ETHICS

A HOUSE DIVIDED

Presented to the Attendees of
The TCAA South Padre Conference

South Padre Island, Texas

June 10-12, 2009

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(Special thanks to Nathan Akers for his assistance and research)

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Introduction

City representation is founded upon the odd circumstance that we can never meet our client. While the outsider may see the representation of an incorporeal being as a relatively simple matter, as City Attorneys, divining the true intent of the client, and faithfully representing that client brings with it many ethical challenges. These challenges are compounded when the representatives of our client, council members and administrative officials, are at odds with each other. While we all, no doubt, would love to represent cities whose representatives always spoke with a clear and unequivocal voice, such cities are the exception, rather than the rule. While Abraham Lincoln may have proclaimed that "A house divided against itself cannot stand," all too often a divided house is exactly what we have in municipal government.

As City Attorneys, competing individuals or factions within cities often call upon us for our expertise and guidance regarding a myriad of matters. When ethical considerations arise, the Texas Disciplinary Rules of Professional Conduct (the Rules) should act as a guide to assist the attorney. While the Rules do offer some guidance, they often serve as a compass, rather than a map or GPS. The range of ethical issues affecting a City Attorney are not fully addressed by the Rules, but the Rules do serve to point the attorney in the proper direction.

This paper is intended to help a City Attorney use the Rules to address the ethical concerns that arise in City representation.

Method

In preparation for this presentation, a number of interviews were held with experienced municipal attorneys, covering a wide range of ethical topics and hypothetical situations. While there were no "right" answers, patterns began to emerge early in the analysis of the answers. While many questions were answered in the same manner by all interviewees, some situations elicited quite varied responses regarding how an ethical attorney should proceed.

Rather than simply dictate to you what other attorneys thought regarding a variety of situations, the examples contained in this paper constitute those questions that either elicited the greatest difference of opinion regarding how to proceed, or which gave our respondents the most pause in answering the questions.

Names, locations, and events have been altered to ensure anonymity of all concerned.

Authority and Discussion

Rule 1.12

No discussion of the rules related to representing entities can even begin without looking at Rule 1.12. This rule is THE rule related to clients organized as entities.

> **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 lawyers 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 lawyers 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.

In reviewing the rule, we find that as lawyers, we represent the entity as a whole, even though we may take direction from authorized constituents. The rule then goes on to detail when and how a lawyer may take remedial action. These two issues will be discussed in-depth during the examples.

Comment 1 of Rule 1.12 states in part that "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." The comment itself acknowledges the difficulty of entity representation. Sadly, the rule does not describe exactly how or when a lawyer should question whether their intermediary legitimately represents the client. That, for the time being, is left to the discretion of the attorney.

Comment number 4 is also helpful. It states in part, "There are times when the organizations 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." As we can imagine, in a divided council, comment number four may be utilized quite often to clarify the role of the City Attorney, and avoid conflicts of interest.

Comment number 9 is a difficult comment to decipher. It states in part, "When a 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." While not particularly helpful, the comment indicates that maintaining confidentially may be less important for a governmental client, in a circumstance where the City Attorney is attempting to prevent a wrongful official act. Unfortunately, without any clear guidance from the comment or rule, any additional steps that a City Attorney may take to prevent official misconduct by releasing information is done at the City Attorney's own risk.

Rules 1.03 and 1.05

In entity representation, ethical concerns often lie at the junction between rules 1.03, related to confidentiality of information, and rule 1.05, the rule requiring that the client be kept informed. Sadly, the only safe method for resolving the conflict is to ensure that such a conflict never arises.

Rules 1.05 and 1.03 state the following:

> **1.05 Confidentiality of Information**
>
> **(a)** Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
>
> **(b)** Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:
>
> **(1)** Reveal confidential information of a client or a former client to:
>
> (i) a person that the client has instructed is not to receive the information; or
>
> (ii) anyone else, other than the client, the clients representatives, or the members, associates, or employees of the lawyers law firm.
>
> **(2)** Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.
>
> **(3)** Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former

client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the clients representatives, or the members, associates, and employees of the lawyers firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyers associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a clients criminal or fraudulent act in the commission of which the lawyers services had been used.

(d) A lawyer also may reveal unprivileged client information.

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyers employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyers representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Rule 1.03

1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The aforementioned tension between 1.03 and 1.05 can arise when a representative of the City informs the City Attorney of certain information, but wishes for the information to remain a secret from the rest of the City.

This problem is not specifically addressed by the Rules or Comments. However, unless the City Attorney has somehow undertaken independent representation of the constituent, or the constituent reasonably believes that he or she is represented in their individual capacity by the City Attorney, this potential conflict can be avoided.

Examples

EXAMPLE 1: Improper Expenditure of Funds

> The City has a certain fund that can only be expended for certain purposes. The City has sought your advice regarding whether it is permissible to expend the funds on a certain project. You have concluded that such a project is outside of the permissible purpose for which that money may be lawfully expended. Moreover, you have advised the Council that the expenditure of such funds would be a misdemeanor. However, a majority of the council votes to spend the money anyway. What are your ethical obligations?

This example is not a particularly subtle or difficult example. However, it is the one example that Rule 1.12 answers effectively. Under Rule 1.12(b), we know that the City intends to commit a violation of a legal obligation. We know that the violation is likely to result in substantial injury to the City, and the violation is within the scope of our representation. Therefore, under Rule 1.12(b), we must take reasonable remedial actions.

Now that we know that we must take remedial action, Rule 1.12(c) shows us how we go about taking such remedial actions. We must first attempt to resolve the situation internally. Asking reconsideration, and/or drafting a separate legal opinion are both reasonable remedial actions. If such actions do not remedy the situation (i.e. cause the City to change its mind about the expenditures), the lawyer must then determine whether to withdraw from representation, or disclose the information to an outside party.

Disclosure of information is governed by Rule 1.05. Specifically, Rule 1.05(c)(7) allows a lawyer to reveal confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act. Therefore, the lawyer must first determine that the expenditure of funds in not only improper, but also criminal. In our example, the City Attorney has already determined that the expenditure at issue would be criminal. Furthermore, the lawyer must have already attempted to take internal remedial action. Once internal remedial action has failed, the City Attorney may disclose the information to outside parties. The City Attorney is further bolstered by the statements in Comment 4 to Rule 1.12 that indicates that confidentiality may be more readily eliminated when a governmental entity is at issue.

Withdrawal from representation is governed by Rule 1.15. In this case, a lawyer may withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent. Since the conduct of the City is criminal, the City Attorney may withdraw from representation.

EXAMPLE 2: Unauthorized Communications

> In an effort to reduce legal bills, the City Council has adopted a rule that only the Mayor, City Manager, or City Secretary may speak with the City Attorney to seek legal services. However, an employee of the City has called to tell you of potentially criminal wrongdoing by one or more of those three.

Rule 1.03 is particularly on point with this scenario. "A lawyer shall keep a client reasonably informed…" The only WRONG answer to this scenario would be to ignore the employee simply because he was not authorized to discuss the matter with the City Attorney. If, for example, the complaint is regarding the City Manager, a telephone call to the Mayor to discuss the matter would be a good first step. In all likelihood, an executive session will be needed to discuss the matter. Potential criminal activity of a City Manager is a matter of concern to the City, and the simplest way to inform your client regarding that matter is at a City Council meeting in an executive session.

If however, your initial communication with either the Mayor or City Manager is not well received, and they ask you to drop the issue, your obligation is not at an end. Under the first comment to Rule 1.12, as the City Attorney, you must be concerned with whether the intermediary legitimately represents the City. If, as City Attorney, you are asked to simply drop the issue of potential criminal wrongdoing by a high ranking City official, at the very least, one should draft a legal memorandum detailing your conversation with the City employee, as well as your recommendation that the City Council address the issue. At this point it is unclear as to whether criminal wrongdoing has actually occurred, but a City Attorney's obligation under Rule 1.03 requires that he inform the Council of the matter.

Regarding the issue of payment, it is entirely possible that the City will choose to not pay their City Attorney for services rendered as the result of an unauthorized communication from a City employee. However, a City Attorney's ethical obligations under the Rules are not contingent upon payment for services rendered. While it may be unfortunate that the City will fail to compensate their City Attorney for protecting their interests, it is a part of the business of being a City Attorney.

EXAMPLE 3: Executive Session

> During an executive session under section 551.071 (Advice of Legal Counsel), several members of the council use the opportunity to deliberate about the matter. You have cautioned them against doing so in the past, but they are ignoring your advice.

There was a split in our responses to this example. Many attorneys took the position that any deliberation amongst council members was a violation of section 551.071. Others took a more liberal view of the exception, noting that so long as the discussions were on point and generally facilitated the exchange of information and legal advice, that the

attorney may not have a problem with such communications. While the question has yet to be posed to the Attorney General's Office, it is this lawyer's assumption that if the Attorney General were ever asked the question, the Attorney General would most likely find that 551.071 is limited to the City Attorney informing the council of certain legal matters, and receiving and responding to questions from council regarding the legal matter. I find it doubtful that the Attorney General would find that deliberations between council members during such a closed session would be permissible.

While the exact line between a permissible closed session and an impermissible closed session may remain somewhat blurry, from an ethics perspective, once a closed session has crossed that line, what are the ethical obligations of the City Attorney?

First, the City Attorney has an obligation to caution the council members again and explain that there are criminal consequences for their actions. If the council members continue to ignore the advice of counsel, the City Attorney can threaten to walk out of the closed session, or ask the council to come out of executive session. If the council refuses to come out of executive session, the only immediate recourse for the City Attorney is to leave the meeting.

EXAMPLE 4: Conflicting Instructions

> In a closely divided council, you receive conflicting directions about the same project from the Mayor and City Manager, who are aligned with the minority faction, and the Mayor Pro Tem, who is aligned with the majority faction.

What to do in this case largely depends upon HOW the directions from the varying factions conflict. For example, if the two factions are asking you to do completely different things (i.e. file a lawsuit vs. draft a letter), that is one thing. However, if the conflict arises because both sides are seeking a different legal conclusion in your analysis of a particular issue, that is entirely another matter.

If the two factions are asking for entirely different things, the easiest way to clear up any confusion is to take the matter to the council at a council meeting, and receive specific direction from the council as a whole. While this option may not make you popular with either faction, it will ensure that you do what your client, the City, actually wants.

If, on the other hand, both factions are simply hoping for a different legal conclusion on an issue that you are researching, the solution is relatively simple. The legal conclusion of a City Attorney should not change regardless of who is asking the question. Whether one faction is hoping for a "yes we can" answer, while the other faction is hoping for a "no we can't" answer, it is the responsibility of the City Attorney to provide accurate legal advice. That advice should remain constant regardless of whether the person requesting the advice would rather have a particular answer. If a particular faction does not like that advice, they can seek a second opinion. Since a City Attorney's legal

conclusion should not change regardless of what the varying factions want, there is no ethical problem related to this situation.

EXAMPLE 5: Confidentiality

> The Mayor contacts you by telephone with concerns regarding the City Manager. The Mayor has gathered a great deal of information on various complaints regarding the City Manager, as well as independent confirmation of wrongdoing on the part of the City Manager. The Mayor e-mails you this information and asks that you review the information and advise him regarding what he should do. After reviewing the submitted information, you conclude that there may be something to these allegations, and an investigation is warranted. You contact the Mayor and state that this matter should be brought to the council as a whole so that the City may determine what it wants to do. At this point, the Mayor states that he does not want to disclose this information to the Council. He further states that the information submitted to you was gathered by the Mayor in his personal capacity, and that he does not consent for you to disclose this matter to the council.

In this example, we know that there is information concerning the City Manager that the Council is entitled to know about under Rule 1.03. We also know that the Mayor is not consenting to the release of this information to the rest of the council. Under Rule 1.05 we may not reveal confidential information of a client. So, we must ask ourselves, "who is our client?"

Certainly the City is our client. The more interesting question is whether, through our conduct, the Mayor as an individual has become a client. As the attorney for the City, it was not the intent of the City Attorney to take up the representation of the Mayor as an individual. However, the subjective intent of a lawyer is irrelevant to determine whether an attorney/client relationship has been formed. The duty to keep information confidential attaches earlier than most other duties. Courts have found that the duty of confidentiality attaches to pre-representation conferences, even if no subsequent attorney/client relationship is formed. However, in this case, the Mayor did not express any intent to be represented separately from the City until after the Mayor found that the City Attorney intended to inform the council. The safest course of action, if there had been any hint that the Mayor believed that the City Attorney was representing the Mayor as opposed to the City, would be to immediately clarify the status of the representation.

In the end, the determination of whether the duty of confidentiality attached to the communications from the Mayor would be determined by a court, and would most likely turn on exactly what was stated by whom, and when. If the City Attorney can show that he or she clarified the status of the representation at that time, the likelihood of the City Attorney getting into trouble would be greatly reduced.

Since we have no evidence that the Mayor demonstrated an intent to be represented separately until after the information at issue was given to the City Attorney, the proper course of action, (after calling the State Bar and confirming your course of action) would be to clarify the status of the representation with the Mayor, and then release the information to the rest of council. Rule 1.03 is clear that a client must be kept informed. Information of the nature described by the example is highly relevant to the operation of the City, and must be disclosed to the rest of Council.

As an aside, it is often the case that when a Mayor, City Manager, Police Chief, or other representative of the City contacts their City Attorney with potentially explosive information, they request that their discussion be "kept confidential." Such a statement provides a City Attorney with the perfect opportunity clarify both the status of the representation, and confidentiality. In this way, a City Attorney can avoid situations like the one described above.

If however, the City Attorney believes that he or she may have given the Mayor the impression that the Mayor was being represented as an individual, or somehow represented in a separate manner from the rest of the City, then the ethical problems increase. Since the Mayor intends to keep information confidential that the City needs to know about, the interests of your two clients are adverse. This conflict of interest must be addressed immediately. If the Mayor continues to insist that the City Attorney not release the information, withdrawal from representation of the City may be the only permissible recourse.

EXAMPLE 6: Political Concerns

> The Mayor and Mayor Pro Tem have the same personal agenda, which is to promote their political careers. Both see every issue that comes before the Council primarily in the light of how it can be used to further their political ambitions. They always have the vote of one other council member, and often that of another, who is the swing vote. As City Attorney, it is obvious to you how a particular issue should be decided in the way that is most beneficial to the City, but that is the opposite of the way it will benefit the Mayor and Mayor Pro Tem. The swing vote council member calls you with questions about the issue, seeking input and guidance on the possible results of voting one way or the other.

This situation is quite common, and may be one of the most difficult situations a City Attorney faces. It often involves City Managers and other staff members instead of Mayors and council members. As City Attorney, you are ethically required to represent the City, your client, in the way that is most beneficial for the client, and you are often in possession of more knowledge about particular issues than any member of the Council. In addition, you may have seen the same or similar issues in other cities, and may know that the direction the Mayor and Mayor Pro Tem, in this case, will expose the City to other issues and problems. In other words, as City Attorney, you may be in the very best position to decide the direction the City should move in (or you may believe you are).

Yet a City Attorney is not a policy maker, but a counselor and advisor. It is not his or her job to steer a City in a particular direction, promote the ambitions of a particular council member, or seek a particular outcome. At the same time, the City Attorney's knowledge and experience is not limited to statutes and cases read or ordinances drafted. The totality of the City Attorney's experience should be offered and shared with the client. Thus, while the City Attorney must not get involved in political matters or take sides with particular council members on matters for which the outcome is legal either way, he or she must also exercise a certain degree of politics in providing advice.

That does not mean that the City Attorney should play politics or give in to a natural urge to advocate an outcome, but that it is incumbent upon the City Attorney to present the knowledge he or she has gained in municipal matters in a way that allows each council member or staff member who is seeking advice to recognize and consider possible outcomes. The challenge is to present the knowledge you possess impartially and objectively, assuring those you advise that it is not your job to convince anyone to go a particular direction, but it is your job to inform them of the various possible consequences of going in each direction.

Yet there are times when the personalities involved make it extremely difficult to maintain a posture of disinterest. Relationships are inevitably formed with staff members and council members. Certain City leaders will be more capable, charismatic, honest, honorable, and admirable than others. Others will dislike the City Attorney for one reason or another, habitually disagree with your advice, or tell you things that convince you they are dishonest, dishonorable, or unintelligent. Your advice on legal issues will be perceived by some council members as being intended to promote an opponent's point of view or to be opposed to their own. Often it is politically expedient for a council member or City Manager to blame an outcome on legal advice provided by you. Politics can sew a mine field for the City Attorney even when he or she is determined not to take sides politically.

EXAMPLE 7: Withholding Information

> The City Manager and City Attorney are attending a highly contested and emotionally charged settlement conference with a former employee. The former employee has alleged wrongful termination, and the City Manager is adamant that the termination was proper. As City Attorney, you have reviewed the case and believe that there is significant exposure to the City if these negotiations fail. The City Council has empowered the City Manager to settle the case up to a specified amount. Much to your surprise, the negotiations, while difficult, are going well. The terminated employee has finally submitted an offer to settle that is well below the maximum settlement set by the Council and is otherwise in the City's best interests. As the City Manager is reviewing the offer, your phone rings. The Police Chief calls with additional information regarding the case. Apparently the terminated employee had previously stated a number of

> derogatory and defamatory statements about the City Manager. These statements are so outrageous that you believe the City Manager may actually have a claim for defamation. However, you also know that if you inform the City Manager of these statements, he will not accept the offer of the employee due to his personal anger and this matter will most likely proceed down a long road of expensive litigation. Can you temporarily withhold this information from the City Manager?

As a general matter, Rule 103 requires a lawyer to keep the client reasonably informed. No provision in the text of the Rule allows for temporary withholding of information. The City Manager would certainly find this information to be important in his decision regarding whether to accept the former employee's offer. Furthermore, the City Manager would no doubt be extremely upset with the knowledge that the City Attorney had deliberately withheld information the attorney knew that the City Manager would have wanted to know.

In addition, Comment 6 to Rule 1.12 indicates that decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. And yet, there is a temptation to withhold the information because, in this example, the City Manager would most likely reject the offer and terminate negotiations, not in the interest of the City, but rather for personal reasons.

Thankfully, there is a Comment to Rule 1.03 that sheds some light on the situation. The Comment states as follows:

> In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication… A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.

In this case, it appears that the City Attorney reasonably believes that the City Manager would react imprudently to the defamatory communications, thus increasing the liability of the City. Furthermore, withholding the information at issue would not serve the lawyer's own interest or convenience, but rather, would protect the City from the potentially rash decision of its City Manager.

Therefore, under the facts of this hypothetical, it would appear that the City Attorney could temporarily withhold information, in the interest of the City. I would certainly caution any City Attorney from using this Comment in anything other than extreme circumstances, since neither clients, nor the State Bar look kindly on an attorney withholding information in more normal circumstances.

EXAMPLE 8: City Attorney/City Manager

> The City Manager for a City you represent has retired. With no heir apparent, the City Council has requested that in addition to your duties as City Attorney, you also serve as the Interim City Manager during a several month long search process for the new City Manager. You are not an in-house City Attorney, but rather, you are an attorney in a private firm that represents Cities.

There are no Ethics Opinions specifically on point regarding this issue. However, in reviewing similar Ethics Opinions, caution is urged.

In Ethics Opinion 196 (1960) a lawyer both owned an abstract company, and represented the abstract company with his law business. The Ethics Opinion made it clear that the "feeding" of a law business by an attorney who was working in a non-lawyer capacity was improper.

In much the same way, it is often the City Manager who will request that a City Attorney look into a particular issue. If the City Attorney in our example requests legal counsel in his or her capacity as City Manager, and then bills the client for such requested legal services, this may be an impermissible "feeding" of the law practice. This does not mean that a City Attorney cannot serve as City Manager or Interim City Manager, but a cautious City Attorney would ensure that such "feeding" activities were not directed by the City Attorney/Manager. If the Attorney at issue was already an in-house attorney, the "feeding" issue would not be as significant of a concern. However, there are other concerns to address.

In Ethics Opinion 136 (1956), a licensed accountant, who was also a licensed attorney, wanted to concurrently practice professional accounting, and hold himself out as an attorney. Without going into much detail, the Ethics Opinion held that if an individual holds himself out as a practicing accountant, that he or she should not hold him or herself out as a lawyer at the same time. While the reasoning for this opinion is not disclosed, two justifications spring to mind.

The first justification is that allowing a lawyer/accountant to wear "both hats" would create confusion and hinder an attorney's ability to effectively represent clients. The second reason could be that the obligations to a client as an accountant, and as an attorney may conflict in a variety of situations, and to avoid such conflicts, dual representation is prohibited.

In much the same way, the City Attorney may have difficulty gaining the necessary perspective on a variety of legal issues if he or she is also acting as an administrator or policy maker in the City. Again, these opinions do not expressly prohibit a City Attorney from acting as a City Manager. Caution is certainly the best approach in situation such as this.

Other legal issues include: When does the attorney/client privilege apply? Can the City Manager/Attorney be called to testify at a trial? If so, what defenses may the City Manager/Attorney have? How can the City Manager/Attorney reduce or eliminate any confusion regarding which "hat" the Attorney/Manager is wearing at any particular time?

Sadly there aren't concrete answers to any of the above questions. As a result, the most cautious thing to do is avoid acting as both City Manager and City Attorney, which can involve temporarily taking the mantle of City Manager and allowing someone else to act as City Attorney, or simply refusing the offer of the City Manager position. Should an attorney undertake to act as both City Manager and City Attorney, caution should be utilized.

Conclusion

As with most problems, the trick to solving an ethical dilemma is to not get involved in one in the first place. When avoidance becomes impossible, the Rules provide some guidance, but do not generally provide one with a concrete answer. Hopefully the above examples have provided a context in which to determine the correct course of action in future situations. While a house divided may be a more challenging representation, there is no reason that such representation cannot be performed ethically and successfully.