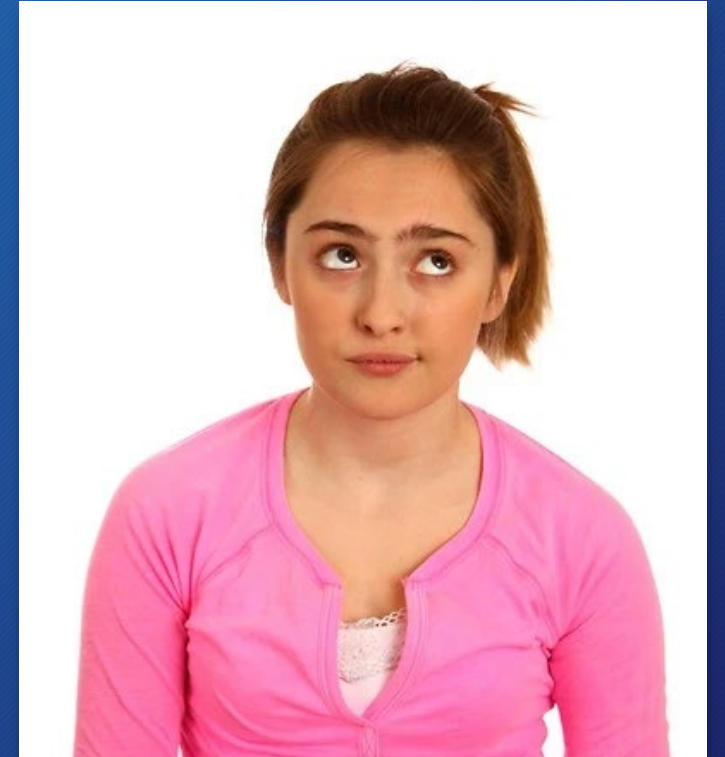# Before, During, and After: Election Issues for City Attorneys

Ryan Henry

Election law & Ethics!!!!

- Someone either:
  - Doesn't like me
  - Doesn't like you

Don't get too upset, it's not that bad

For Both

City Attorneys –Jill Waters

- Hard working
- Conscientious
- No Bar disciplinary matters
- Been City Attorney for 4 years

City of High Wells– Top of the hill

- Jill works for City of High Wells
- Home-rule municipality

Side Note: City of Broken Skull at the bottom

- Jill's brother, Jack works there
- Also city attorney
- General law city

Both have elections in November

Voters must show
ID to vote.

I. City Attorney and Election Basics

Most charters and general law municipalities designate the **City Secretary** or **Clerk** as elections officers

Elections controlled largely by **election calendar**

Secretary of State

Responsible for elections

Chief Election Officer

Resource for forms

Is NOT an **investigative** or **enforcement** authority

Elections

TAC regulations (Title 1, part 4, Chapter 81 of the Texas Administrative Code.)

Uniform Election Dates (Tex. Elec. Code Ann. § 41.001 (West).)

Types of Elections

City Attorneys typically deal with **general** and **special** elections

Rare exceptions provided in City Charters

General elections – elect officials for of term start

Special elections – fill vacancies, bonds, amendments, special measures

II. Ethical Considerations

- How does election law implicate lawyer ethics?

- Who's the client

- Confidentiality

Elected Positions

- A candidate or incumbent's right to hold office is a private matter
- Not a public/city matter
- Citizens' right to vote is a private matter (but city must facilitate)

Jill's city has an election for a council seat

- Jill advises City Secretary on council seat filing

- Mr. J. Horner is the sitting councilman for place 5 and incumbent

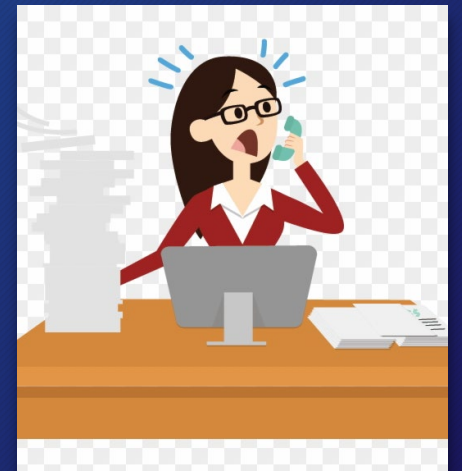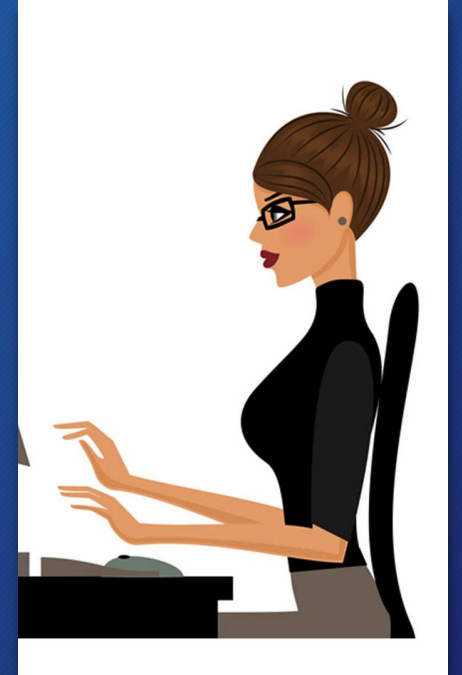- Bo Peeples is challenging Horner for his council seat

Dana = Hard Working City Secretary

- Dana as a team of 3 to help
- Contracts with county for elections
- Been at city for 12 years
- Always askes Jill if she has a question (reality??)

just a small TOWN Secretary

Jill's team

Bo People's application

- Bo filled out City application
- Left off zip code (but secretary has public docs on address)
- City Secretary, Dana, asks Jill if the application is valid
- Jill advises

Jill advised Dana

- The Election Code says omitting certain information on "residence address" will not necessarily invalidate a signature. Tex. Elec. Code § 141.063(d); In re Bell, 91 S.W.3d 784, 787 (Tex. 2002)

- Since Dana could verify candidate from his voter registration, the absence of zip code does not invalidate

- Dana advises Peoples he should amend, which he does.

- Dana accepts application

-

Councilman Horner finds out application incomplete

Horner askes Jill about:

- Charter and city secretary's power over elections
- What has to be in an application (he already turned his in)
- What the city is supposed to do when an application is incomplete
- Whether Jill thinks Dana is competent and are there grounds for removal

Jill does not put 2 and 2 together until later

- Jill answers Councilman Horner's questions
- Does not ask any questions about the context
- Thinks it was just a quick question related to election policy
- Later connects that Horner asked because his opponent had an incomplete application

Horner

- Horner tells the city manager that Jill said Peeple's application was invalid
- That it must contain the zip code and Peeple's should be removed from the ballot
- That Dana must be terminated
- City manager speaks to Jill who advised what she had told Horner, but that voter registration allowed Dana to accept the application

Horner

- Horner attempted to fire the City Secretary as a member of the council (which he later denies)
- Witnessed by several staff members (report to HR)
- Told Dana his application must be kept confidential, or he would sue her as the city secretary
- Thinks if Peeples can omit information, so could he.
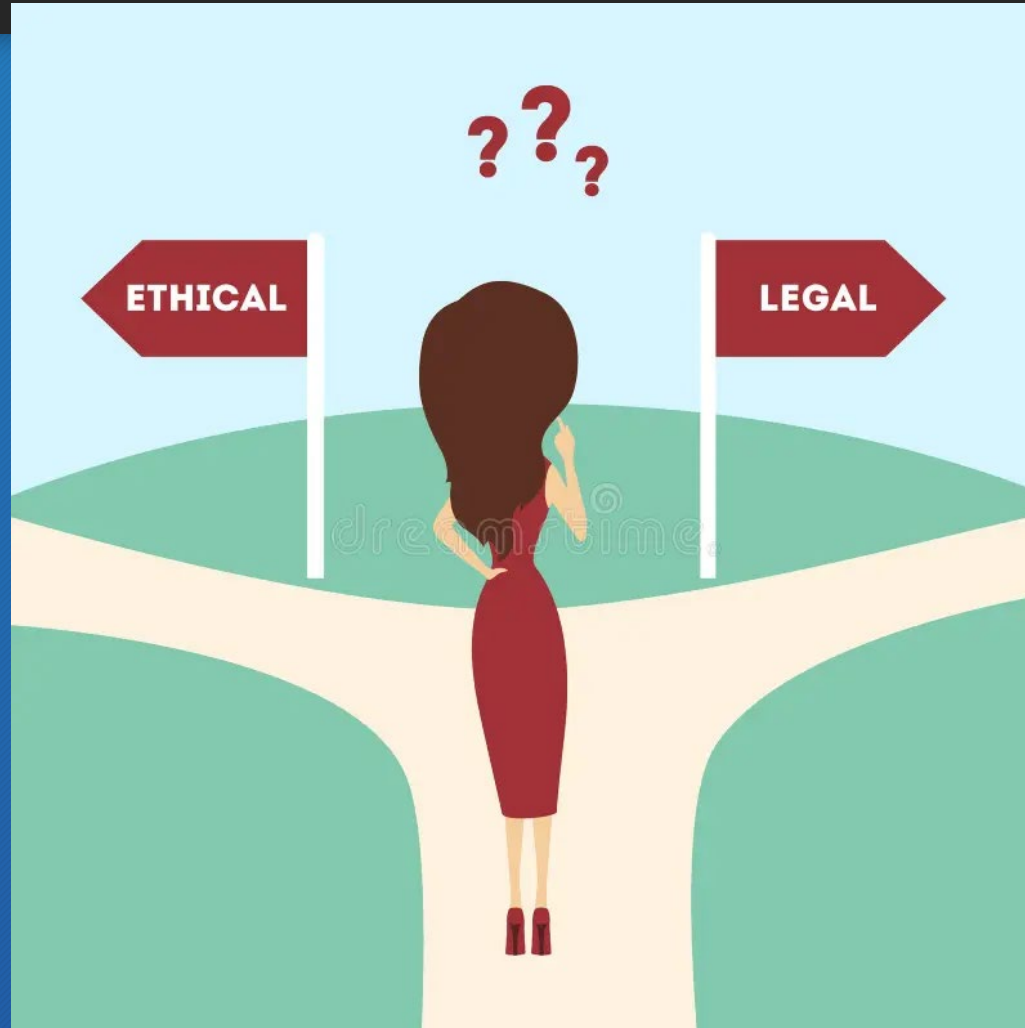- Still asserts Jill told him the application was invalid

Reaction by staff to Horner

- Several of Dana's team expressed concern for their jobs
- Several team members encouraged Dana to file a charter complaint
- Several expressed a potential desire to resign

Here are the problems

Ethical Quandary

ADVERSE TO DECISION

DUTY IS TO CITY

RULE 1.06 CONFLICTS OF INTEREST: GENERAL RULE

RULE 1.07 CONFLICTS OF INTEREST: INTERMEDIARY

Rule 1.06

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

    (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

      (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Rule 1.06

(c) A lawyer may represent a client in the circumstances described in (b) if:

     (1) the lawyer reasonably believes the representation of each client will not be materially affected; and

     (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. Tex. Disciplinary Rules Prof'l Conduct R. 1.06.

Jill

- Duty to advise city secretary

- Was Horner acting in official or individual capacity

- Horner appears to be out to fire Dana (exceeds his authority under charter)

- Horner threatens to sue the City if Peeples is not removed

- City Manager instructs Jill to mediate the dispute between CS and CM

RIGHT   WRONG   MORAL   ETHICS

Rule 1.07

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privilege, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

Rule 1.07

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Rule 1.07

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Several problems for Jill

- Should she mediate between Dana and Horner
- She advised both about the same document (which could result in litigation)
- Is she representing/giving advise to different "clients"
- Jill has knowledge Horner ordered city secretary to remove name and ordered City Manager to fire Dana

III. Organization as a Client

- Represent the entity as a **whole**, not individually

- Rule 1.13

Rule 1.13

(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.

Rule 1.13

(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 lawyer's representation of the organization.

Rule 1.13 Comments

- Stresses duty of client's confidential information

- Proceed as reasonably necessary...

- ...without involving unreasonable risk of disclosure or disruption

Adversity

- City's interest can be adverse to officials (personally)

- "[A]dversity is a product of the likelihood of the risk and the seriousness of its consequences." Nat'l Med. Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996).

- Parties are adverse when the risk to them is <u>serious</u>, even though the risk may <u>be small</u>. *Nat'l Med. Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996).

- Disqualifies the attorney from representing any party. *See In re Roseland Oil & Gas, Inc.*, 68 S.W.3d 784, 787–88 (Tex. App.—Eastland 2001, no pet.).

What can Jill Do

- Speak to staff about what Horner told Dana?
- Speak to staff about what Jill told Horner?
- Act as intermediary?
- Report Horner to City Manager then entire council?

Rule 1.13

(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 ..., 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. ..

Rule 1.13

(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.

Rule 1.13 –Explain to everyone who is the client

(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.
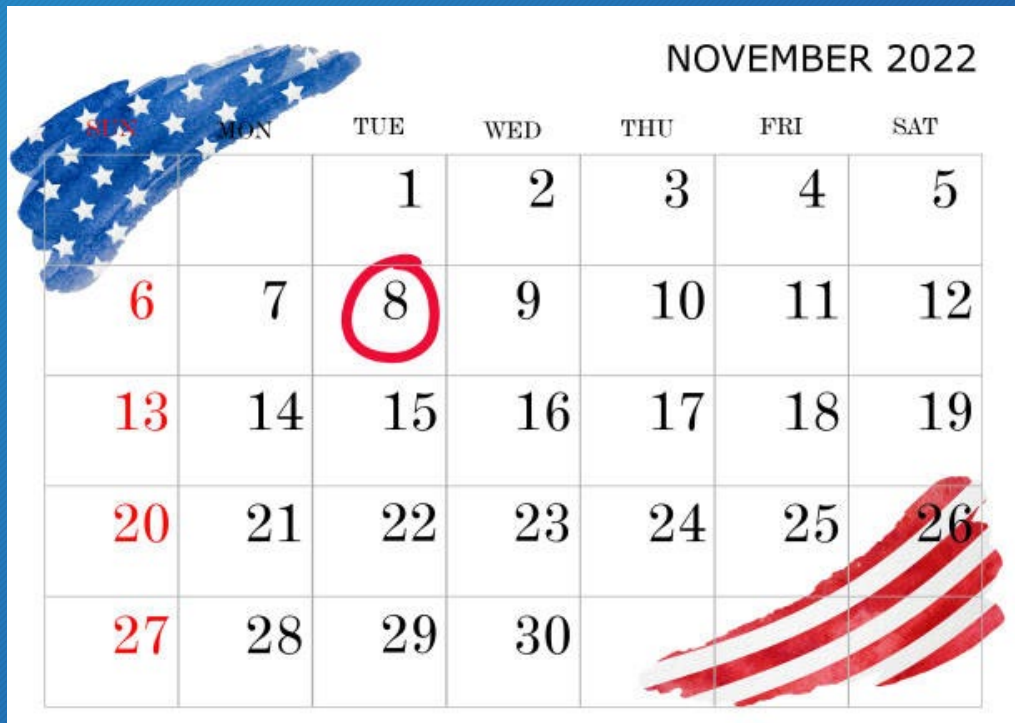
Tex. Disciplinary Rules Prof'l Conduct R.. 1.13.

No easy answer

Not done with Basics

OPEN POSITION
City Council

YES
NO
VOTE HERE

ELECTION DAY

NOVEMBER 2022

IV. Before Elections Start

- Contracting with county

- Joint v Contracted elections with counties

- November elections = Polling places in county

- May elections = ability to draw own precinct lines

Contracted Elections

- Chapter 42 of Election Code

- Contract between subdivision and county election officer. Tex. Elec. Code Ann. § 31.001 (West), *et seq*

- Entered 5-6 months prior

- Must have an escape clause

All Elections

- City will need to call an election

- Ordinance or order Tex. Elec. Code Ann. § 3.001 (West); 3.004.

- Timely file a position

Canidates

- Eligibility. Tex. Elec. Code Ann. § 141.001 (West)

- City charter provisions

- Administratively ineligible Tex. Elec. Code Ann. § 145.003, 009 (West).

- Applications are public. Tex. Elec. Code Ann. § 141.035 (West).

Calling Elections

- Access to machines

- City council/commission calls own elections Tex. Elec. Code §3.04.

- Coordinate with election calendar
  - 103rd and 78th day deadlines

Calling Elections

- General election occur regardless of order/ordinance

- Timing is important

- Special elections require order/ordinance

- File Notices and Register with the County. Tex. Elec. Code Ann. § 4.003 (West); 008.

Cancelled Elections

- Running unopposed. Tex. Elec. Code Ann. § 2.052 (West).

- Certify in writing.

- Order/Ordinance declare unopposed candidates.

- Post copy

Candidate Withdrawing

- Withdrawal before 5pm of the 71st day in elections held on uniform election date

- Candidate filing application with a deadline on the 62nd day, **may not withdrawal after 5pm on the 57th day**

- Unopposed must be listed on ballots of separate but simultaneous elections.

V. During Elections

- May not alter any election standard mandated by law or rule Tex. Elec. Code Ann. § 276.019 (West).

- Early voting counts on election day with speacial rules

- Title 6 of the Election Code: procedures and processes for elections

Election Codes

- Polling place set up and notices (Chapters 61 & 62)

- Check-in procedures (Chapter 63)

- Casting ballot procedures (Chapter 64)

- Early voting (Chapters 84 & 86-87)

Polling Place Procedure

- Open for the conduct of early voting

- Person may not electioneer for or against any:

  - Candidate

  - Measure

  - Or political party

  Within 100ft of any polling place

Polling Procedures

- "Early voting period" prescribed by statute

- "Electioneering" includes posting, use, literature, and political signs Tex. Elec. Code Ann. § 85.036(e).

  - Includes candidates who are not on the ballot Tex. Elec. Code Ann. § 61.003, 85.036 (West).

- Must have 100ft markers surrounding the building

100 ft Boundary

- Election Judges have authority within Tex. Elec. Code Ann. § 32.075(e) (West).

- No wireless devices

- No mechanical or electronic devices Tex. Elec. Code Ann. § 61.014, 81.002 (West).

- If provision is violated, you must inform the proper client

- Be aware of Section 46.03(a) of the Texas Penal Code

VI. Post-Election

- Canvassing must occur post election in open meeting

- Two officers are needed for a quorum

- Tex. Elec. Code Ann. § 67.004(a) (West).

Canvassing

- Canvassing cannot occur until:

  - Provisional ballots and qualified and counted

  - Counted timely received late ballots

  - Counted all previously defective ballots

- Ministerial duty

- Recount does not halt canvas

Preservation

- Preserved by the City for at least 22 months after election

- Ballots in secured, locked ballot box for at least 60 days

- Custodian must take images of all ballots casted

- Mandatory redactions must take place before public distribution

Type A General Law Municipality

- May not assume office until 5th day after election.

  Tex. Loc. Gov't Code Ann. § 22.036 (West).

- Authority to require bond

- Vacant office

This applies to Jack

City of Broken Skull

- Two council seats
- After election, councilmembers immediately take their oaths/seat and do not wait 5 days.
- No wait for canvassing
- What does Jack do?

Rule 1.13 –Explain to everyone who is the client

(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.

Tex. Disciplinary Rules Prof'l Conduct R.. 1.13.

VII. Practice Tips

- Review the disciplinary rules

- Know the election calendar

- Aid the city secretary

- Utilize the SOS attorney

Practice Tips

- Avoid giving any advice directly to elected officials

- Do not give advice regarding treasurer, spending, or proper signage

- Follow disclosure and scope

- Confidential information cannot be shared

Awake?!