8

- The City Manager for a City you represent has retired. With no heir apparent, the City Council has requested that in addition to your duties as City Attorney, you also serve as the Interim City Manager during a several month long search process for the new City Manager. You are not an in-house City Attorney, but rather, you are an attorney in a private firm that represents Cities.

Example 8 Cont...

- In Ethics Opinion 196 (1960) a lawyer both owned an abstract company, and represented the abstract company with his law business. The Ethics Opinion made it clear that the “feeding” of a law business by an attorney who was working in a non-lawyer capacity was improper.

Example 8 Cont...

- In Ethics Opinion 136 (1956), a licensed accountant, who was also a licensed attorney, wanted to concurrently practice professional accounting, and hold himself out as an attorney.
- Without going into much detail, the Ethics Opinion held that if an individual holds himself out as a practicing accountant, that he or she should not hold him or herself out as a lawyer at the same time.

Example 8 Cont...

- Other legal issues include:
 - When does the attorney/client privilege apply?
 - Can the City Manager/Attorney be called to testify at a trial?
 - If so, what defenses may the City Manager/Attorney have?
 - How can the City Manager/Attorney reduce or eliminate any confusion regarding which “hat” the Attorney/Manager is wearing at any particular time?

Example 8 Cont...

- It is not the intent of this example to tell you that an attorney cannot both act as a City Manager and City Attorney.
- However, this arrangement must be entered into with the utmost care.

Questions?