ETHICS: CHALLENGES UNIQUE TO CITY ATTORNEYS

(or, ***"When the Mayor Lies"***)

presented by:

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TABLE OF CONTENTS

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ETHICS: CHALLENGES UNIQUE TO CITY ATTORNEYS

In civilized life, law floats in a sea of ethics. Each is indispensable to civilization. Without law, we should be at the mercy of the least scrupulous; without ethics, law could not exist.
- Earl Warren

INTRODUCTION

This is about communication. As lawyers, we listen, talk and write. Our clients are city officials (elected, appointed, staff and volunteers), but our audiences often include citizens, media, bankers, builders, judges, juries, and state/federal law enforcement. The principles of Open Government, and the decentralized nature of authority at city halls, create interesting challenges for lawyers who represent city attorneys. Of particular interest to governmental lawyers is the ever-swaying balance between the democratic imperative that government business be conducted in the open, and the often-countervailing need for public decision makers to avail themselves of the benefits of legal representation. The other challenge is the seemingly endless list of client representatives within a municipal organization, all of whom collectively constitute the city attorney's "client."

Recent interpretations of state Open Meetings acts and Public Information (*aka*, Freedom of Information) acts in the US have implicated the attorney-client privilege and impacted the ability of government lawyers to properly advise their governmental clients. For example, there is a growing sense that governmental agencies have significantly *less* protection under the attorney-related privileges than do private sector entities.

When representing your clients at City Hall, a working knowledge of Sunshine Laws is valuable to all attorneys. Knowing when and how government entities are permitted to conduct public business is essential. It is also important to remember that the manner in which you communicate with public officials, whether in writing or in person, can have Open Government and Ethical implications. How and to whom you communicate also affects your ability to conform to the Texas Rules of Disciplinary Conduct. This paper outlines some recent developments in the field and revisits a few tried and true maxims. Addressed below are recent Texas Attorney General decisions, various state and federal court rulings, and some legislative amendments. *All references are to Texas laws unless otherwise specifically noted.*

"If we're being elected to look good, I'd rather not be there."

> Former San Antonio City Councilman Enrique "Kike" Martin, 38, a first-term councilman who was indicted on bribery charges in state and federal court in October, 2002. According to an article in the *San Antonio Express News*, on Saturday, February 1, 2003, Martin stated that he is concerned by an emerging attitude on the council that he said is more concerned about image and appearances than making the right decisions.

THE ATTORNEY-CLIENT PRIVILEGE

The oldest of the common law privileges protecting confidential communications is

the attorney-client privilege. The purpose of the privilege is based on two related principles:

(1) The privilege encourages loyalty in the attorney-client relationship; and
(2) The privilege encourages clients to make full and frank disclosures to their lawyers.[1]

Most courts have assumed that governments can claim the benefits of the attorney-client privilege. However, when courts apply the privilege to the governmental setting, they seem generally unwilling to provide broad protection because of fear that the privilege is incompatible with the spirit of Open Government.

Some courts, such as the United States Court of Appeals for the Sixth Circuit, have never explicitly recognized the attorney-client privilege in the municipal setting. In one case, the Sixth Circuit held that communications made at a meeting between the city attorney, city manager, the fire chief, and two city councilmen were discoverable. The court followed the restrictive "control group" test and reasoned that the councilmen were third parties, the discussion was not held in confidence, and thus the requirements of the attorney-client privilege were not met.[2]

Two federal appeals courts have held that the governmental attorney-client privilege does not protect communications between government employees and government attorneys once those conversations become the subject of federal grand jury subpoenas. The two central concerns of both courts in recognizing the governmental attorney-client privilege in the grand jury setting were:

(1) Abuse of public assets and public trust; and
(2) The government attorney's obligation to expose government wrongdoing.[3]

When communicating with clients at city hall, city attorneys must remain aware of the courts' and media's predisposition to protect the public's right to know.

OPEN RECORDS

Like Texas, a great majority of states have adopted statutes providing for public access to government records. While each state's statutes may be uniquely drafted, there is a degree of commonality stemming from the fact that most statutes were drafted using the federal Freedom of Information Act as a model.[4]

E-mail

Electronic mail regarding public business can be "public information." In Texas, the term "public information" is very broad and specifically includes a magnetic, optical, or a solid-state device that can store an electronic signal or be held in computer

[1] This entire section draws heavily from Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655 (2000).

[2] *Reed v. Baxter*, 134 F. 3d 351, 358 (6th Cir. 1998), *cited* 48 DRAKE L. REV. 655, 670.

[3] Adam M. Chud, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1695-99 (1999) (*citing In Re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir), aff'd in part and rev'd in part, 158 F. 3d 1263 (D. C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998); *and In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997)).

[4] Roger A. Nowadazky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65-66 (1996).

memory.[5] The Office of the Attorney General of Texas ("AG") has specifically stated that Texas recognizes that work-related e-mail is information that may be subject to mandatory public disclosure.[6] Even e-mail transmitted from ***home*** through a ***personal computer*** via a ***privately-funded*** internet account might be considered "public."[7]

City attorneys should be particularly careful with e-mail. The American Bar Association's Standing Committee on Ethics and Professional Responsibility issued the following opinion in 1999:

> A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct…because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail.[8]

Nonetheless, attorneys still must exercise ***reasonable care*** when transmitting communications to clients. Those who fail to evaluate the following three factors set out by the ABA Committee on Ethics may encounter challenges to assertions of privilege and possible malpractice liability for the ill-advised use of e-mail:

(1) Sensitivity of the communication;
(2) Costs of disclosure; and
(3) Security of the medium of communication.

Litigation/Attorney-Related Information

The Texas Public Information Act ("PIA") excepts from mandatory disclosure information relating to litigation of a criminal or civil nature, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is, or may be, a party.[9] For the exception to apply, the information must relate to litigation that is pending or reasonably anticipated on the date the requestor applies for access or duplication of the information. The hiring of an attorney and the assertion of intent to sue might establish that litigation is reasonably anticipated.[10] Settlement negotiations are no longer included in this exception. Once data has been obtained by all parties, (*e.g.*, through the discovery or otherwise), no litigation interest exists with respect to that information.[11]

In 2000, the AG issued a series of informal letter rulings stating that a broad range of material that was otherwise protected by the attorney-client privilege was not excepted from disclosure under the PIA. One ruling concluded that a "completed report, audit, evaluation or investigation" must be released to the public even if the document would otherwise fall under the protections of the attorney-client privilege or Litigation

[5] TEX. GOV'T CODE ANN. § 552.002.
[6] Tex. Att'y Gen. ORD-654 (1997).
[7] Tex. Att'y Gen. OR2001-1790.
[8] ABA Comm. On Ethics and Prof'l Responsibility; Formal Op. 99-413 (1999), *cited in* Mitchel L. Winick, Brian Burris, and Y. Danae Bush, *Playing I Spy With Client Confidences: Confidentiality, Privilege, and Electronic Communications,* TEX. TECH. L. REV. 1225, 1249 (2000).

[9] TEX. GOV'T CODE ANN. § 552.103. *See* Tex. Att'y Gen. No. OR94-226 (1994) (city was able to deny open records request for certain records relating to annexation of an area).
[10] Tex. Att'y Gen. ORD 555 (1990).
[11] Tex. Att'y Gen. ORD 349 (1982); *see also* Tex. Att'y Gen. ORD-320 (1982).

Exception.[12] The decisions led to a lawsuit that ultimately went to the Texas Supreme Court where a 5-3 majority ruled in the city's favor.[13] The Court held that "privileged" equals "confidential" for purposes of the PIA.[14]

Note, however, that the former and current AG continues to apply the privilege very sparingly, and reluctantly.

Factual Data from Attorney

The AG has stated that the attorney-related privileges do not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. Unless the facts contained in the memo or notes were selected and ordered by the attorney for the purposes of determining and communicating the legal basis and strategy for the proposed action, the AG will in all likelihood conclude that the document is public.[15] When requesting an Open Records ruling from the Texas AG on the basis of attorney-client privilege (or another attorney-related privilege), be prepared to specifically demonstrate to the AG how the otherwise factual information reveals the attorney's legal advice, analysis, or the client's confidences. Otherwise, the AG is likely to compel disclosure if at all possible.[16]

Attorney Fee Bills

Over the course of two administrations, the Office of the Attorney General of Texas has consistently held that the exception for "privileged" information, for purposes of the PIA, does not apply to all client information held by a governmental body's attorney. For example, a city attorney was ordered to release "purely factual" information contained in an attorney's fee bills such as phone calls and conferences regarding a particular matter, and indications that an attorney had reviewed documents relevant to the attorney's representation of the governmental body.[17] In this situation, the requestor was the law firm representing the property owners engaged in a land dispute with the city.

The Texas AG is not completely alone on this. The Kansas Supreme Court has also held that the narrative information on an attorney's fee statement is not *per se* privileged.[18] The fee bills at issue involved pending litigation. Consequently, government entities should confer with their outside legal counsel regarding the specificity of attorney fee bills.

Attorney in "Non-Legal" Capacity

The attorney-client privilege does not apply to communications between a client and an attorney where the attorney is employed in a ***non-legal*** capacity, for instance as an accountant, escrow agent, negotiator, or notary public.[19] However, if an attorney is retained to conduct independent investigation in the attorney's capacity as attorney for the purpose of providing legal services and advice, the attorney's entire report is protected by attorney-client privilege. Such reports are excepted from disclosure to the newspaper under the PIA, even if the attorney detailed the factual findings in a discrete portion of the report

[12] *See* Tex. Att'y Gen. OR2000-1038 and OR2000-1275.
[13] *In re City of Georgetown and George Russell, In His Official Capacity as Acting City Manager and Officer For Public Information,* 53 S.W. 3d 328 (Tex. 2001).
[14] *See Id.* at 337.
[15] Tex. Att'y Gen. OR99-1376.
[16] *See* Tex. Att'y Gen. OR2000-0259 (2000).
[17] Tex. Att'y Gen. OR2000-2114 (2000) and OR2000-2756 (2000).
[18] *Cypress Media, Inc. v. City of Overland Park*, 997 P.2d 681, 693 (Kansas 2000).
[19] *Harlandale Indep. Sch. Dist. v. Cornyn,* 25 S.W. 3d 328 (Tex.App.-Austin 2000, pet. denied).

apart from the legal analysis and recommendation.

No poet ever interpreted nature as freely as a lawyer interprets truth.
- Jean Giraudoux
19th Century French Playwright

Privilege Under FOIA

The Fifth Circuit Court of Appeals held in April 2002 that the Department of Interior must release certain documents that were "prepared in anticipation" of litigation.[20] The Court found that the agency failed to show that the records, primarily e-mails and letters between lawyers and administrators, were "prepared primarily for litigation."

Agency Memoranda

Under certain circumstances, an interagency or intra-agency memo or letter that would not be available by law to a party in litigation with the agency might be excepted from disclosure. However, the Austin Texas Court of Appeals held that the results of a school district's staff survey, compiled into a format of bar graphs and aggregate percentages, was "purely factual information"—not deliberative in nature—and thus did not fall within this exception.[21]

Selective Disclosure

A governmental body that seeks to withhold certain information from the public at-large may not selectively disclose that information to particular members of the public.[22] However, this prohibition against selective disclosure does not apply to the intra-agency transfer of information to members of the governing body or certain members of particular types of citizen advisory boards.[23] Government lawyers are advised to carefully establish the precise nature of your relationship with volunteer advisory board members, as well as the protocol for distributing otherwise confidential or privileged information to these board members.

Council Access to Data

Each and every member of the City Council has an unrestricted right of access to data belong to, or prepared for, the city. Council Members are legally entitled to view all municipal information (even documents that may be "confidential") as long as the documents are sought in the scope of a member's official capacity and for performance of official duties.

The Texas Attorney General has specifically ruled that members of a governing body have this right.[24] The AG has even concluded that documents such as audit records and employee personnel files are examples of the type of documents that Council has the right to obtain.[25]

Based on these opinions, the phrases "official capacity" and "performance of official duties" would typically be broadly interpreted to allow one member of the Council access to the same information as any other Council Member or the mayor. Defenses to disclosure such as the *Attorney-Client Privilege* cannot be raised by the mayor or one Council Member in an effort to withhold data from another Council Member.

[20] *Maine v. U.S. Dept. of the Interior,* No. 01-1234 (April 5, 2002).
[21] *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160-61 (Tex. App.—Austin 2001, no pet. h.).
[22] *See* TEX. GOV'T CODE ANN. § 552.007(b).
[23] *See* Tex. Att'y Gen. ORD-666 (2000).
[24] *See* Op. Tex. Att'y Gen. No. GA-0138 (2004).
[25] *See* Op. Tex. Att'y Gen. No. JM-0119 (1983), and LO-93-069 (1993).

Unlike citizens, City Council Members are not required to submit requests under the usual Public Information Act (aka, "Open Records Act") process. A Council Member seeking documents need only ask the City's Records Management Officer / Custodian of Records (i.e., City Secretary), or the City official / employee who is in actual possession of the documents.

All documents sent to / from City Hall, or to individual City officials conducting City business remotely, are subject to the mandates of the Texas Records Retention Act.[26]

OPEN MEETINGS

Action without Meetings

If a quorum of a governmental body agrees on a joint statement on a matter of governmental business, the deliberative process through which that agreement is reached may be subject to the requirements of the Open Meetings Act ("OMA"), and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.[27] Telephone conferencing can also be considered a violation of the OMA, depending on the facts.[28] Governing bodies should be particularly careful to avoid deliberating through *e-mail*. "Deliberation" is not limited to "spoken communications." Discussing public business via written notes or e-mail may constitute a "deliberation" that is subject to the OMA.[29]

Lobbyists & Agents

A person who acts independently to urge individual members of a governing body to place an item in the board's agenda or vote a certain way on an item on the agenda does not necessarily commit an offense, even if he or she informs particular board members of other members views on the matter. Although a person who is not a member of the governing body may be charged with violation of section 551.143 or 551.144 of the Texas Open Meetings Act, under sections 7.01 and 7.02 of the Texas Penal Code, that person does not commit an offense under these provisions unless, acting with intent, the person aids or assists a member or members who knowingly act to violate the OMA.[30] While the OMA may permit attorneys to lobby individual city council members, beware of the Texas Disciplinary Rules of Professional Conduct in regards to communications with government entities that are represented by legal counsel.

Consultation with Attorneys

In Texas, governing bodies may confer with their attorney behind closed doors for the purposes of receiving advice about: (a) pending or contemplated litigation; (b) a settlement offer; (c) administrative hearings; or (d) matters in which the duty of the attorney to the governmental body under the Texas Rules of Professional Conduct of the State Bar of Texas clearly conflicts with the Open Meetings Act (*i.e.*, when necessary to protect the attorney-client privilege).[31] This exception applies strictly to ***legal matters***, not to other issues such as financial considerations or the policy merits of a particular project.[32] Remember that this consultation is typically considered a "meeting" that must be properly posted and

[26] Tex. Loc. Gov't Code Chap 203.
[27] Op. Tex. Att'y Gen. No. DM-95 (1992).
[28] *See Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ).
[29] *See* Op. Tex. Att'y Gen. No. JC-307 (2000).
[30] *Id.*
[31] TEX. GOV'T CODE ANN. § 551.071.
[32] Op. Tex. Att'y Gen. No. JC-233 (2000).

otherwise comply with the requirements of the OMA.[33] Although the government is not required to disclose its litigation strategy, it cannot totally conceal the subject matter of a major lawsuit that is pending. Accordingly, the OMA requires a governing body to give notice of the subject of its meetings, including a consultation with its attorney in executive session.[34]

Other States

In 1994, the State of Alabama's "Sunshine Law" prohibited executive sessions (*i.e.*, closed meetings) of governmental bodies.[35] The Alabama Supreme Court carved out an exception for attorney consultations regarding litigation in which the governmental body was named. The court reasoned that matters concerning the attorney-client relationship are subject to judicial control and that neither the attorney-client relationship nor the judiciary's control over it can be affected by legislative action.[36] The Court went further to say that the application of the open meetings law to the attorney-client privilege would be a violation of the separation of powers provision in the Alabama Constitution. Note that the Texas Constitution also has a separation of powers provision.[37]

When posed with a similar question, the Florida Supreme Court has yielded a different result. When asked whether the Florida "Sunshine Law" applies to meetings between a city council and the city attorney held for purposes of discussing the settlement of pending litigation to which the city is a party, the Florida court replied in the affirmative.[38] The court rejected the city's argument that "opening up the consultation of a governmental body with its attorney to its adversary in pending litigation gives the adversary an unfair advantage which can be used to secure unmerited or excessive judgments or settlements against the public." Contrary to the Alabama Supreme Court's ruling, the Florida Supreme Court found that the separations of powers doctrine prevented the court, as a judicial arm of government, from engaging in truly legislative functions."

Long Distance Consultations

The Texas OMA includes limited provisions that authorize members of a governmental body to participate in meetings using telephones or videoconference connections.[39] Before these provisions were adopted, the OMA did not permit governmental bodies to meet by telephone or videoconference call, nor did it authorize any board member to participate from a remote location using telephonic or videoconference connections.[40]

In Texas whether attorneys may confer with their governmental body clients in open or executive session if the attorney is

[33] Op. Tex. Att'y Gen. No. JC-57 (1999).
[34] *Cox Enterprises, Inc. v. Board of Trustees of Austin I.S.D.,* 706 S.W.2d 956, 959 (Tex. 1986) (school board was required to post adequate notice that it would discuss "a major desegregation lawsuit").
[35] ALA. CODE § 13A-14-2(a) (1994).
[36] 28 CUMB. L. REV. 361 (*citing Dunn v. Alabama State University Board of Trustees*, 628 So. 2d 519, 529 (Ala. 1993)).
[37] TEX. CONST. art. II, § 1 (The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.)
[38] 28 CUMB. L. REV. 361 (*citing Neu v. Miami Herald Publishing Co*., 462 So. 2d 821 (Fla. 1985)).
[39] *See* TEX. GOV'T CODE ANN. §§ 551.121-551.127.
[40] Op. Tex. Att'y Gen. No. JC-194 (2000).

participating over the telephone, internet, or through video-conferencing.[41] Senate Bill 170 (2001) made it clear that governing bodies can convene meetings (open or closed) for the purpose of consulting their attorney by telephone, internet or video conference. However, this section does not apply to consultations between a board and its ***in-house*** attorney (*i.e.*, an attorney who is an employee of the governmental body). During public session, the consultation must be audible to the public.[42]

When utilizing this valuable exception, attorneys who represent government entities should be diligent in helping their clients preserve the attorney-client privilege. For example, before dispensing sensitive legal advice over the speakerphone, attorneys may want to verify that the client is in a room conducive to private conversations and that only those persons vital to the discussion are present.

Practical Pointers

Some steps that the lawyers should consider in order to make sure that communications with the client are not compromised include:

(1) Evaluate the purpose and subject matter of meetings (including informal gatherings) and decide who should attend, and who should be excluded.
(2) Include only those individuals who are essential to the decision-making and who have a commonality of interests.
(3) Gather as many facts as early as possible in order to evaluate any legal or factual matters that will be discussed.
(4) Define your role. Are you a problem-solver, informal mediator, legal advisor, or merely a member of an executive department?
(5) Be cognizant of the difference between a "client" and a potential "witness."
(6) Identify the affected parties and their motivations.
(7) Carefully consider who you are talking to, particularly if being asked to offer preliminary assessments as to whether any law has been violated or anything improper or unethical has occurred.
(8) Do not say anything you do not want repeated.[43]

PROFESSIONAL ETHICS

An eminent lawyer cannot be a dishonest man. Tell me a man is dishonest, and I will answer he is no lawyer. He cannot be, because he is careless and reckless of justice; the law is not in his heart [and]… is not the standard and rule of his conduct.
- Daniel Webster

Legislative Immunity

Amici argued on behalf of Harry Joe, a lawyer and Irving city councilmember, that Joe was not required to abstain from voting on a city-wide moratorium which might have affected the development plans of a client of another lawyer at Joe's law firm. The Fifth Court of Appeals, Dallas, ruled that Joe's failure to abstain and his failure to give the client advanced notice of the moratorium vote constituted legal malpractice. TML and TCAA, along with other *amici* representing state legislators/lawyers, argued that such duties would make it impossible for lawyers to serve as elected public officials. The Texas Supreme Court overturned the lower court, holding that the councilman / attorney had no duty to inform the firm's client of the city council meeting, and that the lawyer –

[41] *See* Op. Tex. Att'y Gen. No. H-484 (1974).
[42] *See* TEX. GOV'T CODE ANN. § 551.129.
[43] 48 DRAKE L. REV. 655.

legislator was immune from liability for any conflict of interest arising from his support of, preparation for, and vote on an ordinance.[44]

Rules of Professional Conduct

Legislation enacted in 2003[45] provides that an elected or appointed officer of a city may not be subjected to disciplinary action, sanction, penalty, disability, or liability for:

(1) an action permitted by law that the officer takes in the officer's official capacity regarding a legislative measure;

(2) proposing, endorsing, or expressing support for or opposition to a legislative measure or taking any action permitted by law to support or oppose a legislative measure;

(3) the effect of a legislative measure or of a change in law proposed by a legislative measure on any person; or

(4) a breach of duty, in connection with the member's practice of or employment in a licensed or regulated profession or occupation, to disclose to any person information or to obtain a waiver or consent from any person, regarding:

(a) the officer's actions relating to a legislative measure; or

(b) the substance, effects, or potential effects of a legislative measure.

Representing Private Clients before Municipal Courts & Boards

In order to place the Dallas court's decision in the *Harry Joe* case (above) in context, the reader may find it interesting to learn that the decision has some basis in the former Texas Canon of Ethics. In two 1960s opinions, the former Commission on the on Interpretation of the Canon of Ethics concluded that a member of a law firm may not serve as chairman of a city board while the chairman's law partner accepts employment to represent clients with interests before the board. In its opinion, the Commission held that such a situation would not be ethical or proper, and would violate [the former] Canon 6.[46]

It would be a violation of the [former] Canons of Ethics for an attorney who is a city councilmember to represent clients charged with crimes in the city court of the city.[47]

Remember the basic rule: a lawyer generally is not permitted to represent conflicting interests (except with the consent of all parties). The lawyer who is a member of the board is representing the city in a fiduciary, representative capacity. For him/her to represent an individual or company before the board while he/she is a member of the board would violate Canon 6. Also, when a lawyer is prohibited from handling a legal matter, generally all partners of that lawyer are likewise barred.[48] In a subsequent matter, the former

[44] *Harry J. Joe and Jenkens & Gilchrist, PC, v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150 (Tex. 2004).
[45] S.B. 1047.

[46] STATE BAR OF TEX., RULES AND CANON OF ETHICS, Canon 6. Note that after January 1, 1990, the professional conduct of licensed attorneys in Texas is governed by the Texas Rules of Professional Conduct, which were promulgated by the Texas Supreme Court on October 17, 1989.
[47] Comm. on Interpretation of the Canon of Ethics, State Bar of Tex., Op. 82 (June 1953).
[48] Comm. on Interpretation of the Canon of Ethics, State Bar of Tex., Op. 197 (June 1960).

Commission on the Interpretation of the Canon of Ethics again cited Canon 6 in its determination that no member of a law firm, of which the Mayor of a city is a member, may represent clients before the city's municipal court, the judge of which is appointed by and removable at the will of the City Commission.[49]

Representing Private Clients before Other Courts

The Professional Ethics Committee of the State Bar of Texas ruled that a lawyer who serves as a county judge has a conflict of interest in representing private clients in the justice of the peace, statutory county, and district courts of the county in which the lawyer serves as county judge.[50] The Ethics Committee found that the conflict exists because the lawyer is adversely limited in his representation as a result of his responsibilities to the county, his responsibilities to the private client, and by his personal interests as both a lawyer and public official.[51]

The Committee reasoned that the conflict was created by the county judge's duties as chief budgetary officer and presiding officer of the county commissioner's court, which sets the salary of the justice of the peace and county court-at-law judges, and has influence over the compensation of all court personnel and the personnel of the district attorney's office.[52] In the above opinion, the Ethics Committee referenced a 1994 opinion in which the question was whether an attorney who is also a city commissioner or his law partner may represent private parties in the following situations:

(a) persons charged with criminal offenses in the county and district courts where the city police department participates in the investigation and/or arrest of the defendant.
(b) persons charged with criminal offenses in the county and district courts where members of the city police department are victims (i.e., assault on an officer).
(c) persons charged with criminal offenses in the county and district courts where the arrest and/or search warrant in the case is issued by the city judge. [53]

The Committee concluded that neither lawyer could represent the private clients in these situations unless all parties give appropriate consent after consultation and full disclosure pursuant to Disciplinary Rule 1.06(c).[54] Although the attorney / commissioner does not exercise control over the day-to-day operations of the police department, as a commissioner, he appoints the city manager, who ultimately directs the activities of the department. Certainly, the actions of police officers within a city reflect upon the commissioners. By representing a person charged with criminal offenses where the city police department conducts the investigation and/or arrest of the defendant, or where the police officers are victims of a crime, the attorney/commissioner places himself in a conflict between protecting the city's (and since he is a commissioner, his) interests and in protecting the interests of his client. This situation would also place the police officers in the awkward position of

[49] Comm. on Interpretation of the Canon of Ethics, State Bar of Tex., Op. 272 (November 1963).
[50] Tex. Comm. on Prof'l Ethics, Op. 540 (February 2002).
[51] *Id.*
[52] *Id.*
[53] Tex. Comm. on Prof'l Ethics, Op. 497, V. 57 Tex. B.J. 1136 (1994).
[54] *Id.*

performing their job duties while dealing with a commissioner who is acting as an attorney in the case.

A city commissioner exercises even more control over the city judge than he does over the police officers. The city commission actually hires the judge. The actions of the judge in executing the arrest and/or search warrant, and any other action taken by the judge would necessarily affect the welfare of the attorney / commissioner's client. However, if the judge did not perform his job, the welfare of the city, and that of the commission which is the personal interest of the attorney / commissioner, would be affected.

The attorney who serves as a city commissioner is a public officer, and, as such, is held to a high standard of integrity (Comment 7, Rule 8.04). Having an attorney who is a city commissioner involved in representation of criminal defendants in which employees of the city are involved creates a conflict between the client's interests and the city's interests, as well as the attorney's own interests. Such representation violates Disciplinary Rule 1.06(b)(2). Further, since the attorney/commissioner may not represent these criminal defendants, neither can his law partner. However, Rule 1.06(c) provides for the affected parties to consent to such representation.

Communicating with a Represented Party

Mayors, councilmembers, managers, and other city employees should understand that they are not necessarily required to communicate directly with attorneys representing private parties. If the city has a City Attorney, private lawyers are ethically obligated to go through the City Attorney's Office, and cannot lobby directly. Attorneys are urged to observe established agency protocol when contacting elected officials and staff while representing parties before municipal and county agencies. Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct provides, in part:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate the subject of the representation with a person, organization or ***entity of government*** the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so . . .
>
> (c) For the purpose of this rule, "organization or entity of government" includes:
>
> (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or
>
> (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.[55]

Thus, before attorneys representing private parties go lobbying the city council door to door, it would be wise for them to contact the attorney for the government entity in order to obtain permission to deal directly with agency staff or elected officials.

[55] *See* Tex. Comm. on Prof'l Ethics, Op. 474, V. 55 TEX. B.J. 882 (1992).

Organization as Client

Rule 1.12(a) of the Texas Disciplinary Rules of Conduct states that a lawyer retained by an organization (including a governmental entity), represents the ***entity*** (not the individual constituents). The result is an attorney-client relationship through which the client is always represented by intermediaries.[56]

A lawyer must take reasonable remedial actions whenever the lawyer learns that: (1) a person within the organization has violated or intends to violate the law; (2) the violation is like to substantially injure the organization; and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.[57] However, unless legally required to disclose such a violation, a lawyer should first try to resolve a violation internally, usually by asking for reconsideration of the matter, seeking a separate legal opinion, or referring the matter to a higher authority within the organization.[58]

It should also be noted that when a member of the organizational client individually seeks counsel in that person's official capacity, those communications are governed by the applicable confidentiality rules.[59] If a member's interests become adverse to the organization, the lawyer should take care to explain that he cannot represent the individual's interests.[60] If a lawyer represents both the organization and one of its members, he should ensure that such arrangement does not violate the State Bar rules regulating conflicts of interest.[61]

Representing the Entity, Not Individual Officials

Ethical conflicts can arise when the municipal lawyer is confronted with criminal charges or other actions that have been brought against individual members of the governing body. It is generally recommended that municipal lawyers warn the city council members at the outset that they attorney represents the government entity, not the individual officials.[62]

Representing Parties in Negotiation

Comment 14 to Rule 1.06 states that a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them. *How does a City Attorney handle negotiations for the Chief of Police's new employment agreement when the Chief is not represented by legal counsel?*

Clarify Your Role

At the very least, it would be wise for the City Attorney to clarify the attorney's role in conformance with Rule 1.12, for which Comment 4 reminds us that 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

[56] Fischer, Ross, "The Ethical Challenges of Representing Organizations," Suing & Defending Governmental Entities, Boot Camp (2008), Ch. 4, p. 1.
[57] Tex. R. Disciplinary P. 1.12(b).
[58] Tex. R. Disciplinary P. 1.12(c).
[59] Tex. R. Disciplinary P. 1.12, Comment 3.
[60] Tex. R. Disciplinary P. 1.12, Comment 4.
[61] Tex. R. Disciplinary P. 1.12, Comment 5.
[62] Lance Cole, The Government-Client Privilege after Office of the President v. Office of the Independent Counsel," 22 J. LEGAL PROF. 15, 28 (1998). See also Rule 1.12.

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 discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.[63]

Legal Doesn't Make it Right

City attorneys often yield great influence – perhaps too much weight is given to the legality of a certain course of action or position. Just because it's legal and permissible, does not make it proper. Ethical people often choose to do less than the maximally allowable, and more than the minimally acceptable.[64]

Successive Government Employment

Rule 1.10 (a) tells us that a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

Comment 3 to Rule 1.10 addresses the issue of Revolving Doors, stating that where a public agency and a private client are represented in succession by a lawyer, the risk exists that power or discretion vested in public authority might be used for the special benefit of the private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional function on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

Confidentiality of Information

Comment 5 to Rule 1.05 specifies that the requirement of confidentiality even applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Advising Citizen Advisory Boards

The ability of a City Attorney to advise both the city council and certain citizen advisory boards might be limited. The Texas Commission on Professional Ethics has ruled that an attorney may not render legal advice to a city ethics board concerning the investigation and determination of a complaint against a majority of the members of the city council.[65]

The Commission reasoned that, although the city attorney does not represent the individual city council members, Rule 1.06(b)(2) provides (in pertinent part) that, unless the requirements of Rule 1.06(c)[66]

[63] *State v. DeAngelis,* 116 S.W.3d 396 (Tex.App.—El Paso, 2003).

[64] Josephson, Michael, "Twelve Obstacles to Ethical Decision Making: Rationalization," an excerpt from Making Ethical Decisions, as printed in *Texas Town & City*, (September 2005), P. 26.

[65] Tex. Comm. on Prof'l Ethics, Op. 567 (February 2006).

[66] Tex. R. Disciplinary P. 1.06(c) provides that a lawyer may represent a client in the circumstances described in Rule 1.06(b)(2) if under Rule 1.06(c)(1) the lawyer "reasonably believes" that the representation of the client will not be materially affected and under Rule 1.06(c)(2) each "affected or potentially affected client consents to such representation after full disclosure of the existence,

can be met, a lawyer shall not represent a person if the representation "reasonably appears to be or become adversely limited . . . by the lawyer's own interests." If the city attorney serves at the discretion of the city council and receives such compensation as may be fixed by the city council, representation of the ethics board against a majority of the members of the city council at least "reasonably appears" to be adversely limited by the city attorney's own interests in his position as city attorney.

Media Relations

Be careful about making your case to the media. Rule 3.07 limits our ability to make statements outside the courtroom that will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. Although a city attorney may be justified in engaging the media at the outset, ethical concerns increase as the trial date nears.[67]

Keep Client Informed

Like any lawyer, the City Attorney has a duty to keep the client reasonably informed about the status of legal matters, and to promptly comply with reasonable requests for information.[68] Comment 2 to Rule 1.03 states that the guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the clients overall requirements as to the character of representation.

The Texas Lawyer's Creed states that a lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by self-interest.[69]

Just addressed the California State Legislature and helped them pass a bill to form a lawyer' association to regulate their conduct. Personally, I don't think you can make a lawyer honest by an act of the Legislature. You've got to work on his conscience. And his lack of conscience is what makes him a lawyer.
- Will Rogers

WHEN THE MAYOR LIES

Imagine if you will a small but affluent municipality where just two votes separated the long-time incumbent and a rock star challenger. Imagine further that the charismatic mayor had openly campaigned for the challenger. During the resulting election contest (in which the city, mayor, city secretary and incumbent were named defendants), the City Attorney discovered the mayor was: (1) passing privileged information to the challenger's lawyer, (2) withholding information from the City Attorney, (3) soliciting witnesses for the challenger, and (4) lying about all the above to the city attorney, city manager, and city secretary.

In this situation, the City Attorney has an obligation to inform the entire City Council of the Mayor's activities. A lawyer must keep the client informed under Rule 1.03(a). In this context, the client is the organization (the city), not its individual members, as per Rule 1.12(a); thus, the client is the city council. If a lawyer learns that an officer of the city has committed a violation of a legal obligation to the entity, the lawyer must take

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nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

[67] La Brec, David J., *"Ethics & Professionalism in Government Litigation,"* International Municipal Lawyers Association, San Antonio, Texas (October 3-6, 2004).

[68] Tex. R. Disciplinary P. 1.03(a).

[69] Texas Lawyer's Creed: A Mandate for Professionalism, promulagated by the Supreme Court of Texas and the Texas Court of Criminal Appeals (November 7, 1989), as reprinted in *The Ethics of Practicing Municipal Law*, Lynn Nunns, TCAA (November 8, 2007).

reasonable remedial action pursuant to Rule 1.12(b).

Take this scenario another step and consider the ethical implications of the Mayor unilaterally hiring a law firm at city expense to critique the City Attorney's actions. The firm writes a memo without citing a single court case or published ethics opinion concluding that the City Attorney breached the professional standards by going to the Council. The firm also billed the city for writing a resolution terminating the City Attorney, and submitted a contract to provide City Attorney services.

CONCLUSION

Because you represent municipalities, it is important to understand the democratic context in which government rulemaking and decision-making must take place. It is also imperative to remember your professional responsibilities as members of the Texas Bar.

Hopefully, this paper refreshed your memory on some old concepts and brought some new developments to your attention. This paper is presented for educational purposes only, and in no way should be considered to constitute legal advice.

"All associations are dangerous to good Government …and associations of Lawyers the most dangerous of any next to the Military." – Cadwallader Colden[70]

[70] A 17th Century Irish-born American politician.