

Conflicts of Interest Facing the City Attorney

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A City Attorney's many hats...

- Rule 1.06 “General Rule”

- Don’t represent opposing parties to same case
- Don’t represent person if it would:
 - Involve a substantially related matter in which that person’s interest are directly and materially adverse to the interests of another client; or
 - Reasonably appears to be or become adversely limited to another client, a third person, or your own interests.

Conflicts of Interest

- Rule 1.06, Continued

- Unless...

- You reasonably believe that the representation of each client will not be materially affected;
AND
- Each affected client consents to the dual representation after full disclosure of the nature of the conflict and possible adverse consequences.

Conflicts of Interest

- Who are opposing parties?
 - Councilmember Conflict?
 - Department Head Dispute?
- Know your client...
- TDRPC 1.12
 - A City Attorney represents the Entity
 - Take direction from authorized constituents
 - Duty to clarify your role

Who are opposing parties?

- Rule 1.07 "Intermediary"
- Do not act as an intermediary between clients, *unless...*
 - Each client consents in writing;
 - You believe that litigation is unlikely; **AND**
 - You believe that you can be impartial and that neither client is likely to be harmed.
- If asked to withdraw, must cease representing both clients

Conflicts of Interest

- EDC v. City
 - Competing views on proposed project creates conflict between City Council and EDC Board
 - As long as EDC and City interests are aligned, attorney can transmit confidential information
 - Disputes over cost sharing infrastructure/incentives
 - Level of investment by each entity creates a dispute
 - Emerging projects
 - Interpretation of existing agreements and interpretation of obligations

Dual Representation EDC v. City

- Rule 1.08 “Prohibited Transactions”
- Don’t enter into a business transaction with a client, *unless...*
 - The terms are fair, reasonable, and fully disclosed to the client;
 - The client is given a reasonable opportunity to seek independent legal counsel about it; **AND**
 - The client consents in writing.

Conflicts of Interest

- Business interests owned/controlled by City Attorney?
 - Title Company
 - Third Party Vendor
 - City Attorney contract
 - Malpractice Coverage?
 - Arbitration Clause?
 - Golden Parachute?

Prohibited Transactions

- Rule 1.09 "Former Client"
- Without prior consent, don't represent a client whose interests are adverse to a former client if:
 - The representation will probably involve the use of confidential information; or
 - It is the same or a substantially related matter.
- Going to the Developer "Dark Side"

Conflicts of Interest

- Successive Government and Private Employment

- Don't represent a private client in a matter in which you "personally and substantially" participated as a public officer or employee.
- When serving as a public officer, don't participate in a case against a former client in the same matter.
- **Don't angle for a job with a person involved as a party or party's law firm.**

Rule 1.10

- Rule 1.13: Public Interest Activities

- While serving on a public interest board, don't participate in a matter that would...
 - Violate your obligation to a client; or
 - Harm a client of the organization who happens to be adverse to your own client.
 - (all "civic, charitable or legal reform organization")
- Examples?
 - City Attorney is Lion's Club member and Club wants a variance or permit to advertise annual fund raiser...
 - Duty to Client prevails!

Conflicts of Interests

- Confusing & Competing Conflict Concerns Considering Criminal Court Cases

- Role Shift – Not to Convict but to see justice done (not revenue enhancement)
- Client Shift – Legal Obligation –
 - State of Texas v. _____
- Prosecutorial Immunity under scrutiny
- Prosecutorial/Judicial “employment” under scrutiny by IRS

To Prosecute, or Not to Prosecute, that is the question?

Don't:

- Prosecute (or threaten) a charge not supported by probable cause
- Assist in custodial interrogation
- Encourage unrepresented accused to waive important rights

Do:

- Disclose exculpatory evidence
- Prevent improper trial publicity

Rule 3.09 -Special Responsibilities of Prosecutor

Local attorney – who happens to sit on your City Council – shows up to municipal court to represent his niece in her speeding citation issued by your P.D.

See Ethics Opinion 497 (1994), holding that such a scenario creates conflicts among the client, the city, *and* the attorney, implicating Rule 1.06.

City Attorney v. Prosecutor

- “Don’t Taze Me, Bro!”

While prosecuting an elderly woman for speeding, you learn that your city’s police department “tazed” her before issuing her citation. She complains of the medical complications and mentions that she’d like to sue the city...

City Attorney v. Prosecutor

- "A clear cut case..."

Local developer clear cuts land in violation of city tree ordinance. You pursue civil remedies as well as criminal charges. Your City Council wants an update, and hopes to see all issues resolved at the same time.

City Attorney v. Prosecutor

TOMA

551.071 applies to consultations about pending or contemplated litigation, or a settlement offer

However, allows for general consultation with attorney about any confidential legal advice

TDRPC 4.04(b) - Prohibits threats of criminal charges to gain advantage in civil case

City Attorney v. Prosecutor

- Municipal Prosecutors represent the State of Texas
- CCP 45.019
 - “In the name and by the authority of the State of Texas...”
- CCP 45.201
 - Prosecutions shall be conducted by the city attorney of the municipality or by a deputy city attorney.
- CCP 45.041 permits restitution in Municipal Court
- Texas Two-Step Dismissal process

City Attorney v. Prosecutor

- “Judicial Economy” dismissals
 - Criminal Considerations
 - Sufficient evidence
 - Jury appeal
 - Civil Considerations
 - *Heck v. Humphrey* application
 - Criminal Prosecution for..
 - Administrative Contractual Violations
 - Dangerous Dogs
 - Book Burners

Civil consequences of criminal court action?

Questions?

Scenarios for next year's ethics
presentation?

The End