The Ethical Challenges of Representing Organizations

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Introduction: ***The don'ts and don'ts***

Of the fifty-two rules that comprise the Texas Disciplinary Rules of Professional Conduct, thirty-eight rules include the prohibitive phrase "a lawyer shall not". It is difficult to imagine a more proscriptive document. The list of things a lawyer shall not do is made abundantly clear by the Rules, a few examples of which are found below:

A lawyer shall not neglect a legal matter[1];
A lawyer shall not reveal confidential information[2];
A lawyer shall not bring a frivolous proceeding[3];
And so on….

Those rules that don't use this prohibitive phrase generally tend to either convey some generalized duty (a lawyer shall communicate with his client, render candid advice, report misconduct, etc.) or to address some administrative matter (the responsibility of law firm partners, advertising guidelines, bar admission, and so on).

Perhaps the only rule that goes beyond being either a restriction or an aspiration is Rule 1.12 "Organization as Client". Unlike most rules of conduct, Rule 1.12 is direct, yet anticipates likely real-world problems and offers advice for addressing these issues when they arise. The rule offers practical suggestions, implicitly recognizing the ambiguities and uncertainties inherent in representing an organization. Legal practitioners who advise entities should be grateful for the guidance provided by the rule, because this type of representation is fraught with complexities.

The Challenges of Representing an Entity

When an individual walks into an attorney's office and hires a lawyer, the relationship is relatively straightforward: the attorney knows who the client is, keeps that person's communication confidential, respects the client's decisions regarding the direction of any litigation, and, of course, works to protect that person's interests.

When representing an entity, however, things are not quite as simple. If, for example, an attorney represents a city, that lawyer will interact with, and take direction from, any number of elected officials or municipal staff. Which of those people is the client? Which communications are confidential? From whom should the attorney take his direction? What if he receives conflicting direction from two equally legitimate sources within the city hierarchy? And what should the attorney do when the interests of an individual conflict with the interest of the entire city?

Rule 1.12 anticipates these types of problems, and attempts to provide guidance to attorneys facing them. The rule is essentially comprised of three parts. The first section deals with identifying the true client; the second identifies problem areas likely to arise;

[1] Tex.Disc.R.Prof.Conduct 1.01(b).
[2] Tex.Disc.R.Prof.Conduct 1.05(b).
[3] Tex.Disc.R.Prof.Conduct 3.01.

and the third section sets forth remedial measures an attorney should take to address these problems.

Breaking Down the Rule

The first paragraph of Rule 1.12 reads as follows:

> *(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.*

First, the rule makes it clear that the lawyer represents the entity, and not the individual "constituents". Secondly, the rule recognizes the reality that an attorney providing legal representation will interact with individuals within the entity. Additionally, the rule sets forth a duty, in certain circumstances, to protect the interests of the organization itself.

This section, and the comments that correspond to it, address the most fundamental issue involved with representing an entity: what it means to represent the entity. A lawyer represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.[4] However, the rule recognizes the inherent difficulty associated with this situation: namely, that an organization can only speak, act and decide through its members.[5] The result is an attorney-client relationship in which the client is always represented by intermediaries. Accordingly, a lawyer is required "to be concerned whether the intermediary legitimately represents the organizational client."[6]

An attorney representing an entity should also be mindful to clarify his role when dealing with constituents of the organization. There may be situations in which the organization's interests become, or are likely to become, adverse to some of its members. In those circumstances, the lawyer has a responsibility to advise the constituent of the conflict or potential conflict, that the lawyer cannot represent the individual, and that such person may wish to obtain independent representation.[7]

The second paragraph of Rule 1.12 reads as follows:

> *(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:*

[4] Tex.Disc.R.Prof.Conduct 1.12, Comment 1.
[5] Id.
[6] Id.
[7] *See* Tex.Disc.R.Prof.Conduct 1.12(e), and Comment 4.

(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.*

In this section, the rule contemplates the conflicts that arise between an organization and its members, and identifies the situation in which a lawyer *must* take remedial action. Note that rule imputes a duty onto the attorney, *requiring* the attorney to attempt to remedy the situation.

Which situations trigger this obligation? Only those that meet the three-pronged test set forth in section (b). A lawyer must act when a person affiliated with the client has violated, or intends to violate, an obligation to the entity and the violation is likely to injure the entity and is within the scope of the attorney's representation.

So, when a lawyer learns that an officer is about to do something harmful to the organization, what remedial action should the lawyer take? The rule provides the following guidance:

(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 measure 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 for 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.*

When such a situation arises, the lawyer must first determine if the law or any other rule requires disclosure. For instance, the attorney must determine if anything in

Rule 1.05 of the disciplinary rules mandates disclosure. (These obligations will be discussed later in the paper.)

If another law or rule does not require disclosure, then the lawyer should first take measures within the organization to remedy the situation. The lawyer should evaluate the scenario by considering the seriousness of violation and its consequences, the lawyer's role in the matter, the motive of the individuals involved, and any internal policies. Once this evaluation has been made, the attorney should consider the suggestions offered, including reconsideration, procuring a second legal opinion, or referral to higher authority within the organization.

Rule 1.12(d) states that, upon the resignation or termination of the attorney, the lawyer is excused from the remedial measures imposed by the rule, provided that the attorney ends the representation properly.[8] After the attorney-client relationship has ended, any further obligations of the attorney are governed by the rule addressing confidential information.[9]

Rule 1.12(e) imposes a duty on an attorney representing an entity to 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 needed to avoid misunderstanding.

For attorneys advising entities, questions regarding decision-making authority, confidentiality, and conflicting interests are almost assuredly going to arise during the course of the representation. The remainder of this paper will look at these issues, analyzing them from the perspective of an attorney representing a public entity.

Decision-Making Authority

One of the most challenging aspects of advising an entity is ensuring that the constituent from whom the lawyer is taking direction is the duly authorized agent of the organization. Asked simply: who gives the attorney his orders? In the case of representing a municipality, the city attorney must determine if it is the mayor, a councilmember, the city manager, or someone else who is authorized to give direction in any given situation. Often a city attorney will find himself representing numerous subsets of city government, from the planning commission to the parks board to the local ethics panel. Each of these boards and commissions will presumably have its own chairman, empowered with some degree of authority. Members of each board may seek the attorney's counsel, or attempt to direct the attorney's efforts. It is important, therefore, that the attorney remember that the city is his client, and be forthright in asserting that fact lest his role be misunderstood.

[8] *See* Tex.Disc.R.Prof.Conduct 1.15.
[9] Tex.Disc.R.Prof.Conduct 1.05.

Consequently, an attorney should be ever mindful of the admonishments found in Comment 1 to Rule 1.12, which recognizes that an attorney should be concerned whether the constituent legitimately represents the interests of the organizational client.

Confidentiality

Another challenging aspect of advising an entity is determining which communications made between the lawyer and constituents of the client are subject to the attorney-client privilege. In addition to Rule 1.12, it may be beneficial to turn to both the disciplinary rule governing confidentiality, as well as to the Rule of Evidence address the same matter.

Texas Rule of Evidence 5.03 sets forth the lawyer-client privilege. The general rule of privilege applies to communications between a lawyer and representatives of a client.[10] A representative of a client is defined as:

> *(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client; or*
> *(B) any other person who, for the purpose effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.*[11]

Courts have held that the subject matter of an attorney-client communication is immaterial when deciding if the privilege applies.[12] The privilege applies not only to legal advice, but attaches to complete communications between an attorney and the client.[13]

Rule 1.05 of the Disciplinary Rules of Professional Conduct sets forth the guidelines for confidential and privileged information. Confidential information includes both privileged information (that information of a client that is protected by the attorney-client privilege[14]) and unprivileged client information (that information relating to or furnished by a client, other than privileged information, acquired by a lawyer).[15]

Rule 1.05 sets forth the specific instances in which a lawyer may reveal confidential information. For the purposes of this paper, two merit consideration. First, a lawyer my reveal confidential information when the lawyer has reason to believe that it is reasonably necessary in order to prevent client from committing a criminal or fraudulent act.[16] Additionally, a lawyer may also reveal confidential information to the extent

[10] Tex.R.Evid. 5.03(b).
[11] Tex.R.Evid. 5.03(a).
[12] *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 589 (Tex.App. – Dallas 1994, no writ).
[13] *In re Carbo Ceramics Inc*., 81 S.W.3d 369, 374 (Tex.App. – Houston [14th Dist.] 2002, no pet.).
[14] As set forth in Rule 5.03 of the Texas Rules of Evidence or Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates.
[15] Tex.Disc.R.Prof.Conduct 1.05(a).
[16] Tex.Disc.R.Prof.Conduct 1.05(c)(7).

revelation reasonable appears necessary to rectify consequences of client's criminal or fraudulent act in the commission of which the lawyer's services had been used.[17]

When one of an organization's constituents communicates with the entity's lawyers, the communication is protected by the confidentiality requirements set forth in Rule of Professional Conduct 1.05. By way of example, Comment 3 to Rule 1.12 states:

> *"…if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05."*

In one recent case[18], a court considered the status of a report written by an attorney who had been hired by a school district to conduct a fact-finding investigation and deliver a legal analysis of the matters investigated, including any potential liability facing the district. The Court of Appeals held that the entire report was subject to the attorney-client privilege, because the investigation was related to the rendition of legal services.[19]

Another situation faced by many city attorneys was addressed in a recent land use case that focused on confidential communications in light of multiple clients[20]. In this case, as in many municipalities, the city attorney also acted as counsel for the local economic development corporation. The City of McKinney utilized eminent domain in order to acquire land to be used for a multi-purpose development project. The condemnation was contested, and discovery was conducted during the subsequent litigation. The developer argued that, with regard to certain documents, the City had waived its attorney-client privilege because it had disclosed the information to the McKinney Economic Development Corporation. The Court of Appeals held, however, that the privilege had not been waived. In reaching its conclusion, the Court wrote that "the privilege is not waived if the privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication[21]…Where the attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients."[22] The Court concluded that the city and economic development corporation shared a common interest regarding the development project.

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[17] Tex.Disc.R.Prof.Conduct 1.05(c)(8).
[18] *Harlandale Independent School District v. Cornyn*, 25 S.W.3d 328 (Tex.App. – Austin, 2000).
[19] Id. at 334.
[20] *JDN Real Estate – McKinney L.P., Relator. In re City of McKinney, Relator.* 211 S.W.3d 907 (Tex.App. – Dallas, 2006).
[21] Id at 922, citing *In re Auclair*, 961 F.2d at 69.
[22] Id., citing *Harris v. Daugherty*, 74 Tex. 1, 6, 11 S.W. 921, 923 (1889).

Conflicting Interests

When representing an entity, there will inevitably be circumstances in which a constituent's personal interests differ from those of the entity as a whole. These situations are particularly challenging for the counselor. When an entity's interests become adverse to those of one or more of its constituents, a lawyer should advise the constituent that lawyer cannot represent constituent and that outside representation should be sought.

Often an attorney will be asked to advise an individual on whether a conflict of interest exists. This is particularly true for attorneys advising governmental entities, in situations where personal and public interests intersect. In Texas, such conflicts of interest are governed by state law.[23] Rendering advice on the conflicts of interest statute will be part of any city attorney's job. However, this can lead to a variety of ethical issues for the attorney. If, in seeking the attorney's opinion, a councilmember confides something to the attorney, is that information confidential? If the attorney determines a conflict exists for the official, but the officeholder disregards this conclusion, what limitations does an attorney face on disclosing the conflict? In such a circumstance, it becomes imperative that the attorney clarify his role, identity his true client, and explain to the individual constituent the limitations of his representation.

One relatively recent case highlights the importance of a city attorney clarifying his role when dealing with city employees. In *State v. DeAngelis*[24], during an ongoing corruption investigation, an assistant city attorney tape-recorded conversations with an assistant police chief who was a subject of the investigation. During the assistant chief's subsequent prosecution for aggravated perjury, the trial court suppressed the recordings as privileged communications. The Court of Appeals agreed, holding that the conversations were subject to the attorney-client privilege, which is held by the client. In reaching this conclusion, the Court first determined that a privileged relationship existed between the officer and the attorney, who regularly advised individual police officers in their official capacity. The Court next considered the attorney's failure to clarify her role. The Court cited extensively from comment 4 of Rule 1.12, which reads:

> *"4. There are times when the organization's interests may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer 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 discussion between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned."*

[23] Tex. Loc. Gov't Code Ch. 171.
[24] *State v. DeAngelis*, 116 S.W.3d 396 (Tex.App. – El Paso, 2003).

In *DeAngelis*, the Court focused on the assistant city attorney's failure to clarify her role. By allowing the officer to think that their communications were privileged, a confidential relationship was impliedly formed, and the officer was correct in assuming that the discussions were privileged. Had the attorney followed the admonishments in Comment 4 and advised the officer of the potentially adverse interests, the officer would have been in a better position to decide whether, and how much, to confide in the attorney.

In one of the few formal Professional Ethics Opinions[25] on the matter, the Professional Ethics Committee for the State Bar of Texas considered the following question: *" May a lawyer who represents a city render legal advice to an ethics board appointed by the city council regarding the investigation and determination of a complaint against a majority of the members of the city council?"* This type of scenario is not far-fetched for city attorneys. The answer given, however, reveals the underlying complexities of this relationship. The opinion initially considers the scenario (and seemingly endorses the questionable behavior) in light of Rule 1.12:

> *"The city attorney does not represent the individual city council members. Therefore, in representing the ethics board concerning charges against city council members, the city attorney will not violate [the conflict of interests rule]…Although representation of the ethics board may be materially and directly adverse to the interests of the members of the city council against whom the complaint has been filed, those city council members are not clients of the city attorney."*

However, the opinion then turns to analyzing the City Charter in light of Rule 1.06, which governs conflicts of interest, concluding that the representation at issue should be prohibited. Because the city attorney serves (and is compensated) at the pleasure of the city council, investigating *a majority* of the council would violate Rule 1.06, reasonably placing the attorney's own interests at odds with those of his client.

It should be noted that a lawyer *may* represent individual constituents subject to the conflict of interest rules.[26] Consent to conflicting representation must be given by appropriate official of the organization (as opposed to the one seeking individual representation).

Governmental Clients

The comments to Rule 1.12 suggest that a higher ethical standard, or at least heightened scrutiny, may be appropriate for the attorney representing a governmental agency. Comment 9 states that "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."

[25]Tex. Comm. on Prof. Ethics, Opinion 567 (February 2006).
[26] See Tex.Disc.R.Prof.Conduct 1.06, 1.07, 1.08, and 1.09.

The comment goes on to recognize that government lawyers are often subject to specific statutes or regulations, further complicating the resulting obligations. Importantly, the comment states that, in case involving the conduct of government officials, Rule 1.12 does not limit the lawyer's "authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances."

Conclusion

There is an indefinite number of complexities associated with providing legal counsel to an organization. The relationship between attorney and client is more complicated than when representing an individual. Thankfully, the disciplinary rule addressing the representation of an entity contemplates these complexities, and attempts to provide practical guidance to guidance to attorneys facing these dilemmas. Especially for the government lawyer, who must deal with numerous elected and appointed panels, as well as employees of the organizational client, the potential ethical scenarios are limitless. Thankfully, Rule 1.12 provides some guidance with regard to the sensitive issues of the lawyer's role, decision-making authority, confidentiality, and conflicting interests. Above all, a lawyer advising a public entity should bear in mind the heightened standard that requires a delicate balance of client interest and public accountability.