

The Windshield and the Bug:

Sometimes, when TDRPC meets TOMA,
Splat Happens.

Thomas A. Gwosdz
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The Windshield and the Bug:

The Windshield:

TDRPC

1.03

1.05

1.12

The Bug:

TOMA

551.144

551.071

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Communication

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Rule 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.

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

Communication

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Comment 1:

A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.

Communication

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Comment 2:

The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

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“However, Granado assailed the quality as well as the quantity of Eureka’s communication with him. It is clear from Granado’s testimony that his expectations were not met.”

Confidentiality of Information

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(b) ... 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; or
- ii. anyone else, ...

Confidentiality of Information

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“Confidential information” includes both “privileged information” and “unprivileged client information.”

“... Skelton's testimony that he never learned any confidential information directly from Fletcher is simply not probative with respect to whether Skelton learned confidential information about Fletcher's case during the course of his lengthy professional relationship with Fletcher.”

Confidentiality of Information

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(b) ... a lawyer shall not knowingly:

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

“... regardless of whether from an evidentiary standpoint the privilege attached, Kirk & Carrigan breached their fiduciary duty to Perez either by wrongfully disclosing a privileged statement or by wrongfully representing that an unprivileged statement would be kept confidential. Either characterization shows a clear lack of honesty toward, and a deception of, Perez by his own attorneys regarding the degree of confidentiality with which they intended to treat the statement.

Organization as a Client

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Rule 1.12:

- a) A lawyer employed or retained by an organization represents the entity.

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(b) ...must take reasonable remedial actions whenever the lawyer learns ...:

- (1) an officer [etc.] 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) ...likely to result in substantial injury to the organization; and
- (3) ...related to a matter within the ...lawyer's representation....

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... Such procedures, actions and measures may include, ...:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought ...; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority...

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Comment 7:

The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule

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Comment 7: (cont.)

... If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization.

The Texas Open Meetings Act

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Conspiracy to Circumvent

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(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

- (1) calls or aids in calling or organizing the closed meeting...;
- (2) closes or aids in closing the meeting to the public...; or
- (3) participates in the closed meeting,

The First Exception

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A governmental body may not conduct a private consultation with its attorney except:

(1) when the governmental body seeks the advice of its attorney about:

- (A) pending or contemplated litigation; or
- (B) a settlement offer; or

The First Exception

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(2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.

Others in Closed Session

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“... the commissioners court may include the county auditor in a closed discussion of litigation or settlement offers if it determines that the auditor is necessary to the discussion, that the auditor's interests are not adverse to the county's, and that the auditor's presence is consistent with the attorney-client privilege....”

Others in Closed Session

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If, however, a court subsequently finds that, because of the auditor's presence, the communications are not privileged, then the commissioners court may also be found to have violated section 551.071 of the Government Code."

A Closer Reading

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Gov't body may not conduct private consultation with its attorney except:

(1) When ... body... seeks the advice of its attorney about:

(1) Pending or contemplated litigation; or

(2) A settlement offer; or

(2) [TDRPC] conflicts with this chapter.

Excluding Adversaries

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Governmental bodies may admit to executive sessions ... those officers and employees ... whose presence is necessary to effective communication with the attorney.

Furthermore, the governmental body may not admit to its closed discussion of litigation those third parties who are adversaries or whose presence would otherwise prevent privileged communication from taking place.

Excluding Members of the Body

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“When one member's disagreement with the board leads him to invoke the adversary system of justice against the rest of the board, there is little likelihood that a composite judgment on the matter can be reached through discussion. Thus, no injury is done to the policy entitling all board members to attend all board meetings if the plaintiff board member is excluded from the board's private consultations with its attorney.”

The AG's advice:

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"... a public officer holds a public trust, and he should discharge his duties with honesty and integrity. Given these responsibilities, a public officer who is suing or planning to sue his governmental body should avoid using his public position to secure access to information related to the litigation, for example, by voluntarily refraining from attending executive sessions regarding the litigation and from accepting confidential documents related to the litigation."

The AG's advice:

“... a public officer holds a public trust, and he should discharge his duties with honesty and integrity. Given these responsibilities, a public officer who is suing or planning to sue his governmental body should avoid using his public position to secure access to information related to the litigation, for example, by voluntarily refraining from attending executive sessions regarding the litigation and from accepting confidential documents related to the litigation.”

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