

The Ethical and Strategic Challenges: City Attorney as Investigator

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City Attorney Acting as Legal Advisor or Fact Finder

- ◆ Investigative Role
- ◆ Purpose of the Investigation
- ◆ Strategic Consequences
- ◆ Ethical Consequences

Fact Finding and Potential Outcomes

- ◆ Investigation to serve as basis upon which action will be taken
- ◆ Investigation to be used in potential litigation as affirmative defense
- ◆ Investigation to determine risk analysis and liability

Legal Advice

- ◆ Needs to be protected by the attorney/client privilege and work product doctrine
- ◆ Need to be sure that role is clearly communicated so privilege is maintained
- ◆ Understand the outcome for claiming a privilege (discovery phase and open records issues *Harlandale* case)

Affirmative Defense

- ◆ *Faragher/Ellerth* example
- ◆ No privilege will apply
- ◆ Legal analysis will be made independently by another lawyer
- ◆ Must clearly communicate role with anyone who is interviewed and to whom the City Attorney reports—discoverable

Clearly Communicating City Attorney's Role

- ◆ Legal Advisor or Fact Finder—Not Both
- ◆ Clear disclosures up front
- ◆ Report of Findings to whom and for what
- ◆ Concerns regarding bias
- ◆ Ethical considerations

Common Challenges...

- ◆ Decision-making authority
- ◆ Confidentiality
- ◆ Conflicting Interests

Rule 1.12(a)

- ◆ Who's the boss?
 - Client = Organization, *as distinct from members*
 - Lawyer will report to, and take direction from, *duly authorized* constituents
 - Lawyer shall act in the *best interests of the organization*
 - Question *legitimacy* of constituent

Rule 1.12(b)

- ◆ **Lawyer must take remedial actions when:**
 - **Constituent has violated, or intends to violate, a legal obligation to entity (or violation which might be imputed to entity);**
 - **Violation is likely to substantially injure organization; AND**
 - **Is related to lawyer's scope of responsibility**

Rule 1.12(c)

- ◆ **The prescribed remedy?**
 - **Try to handle with the organization**
 - **Consider:**
 - **Severity of violation**
 - **Scope of lawyer's representation**
 - **Motive of Constituent**
 - **Policies with the organization**

Rule 1.12(c)

- ◆ **The prescribed remedy?**
 - **Determine if disclosure is mandatory**
 - **Ask for reconsideration of the matter**
 - **Advise client to get 2nd legal opinion**
 - **Refer matter to higher authority within the organization**

Rule 1.12(d)

- ◆ **When lawyer quits (or is fired)**
 - **Remedial obligations cease, provided that lawyer ends relationship properly (Rule 1.15)**
 - **Lawyer continues to be governed by confidentiality restrictions set forth in Rule 1.05**

Rule 1.12(e)

- ◆ **Imposes a duty...**
 - **When entity's interests are adverse to those of an individual constituent, lawyer *shall* explain the identity of the client, and that the lawyer may not represent the interests of the individual**

Decision Making Authority

- ◆ **When conducting an investigation, be sure to take direction from duly authorized constituent.**
- ◆ **Look to:**
 - **Relevant Human Resources policies**
 - **Charter provisions governing investigations**

Confidentiality

- ◆ **If City Attorney is acting as legal advisor**
 - **Memorialize that investigation is being done in order to render legal advice**
 - **Explain that your duty is to the City, not to one person**
 - **Explain to witnesses the scope of the attorney-client privilege**

Confidentiality

- ◆ **If City Attorney is acting as fact-finder...**
 - **Remind city staff your role is now different**
 - **Dial back the candor**
 - **Remember that conversations with city staff will be the subject of discovery**
 - **Minimize opportunity to make you look biased**

Conflicting Interests

- ◆ **When entity's interests conflict with those of an individual constituent, lawyer should clarify role by:**
 - **Advising that entity is the client;**
 - **Clarifying that lawyer can't represent individual; and**
 - **Advising individual to get another lawyer**

Governmental Clients

- ◆ **The tip of the day:**
 - **“When the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.”**



The End

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