ETHICS AND GOVERNMENT PRACTICE: NAVIGATING THE DANGEROUS WATERS OF DEFENDING A GOVERNMENT ENTITY

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What Makes Defending A Governmental Entity So Difficult?

THE CLIENT

For FCRL:





Discovery

- How do you get documents?
- Who knows about the documents?
- When do they destroy documents?
- What happened to that document?
- Who is going to sign that interrogatory?

- Who is responsible if you don't get everything?

Life in FCRL BP



How We Obtained CPD Documents

- 1) Send a request to the Office of Legal Affairs ("OLA").
- 2) Someone at OLA would forward the request to the relevant division of CPD.
- 3) Someone at the relevant division would send something to OLA.
- 4) OLA would forward that something to us.

- Where did you, attorney, get it? DUNNO.

How We Obtained OEMC Audio

- 1) Send a request to the Office of Emergency Management and Communication ("OEMC")
- 2) Someone MIGHT look to see if they had audio.
- 3) If someone looked and found anything, that audio was forwarded to us.
- 4) If the audio was not in the right place, someone would respond with a no records statement.

How Could We Be Sure We Had Everything?



Gloria Pinex v. City of Chicago

- Once upon a time, there was an officer-involved shooting …

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

- A lawyer shall not:
- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

- In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;

This Sums It Up:

- "So when Marsh said that no document exists related to the call and that any audio must already be gone, the statements were misleading and therefore sanctionable under the Court's inherent authority."

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But wait, there's more!

- Let's talk about unintentional misconduct.

- "With regard to OEMC recordings, Aumann did not 'talk to anybody at all about how OEMC went about getting relevant documents for this case.' Despite that lack of knowledge, Aumann purported to respond to the production request that sought OEMC recordings relating to the events in the case."

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

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As Judge Chang said:

"It is not reasonable to rely on another person's work in compiling documents to respond to a discovery request if you do not even know *who* did the work. It is not reasonable to rely on a set of documents compiled by another person if you do not know what *sources* were used to compile the file. It is not reasonable to rely on a set of documents compiled by another person if you do not know *when* the documents were gathered or whether the set was ever updated."

The Immediate Result For The Case?

- 1) New trial after a jury found the officers not liable.
- 2) "The City of Chicago and Jordan Marsh are jointly and severally liable for all attorneys' fees and costs incurred by Plaintiff from February 19, 2015 through post-trial discovery and briefing, and the City of Chicago is also responsible for attorneys' fees and costs Plaintiffs expended in preparing for the first trial, even those incurred before February 19, 2015."

What About FCRL?



Well …

- "It is of course true that Civil Rights Litigation Division lawyers, and indeed all Law Department attorneys, have a tough job in responding to discovery, because OEMC and the Chicago Police Department generate and maintain a massive quantity of records. Budgets are tight, the attorneys are probably overworked, and mistakes are inevitable. But that is all the more reason to establish procedures that will minimize negligent mistakes and to instill a culture that will promote complete discovery."

How Do We Minimize Negligent Mistakes?



You Get An Investigation!

- **"Ex-federal prosecutor named in third-party review of city's Law Department"**

- "Less than a week after a federal judge harshly criticized the city's Law Department for how it had handled a police shooting case, the department announced Sunday that former U.S. Attorney Dan Webb has been hired to examine how it deals with federal civil rights claims and make recommendations for improvements.
- Webb, co-chairman of the powerful Winston & Strawn law firm, said in an interview on Sunday that his agreement with Corporation Counsel Stephen Patton allowed him not only to make suggestions for beefing up policies and procedures but also to refer cases of possible misconduct to city Inspector General Joseph Ferguson."

- 1/11/16 Chicago Tribune

Six months (AND a few million dollars) later…

"Webb: No corruption at city law department, but changes needed"

- "After more than six months reviewing the civil rights division of Chicago City Hall's law department, former U.S. Attorney Dan K. Webb has recommended more than 50 policy changes but found no "evidence establishing a culture, practice or approach" of "engaging in intentional misconduct," according to a 74-page report released Thursday."
- 7/21/16 Chicago Sun-Times

"Webb: No corruption at city law department, but changes needed"

- Webb said that if he found evidence that City Hall attorneys or paralegals deliberately concealed evidence, he would have reported that to city Inspector General Joseph Ferguson, but there was nothing to report.
- "I found evidence that mistakes were made in discovery and sometimes documents did not get produced," Webb said. "But I found no evidence that there was any systematic or planned system to conceal evidence."

What Did FCRL Get?

- 1) The "right" to get its own documents from CPD.
- 2) The "right" to have its own dedicated paralegal at OEMC.
- 3) Certification forms filled out by record custodians at CPD and OEMC related to searches.
- 4) LOTS of formal training.

And, hopefully, less of this:

