

**BLINDED BY THE LIGHT**

**ETHICAL IMPLICATIONS OF “SUNSHINE LAWS”  
FOR GOVERNMENTAL ATTORNEYS**

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State Bar of Texas

**SUING AND DEFENDING**

**GOVERNMENTAL ENTITIES BOOT CAMP**

July 23, 2008

San Antonio

**CHAPTER 5**



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## **ALAN J. BOJORQUEZ**

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# BLINDED BY THE LIGHT: ETHICAL IMPLICATIONS OF “SUNSHINE LAWS” FOR GOVERNMENT LAWYERS

“Light is the only thing that can sweeten our political atmosphere and open to view the innermost chambers of government.” -Woodrow Wilson<sup>1</sup>

## INTRODUCTION

The principles of Open Government and the restrictions of our nation’s “Sunshine Laws” create interesting challenges for lawyers who represent government entities. Of particular interest to governmental lawyers is the ever-swaying balance between the democratic imperative that government business be conducted in the open, and the often-countervailing need for public decision makers to avail themselves of the benefits of legal representation.

Recent interpretations of state Open Meetings acts and Public Information (aka, Freedom of Information) acts in the US have implicated the attorney-client privilege and impacted the ability of government lawyers to properly advise their governmental clients. For example, there is a growing sense that governmental agencies have significantly *less* protection under the attorney-related privileges than do private sector entities.

When representing your clients within the County Courthouse, City Hall, or Federal Building, a working knowledge of Sunshine Laws is valuable to all attorneys. Knowing when and how government entities are permitted to conduct public business is essential. It is also important to remember that the manner in which you communicate with public officials, whether in writing or in person, can have Open Government and Ethical implications. This paper outlines some recent developments in the field

<sup>1</sup> WOODROW WILSON, *Committee or Cabinet Government?*, 3 OVERLAND MONTHLY 17-33 (Jan. 1884), reprinted in THE PAPERS OF WOODROW WILSON, 614, 629 (Arthur S. Link ed. 1967), as cited in Christopher W. Deering, *Closing the Door on the Public’s Right to Know: Alabama’s Open Meetings Law After (Dunn v. Alabama State University Board of Directors)*, 28 CUMB. L. REV. 361 (1997-1998).

of Open Government. Addressed below are recent Texas Attorney General decisions, various state and federal court rulings, and some legislative amendments. *All references are to Texas laws unless otherwise specifically noted.*

**"If we're being elected to look good, I'd rather not be there."**

Former San Antonio City Councilman Enrique "Kike" Martin, 38, a first-term councilman who was indicted on bribery charges in state and federal court in October, 2002. According to an article in the *San Antonio Express News*, on Saturday, February 1, 2003, Martin stated that he is concerned by an emerging attitude on the council that he said is more concerned about image and appearances than making the right decisions.

## THE ATTORNEY-CLIENT PRIVILEGE

The oldest of the common law privileges protecting confidential communications is the attorney-client privilege. The purpose of the privilege is based on two related principles:

- (1) The privilege encourages loyalty in the attorney-client relationship; and
- (2) The privilege encourages clients to make full and frank disclosures to their lawyers.<sup>2</sup>

Most courts have assumed that governments can claim the benefits of the attorney-client privilege. However, when courts apply the privilege to the governmental setting, they seem generally unwilling to provide broad protection because of fear that the privilege is incompatible with the spirit of Open Government.

Some courts, such as the United States Court of Appeals for the Sixth Circuit, have never explicitly recognized the attorney-client privilege in the municipal setting. In one recent case, the Sixth

<sup>2</sup> This entire section draws heavily from Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655 (2000).

Circuit held that communications made at a meeting between the city attorney, city manager, the fire chief, and two city councilmen were discoverable. The court followed the restrictive “control group” test and reasoned that the councilmen were third parties, the discussion was not held in confidence, and thus the requirements of the attorney-client privilege were not met.<sup>3</sup>

Two federal appeals courts have recently held that the governmental attorney-client privilege does not protect communications between government employees and government attorneys once those conversations become the subject of federal grand jury subpoenas. The two central concerns of both courts in recognizing the governmental attorney-client privilege in the grand jury setting were:

- (1) Abuse of public assets and public trust; and
- (2) The government attorney’s obligation to expose government wrongdoing.<sup>4</sup>

### OPEN RECORDS

Like Texas, a great majority of states have adopted statutes providing for public access to government records. While each state’s statutes may be uniquely drafted, there is a degree of commonality stemming from the fact that most statutes were drafted using the federal Freedom of Information Act as a model.<sup>5</sup>

### E-mail

Electronic mail regarding public business can be “public information.” In Texas, the term “public information” is very broad and specifically includes a magnetic, optical, or a solid-state device that can store an electronic signal or be held in computer memory.<sup>6</sup> The Office of the Attorney General of Texas (“AG”)

has specifically stated that Texas recognizes that work-related e-mail is information that may be subject to mandatory public disclosure.<sup>7</sup> Even e-mail transmitted from *home* through a *personal computer* via a *privately-funded* internet account might be considered “public.”<sup>8</sup>

Government lawyers should be particularly careful with e-mail. The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued the following opinion in 1999:

A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct...because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail.<sup>9</sup>

Nonetheless, attorneys still must exercise reasonable care when transmitting communications to clients. Those who fail to evaluate the following three factors set out by the ABA Committee on Ethics may encounter challenges to assertions of privilege and possible malpractice liability for the ill-advised use of e-mail

- (1) Sensitivity of the communication;
- (2) Costs of disclosure; and
- (3) Security of the medium of communication.

### Litigation/Attorney-Related Information

The Texas Public Information Act (“PIA”) excepts from mandatory disclosure information relating to litigation of a criminal or civil nature, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or

<sup>3</sup> *Reed v. Baxter*, 134 F.3d 351, 358 (6<sup>th</sup> Cir. 1998), cited 48 DRAKE L. REV. 655, 670.

<sup>4</sup> Adam M. Chud, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1695-99 (1999) (citing *In Re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir.), aff’d in part and rev’d in part, 158 F.3d 1263 (D. C. Cir.), cert. denied, 119 S. Ct. 466 (1998); and *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8<sup>th</sup> Cir.), cert. denied, 521 U.S. 1105 (1997)).

<sup>5</sup> Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65-66 (1996).

<sup>6</sup> TEX. GOV’T CODE ANN. § 552.002.

<sup>7</sup> Tex. Att’y Gen. ORD-654 (1997).

<sup>8</sup> Tex. Att’y Gen. OR2001-1790.

<sup>9</sup> ABA Comm. On Ethics and Prof’l Responsibility; Formal Op. 99-413 (1999), cited in Mitchel L. Winick, Brian Burris, and Y. Danae Bush, *Playing I Spy With Client Confidences: Confidentiality, Privilege, and Electronic Communications*, TEX. TECH. L. REV. 1225, 1249 (2000).

employment, is, or may be, a party.<sup>10</sup> For the exception to apply, the information must relate to litigation that is pending or reasonably anticipated on the date the requestor applies for access or duplication of the information. The hiring of an attorney and the assertion of intent to sue might establish that litigation is reasonably anticipated.<sup>11</sup> Settlement negotiations are no longer included in this exception. Once data has been obtained by all parties, (e.g., through the discovery or otherwise), no litigation interest exists with respect to that information.<sup>12</sup>

In 2000, the AG shocked government lawyers across the state by issuing informal letter rulings stating that a broad range of material that was otherwise protected by the attorney-client privilege was not excepted from disclosure under the PIA. One ruling in particular concluded that a “completed report, audit, evaluation or investigation” must be released to the public even if the document would otherwise fall under the protections of the attorney-client privilege or Litigation Exception.<sup>13</sup> The decisions led to a lawsuit that ultimately went to the Texas Supreme Court where a 5-3 majority ruled in the city’s favor.<sup>14</sup> The Court held that “privileged” equals “confidential” for purposes of the PIA.<sup>15</sup> Note, however, that the former and current AG continues to apply the privilege very sparingly.

### Factual Data from Attorney

The AG has stated that the attorney-related privileges do not protect memoranda prepared by an attorney that contain only a “neutral recital” of facts. Unless the facts contained in the memo or notes were selected and ordered by the attorney for the purposes of determining and communicating the legal basis and strategy for the proposed action, the AG will in all likelihood conclude that the document is public.<sup>16</sup> When requesting an Open Records ruling from the Texas AG on the basis of attorney-client privilege (or another attorney-related privilege), be prepared to specifically demonstrate to the AG how the otherwise factual information reveals the attorney’s legal advice, analysis, or the client’s confidences. Otherwise, the AG is likely to compel disclosure if at all possible.<sup>17</sup>

### Attorney Fee Bills

Over the course of two administrations, the Office of the Attorney General of Texas has consistently held that the exception for “privileged” information, for purposes of the PIA, does not apply to all client information held by a governmental body’s attorney. For example, a city attorney was ordered to release “purely factual” information contained in an attorney’s fee bills such as phone calls and conferences regarding a particular matter, and indications that an attorney had reviewed documents relevant to the attorney’s representation of the governmental body.<sup>18</sup> In this situation, the requestor was the law firm representing the property owners engaged in a land dispute with the city.

The Texas AG is not completely alone on this. The Kansas Supreme Court has also held that the narrative information on an attorney’s fee statement is not *per se* privileged.<sup>19</sup> The fee bills at issue involved pending litigation. Consequently, government entities should confer with their outside legal counsel regarding the specificity of attorney fee bills.

### Attorney in “Non-Legal” Capacity

The attorney-client privilege does not apply to communications between a client and an attorney where the attorney is employed in a *non-legal* capacity, for instance as an accountant, escrow agent,

<sup>10</sup> TEX. GOV’T CODE ANN. § 552.103. See Tex. Att’y Gen. No. OR94-226 (1994) (city was able to deny open records request for certain records relating to annexation of an area).

<sup>11</sup> Tex. Att’y Gen. ORD 555 (1990).

<sup>12</sup> Tex. Att’y Gen. ORD 349 (1982); see also Tex. Att’y Gen. ORD-320 (1982).

<sup>13</sup> See Tex. Att’y Gen. OR2000-1038 and OR2000-1275.

<sup>14</sup> *In re City of Georgetown and George Russell, In His Official Capacity as Acting City Manager and Officer For Public Information*, 53 S.W. 3d 328 (Tex. 2001).

<sup>15</sup> See *Id.* at 337.

<sup>16</sup> Tex. Att’y Gen. OR99-1376.

<sup>17</sup> See Tex. Att’y Gen. OR2000-0259 (2000).

<sup>18</sup> Tex. Att’y Gen. OR2000-2114 (2000) and OR2000-2756 (2000).

<sup>19</sup> *Cypress Media, Inc. v. City of Overland Park*, 997 P.2d 681, 693 (Kansas 2000).

negotiator, or notary public.<sup>20</sup> However, if an attorney is retained to conduct independent investigation in the attorney’s capacity as attorney for the purpose of providing legal services and advice, the attorney’s entire report is protected by attorney-client privilege. Such reports are excepted from disclosure to the newspaper under the PIA, even if the attorney detailed the factual findings in a discrete portion of the report apart from the legal analysis and recommendation.

### Privilege Under FOIA

The Fifth Circuit Court of Appeals held in April 2002 that the Department of Interior must release certain documents that were “prepared in anticipation” of litigation.<sup>21</sup> The Court found that the agency failed to show that the records, primarily e-mails and letters between lawyers and administrators, were “prepared primarily for litigation.”

### Agency Memoranda

Under certain circumstances, an interagency or intra-agency memo or letter that would not be available by law to a party in litigation with the agency might be excepted from disclosure. However, the Austin Texas Court of Appeals held that the results of a school district’s staff survey, compiled into a format of bar graphs and aggregate percentages, was “purely factual information”—not deliberative in nature—and thus did not fall within this exception.<sup>22</sup>

### Selective Disclosure

A governmental body that seeks to withhold certain information from the public at-large may not selectively disclose that information to particular members of the public.<sup>23</sup> However, this prohibition against selective disclosure does not apply to the intra-agency transfer of information to members of the governing body or certain members of particular types of citizen advisory boards.<sup>24</sup> Government lawyers are advised to carefully establish the precise nature of your relationship with volunteer advisory board members, as well as the protocol for distributing

otherwise confidential or privileged information to these board members.

*“The right of freely examining public characters and measures, and of free communication among the people thereon... is the only effectual guardian of every other right.”* - U.S. Supreme Court<sup>25</sup>

## OPEN MEETINGS

### Action without Meetings

If a quorum of a governmental body agrees on a joint statement on a matter of governmental business, the deliberative process through which that agreement is reached may be subject to the requirements of the Open Meetings Act (“OMA”), and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.<sup>26</sup> Telephone conferencing can also be considered a violation of the OMA, depending on the facts.<sup>27</sup> Governing bodies should be particularly careful to avoid deliberating through *e-mail*. “Deliberation” is not limited to “spoken communications.” Discussing public business via written notes or e-mail may constitute a “deliberation” that is subject to the OMA.<sup>28</sup>

### Lobbyists and Agents

A person who acts independently to urge individual members of a governing body to place an item in the board’s agenda or vote a certain way on an item on the agenda does not necessarily commit an offense, even if he or she informs particular board members of other members views on the matter. Although a person who is not a member of the governing body may be charged with violation of section 551.143 or 551.144 of the Texas Open Meetings Act, under sections 7.01 and 7.02 of the Texas Penal Code, that person does not commit an offense under these provisions unless, acting with intent, he or she aids or assists a member or members who knowingly act to violate the OMA.<sup>29</sup> While the OMA may permit attorneys to lobby individual city council members, beware of the Texas

<sup>20</sup> *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W. 3d 328 (Tex.App.-Austin 2000, pet. denied).

<sup>21</sup> *Maine v. U.S. Dept. of the Interior*, No. 01-1234 (April 5, 2002).

<sup>22</sup> *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160-61 (Tex. App.—Austin 2001, no pet. h.).

<sup>23</sup> *See* TEX. GOV’T CODE ANN. § 552.007(b).

<sup>24</sup> *See* Tex. Att’y Gen. ORD-666 (2000).

<sup>25</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) quoting 4 ELLIOT’S DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 554 (1888), as cited in 28 CUMB. L. REV. 361 (1997-1998).

<sup>26</sup> Op. Tex. Att’y Gen. No. DM-95 (1992).

<sup>27</sup> *See Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ).

<sup>28</sup> *See* Op. Tex. Att’y Gen. No. JC-307 (2000).

<sup>29</sup> *Id.*

Disciplinary Rules of Professional Conduct in regards to communications with government entities that are represented by legal counsel.

### Consultation with Attorneys

In Texas, governing bodies may confer with their attorney behind closed doors for the purposes of receiving advice about: (a) pending or contemplated litigation; (b) a settlement offer; (c) administrative hearings; or (d) matters in which the duty of the attorney to the governmental body under the Texas Rules of Professional Conduct of the State Bar of Texas clearly conflicts with the Open Meetings Act (*i.e.*, when necessary to protect the attorney-client privilege).<sup>30</sup> This exception applies strictly to *legal matters*, not to other issues such as financial considerations or the policy merits of a particular project.<sup>31</sup> Remember that this consultation is typically considered a “meeting” that must be properly posted and otherwise comply with the requirements of the OMA.<sup>32</sup> Although the government is not required to disclose its litigation strategy, it cannot totally conceal the subject matter of a major lawsuit that is pending. Accordingly, the OMA requires a governing body to give notice of the subject of its meetings, including a consultation with its attorney in executive session.<sup>33</sup>

### Other States

In 1994, the State of Alabama’s “Sunshine Law” prohibited executive sessions (*i.e.*, closed meetings) of governmental bodies.<sup>34</sup> The Alabama Supreme Court carved out an exception for attorney consultations regarding litigation in which the governmental body was named. The court reasoned that matters concerning the attorney-client relationship are subject to judicial control and that neither the attorney-client relationship nor the judiciary’s control over it can be affected by legislative action.<sup>35</sup> The Court went further to say that the application of the open meetings law to the attorney-client privilege would be a violation of the separation of powers provision in the Alabama Constitution. Note that the Texas

Constitution also has a separation of powers provision.<sup>36</sup>

When posed with a similar question, the Florida Supreme Court has yielded a different result. When asked whether the Florida “Sunshine Law” applies to meetings between a city council and the city attorney held for purposes of discussing the settlement of pending litigation to which the city is a party, the Florida court replied in the affirmative.<sup>37</sup> The court rejected the city’s argument that “opening up the consultation of a governmental body with its attorney to its adversary in pending litigation gives the adversary an unfair advantage which can be used to secure unmerited or excessive judgments or settlements against the public.” Contrary to the Alabama Supreme Court’s ruling, the Florida Supreme Court found that the separations of powers doctrine prevented the court, as a judicial arm of government, from engaging in truly legislative functions.”

### Long Distance Consultations

The Texas OMA includes limited provisions that authorize members of a governmental body to participate in meetings using telephones or videoconference connections.<sup>38</sup> Before these provisions were adopted, the OMA did not permit governmental bodies to meet by telephone or videoconference call, nor did it authorize any board member to participate from a remote location using telephonic or videoconference connections.<sup>39</sup>

Until recently, it was unclear in Texas whether attorneys may confer with their governmental body clients in open or executive session if the attorney is participating over the telephone, internet, or through

<sup>30</sup> TEX. GOV’T CODE ANN. § 551.071.

<sup>31</sup> Op. Tex. Att’y Gen. No. JC-233 (2000).

<sup>32</sup> Op. Tex. Att’y Gen. No. JC-57 (1999).

<sup>33</sup> *Cox Enterprises, Inc. v. Board of Trustees of Austin I.S.D.*, 706 S.W.2d 956, 959 (Tex. 1986) (school board was required to post adequate notice that it would discuss “a major desegregation lawsuit”).

<sup>34</sup> ALA. CODE § 13A-14-2(a) (1994).

<sup>35</sup> 28 CUMB. L. REV. 361 (*citing Dunn v. Alabama State University Board of Trustees*, 628 So. 2d 519, 529 (Ala. 1993)).

<sup>36</sup> TEX. CONST. art. II, § 1 (The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.)

<sup>37</sup> 28 CUMB. L. REV. 361 (*citing Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985)).

<sup>38</sup> See TEX. GOV’T CODE ANN. §§ 551.121-551.127.

<sup>39</sup> Op. Tex. Atty. Gen No. JC-194 (2000)

video-conferencing.<sup>40</sup> Senate Bill 170 (2001) made it clear that governing bodies can convene meetings (open or closed) for the purpose of consulting their attorney by telephone, internet or video conference. However, this section does not apply to consultations between a board and its in-house attorney (*i.e.*, an attorney who is an employee of the governmental body). During public session, the consultation must be audible to the public.<sup>41</sup>

When utilizing this valuable exception, attorneys who represent government entities should be diligent in helping their clients preserve the attorney-client privilege. For example, before dispensing sensitive legal advice over the speakerphone, attorneys may want to verify that the client is in a room conducive to private conversations and that only those persons vital to the discussion are present.

### Practical Pointers

Some steps that the lawyers should consider in order to make sure that communications with the client are not compromised include:

- (1) Evaluate the purpose and subject matter of meetings (including informal gatherings) and decide who should attend, and who should be excluded.
- (2) Include only those individuals who are essential to the decision-making and who have a commonality of interests.
- (3) Gather as many facts as early as possible in order to evaluate any legal or factual matters that will be discussed.
- (4) Define your role. Are you a problem-solver, informal mediator, legal advisor, or merely a member of an executive department?
- (5) Be cognizant of the difference between a “client” and a potential “witness.”
- (6) Identify the affected parties and their motivations.
- (7) Carefully consider who you are talking to, particularly if being asked to offer preliminary assessments as to whether any law has been violated or anything improper or unethical has occurred.
- (8) Do not say anything you do not want repeated.<sup>42</sup>

<sup>40</sup> See Op. Tex. Att’y Gen. No. H-484 (1974).

<sup>41</sup> See TEX. GOV’T CODE ANN. § 551.129.

<sup>42</sup> 48 DRAKE L. REV. 655.

## PROFESSIONAL ETHICS

### Legislative Immunity

*Amici* argued on behalf of Harry Joe, a lawyer and Irving city councilmember, that Joe was not required to abstain from voting on a city-wide moratorium which might have affected the development plans of a client of another lawyer at Joe’s law firm.<sup>43</sup> The Fifth Court of Appeals, Dallas, ruled that Joe’s failure to abstain and his failure to give the client advanced notice of the moratorium vote constituted legal malpractice. TML and TCAA, along with other *amici* representing state legislators/lawyers, argued that such duties would make it impossible for lawyers to serve as elected public officials. The court granted Joe’s petition for review on February 13, 2003. Oral argument was heard on April 9, 2003. A decision is still pending.

### Rules of Professional Conduct

New legislation enacted in 2003<sup>44</sup> provides that an elected or appointed officer of a city may not be subjected to disciplinary action, sanction, penalty, disability, or liability for:

- (1) an action permitted by law that the officer takes in the officer’s official capacity regarding a legislative measure;
- (2) proposing, endorsing, or expressing support for or opposition to a legislative measure or taking any action permitted by law to support or oppose a legislative measure;
- (3) the effect of a legislative measure or of a change in law proposed by a legislative measure on any person; or
- (4) a breach of duty, in connection with the member’s practice of or employment in a licensed or regulated profession or occupation, to disclose to any person information or to obtain a waiver or consent from any person, regarding:
  - (a) the officer’s actions relating to a legislative measure; or

<sup>43</sup> *Joe v. 239 Joint Venture*, No. 02-0218 in the Texas Supreme Court.

<sup>44</sup> S.B. 1047.

(b) the substance, effects, or potential effects of a legislative measure.

### Representing Private Clients before Municipal Courts & Boards

In order to place the Dallas court’s decision in context, the reader may find it interesting to learn that the decision has some basis in the former Texas Canon of Ethics. In two 1960s opinions, the former Commission on the Interpretation of the Canon of Ethics concluded that a member of a law firm may not serve as chairman of a city board while the chairman’s law partner accepts employment to represent clients with interests before the board. In its opinion, the Commission held that such a situation would not be ethical or proper, and would violate Canon 6.<sup>45</sup>

Remember the basic rule: a lawyer generally is not permitted to represent conflicting interests (except with the consent of all parties). The lawyer who is a member of the board is representing the city in a fiduciary, representative capacity. For him/her to represent an individual or company before the board while he/she is a member of the board would violate Canon 6. Also, when a lawyer is prohibited from handling a legal matter, generally all partners of that lawyer are likewise barred.<sup>46</sup> In a subsequent matter, the former Commission on the Interpretation of the Canon of Ethics again cited Canon 6 in its determination that no member of a law firm, of which the Mayor of a city is a member, may represent clients before the city’s municipal court, the judge of which is appointed by and removable at the will of the City Commission.<sup>47</sup>

### Representing Private Clients before Other Courts

The Professional Ethics Committee of the State Bar of Texas recently ruled that a lawyer who serves as a county judge has a conflict of interest in representing private clients in the justice of the peace, statutory county, and district courts of the county in which the

lawyer serves as county judge.<sup>48</sup> The Ethics Committee found that the conflict exists because the lawyer is adversely limited in his representation as a result of his responsibilities to the county, his responsibilities to the private client, and by his personal interests as both a lawyer and public official.<sup>49</sup>

The Committee reasoned that the conflict was created by the county judge’s duties as chief budgetary officer and presiding officer of the county commissioner’s court, which sets the salary of the justice of the peace and county court-at-law judges, and has influence over the compensation of all court personnel and the personnel of the district attorney’s office.<sup>50</sup> In the above opinion, the Ethics Committee referenced a 1994 opinion in which the question was whether an attorney who is also a city commissioner or his law partner may represent private parties in the following situations:

- (a) persons charged with criminal offenses in the county and district courts where the city police department participates in the investigation and/or arrest of the defendant.
- (b) persons charged with criminal offenses in the county and district courts where members of the city police department are victims (i.e., assault on an officer).
- (c) persons charged with criminal offenses in the county and district courts where the arrest and/or search warrant in the case is issued by the city judge.<sup>51</sup>

The Committee concluded that neither lawyer could represent the private clients in these situations unless all parties give appropriate consent after consultation and full disclosure pursuant to Disciplinary Rule 1.06(c).<sup>52</sup> Although the attorney/commissioner does not exercise control over the day-to-day operations of the police department, as a commissioner, he appoints the city manager, who ultimately directs the activities of the department. Certainly, the actions of police officers within a city reflect upon the commissioners. By representing a person charged with criminal offenses where the city police department conducts the investigation and/or arrest of the defendant, or

<sup>45</sup> STATE BAR OF TEX., RULES AND CANON OF ETHICS, Canon 6. Note that after January 1, 1990, the professional conduct of licensed attorneys in Texas is governed by the Texas Rules of Professional Conduct, which were promulgated by the Texas Supreme Court on October 17, 1989.

<sup>46</sup> Comm. On Interpretation of the Canon of Ethics, State Bar of Tex., Op. 197 (June 1960).

<sup>47</sup> Comm. On Interpretation of the Canon of Ethics, State Bar of Tex., Op. 272 (November 1963).

<sup>48</sup> Tex. Comm. on Prof’l Ethics, Op. 540 (February 2002).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Tex. Comm. on Professional Ethics, Op. 497, V. 57 Tex. B.J. 1136 (1994).

<sup>52</sup> *Id.*

where the police officers are victims of a crime, the attorney/commissioner places himself in a conflict between protecting the city's (and since he is a commissioner, his) interests and in protecting the interests of his client. This situation would also place the police officers in the awkward position of performing their job duties while dealing with a commissioner who is acting as an attorney in the case.

*“All associations are dangerous to good Government ...and associations of Lawyers the most dangerous of any next to the Military.” – Cadwallader Colden<sup>53</sup>*

A city commissioner exercises even more control over the city judge than he does over the police officers. The city commission actually hires the judge. The actions of the judge in executing the arrest and/or search warrant, and any other action taken by the judge would necessarily affect the welfare of the attorney/commissioner's client. However, if the judge did not perform his job, the welfare of the city, and that of the commission which is the personal interest of the attorney/commissioner, would be affected. The attorney who serves as a city commissioner is a public officer, and, as such, is held to a high standard of integrity (Comment 7, Rule 8.04). Having an attorney who is a city commissioner involved in representation of criminal defendants in which employees of the city are involved creates a conflict between the client's interests and the city's interests, as well as the attorney's own interests. Such representation violates Disciplinary Rule 1.06(b)(2). Further, since the attorney/commissioner may not represent these criminal defendants, neither can his law partner. However, Rule 1.06(c) provides for the affected parties to consent to such representation.

## **CONCLUSION**

Because you represent governmental entities, it is important to understand the democratic context in which government rulemaking and decision-making must take place. It is also imperative to remember your professional responsibilities as an attorney.

Hopefully, this paper refreshed your memory on some old concepts and brought some new developments to your attention. This paper is presented for educational purposes only, and in no way should be considered to constitute legal advice.

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<sup>53</sup> A 17<sup>th</sup> Century Irish-born American politician.