

The Mayor v. the EDC

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Factual Background¹

The City of Clairemont, Texas is a home rule municipality located in Kent County with a population of less than 7500.² The city formed the Clairemont Economic Development Corporation, a Type B EDC (the “EDC”), with no member of the city council or city staff serving on the EDC board.

You serve as the general counsel for the city on an as-needed basis. You do not normally attend city council meetings but have in the past when requested. You also do not normally attend the EDC board meetings but have done so and have provided legal advice to the EDC in the past including assisting the EDC in purchasing the property for a business park.

The city council meets on the third Thursday of the month with the EDC always meeting during lunch on the Fridays preceding council meetings in case the council needs to act on a matter approved by the EDC board.

The relations between the mayor and the city council are strained. The city council is looking for new economic development opportunities in the city and wants to invest in upgraded infrastructure. An economic development project like a large truck stop would most likely be viewed favorably by the city council as it would bring new employment opportunities as well as new tax dollars that could be used to improve infrastructure.

The city manager and the mayor do not get along. Twice the mayor has placed an item on the agenda to fire the city manager but when the item was presented it failed to even receive a motion from any council member.

Phone Call #1

On the Thursday afternoon before the EDC board meeting, the city manager calls you and asks that you attend the executive sessions of the upcoming EDC board meeting and following city council meeting. The city manager has been unable to attend the last couple of EDC board meetings but apparently an economic development project is reaching the point that full briefings of both bodies are necessary.

¹ This factual scenario is entirely fictitious and any resemblance to any actual situation, city council, EDC board or person(s) is purely coincidental.

² Actually, Clairemont is considered a ghost town located in Kent County, Texas. While once the county seat, it was largely abandoned when the railroad went through nearby Jayton. Other than a few scattered residences and a blinking yellow light at the intersection of a county road and a state highway (the only intersection), the only significant structures include the first stories of the formerly two story courthouse and jail. The jail is accessible and is worth the stop if you are ever in that area. According to the 2000 census, Clairemont had a population of 15. *Clairemont, A Silent History* by Scott White, P.H.D., Ranch Record, Spring 2010; Handbook of Texas - <https://www.tshaonline.org/handbook/entries/clairemont-tx>

The EDC is in negotiations with a company that wants to construct a very large truck stop/convenience store in the EDC's business park. The business park property was recently purchased by the EDC and is located outside the city but adjacent to the city limits. This project would be the first development in the business park and the EDC hopes it will serve as a catalyst for other development in the business park. The EDC hopes to voluntarily annex the entire business park into the city after the agreement is finalized to secure the necessary utilities and other infrastructure.

The city manager is highly in favor of the project and has been working closely with the executive director of the EDC and the chairman of the board to get the project completed. No final performance agreement or other agreement has been reached with the truck stop company but negotiations have reached a point that serious and detailed discussions need to be held with the EDC board in executive session.

The mayor, in private discussions with the chairman of the EDC board, the city manager and the executive director of the EDC, is adamantly against the project. According to the mayor, the city doesn't need the additional truck traffic and stress on the city's streets and he is also worried about the environmental impact the truck stop will have on the city. It should also be noted that the mayor owns the only other gas stations in town each with a small convenience store attached to the gas station.

Issues to Consider

Who is my client?

At this point in our scenario, a few issues are raised that seem pertinent. A good first step is for the attorney to remember is who is the actual client. While it seems obvious that your client is the City of Clairemont, what does that mean and how does it manifest itself in this scenario? Currently, the administrative head of your client, the city manager, is talking to you favorably about an issue that the elected head of the governing body of your client, the mayor, is against. You are also being asked to attend the executive session of an incorporated non-profit board where confidential information will be discussed. While it may seem obvious at first glance who your client is, it probably is a good idea to always ask yourself that question and when in doubt look to the rules.

Texas Disciplinary Rules of Professional Conduct Rule 1.12 governs when your client is an organization. The rule reads as follows:

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.

(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.

(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.

(d) Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(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.

TX ST RPC Rule 1.12.

Please note the following official comments to Rule 1.12 (not necessarily copied in their totality):

The Entity as the Client

1. A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.
2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officers, employees, shareholders, members, and others serving in capacities similar to those positions or capacities.
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.
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

Government Agency

9. The duty defined in this Rule applies to governmental organizations. However, 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. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. 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 the government as a whole may be the client for purpose of this Rule. 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. This Rule does not limit that authority. See Preamble: Scope.

At this point in our scenario, although the governing body of the city council has not taken official action, it is apparent that the city manager is acting in his official capacity and the communications between the attorney and the city manager should be protected. It is appropriate for the city manager to seek out the legal counsel of the city's attorney in this scenario.

What about attending the executive session of the EDC? Can you represent both the EDC and the City of Clairemont?

In answering this question, it is helpful to get a better understanding regarding the statutory foundations for economic development corporations.

- The EDC works on behalf of the city. Tex. Loc. Gov't Code Ann. § 501.051
- The EDC is a nonprofit corporation that “has the powers, privileges, and functions of a nonprofit corporation” incorporated under Texas law subject to the Development Corporation Act and “the control of the governing body of the corporation's authorizing unit.” Tex. Loc. Gov't Code Ann. § 501.054
- The EDC may sue and be sued in the EDC's name. Tex. Loc. Gov't Code Ann. § 501.060
- The board of directors are appointed by the city council and they “may remove a director for cause or at will.” Tex. Loc. Gov't Code Ann. § 501.062
- Bylaws must be approved by the city council. Tex. Loc. Gov't Code Ann. § 501.064
- The city council must approve all EDC “programs and expenditures” and “annually review any financial statements of the corporation.” Plus, the city council is “entitled to access to the corporation's books and records at all times.” Tex. Loc. Gov't Code Ann. § 501.073
- The EDC board may only amend its certificate of formation with the approval of the city council but the city council can amend the EDC's certificate of formation at their “sole discretion” without the consent of the EDC board. Tex. Loc. Gov't Code Ann. § 501.301 and § 501.302
- All assets on dissolution transfer back to the city. Tex. Loc. Gov't Code Ann. § 501.406; § 505.354
- A municipal attorney is an authorized individual to receive the required training regarding the operation of the EDC. Tex. Loc. Gov't Code Ann. § 502.101(a)(1)
- The board of directors of a Type B corporation are appointed by the city council and may be removed by the city council “at any time without cause.” Tex. Loc. Gov't Code Ann. § 505.051
- Up to four of the members of the Type B board of directors can be employees, officers or city council members of the city creating the Type B EDC. Tex. Loc. Gov't Code Ann. § 505.052

Looking at the provisions of the Development Corporation Act, it is clear that the Legislature intended EDC's to function on behalf of and as part of the city creating the corporation. The city's control and authority over the EDC in most fundamental aspects is clear. The city and the EDC

the city created are inextricably intertwined. In addition to the control the city exercises over the EDC, the statute requires a municipal attorney to receive training on the operation of an EDC every two years. It would be difficult to reconcile this requirement in the statute unless it was assumed the municipal attorney would be involved with the city's EDC in some official capacity.

Even so, since the EDC is a separate legal entity, it is still necessary to apply the Disciplinary Rules of Professional Conduct when determining whether an attorney who represents the city can also represent the city's EDC.

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 become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's 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.

(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.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Please note the following official comments to Rule 1.06

Loyalty to a Client

1. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer's firm from doing so. See paragraph (f).

Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

TX ST RPC Rule 1.06

As pointed out in Rule 1.06, it is possible to represent two entities so long as the lawyer reasonably believes the representation of each entity will not be materially affected and each entity consents to the representation after full disclosure. This is further spelled out in the comments in non-litigation situations that when determining if you can represent both the city and the EDC you would look at the likelihood of a conflict arising as well as whether the interests of the two are aligned.

In many cases between the city and the EDC, the likelihood of a conflict arising is remote and the interests are usually aligned. Based on the facts presented up to this point, it seems that the interests of the parties are still aligned and the likelihood of a conflict between the entities is relatively remote.

Phone Call #2

After talking with the city manager, you decide to give the chairman of the EDC a courtesy call to let him know you plan on attending the EDC board meeting including executive session. In doing so, you get an earful from the EDC chairman and matters get more complicated.

First, unbeknownst to the city manager, the EDC has decided to retain its own legal counsel for this particular project due to the apparent expertise of the attorney with economic development projects with truck stops. The attorney has attended the last two EDC meetings and she will be attending the EDC meeting the next day as well.

Secondly, while the city manager hasn't been able to attend the meetings, the mayor has been attending including the EDC's executive sessions and has been very vocal in his opposition to the project. In fact, at the last meeting, the mayor said something to the effect that "he owned the EDC" and he would make sure that the project was not approved. The mayor then left the meeting. In his absence, the EDC apparently discussed the fact that "around town" there was speculation that the mayor was selling out his gas stations to another party but the price was contingent on the mayor effectively having a monopoly in town for selling gas. The EDC board determined that the mayor's interest was in conflict with the EDC's and directed their attorney to seek and obtain a temporary restraining order to prevent the mayor from attending the executive session of any EDC meeting where this project would be discussed. According to the board chairman, she had already filed for the TRO and was planning on having the mayor served before the next EDC board meeting. The mayor, when hearing what the EDC board had done, simply replied, "I'm not worried, the city has a great lawyer and he'll take care of me on this."

The EDC chairman does not want you to attend the EDC meeting since they had an attorney and she was taking care of the situation.

Based on this information, what are your responsibilities as the city's attorney?

There are several steps that may seem practical and may be the correct course of action – calling the attorney for the EDC and seeing what facts she can provide and what she has filed on behalf of the EDC – might be a logical first step. However, even if this might be proper, it would benefit the city's attorney to first look at the applicable Rules of Professional Conduct.

It has already been shown in Rule 1.12(e) and the comments related thereto that the city's attorney representing an organization must "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.**"

Rule 1.02(a) states that "a lawyer shall abide by a client's decisions: (1) concerning the objectives and general methods of representation;" TX ST RPC Rule 1.02. Does this apply to the EDC chairman's request that you do not attend the meeting and if so, what about the city manager's request that you do attend the meeting?

Furthermore, in Rule 1.02 (f) "[w]hen 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." TX ST RPC Rule 1.02.

In this case, assuming that the comments made by the mayor are true and he has an expectation that the city's attorney will represent him on an individual basis, it might be necessary for the city's attorney to have a discussion with the mayor explaining the limits of the representation the city's

attorney can actually provide in this scenario. Depending on the facts, there may be enough information that the mayor's personal interests may likely become "materially and directly adverse" to the interests of the EDC and the city. TX ST RPC Rule 1.06.

Also, a conference with the city manager regarding the EDC chairman's request not to attend the meeting and a phone call to the attorney the EDC retained seem to be appropriate as well.

Phone Call #3

You made a couple of attempts to contact the mayor to discuss some of the issues relating to this project but have not been able to get in touch with him. Considering the fact that the EDC had hired an attorney, since the EDC chairman told you it wasn't necessary for you to attend the EDC board and since the city manager would be attending the EDC meeting, after discussing the matter with the city manager you decided not to attend the meeting.

Later that afternoon, your secretary informs you that the mayor is on the telephone and would like to talk to you. Your first thought is that this is good – he is finally returning your earlier phone calls and you will get a chance to discuss your concerns with him. However, when you get on the telephone, he tells you he has been arrested and he needs a lawyer.

Apparently, when the mayor appeared at the EDC meeting, the EDC's attorney had him served with a temporary restraining order she had obtained earlier that morning that prevented the mayor from attending the EDC's executive session. After receiving the TRO, the mayor left the meeting and the EDC went into executive session to discuss the truck stop project. While in the parking lot, as the mayor started the engine on his truck, he thought to himself "the city created the EDC, the EDC is supposed to pursue the best economic interests of the city, I'm the mayor of the city, I can go to this meeting regardless of any TRO". He promptly went back into the building, barged into the EDC executive session and refused to leave. The EDC chairman called the police chief who came to the meeting, reviewed the TRO, confirmed with the mayor that he was refusing to leave the meeting and arrested the mayor.

The mayor now wants you to represent him since you are the city's attorney. Before you get a chance to say anything he also tells you that he thinks the police chief was too rough on him during the arrest probably because the mayor had recently married the police chief's ex-wife.

What do you tell the mayor?

At this point, you now have personal information that the mayor's interest is adverse to the city and it would be impossible for you to represent the mayor on his criminal case without taking a position adverse to your client, the City of Clairemont or the EDC. Based on Rules 1.01, 1.06, and 1.12 you inform the mayor that you are not a criminal defense attorney and because you are the city's attorney you cannot represent him in this situation.

Conclusion.

The only conclusion to offer is that the city attorney needs to review and keep the Disciplinary Rules of Professional Conduct in the back of their mind when working with their clients. What started out as a simple request by the city manager to attend a couple of meetings because of an exciting economic development project quickly escalated into something much more. While this is obviously a fictitious factual scenario, when representing municipalities, it is common for 'additional facts' to present themselves requiring the city's attorney to constantly reassess the situation and the attorney's ethical responsibilities.