

# Fifty Shades of Blue:

Who Do Police Legal Advisors  
Really Work For?

# Police Legal Advisors



deal with various areas of law such as:  
criminal, employment, civil liability,  
administrative, municipal, contract, family and  
countless other laws.

Whether we work for or with the  
Police Department,



Advisors still represent  
the City.



# What do the rules say?

Texas Disciplinary Rules of Professional Conduct

## **Rule 1.12 Organization as a Client**

*(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.*



The rules recognize the fact that we will  
report to or accept direction from a

**“duly authorized constituent,”**

but we must remember that our true client is  
the city.



This is where  
the lines  
get blurry

I need this  
to be  
confidential!



# What should you do?

You need to immediately remind the person that you represent the city and as long as this conversation does not conflict with that obligation, we are good.

While most of the time the individual members employed by the city and the city itself will have the same interests.



What about the circumstances when the interest is not the same?

# Rule 1.06 Conflict of Interest: General Rule

- *(a) A lawyer shall not represent opposing parties to the same litigation.*
- *(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:*
  - *(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or*
  - *(2) reasonably appears to be or becomes adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.*
- *(c) A lawyer may represent a client in the circumstances described in (b) if:*
  - *(1) the lawyer reasonably believes the representation of each client will not be materially affected; and*
  - *(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.*

# Rule 1.12 Comments

*4. There are times when the organization's 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. 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. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.*

# In short...

*...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.*

*Care should be taken to assure that the individual understands...*



## Two possible scenarios:

- 1) In the course of the officer's duties, followed appropriate policies and guidelines, **or**
- 2) Officer did not follow policy.

(Reality- Shades of Blue – there could be other more complicated scenarios, but it's case by case.)



Advisor must align himself with  
the best interest of the city.

If at all possible, best practice is to avoid conflicts up front!



The rules suggest open and frank disclosure.

## **Rule 1.12 Organization as a Client**

*(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.*

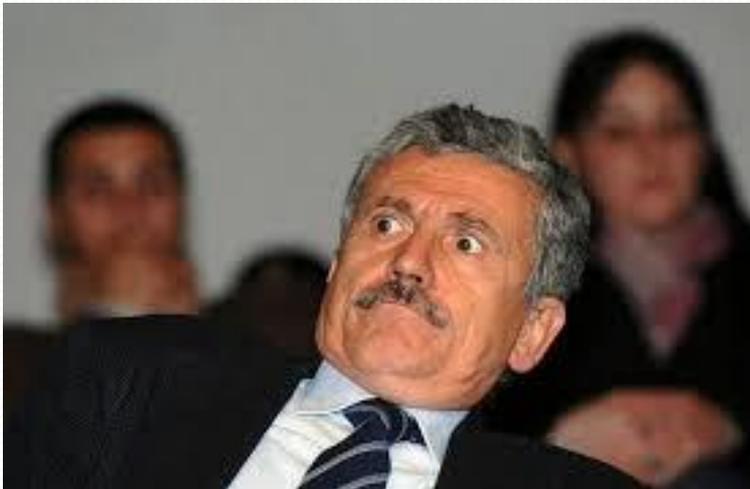


The advisor should always be prepared to remind the people he works with of who his true client is. He should have a statement prepared and ready for those situations.

Personal relationships within the entity that you represent should be at a minimal to avoid conflicts. Something as simple as being Facebook friends can create conflict or put you in the position of snitch.



What happens when there is a criminal investigation of an employee or city official?!?



## Rule 1.02 Scope of Objective of Representations

- *(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.*
- *(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.*

## Rules 1.02 Continued...

*(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.*

*(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.*

## Rule 1.12 Organization as a Client

- (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 lawyer's representation of the organization.*

## Rule 1.12 Continued...

(c) *Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall **first** attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the **seriousness of the violation** and its consequences, the scope and nature of the lawyer's **representation**, the responsibility in the organization and the apparent **motivation** of the person involved, the **policies** of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:*

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; 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 that can act in behalf of the organization as determined by applicable law.

The advisor must attempt to resolve any violation by addressing the concern within the organization. The rules suggest attempting to resolve the matter with the party involved, but also recognizes that if there is not an appropriate response, the attorney has the duty to pursue up to the highest authority within the organization.



If the employee or official investigated operated outside the scope of their employment or violated internal policies, then the individual is not acting on behalf of the city. It is likely that he no longer falls under the umbrella of client.



Since Police Legal Advisors work closely with law enforcement, who are likely the ones investigating the employee, the advisor may be privy to information not generally available to others.

Confidentiality becomes very important.



## Rule 1.05 Confidentiality

*(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.*

*(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:*

## Rule 1.05 Continued...

- 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, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.*
- 2) *Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.*
- 3) *Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.*
- 4) *Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.*



Along with criminal investigations, an internal investigation is usually running parallel. With an investigation of a police officer, there will be *Garrity* statements made requiring the internal investigation to be confidential from any other criminal investigation.

Again, confidentiality plays an important role.

In addition, the advisor must be careful to not be so involved as to make himself a witness. Once the advisor becomes a witness, it may prevent him from proceeding as the city's representative in a hearing or litigation dealing with that same matter.

The Rules address the  
Lawyer as a Witness  
in Rule 3.08, which states:



## Rule 3.08 Lawyer as Witness

*(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:*

*(1) the testimony relates to an uncontested issue;*

*(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;*

*(3) the testimony relates to the nature and value of legal services rendered in the case;*

*(4) the lawyer is a party to the action and is appearing pro se; or*

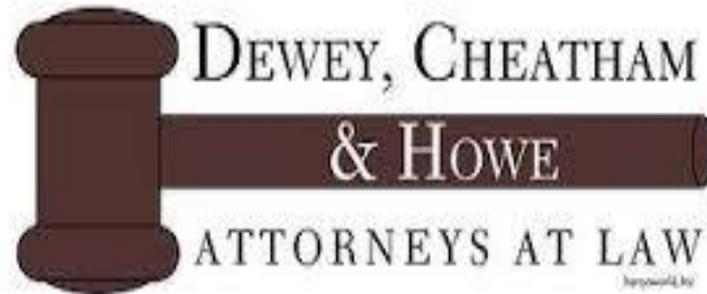
*(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.*



In addition to criminal and internal investigations, there could be civil litigation.

Many times civil lawsuits require the plaintiff to choose between the employee or city. With the deeper pockets, it is common for the plaintiff to choose the city. However, in cases where both may be sued, it is possible that the case may turn into blame-shifting by the parties. In these cases, dual representation would not be possible.

# What are the Advisor's duties if he leaves his position?



This can be a bit tricky if the advisor chooses to practice in the same jurisdiction. He should be well aware of this duties to the former client before taking on new clients.

## Rule 1.09 Conflict of Interest: Former client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

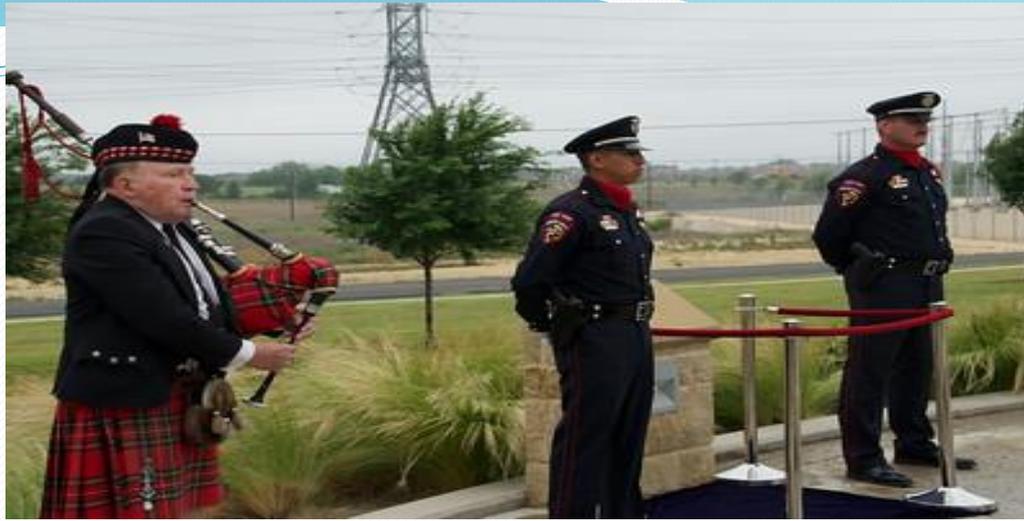
(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

*(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.*

## Rule 1.06 Conflict of Interest: General Rule

*d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.*



Police Legal Advisors are lucky to work in the field of law enforcement and participate, to some degree, in helping to improve the communities we live in.

Although Legal Advisors have confidential communications with individual police officers and administration at the police department in the course of advising them on matters of law, it is possible to maintain the professional obligations to the client, the city.