

Ethical
Conflicts
with
Individual
Council
Members

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Objectives

- Identify types of council members likely to cause ethical conflicts.
- Pinpoint the specific ethical standards likely to arise.
- Discuss your ethical obligations in responding to these scenarios.

The NOB

“No offense, but...”



- “No offense, but...” translates to “I am about to offend you...”
- “No offense, but I don’t think you need to be at our meetings from now on; I’m sure you have better things to do and we’ll be just fine.”
- From whom do you take direction?
 - Under Rule 1.12(a) specifies that lawyer representing an organization takes direction from the organization’s “duly authorized constituents.”

Captain Hearsay

“Somebody told me...”



- Captain Hearsay has all kinds of insights that wouldn't be permitted into evidence. A font of out-of-court statements offered for the proof of the matter.
- Habitually cites other – often unnamed – people to challenge you or to support his own theories.
- Rule 2.01 requires a lawyer, when representing a client, to exercise professional judgment and to render candid advice.
- Rule 8.04 prohibits a lawyer from engaging in criminal conduct that reflects adversely on lawyer's fitness to practice.

The Scofflaw

aka The Freedom Fighter



Scenario:

One of your councilmembers believes in

FREEDOM

and therefore, does not abide with city ordinances. Consequently, he is cited for an ordinance violation and is being prosecuted in municipal court.

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Cont'd:

- Do you, as City Attorney, have a conflict of interest?
 - Rule 1.06 (Conflict of Interests) deals with conflicts among *clients*
 - Rule 1.12 (Organization as Client) provides that you represent the organization as an entity, distinct from its constituents. The council member is not your client.
 - Also – when prosecuting in municipal court, you represent the State of Texas (not the City). The court belongs to the state; the City is merely hosting the court.

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Cont'd:

- Since Scofflaw is represented by counsel, can you knowingly allow your code enforcement staff to interact with him about his case?
 - Rule 4.02 prohibits a lawyer from communicating with a person represented by counsel about the subject matter of that representation. It also prohibits a lawyer from counseling their client from making communications that are devised and controlled by the attorney.
 - Rule 5.03 prohibits a lawyer from directing, encouraging, or permitting supervised non-lawyers to engage in conduct that the lawyer is prohibited from doing.

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Cont'd:

- SBOT Professional Ethics Committee Opinion #600 (2010)
 - If the agency's counsel does not supervise enforcement staff, no violation of 4.02.
 - If the agency's counsel does supervise enforcement staff, lawyer is obligated to prevent communications between staff and represented person.

The Opposing Party

“With friends like this...”



Council member brings suit against the City for something stupid.

- City attorney should avoid discussing the litigation with the councilmember. But what if the litigious council member seeks the City Attorney’s advice about something unrelated to the litigation?
 - Probably okay, but make sure plaintiff’s counsel is aware of the outreach.
 - When organization’s interests are adverse to those of constituent, Rule 1.12(d) requires lawyer to explain lawyer’s obligation/role in order “to avoid misunderstanding.”

The Opposing Party

“With friends like this...”



Council member brings suit against the City for something stupid.

- Can you exclude a city council member from closed session?
 - Yes, if the council member is formally adverse to the City in a formal proceeding.
 - Probably not, if the council member is merely threatening to sue.
 - GA-0334: exclusion of an elected official from participating in a matter before the board on which he or she serves “raises important policy issues concerning the powers and duties of elected and appointed board members and conflicts between their public responsibilities and their personal interests...” The A.G. has opined that an elected official that has sued the board on which he sits may be excluded from an executive session to discuss the pending litigation brought by the official, but that there is “no authority on excluding a board member who merely contemplates litigation against his board.”

The “Expert”



The expert knows everything about all topics, and willingness shares this knowledge (often to your detriment).

- Your job is to know more about the law than your client.
- Comment 8 to Rule 1.01: To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education.

Need someone to deal with those
conflicted council members?

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