

ETHICS CONSIDERATIONS FOR GENERAL COUNSEL UNDER “ATTORNEY/WITNESS” RULE

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MEET IMA A. SKIKKIR

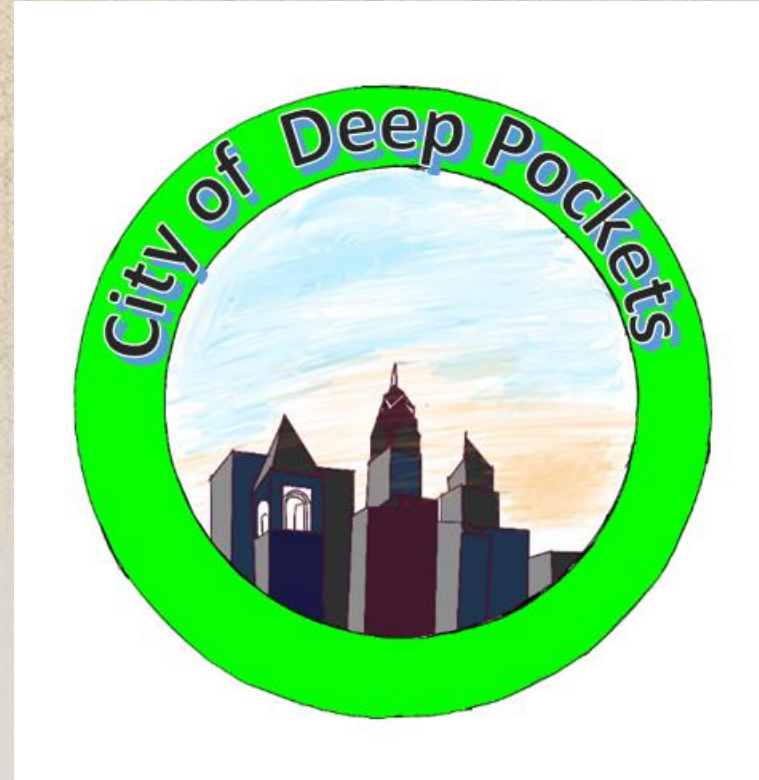
City Attorney for Deep Pockets,
Texas



BACKGROUND

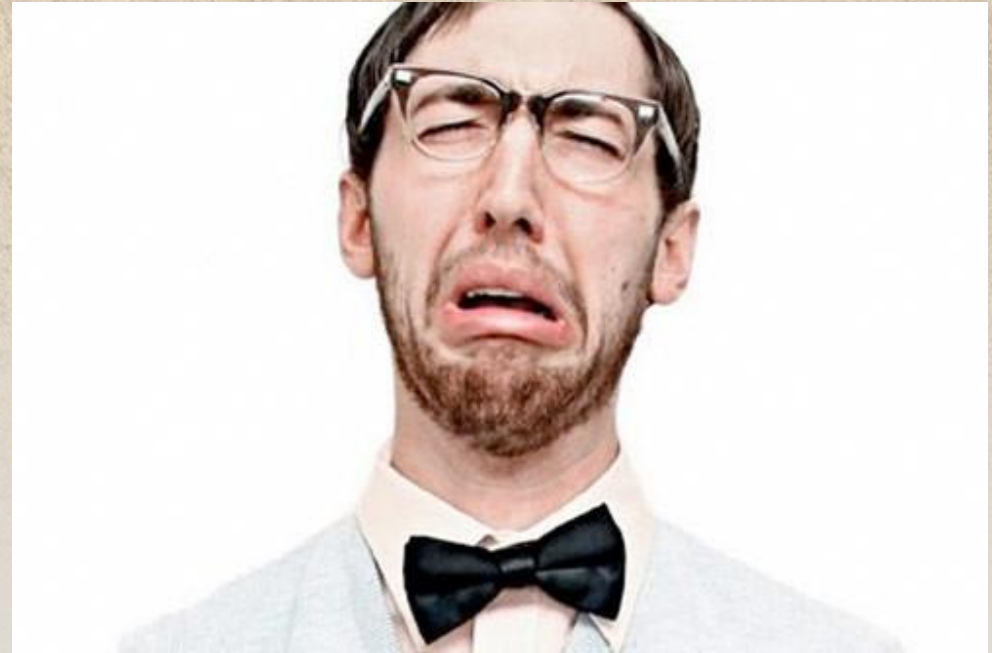
- Darrell Developer wants to bring Big Chain Store to Deep Pockets
- Requests a zoning change
- Always brings lawyers to meetings
- Mayor wants Ima to be intricately involved

ULTIMATELY GOT DONE



MR. LINGWHINIR – LOCAL RESIDENT

- Snivv Lingwhinir – local resident and regular at council meetings
- Files lawsuit to hold zoning ordinance void
- No coverage
- Mayor wants Ima to defend



MSJ HEARING

- Ima writes MSJ
- Snivv does not file response
- At MSJ hearing, Snivv files Rule 3.08 motion to disqualify

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:*

CONTINUED

- (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. or

CONTINUED

- *(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.*
- *(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.*

SOME KEY ELEMENTS

- *Under (a) - witness necessary to establish an essential fact*
- *on behalf of the lawyer's client*
- *Before a tribunal (this includes SOHA, admin, other adjudicatory fact finders)*

ADVERSE FACTS

- Sub (a) does NOT require an attorney to be forced to testify to an adverse fact
- Sub (b) does involve testifying about an adverse fact
- Sub (c) applies to both

OFFICIAL COMMENTS ARE HELPFUL

- One of the key concerns is the confusion that potentially can result when the lawyer is allowed to serve as both an advocate and a witness for his or her client. (Comment 4)
- Witness = facts
- Lawyer = advocate
- Mainly for sub (a)

COMMENT 2

- If testimony will be substantially adverse to the client, paragraphs (b) (compelled to furnish testimony adverse to client) and (c) (without client's consent) provide the governing standard. In other situations, paragraphs (a) (essential fact witness) and (c) (without client consent) controls.

COMMENT 8

- This rule does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal.

COMMENT 10

- While procedural disqualification is possible, the comment notes “ it should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice.”

IMA'S TAKEAWAYS

- Prepare in advance for possibility;
- Separate out office attorneys for possibility (or have separate outside litigation counsel);
- Disqualification vs. Ethics Violation
- Get client's consent

BY PLANNING AHEAD IMA WAS VICTORIOUS AND AVOIDED ETHICAL COMPLAINTS

