

THE ETHICS OF HANDLING MUNICIPAL MATTERS INVOLVING UNREPRESENTED PARTIES

Prepared and presented by

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Introduction

Municipal attorneys are often required to wear many different hats. Depending on how a city attorney's office is structured, job duties can vary widely or be extremely focused on a specific area. However, no matter what the nature of a municipal attorney's duties entails, there will be times where the attorney will encounter unrepresented persons either seeking advice on a matter, personal or professional, or facing an unrepresented person as an adversary in a judicial or administrative matter.

Almost all areas of municipal practice lend themselves to regular interaction with unrepresented parties: advising board/commission/council during public meetings; prosecuting in municipal court with *pro se* defendants; litigating cases against *pro se* plaintiffs, i.e. civil rights or eminent domain/condemnation matters; handling in-house employment matters; working with developers on development/zoning issues. In addition, there may be times where a citizen in the municipality calls to seek legal advice on a personal matter, "since you represent the city, you must be the lawyer for the citizens." It is at that moment of contact, no matter what the issue relates to, where the Texas Rules of Disciplinary Procedure and American Bar Association Model Rules of Professional Conduct require an attorney to take certain steps in order to prevent an ethical violation that can lead to confusion by a person, at best, or a disciplinary action or sanction, at worst.

Ethical Rules

The American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") provides guidance for government attorneys facing an unrepresented person. An attorney dealing with an unrepresented person shall not give the appearance that the lawyer is disinterested nor shall he give legal advice to the unrepresented person, other than advice to secure counsel.¹ Comment 2 to the ABA Model Rules, Rule 4.3 provides additional guidance for an attorney dealing with an unrepresented person in an adverse proceeding; a lawyer is not prohibited from settling a dispute or negotiating, if the lawyer has explained that he represents an adverse party.

Further, the Texas Disciplinary Rules of Professional Conduct ("Texas Disciplinary Rules") provides that if a lawyer "knows or reasonably should know that" a person without representation does not understand the role of the lawyer, "the lawyer shall make reasonable efforts to correct the understanding."² Instructively, the Texas Disciplinary Rules states that a lawyer should not give advice to an unrepresented person, other than the advice to obtain counsel.³ This admonition is a clear reminder to all attorneys regarding the limits that should be followed in dealing with unrepresented parties, who may otherwise believe that an advisory relationship has been formed, even during an adversarial proceeding.

¹ Model Rules of Prof'l Conduct, R. 4.3 (2004).

² Tex. Disciplinary R. Prof. Conduct, R. 4.03 (1989).

³ *See id.*, comment.

City Council/Board/Commission Advisor

As an advisor to council or the boards and commissions of the city, an attorney is tasked with advising on procedural matters and legal issues that arise during a public meeting. The advice that must be given during a public meeting is often contrary to what a person in the public may want to hear or at other times a member of the public may feel that their voice has not been heard due to the actions of the attorney. Similarly, the attorney is often faced with questions by the public seeking advice regarding legal issues that the officials are facing in litigation, asked to opine on a subject regarding a matter that is in litigation during an open meeting or questioned about an issue by a person who is in opposition to the issue. These situations clearly put the attorney in a precarious position. A cautious attorney must carefully weigh how to protect the interests of the client while acting as advisor to a board or commission appointed by the client or as an advisor to the council assisting in helping citizens understand issues arising before council.

It is essential for the attorney to not only understand who the client is, but how the client desires the attorney to work with citizens and the city's employees and agents. While the attorney represents the boards and commissions, the representation is limited to their official capacity; thus, any issues that arise beyond that official capacity which are not within the scope of representation can create a conflict for the attorney. When these situations arise, it is imperative that the attorney promptly reminds the individual of the scope of the attorney's representation and that the attorney does not represent the individual in matters that may conflict with the city's interests.

Staff Advisor

Attorneys are tasked by the client to work with the client's staff to ensure that the council's directives are completed and complied with. During day-to-day operations at the city, issues may arise in many different areas, such as employment matters or in planning and zoning issues, which require the attorney to work directly with staff to reach a resolution supported by the law and in the best interest of the client. In addition, due to typical staff-attorney interactions, an attorney is often confided in by staff on matters which are clearly contrary to the client interest, such as an arrest. It is again the attorney's duty to provide notice to the confiding staff, while remaining mindful of whom the client is.

This ethical challenge is highlighted in the case *State v. Martinez*, where a deputy police chief was indicted and convicted of aggravated perjury after conflicting statements to investigators and the city attorney's office were disclosed. 116 S.W.3d 385 (Tex. App. – El Paso 2003). The deputy chief, Cerjio Martinez (“Martinez”), regularly confided in the assistant city attorney, Stephanie Osburn (“Osburn”), regarding issues in the police department. After information was leaked to the media regarding activities by the chief of El Paso's police department, an investigation was initiated in the police department. Activities by Osburn were questioned regarding advice she had given and she agreed to wear a “wire” during conversations with Martinez in exchange for immunity. *See id.*, at

390. Martinez confided in Osburn regarding statements he had made to the media which conflicted with the sworn statement he provided to the internal investigators. The lower court suppressed Martinez' statements to Osburn based upon Osburn's failure to notify Martinez that she was not his attorney. *See id.*, at 391. Martinez claimed that Osburn, which she agreed with, had called Martinez her client and had allowed Martinez to confide in her regarding non-departmental issues. Therefore, the Court upheld Martinez' assertion that Osburn had held herself out as his attorney and that the attorney-client relationship had formed, thus making his statements privileged. *See id.*, at 395.

Litigation

There are numerous types of suits in which an attorney may represent a municipality where the plaintiff or defendant is unrepresented. Typically, inmate cases, such as civil rights claims, are filed *pro se* against a city and its police department. In addition, eminent domain cases are often filed against property owners who do not seek representation to assist them in the condemnation process. Obviously there is a vast difference in proceeding against a prisoner in a civil rights claim and a property owner in a condemnation case from a procedural point of view; however, from an ethical viewpoint they are very similar. In either situation, the attorney must proceed with caution to avoid the appearance that the attorney is acting as an advisor to the unrepresented party.

In eminent domain cases, pursuing land acquisition against an unrepresented landowner can be a mine field as the administrative nature of the action often requires a lot of hand-holding of the defendant by the municipal attorney in order to proceed to resolution. A careful attorney will consistently provide written notice to the defendant landowner that the attorney represents the governmental entity and does not represent the landowner. It is important to keep this in mind, especially in situations where the judge asks the government's attorney to assist the plaintiff in withdrawing the money deposited in the registry of the court or clearing title to the property.

Likewise, a plaintiff in an inmate case may seek latitude from the court from following the procedural rules, attorneys must be cautious in handling these matters to avoid the appearance of waiving important requirements or appearing to assist the plaintiff. However, the attorney must be cognizant of the court's leniency and what is required of the government in deference to the inmate status.

Prosecutor

Special rules of conduct apply to prosecutors, demonstrating the problem of dealing with *pro se* defendants. A prosecutor shall not seek to obtain waivers of important pretrial rights from an unrepresented accused person.⁴ The Texas Disciplinary Rules sets forth the "[s]pecial [r]esponsibilities of a [p]rosecutor" in Section 3.09. These responsibilities include not initiating or encouraging an unrepresented person from

⁴ *See* Model Rules of Prof'l Conduct, R. 3.8(c).

waiving any rights, whether the rights are pre-trial, trial or post-trial in nature.⁵ This ethical obligation coupled with many courts standard practice of granting latitude to *pro se* defendants⁶ makes effective representation of the client, a governmental entity, difficult and highlights the heightened responsibilities of prosecutors. The Texas Municipal Courts Education Center (“TMCEC”) has attempted to address this issue by proposing the use of a “Prosecutor’s Admonishment” form which sets forth the rights of the Defendant and the role of the prosecutor in municipal court.⁷

A city attorney serving as a prosecutor may have the additional dilemma of having additional knowledge gathered from non-prosecutorial duties. During negotiations of development plans, requests for variances to a board of adjustment or simply providing assistance to a citizen calling for information may lead to knowledge of important facts to a potential accused person’s defense. For example, a citizen calls complaining of a code violation and the citizen is connected with the city attorney’s office and the prosecutor handles the call. The citizen wants the law explained and upon hearing the basis for the law, admits the offense. However, the citizen tells the prosecutor that she feels that she is being singled out and that everyone is committing the same violation. As a citizen, this unrepresented person called the city attorney seeking legal clarification; however, she has now made potentially damaging statements to the prosecutor in the event she is cited for a code violation. As a prosecutor, the attorney must ensure disclosure of his role as the representative of the state in a criminal proceeding against the citizen pursuant to the Texas Disciplinary Rules.

The model rules are effectively making the prosecutor refrain from utilizing strategies which an attorney otherwise may use to further the governmental client’s interests. For example, instead of using the rules of procedure to the prosecutor’s advantage, the prosecutor must avoid such strategic planning and “aid” the *pro se* defendant through the pre-trial process. Caution must be taken in ever crossing the line or ensuring that one is following the ethical guidelines and providing what may be viewed as legal guidance to a *pro se* defendant.

Development

As an advisor to city staff, an attorney must be aware of who the client is and whom the client directs the attorney to assist. Likewise, when assisting staff with development projects, an attorney must be careful in dealing with unrepresented developers or landowners seeking to develop their land. The platting and land development process is a time intensive process that requires constant attention to detail to ensure that deadlines are met. In addition, a developer or landowner seeking to cut costs may rely on the city’s attorney as their advisor regarding city requirements and

⁵ See Tex. Disciplinary R. Prof. Conduct, R. 3.09(c).

⁶ See *Henderson v. Fisher*, 631 F.2d 1115, 1117 (3rd Cir. 1980) (citing *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, L.Ed.2d 652 (1972) (allegations of pro se complaint are held to less stringent standards than pleadings drafted by lawyers)).

⁷ The form is available at: http://www.tmcec.com/tmcec/Resources/Books/Forms_Book.

necessary deadlines. Again, it is imperative that the attorney make all parties aware of who the attorney represents and that it does not include the developer or landowner.

Liability Considerations

Beyond the ethical complications inherent in such a dual role, private attorneys serving as city attorneys are not guaranteed immunity from possible liability. In *The Development Group, L.L.C. v. Franklin Township Board of Supervisors*, the court ruled that private persons who work in concert with state actors to deprive a person of constitutionally protected rights are acting under color of state law for the purpose of a section 1983 violation.⁸ The attorney in *The Development Group* was a partner in a firm appointed as the town solicitor, his actions were deemed to “be attributed to the State” due to his function within the state system and the terms of his employment did not remove him from potential liability.⁹ It is important to note that prosecutors are “absolutely immune from liability in ‘initiating a prosecution and presenting the State’s case.’”¹⁰ However, any actions not deemed by a court to consist of initiating and presenting the state’s case, such as acting as an advocate for a pro se defendant, are not protected by absolute immunity.¹¹

In contrast, the Second Circuit recently ruled that city attorneys are absolutely immune from liability when acting in their official capacity in defense of civil suits.¹² The court stated that even attorneys engaged in “questionable or harmful conduct during the course of [the] representation . . . is irrelevant. The immunity attaches to [a government attorney’s] function, not to the manner in which he performed it.”¹³ This opinion recognizes a city attorney’s role as an advocate of the governmental entity and removes state action from such a role. However, faced with ethical rules holding prosecutors to a higher duty than advocacy of a client, a prosecutor should not rely on this opinion to act in contravention of the Model Rules of Professional Conduct Rule 3.8.

Conclusion

It is every attorney’s duty to provide quality representation to his client. An attorney representing a governmental entity has additional responsibilities regarding

⁸ See 2004 WL 2812049, *22 (E.D.Pa.) (citing *Dennis v. Sparks*, 449 U.S. 24, 27-8, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) (holding that private parties conspiring with judge were acting under color of state law even though judge was immune)).

⁹ See 2004 WL 2812049, *22 (citing *West v. Atkins*, 487 U.S. 42, 55-6, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1998) (reversing circuit court’s decision affirming summary judgment in favor of physician in inmate’s civil rights action under § 1983)).

¹⁰ *Henderson*, 631 F.2d at 1120 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1975)).

¹¹ See *Henderson*, 631 F.2d at 1120 (citing *Forsyth v. Kleindienst*, 599 F.2d 1203, 1211-16 (3rd Cir. 1979) (prosecutorial act that does not fall within presenting the State’s case is protected from § 1983 liability by qualified, not absolute, immunity.))

¹² See *Zybryski v. Bd. of Trustees of the N.Y. Fire Dept. Pension Fund*, 2004 WL 2238503, *6 (S.D.N.Y.) (citing *Spear v. Town of W. Hartford*, 954 F.2d 63, 66 (2nd Cir. 1992); *Barrett v. United States*, 798 F.2d 565, 572-73 (2nd Cir. 1986)).

¹³ *Zybryski*, 2004 WL 2238503, *6 (quoting *Barrett*, 798 F.2d at 573).

working with city staff, the agents of the client, and unrepresented parties seeking to interact or in litigation with the city. As a prosecutor, the attorney has of the burden of practicing within specialized ethical guidelines that appear to be in conflict with his duty to his client. An attorney must balance his ethical obligations with his duty to his client and carry those obligations into all parts of his practice to ensure that he complies with the rules and avoid potential violations.