

Representing a City & the Sometimes Impossible Ethical Challenges

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Who is the Client?

- An attorney working as outside or in-house counsel for a city must ask who he or she represents. Is it:
 - The egomaniacs (elected officials);
 - The downtrodden (city staff);
 - The people who pay our salaries (general public);
 - The entity as a whole;
 - A combination of the above?
- Why is client identification important?

General Rule

- The lawyer represents the city as a whole, acting through its officials.
- Eighth Circuit ruled that the White House lawyers DO NOT represent President and First Lady as individuals but represent White House and the officials in their official capacity. *WHITEWATER CASE*
- The entity approach is consistent with Texas Disciplinary Rules of Professional Conduct ([Rule 1.12](#)) and ABA Model Rules ([ABA Rule 1.13](#))
- Both rules limit the representation of entity officials & employees conducting official city business.

Texas Disc. R. Prof. Conduct 1.12 Controls

- (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.

Why is issue important?

- The identity of the client is vital to determine certain issues, including:
 - Who shall I take direction from? What if its conflicting direction?
 - Whose interests am I charged with protecting? What if the interest of individual official conflicts with the interest of the City?
 - Whose confidences am I obligated to protect?

Judgment

- Have policy making it clear that City Attorney represents, officials and employees in their official capacity.
- Policy should state you defend in litigation any official or employee sued in their official capacity that was acting within the course and scope of employment.
- Being in uniform does not guarantee representation!
- If internal conflict exists between officials and/or employees & attorney is receiving conflicting directions:
 - Go to highest authority (Mayor or City Manager); or
 - Have the Council vote to give you direction

Scenario #1

- Councilmember requests guidance on Robert's Rules of Order and Council Rules on conduct of public meetings.
- Councilmember informs you that intent is to filibuster so that City's annexation plan does not get approved.
(Making promises to rich at the expense of poor).
- Councilmember requests that you keep the matter confidential from Mayor and other Councilmembers.
(Has a few other colleagues who support position, but does not have a majority).
- Mayor contacts you and tells you he has heard rumors about a filibuster and wants guidance on how to avoid it.

Texas Disc. R. Prof. Conduct 1.12 Comment

4. ...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.... 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 discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned.

Conflicting Interests

- **It will happen!** You represent a city and a city employee's or councilmember's personal interest differ from those of the City.
- When an attorney becomes aware of adverse positions, must immediately notify the individual that the attorney can not represent them and outside representation should be obtained.
- **Easy:** Police officer violates chase policy, causes accident and receives a 5 day suspension. Accident victim files lawsuit against City and officer in individual and official capacity.

Scenario #2

- City Attorney is conducting an investigation regarding an ethics violation of the Mayor.
- While interviewing the Mayor, the Mayor provides confidential information that clearly would lead to a finding of an ethics violation.
- Can the Attorney use the information provided by the Mayor?
- **No** if the Attorney did not notify the Mayor from the outset of the interview of the potential adverse interests.
- Must let Mayor know of the potential so the Mayor is in a better position to decide how much to tell the Attorney.
- Does answer change if investigating a majority of Council?

Dual Internal Representations

- Issue arises when City Attorney represents the decision maker and is an advocate on behalf of city staff.
- **Example:**
 - Appeal to Board of Adjustment as a result of City Staff action and advises the Board on the ordinances and assists staff to assist in their interpretation

Dual Internal Representations

- General Rule: Due process only requires impartial decision maker, overlapping duties of attorney do not automatically amount to constitutional violation. *Withrow v. Larkin*, 421 U.S. 35.
- Problem can arise if same attorney doing both.
- Non adversary proceedings, no constitutional issue for same attorney to represent both. *Withrow*
- Adversarial proceedings, when same attorney represents both, due process problems likely. *Withrow*
 - What if different attorneys in the same office?

Scenario #3

- Disciplinary appeal to Civil Service Commission and Assistant City Attorney advises the Commission on procedural matters any other legal issues that may arise.
- Another Assistant City Attorney represents the City Department and presents testimony, documents to support the discipline.
- Is there a conflict of interest?

Client Confidentiality

- General Rule: An attorney shall not, without the consent of client, reveal any confidences relating to representation of a client or advise given to a client. **Texas Disc. R. Prof. Conduct 1.05**
- The general rule is applicable to a City Attorney.
- Rule applies not only to legal advice, but to any communication between an attorney and the client.
- Exception:
 - Furtherance of a crime or regarding the contemplation of a future crime;
 - Court order
 - Waived by the client

How far does the Privilege Go?

- Is privilege limited to governing body and executive staff of the City?
- Privilege applies if the city employee making the communication is in a position to provide necessary information to the attorney that is within the scope of the employees' duties.
- Privilege extends to only protect confidential communications.
- Information should be provided to anyone in the City that is part of the decision making process.

Scenario #4

- You are handling the response to a discrimination grievance.
- You meet individually and as a group with a co-worker, immediate supervisor and Department Director to discuss the discrimination grievance.
- Are discussions which take place in front of all the three employees privileged?
- Yes. Any employee who is necessary part of the process to make an appropriate decision should fall under the protection. Attorney should let them know about the privilege.

Waiver by City

- The attorney/client privilege is the privilege of the client alone! It may be waived by client.
- Waiver must be distinct and unequivocal.
- Actions and discussion by client may waive the privilege.
- Inadvertent waiver may not lose the privilege unless no precautions taken.
- Must look at steps taken to keep confidential; how long to remedy release; extent of disclosure; and who released it.

Scenario #5

- Council conducts an Executive Session under Attorney/Client consultation regarding legal theory and strategy of case.
- Councilmember releases information to press. Does this release constitute a waiver?
- No. Privilege belongs to City not the individual councilmember who is acting out for his own interest.
- However, precautions taken and further public discussion by public officials will come into play and may lead to waiver.

Conclusion

- Representing a City and its employees is much more difficult than representing one individual.
- You work in a fishbowl and your decisions will be scrutinized.
- Know your “**TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT**”
- You are not alone. When ethical issues arise, talk to colleagues, TML legal counsel or your priest.
- Most importantly, keep your cool.

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