



# CITY ATTORNEYS AND THE ATTORNEY-CLIENT RELATIONSHIP

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# Why important?

- Whose interests do you represent/advocate for?
- To whom does the attorney-client privilege apply?
- How does all of this implicate your duties as a lawyer under the disciplinary rules?



# Who is your client?

- Mayor
- City council
- Individual councilmembers
- City's governing structure
- City government
- The city
- The public at large



# Things to consider

- Does it matter whether you're the actual city attorney or an assistant city attorney?
- Does it matter how you got your position (i.e., elected vs. appointed)?



# What do the rules say?

TDRPC 1.12(a): “A lawyer employed or retained by an organization represents the entity.”

- You do not represent any city employees in an individual capacity
- BUT, you have an attorney-client relationship with individuals in their official capacity as city employees



## Comment 3

“When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.05.”



## But, relationship can be confusing!

- TDRPC 1.12(e): “In dealing with an organization’s . . . employees . . . 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.”

- Comment 4
- Consider an Upjohn warning when interviewing employees during an investigation or otherwise





# Big Takeaway

YOU DO NOT WANT TO  
INADVERTENTLY CREATE AN  
ATTORNEY-CLIENT RELATIONSHIP  
WITH A CITY EMPLOYEE OR ANYONE  
ELSE!



# Formation of Attorney-Client Relationship

- Relationship may be created by contract OR it may be implied by the actions of the parties
- Determination of whether there has been a “meeting of the minds” must be based on objective standards of what the parties did and said and not on their alleged objective states of mind



# Formation of Attorney-Client Relationship

- If you are not careful, you may unwittingly form an attorney-client relationship with a city employee
- This could pose ethical problems, as well as hamper any investigations or other work for the city

*State v. Martinez*, 116 S.W.3d 385 (Tex. App.—El Paso 2003, no pet.)



# It's not just city employees, but also the public

- TDRPC 4.03: “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”



# Duties to the City as its Attorney

- TDRPC 1.12(b): “A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:
  - (1) [an employee] 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;



# Duties to the City as its Attorney

- (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.”
- Comments 6 and 7



## Duties to the City as its Attorney: Comment 9

- “When the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved.”



## Duties to the City as its Attorney: Comment 9

- “Although in some circumstances the client may be a specific agency, it is generally the government as a whole.”
  - “For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or or the government as a whole may be the client for the purpose of this Rule.”





## Duties to the City as its Attorney: Comment 9

- “Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.”



# Potential Conflicts

- Ethics opinion 567
  - Know who your clients are, but also be aware of actual or potential conflicts of interest per TDRPC 1.06(b)(2)
- Advising different constituents