



MY CLIENT, MY ENEMY?
Ethical Challenges
When Representing Cities

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About the Presenter: *Alan Bojorquez*

- Managing Partner, Bojorquez Law Firm
- Texas Tech University: JD, MPA & BA
- Past- President, TCAA
- Board Member, IMLA
- Author, *Texas Municipal Law & Proc Manual (7th Ed.)*



TM
BOJORQUEZ
LAW FIRM, PC

TexasMunicipalLawyers.com

Why are *you* here?

- To get your minimum hours of CLE annually?
- To get your minimum hours of “Ethics”?
- To be a better public servant & practitioner?



Why am / here?

Because of this! A Plat & Eminent Domain dispute.

COPY

of _____ County, Texas
 _____ 2016
 At _____ 9:50 AM.
 _____ District Clerk

Buyers → _____

 Plaintiffs,

Council Member / Seller v. _____

 REAL ESTATE,

 TITLE COMPANY, _____

Mayor & City Manager → TITLE INSURANCE CO., CITY OF _____

 ALAN
 BOJORQUEZ, and _____
 Defendants.

Me → _____

§ IN THE DISTRICT COURT
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 §

_____ JUDICIAL DISTRICT

OF TRAVIS COUNTY, TEXAS

FINAL JUDGMENT

Why am I here?

& because of this!

Council Member



Working w/o Permit

OFFICIAL NOTICE OF ORDINANCE VIOLATION

Notice #: 0012

Date Notice Issued: 08 / 12 / 2021 Time: 8:45a

In the Municipal Court, [redacted], Texas

Offense Date: 08 / 09 / 21 Time: _____

Name: [redacted] [redacted] [redacted]

Address: [redacted] [redacted] [redacted]

City: [redacted] State: TX Zip: 79602

Home Phone: 512-[redacted] Work Phone: _____

Place of Business: [redacted] Construction

DOB: na / / [Juvenile / Adult] Sex: (M / F) Race: A / B / C / H / Other

DL: na / / License Plate: na / /

Vehicle Information: na / / / / / /

In the name and by the authority of the State of Texas: I, the undersigned affiant, do solemnly swear that I have good reason to believe that on or about the above date and before the making and filing of this notice, in the territorial limits of the City of [redacted] County, Texas, the above-named person then and there unlawfully committed the following offense(s) against the peace and dignity of the State:

VIOLATION 1: work w/o permit VIOLATION 2: _____ VIOLATION 3: _____

Planning & Development

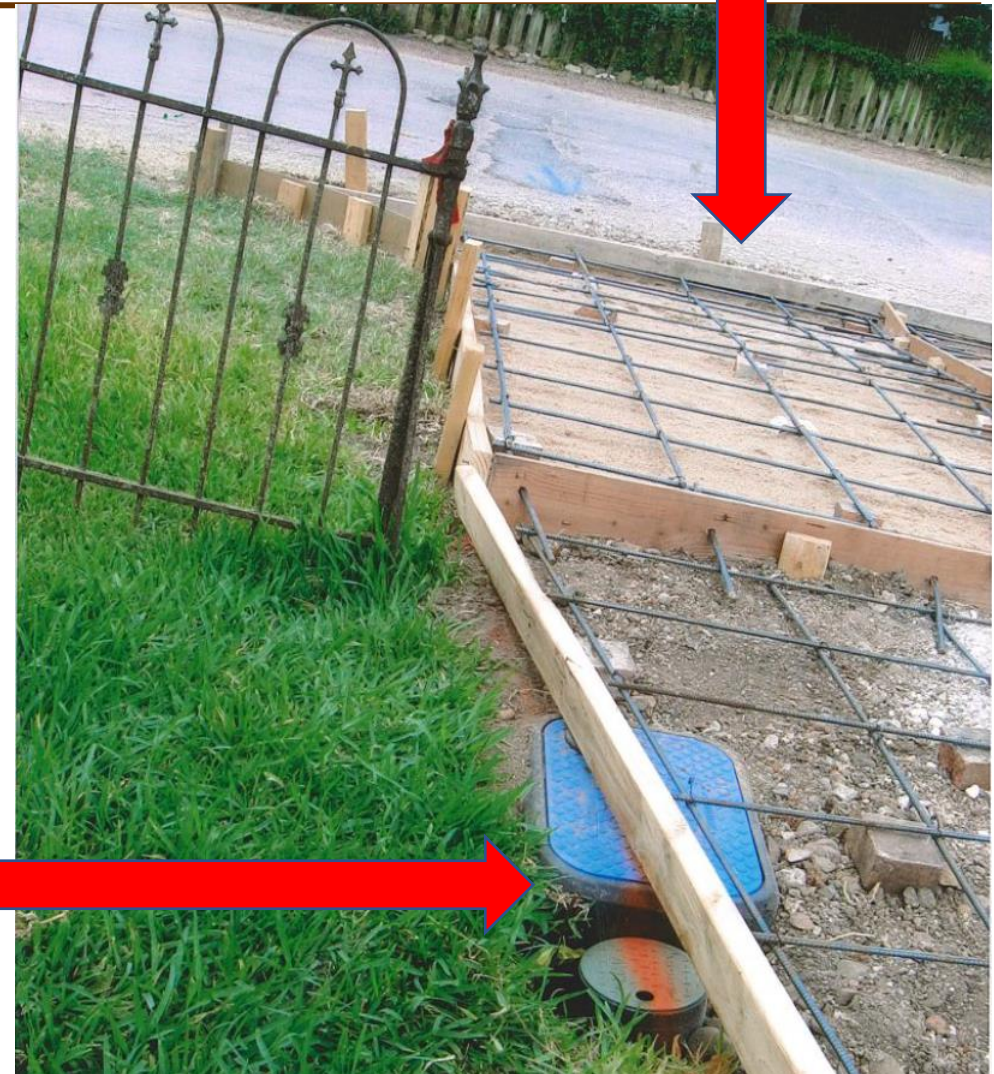
Why am I here?

Oh, we can't forget this!

Council Member is a General Contractor in town & this is their client's project

Yes, that's a *Water Meter!*

That's going to be the driveway



Why am I here?

& finally, ...

LOCAL

City Council strips some duties from Mayor after ethics reprimand

City Council on Monday night limited and stripped some duties from Mayor during a packed meeting attended by both supporters and opponents of the mayor.

mayor receives reprimand

Mayor faces ethics complaint filed by City Council

CITY COUNCIL CURTAILS MAYOR POWERS AMID FUNDS MISMANAGEMENT ALLEGATIONS

mayor loses responsibilities after interference with investigation on misuse of public funds

Texas Disciplinary Rules of Professional Conduct

Rule 1.12 Organization as a Client

A lawyer employed or retained by an organization represents the *entity* &

accepts direction from an entity's duly authorized *constituents*, ...



Texas Disciplinary Rules of Professional Conduct

Rule 1.12 (Comment 9) Government Agency

Duty defined in this Rule applies to ***Governmental Organizations***





The End

(And they all lawyered happily ever after)



***Ooops, ... wait,
perhaps there's more to it***

(It ain't that simple!)

What do you do when ...

- Mayor attends the City Secretary's consultation with City Secretary's *personal* attorney prior to the City Secretary's disciplinary hearing before the Council?
- Council Member sues the City?
- Mayor Pro Tem is married to a city department head whose position is scheduled to be abolished by the Council?



What do you do when ...

- Mayor is convinced the City Manager is like the *Chief of Staff* & the City Attorney is akin to *White House Counsel*?
- Council votes to file a City Ethics Complaint against a Council Member?
- Council Member is accused of having an affair with CEO of corporation / vendor that receives city funding?



What do you do when ...

- Chief of Police secretly records Mayor trying to influence investigation of traffic accident (Mayor didn't witness)?
- Council Member is being prosecuted for plumbing work that he did as professional plumber *without* the required permits?
- Council Member is being prosecuted by city for *Public Intoxication* after being in a brawl at the city's annual *Goat Cookoff*?



Who's my client? *My client is a Thing!*

Rule 1.12(a):

- Lawyer representing an **Organization** represents the **Entity**
- **Comment 1.** Lawyer represents the Org as distinct from its directors, officers, employees



Who's my client? *My client is People?*

Rule 1.12(a):

- **Comment 2.** The constituents of an org client are its directors, officers, employees, etc (thus mayor, council, staff)
- **Comment 6.** When constituents of the org make decisions, ordinarily the lawyer must accept those decisions even if their utility or prudence are doubtful



What if the *Thing* & *People* conflict?

Rule 1.12(a):

- **Comment 4.** When the Org's interests are **adverse** to those of *Constituent's*, lawyers should advise that Constituent that lawyer can't represent them & they can obtain *independent legal rep*
- **Comment 9.** When the client is a governmental organization, a different balance may be appropriate between maintaining **confidentiality** & assuring that a wrongful official act is **prevented** or **rectified**, because public business is involved



Universal Definition of “Client”?

- “no universal definition of the client of a governmental lawyer is possible”

*Restatement (3rd) of the Law
Governing Lawyers § 97, CMT.
C (AM. L. INST. 2000)*

- Possible identities for the client of a government lawyer: **(1)** the public, **(2)** the government as a whole, **(3)** the branch of government in which the lawyer is employed, **(4)** the particular agency or department in which the lawyer works, & **(5)** the responsible officers who make decisions for the agency

*S Fortney, Ethical Quagmire for
Governmental Lawyers, 69
Wash. U. J. L. & Pol'y 17 (2022)*

- The nature of government lawyers’ work can vary a great deal depending on the level & branch of government & position held by the attorney. Many lawyers act in **representational** capacities, while others find themselves in more **regulatory & adjudicative** roles

*R. Cramton, Lawyer as Whistleblower:
Confidentiality & the Government Lawyer,
5 Geo. J. Legal Ethics 291 (1991)*

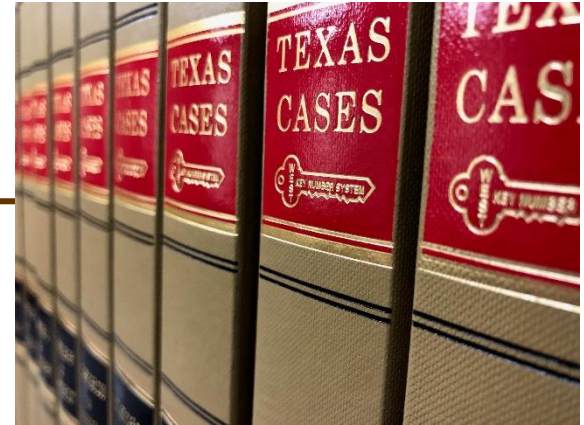
January 6th Hearings

*The client of the US DOJ is not the American people.
The one & only client of the DOJ is the
United States government*

- **Richard Donoghue** (*paraphrased*)
 - former US Attorney for E Dist of NY
 - former Acting Deputy Attorney General



Attorney-Client Relationship



Texas cases on Formation of the Relationship

- Expressly created by contract or implied from actions of parties
Tanox v Akin Gump
- Determination of whether there is a **meeting of the minds** must be based on objective standards of what the parties did & said, & not on their alleged subjective states of mind
Terrell v State
- Question of fact exists when the evidence does not conclusively establish the existence of an Attorney-Client relationship
Sutton v Estate of McCormick

Accusations of “Conflict” for City Atty!

Rule 1.01. Competent & Diligent Representation

Lawyer can't neglect a legal matter entrusted to them or fail to carry out completely the obligations the lawyer owes the client

Comment 6. Lawyer should act with ***commitment & dedication*** to the interests of the client & ***zeal*** in advocacy on the client's behalf

Rule 1.02. Scope & Objectives of Representation

Lawyer shall abide by ***client's*** decisions concerning objectives & methods of representation

Rule 1.06. Conflicts of Interests

Lawyer can't represent a person if it involves a substantially related matter & interests are materially & directly adverse to another client

Adverse Interests w/i City Hall?

- Can a lawyer represent more than one Department w/i a city?
- Can a lawyer represent more than one city Board / Committee / Commission? Does P&Z get its own attorney?
- What happens when staff's position is contrary to that of the citizen Advisory Board?
- What about Boards / Commissions that have statutory functions (*sovereign duties*, eg Board of Adjustment)?
- What do you do when the Council goes after the Mayor?



Confidentiality

Rule 1.05. Confidentiality of Info:



- Privileged & Unprivileged info
- A lawyer shall not knowingly reveal clients' confidential info to a person the client instructed is not to receive the info or anyone else [exceptions, eg, client reps, lawyer's employees]
- Exceptions to prevent death, harm, crime, fraud, etc
- A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, info relating to representation of a client

Scope of the Privilege

- Defined by **Tex R Evid 503**
- Intended to allow unrestrained communication & contact between attorney & client in all matters in which attorney's professional advice or services are sought
- without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding
- Rule 503 protects confidential communications made for purpose of facilitating rendition of professional legal services to client

Identity of the Client

“Pricklier Issue” of the role of a Government Lawyer: ***ID of the client!***

State v Martinez

- **Client:** Person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer

Tex R Evid 503(a)(1)

- **Representative of the Client:** (a) a person having authority to obtain professional legal services, or to act on advice rendered, on behalf of client, or (b) any other person who, for purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for client

Tex R Evid 503(a)(2)(A)

Local Rules can provide Guidance

- City Attorney shall be legal advisor to & attorney for **all** officers of the City acting in their **official capacities** & shall represent the **City & its departments** in all legal proceedings

Bastrop, TX Charter, §3.10

- City Attorney shall serve as chief legal advisor to the **Council**, the City **Manager, directors of City departments** & other City **officers & agencies**. City Attorney shall represent the City in all legal proceedings & shall perform any other duties prescribed by this Charter, ordinance or law

Buda, TX Charter, §5.02

Local Rules (cont'd)

- The City Council shall appoint a competent & duly licensed attorney practicing law in the state of Texas, who shall be the City Attorney. The City Attorney shall hold office at the pleasure of the City Council. The City Attorney, or such other attorneys selected by the City Attorney with the approval of the City Council, shall represent the City in all litigation. The City Attorney shall be the legal advisor of, & attorney & counsel for, the City & ***all officers & departments*** thereof
- The City Council may appoint a competent & duly licensed attorney practicing law in the state of Texas, who shall be the Deputy City Attorney. The Deputy City Attorney shall hold office at the pleasure of the City Council. The Deputy City Attorney, or such other attorneys selected by the Deputy City Attorney with the approval of the City Council, shall conduct all ***prosecutions*** in the Municipal Court

Hutto, TX Charter, § 4.04

Clarifying the Lawyer's Role

TRDC Rule 1.12. Comment 4 warns us there are times when entity's interest may be *adverse* to that of certain officers or employees

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 can't represent such constituent, & that such person may wish to obtain independent (personal) legal representation



Beware of *Blurred Lines*

- City Employees often seek the City Attorney's guidance (advice)
- Sometimes as an ***attorney*** & sometimes as a ***friend***
- Maybe they each vent their frustrations & criticisms of others
- Perhaps they agree that a situation, policy or practice is wrong
- Government Lawyer's job is difficult because it includes a duty to:
 - keep sight of their ***Client***,
 - clarify their ***Role***, & sometimes
 - suggest ***Private Counsel***

State v Martinez, 116 SW3d
385, 392–95 (Tex App 2003)



We Don't Represent *Individual* Members?

But we do represent the *majority*?

- City Attorney does not represent individual Council Members
- Representation of Ethics Board may be materially & directly adverse to interests of specific Council Members against whom complaint was filed, those Council Members are not clients of the City Attorney
- However, if ethics complaint(s) are against a **majority** of Council Members, & Council *hires / fires the* City Attorney, there might be a conflict (*probably*)

Excluding Adverse Parties from Exec

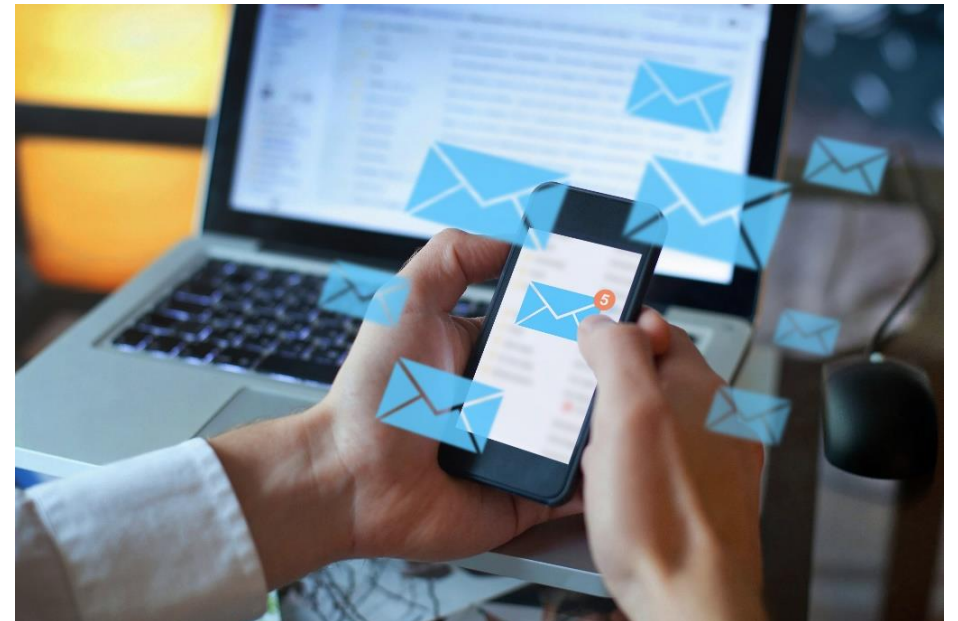
- Persons with interests adverse to that of the governmental body:
 - Are they permitted in Closed Meetings (Executive Sessions)?
- You may (*must?*) exclude Council Members who have sued the City, but can't if only threatened to sue?
- What if Executive Session is about a Council Member's conduct?



Op Tex Att'y Gen Nos JM-238
(1984) & GA-334 (2005)
Tex Gov't Code Ch 551
Tex Loc Gov't Code Ch 171

Clients on Emails w/ Opposing Counsel

- **Rule 4.02:** *Lawyers should talk to Lawyers!*
 - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer regarding the matter, unless the lawyer has the **consent** of the other lawyer or is authorized to do so by law
- What about when a Lawyer CC's their Client on emails w/ Opposing Counsel?
- What happens when your City Manager emails a Developer & CC's the Developer's Lawyer?



Clients on Emails w/ Opposing Counsel

- **ABA Formal Opinion 503** (Nov. 2, 2022):

In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter ***impliedly consent*** to receiving counsel’s “reply all” to the communication. Thus, unless that result is intended, lawyers ***should not copy their clients*** on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients



Parting Words

- Make training a priority
- Be familiar w/ local rules
- Engage in an ongoing dialogue
- Network w/ honorable colleagues
- Know your place (clarify your role)
- Remember you are part of a team
- Imagine your worst enemy learns all that you've done
- Don't be so insecure or engaged you're reluctant to recuse yourself
- Remember why you got into public service in the first place
- Don't be so eager to please that *you* become your client's problem

