

Recognizing the Client

Knowing the Client that the City Attorney Represents

WHO is the City Attorney's client? Is it the Council, the Councilmembers individually, the Director of Public Works, the City as an organization, the Chief of Police, the Road Crew Foreman, the City Secretary, the Finance Director, or some combination of them?

From attending City Council meetings to working on special projects, the City's Attorney, or City Attorney, works with many groups and individuals to help the City achieve its goals. Those who get involved in City government soon realize the organization is not like a lifeless vending machine that doesn't always work, but always takes your coins. The "City" is a group of hard-working individuals whose collective actions impact residents' lives and well-being every day. The individuals who make up the City face obstacles and risks on a daily basis, and the City Attorney must keep focused on the ethical considerations and laws which impact their decisions and actions.

The "Rules"

The Texas Disciplinary Rules of Professional Conduct (the "**Rules**") guide the City Attorney in representation of the City and the individuals who make it work. Rule 1.12 is THE RULE related to client organizations, such as cities.

Rule 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 lawyer's 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 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. 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 organizations 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.

The City Attorney represents the organization or entity as a whole, even though the attorney may take direction from authorized individuals. The City's interests take precedence over any individual's interests.

The comments to Rule 1.12 states, in part: "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 does not describe how or when a lawyer should question whether the intermediary legitimately represents the client. That is left to the City Attorney to determine.

Another comment to rule 1.12 states, in part: “There are many times when the organization’s interests 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 the constituent, and that such person may wish to obtain independent representation.” This can be tough advice to follow when the interests of the City's representatives and the City are intertwined AND adverse.

The following comment to Rule 1.12 may also be difficult to contend with: “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.” The comment indicates that maintaining confidentiality may be less important for a governmental client in a circumstance where the City Attorney is attempting to prevent a wrongful official act. In short, the comment again reflects that the City as an organization is the client.

Practical Application: The City Attorney as Investigator; The Best Interest of the Organization: See Rule 1.12(a) {above}

From time to time a City Attorney is asked to assume the role of investigator. Investigations may involve: (1) an issue in which the City is looking to take action (illegal conduct or misuse of funds); (2) facts to be used in potential City litigation (what went wrong with a contract); (3) an investigation to determine City risk analysis and liability (for insurance). When warranted, the legal advice conveyed to the City must be protected by the attorney/client privilege (communications) and attorney work product (work done for the client involving legal advice) doctrines. In civil cases in State Courts, these privileges are governed by Texas Rules of Civil Procedure and Texas Rules of Evidence.

Information must be clearly conveyed to only the client so the privileges are maintained, not waived. How information is conveyed may be different in different contexts: for example, disclosure in the discovery phase of litigation in which the City is involved, or disclosure through an open records request. The attorney and the City must understand the need for confidentiality or privilege in the circumstance presented.

In an investigation, the City Attorney may be asked to be both fact finder and legal advisor. So, the question should be asked up-front if there are concerns as to, for example, bias of the attorney as investigator. There must also be a clear chain of command for the City Attorney to report findings, and clear expectations of what should be reported.

If the City Attorney is acting as a fact-finder, conversations with the city representatives or staff may be (it will be argued) subject to discovery. If the attorney is acting as legal advisor, the attorney must make it clear that the investigation is being done to provide legal advice, in order to maintain the attorney-client privilege. The attorney must also remind/explain to those contacted or interviewed that the attorney's duty is to the City, and not to any individual person.

Rule 1.03 Communication, and Rule 1.05 Confidentiality of Information

Communication is an everyday thing for all of us. Remember the communications of City representatives are subject to specific ethical rules, laws and practical considerations: think about the open meetings and open records laws. Rule 1.03 is related to communication, requiring the attorney to keep the organization informed. On the other hand, Rule 1.05 deals with confidentiality of information or communications. Rule 1.03 states:

Rule 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 comments to Rule 1.03 give these examples:

- "[F]or example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party."
- "[I]n litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail."

- "[W]hen the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization."

While Rule 1.03 deals with communications, Rule 1.05 deals with the confidentiality of information. Rule 1.05 states:

Rule 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 (cl), 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 J aw firm.

(2) Use confidential information of a client to the disadvantage of a 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;

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

(iii) 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.

(t) 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).

[for example, (i) to avoid assisting in a criminal act; (ii) to correct false evidence; (iii) to avoid perpetration by the client of a fraud.]

Comments to Rule 1.05 provide these examples:

- "The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance."
- "The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. Several sound exceptions to confidentiality have been

developed in the evidence law of privilege."

- "Rule 1.05 reinforces the principles of evidence law relating to the attorney-client privilege. Rule J .05 also furnishes considerable protection to other information falling outside the scope of the privilege Rule J .05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1 .05 accords with general fiduciary principles of agency."

Rule 1 .03 and 1 .05 can create a conflict when a representative of the City informs the City Attorney of "information" which the representative wants to remain confidential from others with the City. The City Attorney must weigh the factors involved to determine whether the information must be divulged in order to protect or represent the City as the client. This problem is not specifically addressed by the Rules or the Comments. Unless the City Attorney has "somehow" undertaken independent representation of a constituent, this potential conflict should be avoided. The City Attorney should advise the person, prior to the receipt of confidential information, of the Attorney's duty to the organization as the Client.

Rule 1.06 touches on this same point; potential conflicts of interest for the City Attorney.

Portions of Rule 1.06 are cited below:

Disciplinary Rule 1.06 Conflict of Interest: General Rule

(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 lawyers firm; or

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

The Comments to Rule 1.06 are titled "Loyalty to a Client." The Comments briefly describe "loyalty" in the attorney client relationship.

- "Loyalty is an essential element in the lawyer's relationship to a client."

- "Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer' s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

If you have a question or concern about a situation discuss it with the City Attorney, but recognize that, in the crunch, the City Attorney's client is the City, as an organization --- not you as an individual.

CONCLUSION

Here's the message: as a member of the City organization - remember who the City Attorney represents – it's the City! Utilize the services of the City Attorney within that framework.