

COMPLIANCE TO CONVICTION:
COLLABORATIVE LEGAL STRATEGIES FOR
EFFECTIVE CODE ENFORCEMENT

Texas City Attorney's Association
2021 Summer Conference
Austin, Texas

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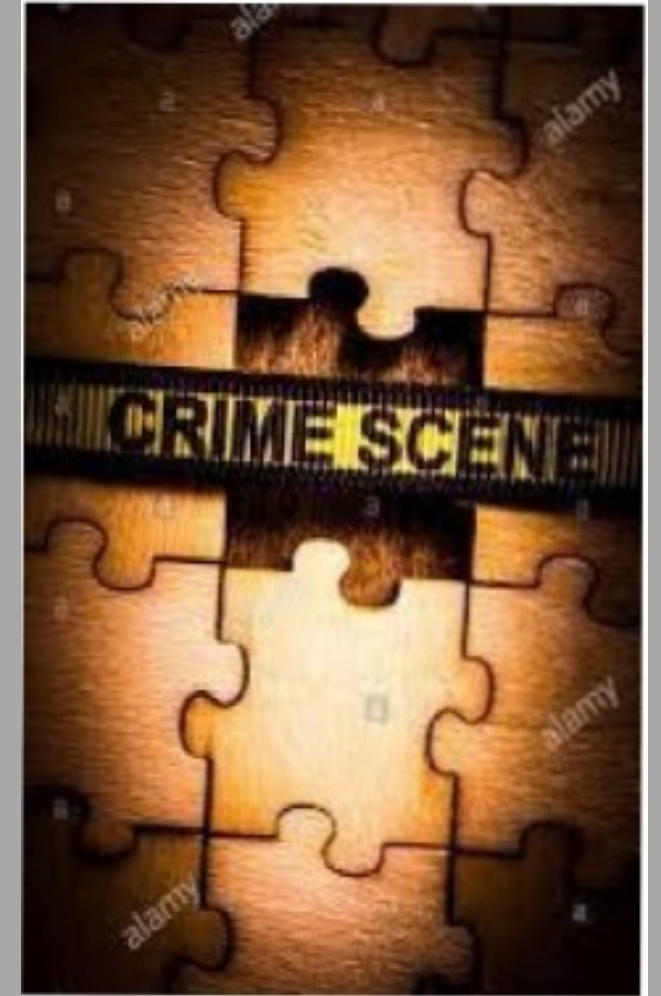
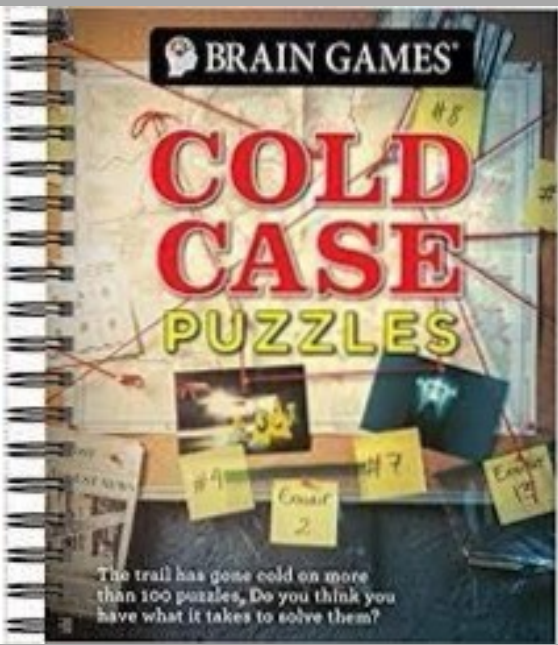
Overview



- Role of the City Attorney in Code Cases
- Collaboration beyond Code
- The Big Picture

Role of the City Attorney in Code Cases





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Attorneys

- What are you?
 - Problem Solvers
- How?
 - Identify problem.
 - Establish common goal.
 - Find solution.



Identifying the Problem Begins with your Client



- Know Your Client
- Texas Disciplinary Rules of Professional Conduct
 - Rule 1.12 – Organization as Client
 - Cmt. 9 – “Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context”

City Reps as “client”



- City professional staff, i.e. Code Officials & Inspectors
- Communication is critical
- Establishing internal process for case referrals and developing strategy approach
- Try to get on the same page

Criminal Prosecutions vs. Civil Enforcement Action

<u>Issue</u>	<u>Criminal</u>	<u>Civil</u>
Burden of Proof	Beyond a Reasonable Doubt	Preponderance of Evidence
Personal identification	Required	Not necessary, except for notice requirements
Defendants	<ul style="list-style-type: none"> • Owner/Tenant/Manager • Individual defendant allows FTA/Warrant • Corporation convicted if properly served and fails to appear but service and compliance more difficult 	Can serve through secretary of state or use long arm
Detail of Ordinances	Defense attorneys/frequent fliers	Most judges focus on result / big picture
Posture of the Case	<ul style="list-style-type: none"> • Each violation separate, every day; • Multiple cases get attention quickly; • Extraneous to prove ownership, knowledge 	Deal with all violations at property in one case; Consider history of Def and property

Criminal Prosecutions vs. Civil Enforcement Action

<u>Issue</u>	<u>Criminal</u>	<u>Civil</u>
Testimony of Defendant	5 th Amendment Right Not to Testify	<ul style="list-style-type: none"> • Subpoena and call Def • Trier-of-fact can consider failure to testify
Result	<ul style="list-style-type: none"> • Fines, court costs, Class C • Deferred Disposition with condition of compliance • Reduced fine incentive for compliance • Separate criminal case for Failure to Appear 	<ol style="list-style-type: none"> 1) Injunctive relief 2) Civil penalties
Post judgment relief	Fine; Capias Warrant	Judgment collection; liens in some cases; contempt power
Timelines	<ul style="list-style-type: none"> • Compliance is the primary goal • Court summons prompts compliance • Most resolved with 1-2 court settings 	<ul style="list-style-type: none"> • TRO – immediate hearing • Temporary Injunction – within weeks • Permanent Injunction – 1 year+

Achieving the Client's Objectives



- Establish reasonable client expectations
- Explain different processes available for enforcement
 - Pros/Cons of each
- Get buy in

Seeking Client Authorization

- When is this needed?
- Executive Session briefing – legal advice
- Council Resolution – Authorizing the City Attorney’s Office to file suit (or ratifying suit in emergency/TRO situation)
- Settlement authority





Collaboration Beyond Code



All the Pieces

- How to avoid missing pieces?
 - **CONNECT** all the players.
 - **CONSIDER** everyone's unique objectives, responsibilities, challenges, and skills.
 - **COLLABORATE** to identify problems, define goals, and find solutions.
- **“Collaborate”** = work jointly to produce or create something”
 - (also “to cooperate traitorously with an enemy”)
- **“MDT”**
 - Mountain Daylight Time
 - Management Discovery Tool
 - Mutually Detectable Target



MDT IN CODE ENFORCEMENT



Goals in Code Enforcement

- FOR CITIZENS

- Identify the problem
 - Community expectations
 - Health and safety
- Find the solution
- Abate the problem
- Compliance

- FOR THE CITY

- Create the Law
- Enforce the Law
- Minimize risk of liability



Identifying Common Goals

- Citizens: *Don't want to see homeless people.*
 - City: Reduce crime related to homelessness, connect with resources, protect constitutional rights, avoid civil liability.
- Citizens: *Get rid of shady businesses.*
 - City: Reduce crime, protect lawful businesses, avoid civil liability.
- Citizens: *Get rid of unsightly, hoarding neighbor.*
 - City: Compliance with Prop Maintenance, Building, Fire Codes; reduce health and safety risks; address mental, physical, and financial needs of owner.

Land Mines – Creating the Law

- **Not recognizing it's a crime.**
 - Penalty up to \$2,000, every day, every violation.
 - Defendant can go to *jail* for failing to appear / comply with court order.



“To See That Justice Is Done”

Prosecutor represents the State of Texas.

2.02 Texas Code of Criminal Procedure

It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done.

They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.”



Land Mines – Creating the Law

- **Unclear ordinance.**
 - **Insufficient notice of elements of offense**
 - Person responsible – Define “Owner”
 - Prohibited or required *conduct*
 - Mental culpability
 - Definitions
 - Exceptions vs. Affirmative Defenses
 - **Confusing language.**
 - Wordy Lawyer Speak
 - Lengthy court charging instrument and jury charge





**COURT OF CRIMINAL APPEALS
SUBMISSION SCHEDULE**

October 2, 2013

**Don Hunt Courtroom
Texas Tech Law School
1802 Hartford Avenue**

ORAL ARGUMENT

9:00 a.m.

**PD-0001-13
PD-0202-13**

JAY SANDON COOPER

COLLIN

VIOLATION OF CITY PROPERTY CODE

Paul K. Pearce for the State
Jay Sandon Cooper for the Appellant
STATE

AP-76,703

**JAIME PIERO COLE
CAPITAL MURDER**

HARRIS

Amy Martin and Heather Lytle for the Appellant
Bridget Holloway for the State
APPELLANT

PD-1581-12

**BRIAN SHAWN GILLEY
AGGRAVATED SEXUAL ASSAULT OF A CHILD**

WICHITA

Julia Bella for the Appellant
John Gillespie for the State
APPELLANT

Land Mines – Creating the Law

- **Model Codes**
- Notice requirements



Land Mines – Creating the Law

- **Inconsistent with constitution or state law**
 - Cannot negate constitutional rights.
 - Don't regurgitate state law that may change.
 - Don't use language in higher offense and make it a Class C ordinance violation.

Land Mines – Enforcing the Law

- **Ethical Responsibilities**

- Cannot direct enforcement agent.
- Who do you represent?
- Prosecutor's Oath vs. Legal Advice
- Brady
- Credibility of witnesses



Land Mines – Enforcing the Law

- **Burden of proof**

- Beyond a Reasonable Doubt, Unanimous

- **Criminal Laws**

- Code of Criminal Procedure
- Rules of Criminal Evidence
- Discovery vs. Open Records

- **4th Amendment**

- Protect against unreasonable search and seizure by govt.
- Can Code Enforcement rely on info from a private citizen?

- **Lack of Training**



The Big Picture



The Big Picture

- Write a ticket. Get a fine.
 - Problem solved?
- **What** else and **who** else can help solve long-term problems?



Civil enforcement of code violations

- Authority under TLGC Chapter 54 and/or Chapter 214 (for dilapidated/substandard buildings) to file civil lawsuits for code violations in:
 - Municipal Courts of Record
 - District and County Courts
- Section 54.012 of the Texas Local Government Code lists categories of violations for which you may bring a civil action in district and county courts
 - health and safety
 - zoning
 - criteria for land subdivision (i.e. platting)
 - interior configuration for sexually oriented businesses
 - storm water
 - flood plain management
 - animal care and control
 - water conservation



Standard for Injunction under Chapter 54



- Section 54.016 of TLGC allows, upon a showing of “substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant,” an injunction that:
 - Prohibits or requires specific conduct
 - Compels the repair or demolition of a structure by owner or authorizes city to remove the structure and recover removal costs

Additional Causes of Action Related to Code Enforcement

- Demolition of Historic Structures – Tex. Local Gov't Code § 315.006
- Restraint of zoning violation – Chapter 211 of Tex. Local Gov't Code
- Enforcement of Massage License Statute – Chapter 455 of Texas Occupations Code
- Abatement of public health nuisances, including a restaurant's unsanitary condition - Tex. Health and Safety Code § 341.011 et seq.
- Criminal Nuisance Abatement – Tex. Civil Prac. And Rem. Code § 125.001 et seq.

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Opportunities for Collaboration



- ***MASSAGE ESTABLISHMENTS***
- **Texas Penal Code – Prostitution**
- **Texas Occupations Code, Chapter 455**
 - Therapist must be licensed, U.S. citizen or resident with valid work permit
 - Must display license, photo, sign related to trafficking
 - Make records available upon request
 - No residency on premises
 - Peace officer (police/fire marshal) may enter massage establishment **at reasonable times** for inspections incidental to issuance of license **or officer considers it necessary to ensure compliance** with Chapter 455.

Opportunities for Collaboration

- ***MASSAGE ESTABLISHMENTS***

- Broader criminal responsibility; Charge persons with ownership in or care, custody, or control over property
- **Zoning** – Prohibited Use as Residential Use
- **Property Maintenance**
 - Damage to structure, water leaks, electrical, mechanical, trash, sanitation, ingress/egress, fire extinguisher
- **Administrative Search Warrants**
 - Affidavit based on info from police

Opportunities for Collaboration

- ***MASSAGE ESTABLISHMENTS***
- **Injunction and Civil Penalty – Chapter 455 Tex. Occupations Code**
 - Restrain person who **appears to be or threatening to violate** Chapter 455 or is owner/operator of unlicensed massage establishment
 - Civil Penalty \$1,000-10,000, each violation, every day
 - Can recover attorneys' fees and expenses
- **Criminal Code Enforcement**
 - Train police on inspections/prostitution stings to recognize code violations
 - Police provide observations/photos to code enforcement
 - Search warrant (confidential informant to protect undercover officers)
 - Class C cases from observations made by code enforcement during warrant
- **Owners/Managers**
 - Civil penalties and criminal fines (up to \$2,000 fine, every violation)

Opportunities for Collaboration

- **HOARDING**
- **Code Enforcement**
 - Property Maintenance
 - Unsanitary, Infestation, Outside Storage
- **Include in collaboration**
 - Police backup during administrative warrant
 - Adult Protective Services
 - Child Protective Services: Duty to report *suspected* abuse or neglect of a child
 - Police Mental Health Coordinator and Neighborhood Police
 - Family of owner/occupant
 - Non-profit providers for mental health, substance abuse, veterans



Opportunities for Collaboration

- ***HOARDING***

- **Class C Misdemeanor Offenses - Fines**

- Court order that criminal fines be satisfied by assessment/counseling.

- **Building Standards Commission, Texas Local Government Code § 54.036**

- Property substandard, public nuisance
- Property unsafe and unfit for human habitation
- Order occupants to vacate and timeline to bring into compliance
- If fails to bring into compliance, the city authorized to abate
- Attach lien for costs of abatement



Use all the tools in your code enforcement toolbox

