When City Hall is a House Divided

Ethical Challenges for Municipal Lawyers



IMLA Florida, September 29, 2024

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

American Bar Association Model Rules of Professional Conduct
ABA Rule 1.13:

- Lawyer representing an ***Organization*** represents ***Entity***



ABA Model Rules of Professional Conduct

Rule 1.13 (Comment 9) Government Agency

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



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 constituents
  - Mayor, Council Members, Manager, Department Heads?
- ***Comment 3.*** When constituents of organization make decisions for it (policy & operations), decisions ordinarily must be accepted by 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 client is governmental organization, different balance may be appropriate between maintaining ***confidentiality*** & assuring that ***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 private organization
- Perhaps when Org's interests are ***adverse*** to those of *Constituent's*, lawyers should advise that lawyer cannot represent them, & they can retain ***independent legal rep***



Universal Definition of "Client"?

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

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

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

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

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

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

Duties of Attorney

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

Local Rules can provide Guidance

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

Bastrop, TX Charter, §3.10

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

Buda, TX Charter, §5.02

What do you do when …

MPT is a Keyboard Warrior?

- Your Mayor Pro Tem uses Social Media to attack individual City Council Members
- Social media posts are about city business
- Targeted City Council Members want City Attorney to “do something about it!”
- ***What is City Attorney’s role in these Cyber Wars?***



What do you do when …

Council Member's Spouse is Defendant in Muni Ct?

- City Council Member's spouse is a defendant in Municipal Court
- Incident involves inappropriate behavior with potential business entrepreneur looking to do business with City
- City Attorney supervise the Prosecutor
- ***What should City Attorney do?***
- ***What should City Attorney not do?***



What do you do when …

Council Member is Involved in Purchasing?

- The Council Member is having his own communications directly with a vendor that has submitted a proposal
- The Council Member wants access to data on process & submittals
- All proposals are currently being evaluated by City Staff
- ***What's duty of City Attorney?***



What do you do when …

Politician Wants a Favor?

- Local politician from another jurisdiction receives Code Enforcement violation notices
- Politician reaches out to Mayor requesting tickets dismissed
- City Attorney advises Code Enforcement & supervises Prosecutor
- ***What should City Attorney do?***



What do you do when …

City Receives Recall Election Petition?

- City Councilmember faces a recall election
- The City Attorney is appointed by Mayor
- But City Attorney must be confirmed by City Council
- ***What role, if any, does City Attorney have?***
- ***Who does City Attorney advise?***



What do you do when …

Mayor Sues the City?

- Mayor sues City & 3 Council Members in 3 separate suits
- Claims arise out of amendment to Zoning by entire Council
- Mayor's subsequent veto unanimously overridden
- There is friction between these 3 councilmembers & Mayor
- City Attorney is appointed by City Council
- ***Should / Can City Attorney represent any party?***



What do you do when …

Majority of Council files Ethics Complaint on Mayor Pro Tem?

- 3 of 5 City Council Members file Complaint that MPT *(Vice-Mayor)* violated Code of Ethics
- Majority voted to approve Resolution in Open Session
- Council adopts Code of Ethics by Ordinance
- Council appoints Board of Ethics
- Council appoints City Attorney
- ***Who does City Attorney represent?***



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