

ETHICAL ISSUES WITH CITY COUNCILS WHO DO NOT (WANT TO) GET ALONG

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SOCIETY HAS CHANGED

- Historically, little dissention among City Council Members.
- Access to more information – some good and some bad.
- Politics now taught on cable television.
- Opposing viewpoints can be a positive or absolutely destructive.
- City attorneys have a unique position that allows us to be a part of the solution.

THE QUESTIONS

- Who is the attorney's client?
- Who does the attorney take direction from?
- Who does the attorney report to?
- What duties does the attorney have if the interests or actions of the person who is giving the attorney direction becomes contrary to the interests of the city as a whole?
- Are communications with any individual going to be confidential?



THE BASICS

A lawyer who is employed or retained by an organization represents the entity, and not the individual officers or employees.

The lawyer shall proceed as reasonably necessary in the best interests of the organization.

A lawyer shall first attempt to resolve violations of legal issues by taking measures within the organization.

A lawyer shall explain the identity of the client when the client's interests may be adverse to officer or employee.

CONFLICT IN COUNCILS

- We are often placed in the position of refereeing, mediating or resolving disputes.
- Lawyer must understand role, obligations and ethics when disputes arise.
- Determine when individuals interest are adverse to the City.
- Understand when you must recuse yourself.
- Use your ethical obligations to provide steady, consistent leadership.

SCENARIO 1

- Council Member loses election but attends future meeting as a private citizen advising municipal judge during discussion on Judge's possible reappointment.
- Municipal judge proposes several changes which would not be permissible under current law.
- City council requested to go into executive session to receive legal advice from City Attorney.
- Former council member filed criminal complaint against current council members and the city attorney for violations of open meetings laws, which were investigated and presented to Grand Jury.



ETHICAL ISSUES

- Rule 1.06(b)(2) notes that a lawyer shall not represent a client where the client's interests are or could become limited by the lawyer's or their law firm's own interests.
 - A lawyer defending himself could be adverse to the client's interest – remembering that technically the client is the city.
- Rule 3.08 notes that a lawyer shall not accept or continue employment in a contemplated or pending proceeding if the lawyer is or may become a witness necessary to establish an essential fact on behalf of the lawyer's client.
- City hired separate counsel to investigate and respond on behalf of the city, while each council member offered the opportunity to retain separate counsel for themselves.
- Separate counsel interviewed all council members and city attorney regarding the legality of the executive session to receive legal advice. All were informed of their Fifth Amendment rights to remain silent and not participate in interviews.

SCENARIO 2

- Statutorily created elected board (hospital district) comprised of six members. Statute specifically makes three members a quorum.
- Historically, meetings were comprised of three members with the other three elected members rarely showing up.
- When three new members were elected to replace the long-absent members, remaining three quit coming to meetings (thinking it avoided a quorum).
- When three new members continue conducting business as a quorum, original remaining three Board members sued the other three to prevent them conducting business.

ETHICAL ISSUES

- With allegation of illegal meetings and actions that were potentially void or voidable, there is definite conflict that affects the entity.
- With potential three versus three tie on any potential vote, who does an attorney take direction from? Under Comment 9 to Rule 1.12 confidentiality must be addressed, and all board members would likely have a right to information and advice from board attorney.
- Under 1.12(b), the board attorney has a duty to try to resolve the conflict internally. When that fails and three individual members sue the other three members individually, the board attorney must recuse themselves from the matter and the individuals hire their own attorneys related to the dispute.
- Significant issues avoided by not having the hospital district as a party.

SCENARIO 3

- Council member openly and knowingly violating city code of ordinances.
- Council member repeatedly posts on social media that city ordinances were illegal and unenforceable.
- Council member requested opinion from city attorney confirming that his legal interpretation was correct.
- Ultimately entire council asked for legal opinion on whether the ordinances in question were in fact illegal and unenforceable.

ETHICAL ISSUES

- Under 1.12(a) the attorney represents the entity, and not any individual official or employee. It was likely proper to resolve a point of contention between members of the council.
- Individual council member did not have authority to “void” a portion of the code of ordinances nor to communicate that through his official Facebook page.
- Under 1.12(b), the city attorney has a duty to try to resolve the conflict internally. When that fails and individual council member continues the dispute he must be cautioned to seek his own counsel for the dispute.
- In prosecution of code of ordinances violation, the city attorney and municipal judge recused themselves because of the relationships involved and the fact that the attorney could become a material fact witness. Counsel was in fact subpoenaed for trial.
- At all times each council member was cautioned that their communications with the city attorney on this topic would be shared with the others so as to avoid any confusion or misunderstanding.

SCENARIO 4

- City Council member's wife files lawsuit on behalf of minor daughter against the city.
- In another city, a City Council member hires an attorney for nine citizens (none related to him) to sue the City.
- Do council members have the right to participate in executive sessions discussing the pending litigation?

ETHICAL ISSUES

- A lawyer cannot zealously pursue his client's interests if a person involved with an opposing party is able to hear and participate in attorney discussions. See Preamble at Paragraph 3.
- Under 1.05 a lawyer shall not knowingly reveal the confidential information of a client.
- Exclude them from the meeting under a point of order.

SCENARIO 5

- City council member sues city, city employees and partners of the city attorney.
- No allegations are included in the suit regarding the attorney's legal services or any acts or omissions of the attorneys.
- In related matter, another plaintiff has numerous documents only available to council members.
- Possible reasons for including the lawyers are to disqualify them from representing the city or to establish venue elsewhere. Service of process was never attempted.
- Also, could have been an attempt to breach the attorney-client privilege since Plaintiff was alleging a conspiracy.

ETHICAL ISSUES

- Rule 1.06(b)(2) notes that a lawyer shall not represent a client where the client's interests are or could become limited by the lawyer's or their law firm's own interests.
 - A lawyer defending himself could be adverse to the client's interest - remembering that technically the client is the city.
- Rule 3.08 notes that a lawyer shall not accept or continue employment in a contemplated or pending proceeding if the lawyer is or may become a witness necessary to establish an essential fact on behalf of the lawyer's client.
- Separate counsel provides an opportunity to best protect the interests of the client by providing an unbiased representation and investigation of the facts, both good and bad.

SCENARIO 6

- Mayor and Council Member, without knowledge of other Council Members, meet with City Manager to gauge interest in her resigning.
- Following meeting, Mayor calls to tell two council members what happened at meeting. Council Member called other two.
- One of those council members (big supporter of City Manager) decides contact violated open meetings laws and seeks 1) advice from City Attorney and 2) to file criminal charges against Mayor and City Council Member.

ETHICAL ISSUES

- Council member should be encouraged to report any legitimate concerns they have to law enforcement. An attorney cannot be seen as trying to prevent anyone from reporting potential criminal conduct.
- Under Comment 9 to Rule 1.12 confidentiality must be addressed, and all council members would likely have a right to information and advice from city attorney.
- Under 1.12(a) the attorney represents the entity, and not any individual official or employee. In this type of dispute it is easy for either side to claim city attorney is representing personal interests of certain council members against others.
- Under 1.12(b), the city attorney has a duty to try to resolve the conflict internally. This resolution should happen in the context of a called meeting.
 - When that fails and the individual members maintain their positions, the board attorney must recuse themselves from the matter and the individuals hire their own attorneys or let prosecuting attorneys handle the matter.

SCENARIO 7

- Dysfunctional city council (without a city manager) that, by agreement and understanding, allows all council members to contact attorney.
- Sometimes directly (and otherwise indirectly) all calls focus on undermining other council members for the perceived benefit of positions taken by the calling council member.



ETHICAL ISSUES

- There is always a question of how information is transmitted from the council member receiving it to others on the council or employees of the city.
 - This process is inefficient and leads to possible open meeting violations when one council member starts relaying legal information to the others.
- Under Comment 9 to Rule 1.12 confidentiality must be addressed, and all council members would likely have a right to information and advice from board attorney.
- Under 1.12(a) the attorney represents the entity, and not any individual official or employee.
 - In this type of dispute it is easy for either side to claim city attorney is representing personal interests of certain council members against others.

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