

MY CLIENT, MY ENEMY?

Ethical Challenges

When Representing Cities

IMLA, La Quinta, CA, Sept 29, 2023

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- Board Member, International Municipal Law Assn
- Glink Award, International Municipal Law Assn
- Honorary Member, International City Management Assn
- Honorary Member, Texas Municipal Clerks Assn
- *Outstanding Government Lawyer Award*, Texas Bar Assn
- *Ambassador Award*, Texas Tech University School of Law
- Author, *Texas Municipal Law & Proc Manual (7th Ed.)*



BOJORQUEZ LAW FIRM, PC
TexasMunicipalLawyers.com

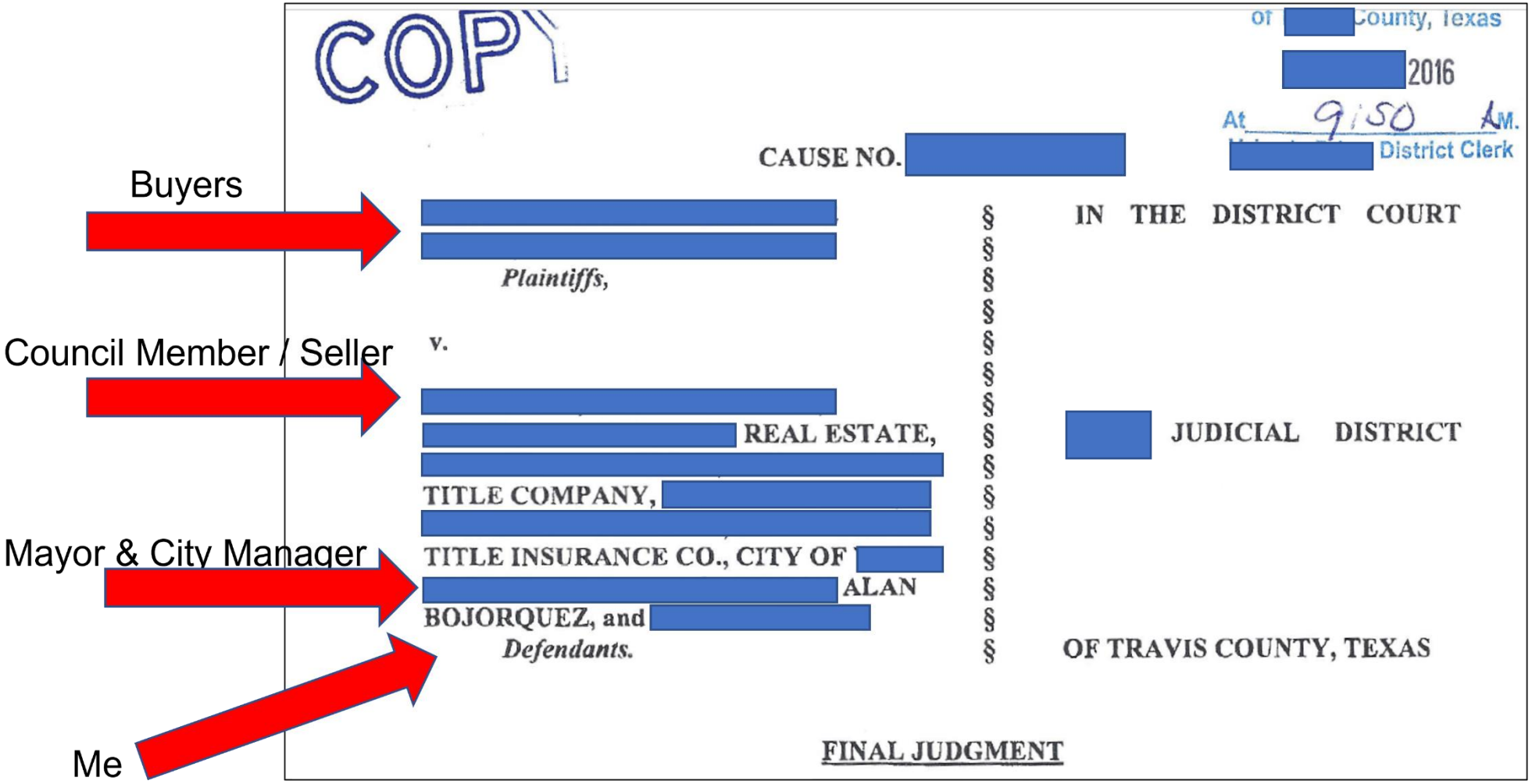
Why are *you* here?

- To get your minimum hours of CLE annually?
- To get your minimum hours of “Ethics”?
- To be a better public servant & practitioner?



Why am I here?

Because of this! A Plat & Eminent Domain dispute.


Buyers
Council Member / Seller
Mayor & City Manager
Me
COPY
of [redacted] County, Texas
[redacted] 2016
At 9:50 AM.
[redacted] District Clerk
CAUSE NO. [redacted]
[redacted]
Plaintiffs,
v.
[redacted] REAL ESTATE,
[redacted]
TITLE COMPANY, [redacted]
[redacted]
TITLE INSURANCE CO., CITY OF [redacted]
[redacted] ALAN
BOJORQUEZ, and [redacted]
Defendants.
§ IN THE DISTRICT COURT
§
§
§

Why am I here?

And because of this!

Council Member



OFFICIAL NOTICE OF ORDINANCE VIOLATION

Notice #: 0012

Date Notice Issued: 08 / 12 / 2021 (Month / Day / Year) Time: 8:45a

[redacted]

Planning & Development

In the Municipal Court, [redacted], Texas

Offense Date: 08 / 09 / 21 (Month / Day / Year) Time: _____

Name: [redacted] (First / Middle / Last)

Address: [redacted] (Street / Apt. #)

City: [redacted]

State: Tx Zip: 78602

Home Phone: 512-[redacted] Work Phone: _____

[redacted] Construction (Place of Business / Address / City/St/Zip)

DOB: na / / [Juvenile (Adult)] Sex: [(M) F] Race: A / B (C) / H / Other

DL: na / (State / Number) License Plate: na / (State / Number)

Vehicle Information: na (Year / Make / Model / Color)

In the name and by the authority of the State of Texas: I, the undersigned affiant, do solemnly swear that I have good reason to believe that on or about the above date and before the making and filing of this notice, in the territorial limits of the City of [redacted] County, Texas, the above-named person then and there unlawfully committed the following offense(s) against the peace and dignity of the State:

VIOLATION 1: work w/o permit VIOLATION 2: _____ VIOLATION 3: _____

Working w/o Permit

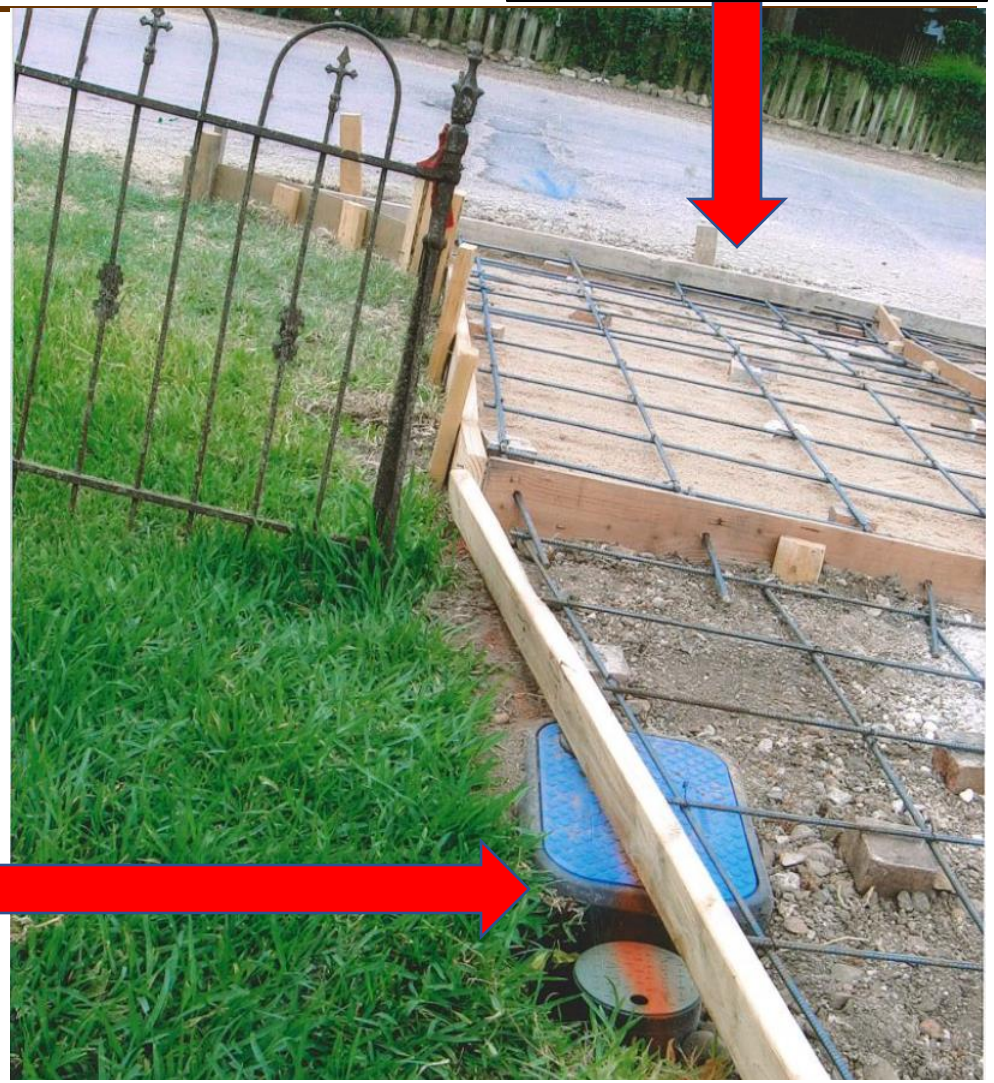
Why am I here?

That's going to be the driveway

Oh, and we can't forget this!

Council Member is a General Contractor in town and this is their client's project

Yes, that's a *Water Meter!*



ABA Model Rules of Professional Conduct

ABA Rule 1.13 Organization as a Client

A lawyer employed or retained by an organization represents the ***organization*** ….

Acting through its duly authorized ***constituents***, …



ABA Model Rules of Professional Conduct

Rule 1.13 (Comment 9) Government Agency

- Duty defined in this Rule applies to ***Governmental Organizations***
- Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context
- Client may be a specific agency, and / or a branch of government, such as the executive branch, or the government as a whole
- If action / failure involves head of bureau, either the department or relevant branch of government may be the client









The End

(And they all lawyered happily ever after)







Ooops,… wait,

perhaps there's more to it

(It ain't that simple!)

What do you do when …

- Mayor attends the City Secretary's consultation with City Secretary's *personal* attorney prior to the City Secretary's disciplinary hearing before the Council?

- Council Member sues the City?

- Mayor Pro Tem is married to a city department head whose position is scheduled to be abolished by the Council?



What do you do when …

- Mayor is convinced the City Manager is like the *Chief of Staff* and the City Attorney is akin to *White House Counsel*?
- Council votes to file a City Ethics Complaint against a Council Member?
- Council Member is accused of having an affair with CEO of corporation / vendor that receives city funding?



What do you do when …

- Chief of Police secretly records Mayor trying to influence investigation of traffic accident (Mayor didn't witness)?

- Council Member is being prosecuted for plumbing work that he did as professional plumber *without* the required permits?

- Council Member is being prosecuted by city for *Public Intoxication* after being in a brawl at the city's annual *Goat Cookoff?*



Who's my client? *My client is a Thing!*

ABA Rule 1.13:

- Lawyer representing an ***Organization*** represents the ***Entity.***
- Lawyer takes direction from entity's duly authorized *Constituents*
- ***Comment 1.*** Officers, directors, and employees are the constituent
- ***Comment 3.*** When constituents of the organization make decisions for it (policy & operations), the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful, including ones entailing serious risk



Who's my client? *My client is People!*

ABA Rule 1.13:

- Lawyer takes direction from entity's duly authorized ***Constituents***
- ***Comment 1.*** Officers, directors & employees are the constituents
  - Mayor, Council Members, Manager, Department Heads?
- ***Comment 3.*** When constituents of the organization make decisions for it (policy & operations), the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful, including ones entailing serious risk



Different Authority? *Different Balance?*

ABA Rule 1.13:

- ***Comment 9.*** When the client is a governmental organization, a different balance may be appropriate between maintaining ***confidentiality*** and assuring that a wrongful official act is ***prevented*** or ***rectified***, because public business is involved
- Regarding conduct of government officials, government lawyer may have authority to ***question conduct more extensively*** than a lawyer for a private organization
- Perhaps when the Org's interests are ***adverse*** to those of *Constituent's*, lawyers should advise that the lawyer cannot represent them, and they can obtain *independent legal rep*



Universal Definition of "Client"?

- "no universal definition of the client of a governmental lawyer is possible"

Restatement (3rd) of the Law Governing Lawyers § 97, CMT. C (AM. L. INST. 2000)

- Possible identities for the client of a government lawyer: **(1)** the public, **(2)** the government as a whole, **(3)** the branch of government in which the lawyer is employed, **(4)** the particular agency or department in which the lawyer works, and **(5)** the responsible officers who make decisions for the agency

S Fortney, *Ethical Quagmire for Governmental Lawyers, 69 Wash. U. J. L. & Pol'y 17 (2022)*

- The nature of government lawyers' work can vary a great deal depending on the level and branch of government and position held by the attorney. Many lawyers act in ***representational*** capacities, while others find themselves in more ***regulatory*** and ***adjudicative*** roles.

R. Cramton, *Lawyer as Whistleblower: Confidentiality & the Government Lawyer,* 5 Geo. J. Legal Ethics 291 (1991)

January 6th Hearings

The client of the US DOJ is not the American people.
The one and only client of the DOJ is the
United States government.

- **Richard Donoghue** (*paraphrased*)
  - former US Attorney for E. Dist. of NY
  - former Acting Deputy Attorney General





Attorney-Client Relationship



Texas cases on Formation of the Relationship

- Expressly created by contract or implied from actions of parties.

  Tanox v. Akin Gump

- Determination of whether there is a ***meeting of the minds*** must be based on objective standards of what the parties did and said, and not on their alleged subjective states of mind.

  Terrell v. State

- Question of fact exists when the evidence does not conclusively establish the existence of an Attorney-Client relationship.

  Sutton v. Estate of McCormick

Accusations of "Conflict" for City Atty!

ABA Rule 1.1. Competence

- Lawyer shall provide competent representation to a client
- Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

Comment 1. Employ requisite knowledge, skill, experience, preparation

ABA Rule 1.2. Scope of Representation

Lawyer shall abide by ***client's*** decisions concerning objectives & means of representation

ABA Rule 1.7. Conflicts of Interests *(Concurrent Clients)*

Lawyer can't represent a client if it will be directly adverse to another client, or there is significant risk that representation of one clients will be materially limited by the lawyer's responsibilities to another client or a former client

Adverse Interests w/i City Hall?

- Can a lawyer represent more than one Department within a city?
- Can a lawyer represent more than one city Board / Committee / Commission? Does P&Z get its own attorney?
- What happens when staff's position is contrary to that of the citizen Advisory Board?
- What about Boards / Commissions that have statutory functions (*sovereign duties*, e.g. Board of Adjustment)?
- Can a City Attorney also represent Private Property Owners at City Hall?



Privilege

Confidentiality of Information: Client-Lawyer Relationship:

- A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [exceptions].
- Exceptions to prevent death, harm, crime, fraud, etc.
- A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Rule 1.6

Scope of the Privilege



- Defined by **Tex.R.Evid. 503**
- Intended to allow unrestrained communication and contact between attorney and client in all matters in which attorney's professional advice or services are sought
- without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding
- Rule 503 protects confidential communications made for purpose of facilitating rendition of professional legal services to client

Huie v. DeShazo

Identity of the Client

"Pricklier Issue" of the role of a Government Lawyer: ***ID of the client!***

State v. Martinez

- **Client:** Person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

Tex.R.Evid. 503(a)(1)

- **Representative of the Client:** (a) a person having authority to obtain professional legal services, or to act on advice rendered, on behalf of client, or (b) any other person who, for purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for client.

Tex.R.Evid. 503(a)(2)(A)

Local Rules can provide Guidance

- City Attorney shall be legal advisor to and attorney for ***all*** officers of the City acting in their ***official capacities*** and shall represent the ***City and its departments*** in all legal proceedings.

Bastrop, TX Charter, §3.10

- City Attorney shall serve as chief legal advisor to the ***Council***, the City ***Manager, directors of City departments*** and other City ***officers and agencies***. City Attorney shall represent the City in all legal proceedings and shall perform any other duties prescribed by this Charter, ordinance or law.

Buda, TX Charter, §5.02

Local Rules (cont'd)

- The City Council shall appoint a competent and duly licensed attorney practicing law in the state of Texas, who shall be the City Attorney. The City Attorney shall hold office at the pleasure of the City Council. The City Attorney, or such other attorneys selected by the City Attorney with the approval of the City Council, shall represent the City in all litigation. The City Attorney shall be the legal advisor of, and attorney and counsel for, the City and ***all officers and departments*** thereof.

- The City Council may appoint a competent and duly licensed attorney practicing law in the state of Texas, who shall be the Deputy City Attorney. The Deputy City Attorney shall hold office at the pleasure of the City Council. The Deputy City Attorney, or such other attorneys selected by the Deputy City Attorney with the approval of the City Council, shall conduct all ***prosecutions*** in the Municipal Court.

Hutto, TX Charter, Sec. 4.04

Clarifying the Lawyer's Role

TRDC Rule 1.12. ***Comment 4*** warns us there are times when entity's interest may be *adverse* to that of certain officers or employees.

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 can't represent such constituent, and that such person may wish to obtain independent (personal) legal representation.



Beware of *Blurred* Lines

- City Employees often seek the City Attorney's guidance (advice)
- Sometimes as an ***attorney*** and sometimes as a ***friend***
- Maybe they each vent their frustrations and criticisms of others
- Perhaps they agree that a situation, policy or practice is wrong
- Government Lawyer's job is difficult because it includes a duty to:
  - keep sight of their ***Client***,
  - clarify their ***Role***, & sometimes
  - suggest ***Private Counsel***

State v. Martinez, 116 S.W.3d 385, 392–95 (Tex. App. 2003)



We Don't Represent *Individual* Members?

But we do represent the *majority?*

- City Attorney does not represent individual Council Members
- Representation of Ethics Board may be materially and directly adverse to interests of specific Council Members against whom complaint was filed, those Council Members are not clients of the City Attorney
- However, if ethics complaint(s) are against a ***majority*** of Council Members, and Council *hires / fires the* City Attorney, there might be a conflict (*probably*)

Supreme Court of Texas
Professional Ethics Committee
Op. No. 567 (Feb. 2006)

Excluding Adverse Parties from Exec

- Persons with interests adverse to that of the governmental body:
  - Are they permitted in Closed Meetings (Executive Sessions)?
- You may *(must?)* exclude Council Members who have sued the City, but can't if only threatened to sue?
- What if Executive Session is about a Council Member's conduct?

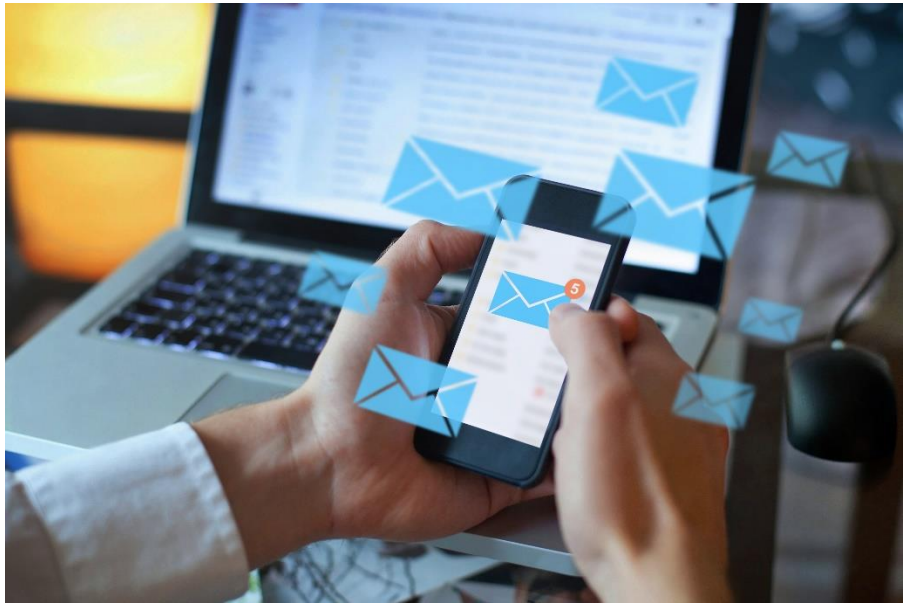


Op. Tex. Att'y Gen. Nos. JM-238 (1984) & GA-334 (2005)
Tex. Gov't Code Ch. 551
Tex. Loc. Gov't Code Ch. 171

Clients on Emails w/ Opposing Counsel

- **ABA 4.2:** *Lawyers should talk to Lawyers!*
  - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer regarding the matter, unless the lawyer has the ***consent*** of the other lawyer or is authorized to do so by law or a court order.

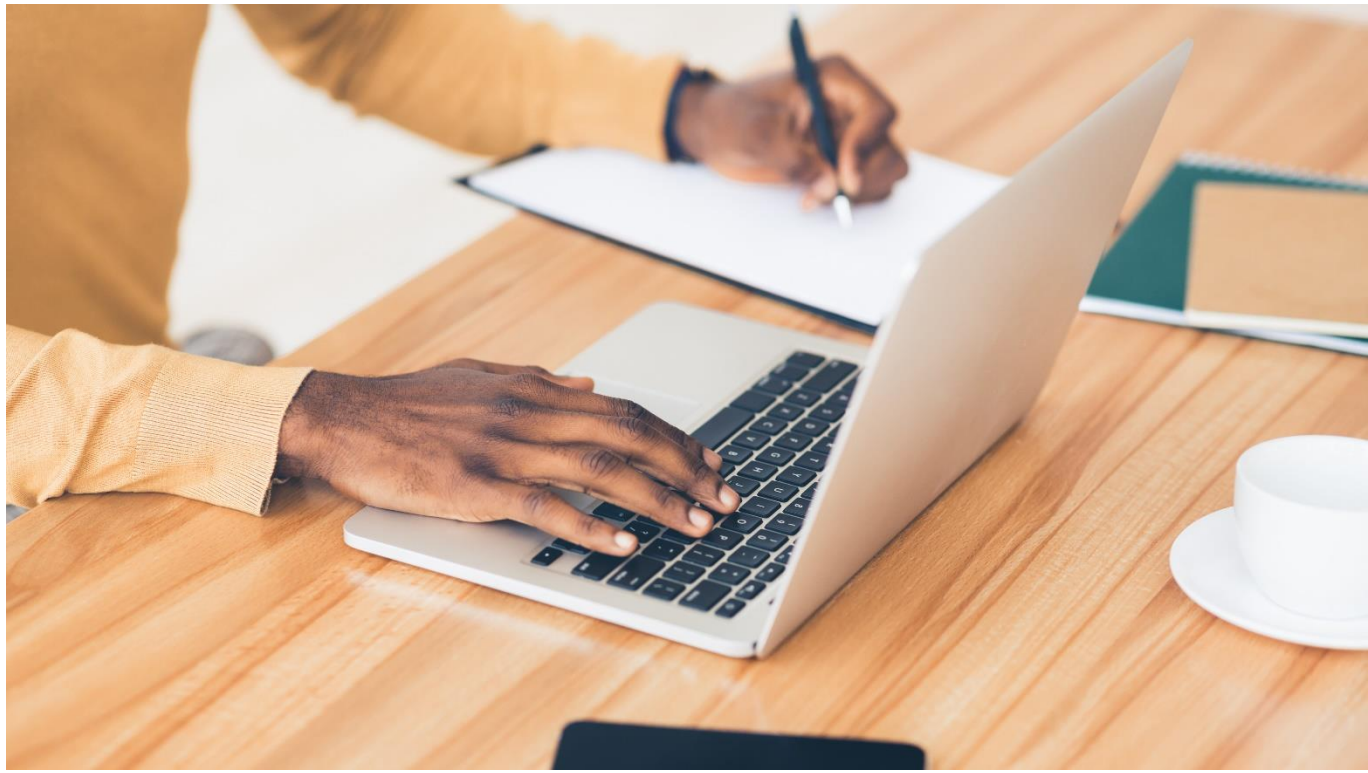
- What about when a Lawyer CC's their Client on emails w/ Opposing Counsel?
- What happens when your City Manager emails a Developer & CC's the Developer's Lawyer?



Clients on Emails w/ Opposing Counsel

- **ABA Formal Opinion 503** (Nov. 2, 2022):

In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter ***impliedly consent*** to receiving counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers ***should not copy their clients*** on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients



Parting Words

- Make training a priority
- Be familiar with local rules
- Engage in an ongoing dialogue
- Network with honorable colleagues
- Know your place (clarify your role)
- Remember you are part of a team
- Imagine your worst enemy learns



- Don’t be so insecure or engaged you’re reluctant to recuse yourself
- Remember why you got into public service in the first place
- Don’t be so eager to please that *you* become your client’s problem