

TRIALS & TRIBULATIONS
OF A POLICE LEGAL ADVISOR

Bryan McWilliams
City Attorney



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THE ROLE OF A POLICE LEGAL ADVISOR

Self-Initiating Attorney
works with little direct supervision to provide a wide range of high level professional legal services to the city departments including police, airport police, fire, fire marshal, and animal management and welfare.

Primary Point of Contact
in the Legal Department for services to assigned departments.

Plan & Conduct
trainings and updates for personnel on pertinent legal matters (civil rights, tort liability, due process, etc.), including new legislation and recent court & A.G. opinions.

Recommend
to the city attorney and draft ordinances or amendments.

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THE ROLE OF A POLICE LEGAL ADVISOR

Review & Monitor
policies and procedures of each department for legal compliance.

Respond to Critical Incidents
on SWAT call out, police involved shooting and city fleet or industrial accidents involving serious bodily injury, death, or property damage.

Represents the City
before all federal, state, municipal courts, regulatory agencies, and in other forums as necessary.

Seek Positive Liaison Relationship
with District Attorney and county prosecutors and other law enforcement agencies.

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Texas Disciplinary Rules of Professional Conduct
Lawyer Preamble - Paragraph 2

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's affairs and reporting about them to the client or to others.

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Texas Disciplinary Rules of Professional Conduct
Lawyer Preamble - Paragraph 3

In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

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TRIAL
the formal examination before a competent tribunal of the matter in issue in a civil or criminal cause in order to determine such issue, or
the action or process of trying or putting to the proof. [Merriam-Webster]

Calm seas never made a good sailor.
Franklin D. Roosevelt

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TRIBULATION
 distress or suffering resulting from cruel or unjust treatment or misfortune or **a trying experience.** [Merriam-Webster]

There is no secret to Success. It is the result of preparation, hard work, and learning from failure.
 Colin Powell

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Texas Disciplinary Rules of Professional Conduct
Competent & Diligent Representation

A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. "Competence" is defined . . . as possession of the legal knowledge, skill, and training reasonably necessary for the representation." Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.
Rule 1.01 - Comment 1

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Texas Disciplinary Rules of Professional Conduct
Competent & Diligent Representation

Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.
Rule 1.01 - Comment 8

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THE TRIALS OF A LEGAL ADVISOR

- **SWAT Barricaded Subjects / Officer Involved Shootings**
- **Pursuits**
- **Fleet Accidents**
- **Adoption of Police Policies & Revisions**
- **Training**

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SCENARIO #1



Suspected armed barricaded subject with a warrant in a multiagency operation. One law enforcement agency believes persons are being held against their will and believes deadly force is necessary to end the stand-off.

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FOUNDATIONAL INQUIRIES

- **Who is your client?**
- **Who does the advisor take direction from?**
- **Who does the advisor report to?**
- **What happens if the interests or actions of the person or an agency in a multiagency operation becomes contrary to the interests of the client?**

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Texas Disciplinary Rules of Professional Conduct

Organization as a Client

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization. **Rule 1.12**

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Texas Disciplinary Rules of Professional Conduct

Organization as a Client

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that: (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization; (2) the violation is likely to result in substantial injury to the organization; and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization. **Rule 1.12**

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Texas Disciplinary Rules of Professional Conduct

Advisor

- In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
- Multiagency operational impacts
- Rule 1.05. Confidentiality of Information **Rule 2.01**

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Texas Disciplinary Rules of Professional Conduct

Confidentiality of Information

a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client. **Rule 1.05**

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Texas Disciplinary Rules of Professional Conduct

Advisor

Comment 1.
A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. **Rule 2.01**

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Texas Disciplinary Rules of Professional Conduct

Evaluation for Use by Third Persons

A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless:
(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
(b) the client consents after consultation. **Rule 2.02**

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Texas Disciplinary Rules of Professional Conduct
Evaluation for Use by Third Persons

Comment 2.
 Lawyers for the government may be called upon to serve as advisors or as evaluators. A lawyer for the government serves as advisor when the lawyer is an advocate for a government agency or is a counselor for a government agency. When serving as an advisor the rule of confidentiality of information applies. See TDRPC Rules 1.05 and 2.01. (Rule 1.05. Confidentiality of Information) (Rule 2.01. Advisor)

Rule 2.02

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Texas Disciplinary Rules of Professional Conduct
Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation. (b) In other situations, and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

- involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
- reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Rule 1.06

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Texas Disciplinary Rules of Professional Conduct
Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client.

Just something to think about when signing the log for crossing the tape at crime scene...

Rule 3.08

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TIPS OF THE TRADE: SWAT OPERATIONS/OFFICER INVOLVED SHOOTINGS

- *Always assume that the incident will be litigated.*
- *Look to memorialize all aspects of the incident.*
- *Checklists are vital both for you and your client.*
- *Police operations should have their own*
- *Pre-drafted MOUs for multiagency incidents*

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TIPS OF THE TRADE: SWAT OPERATIONS/OFFICER INVOLVED SHOOTINGS (CONTINUED...)

- *Press releases and notifications to the public.*
- *Notifications to management.*
- *Post operational briefing with command/City Attorney/City Manager*
- *Verify actual operations reflect applicable agency policy/make revisions as necessary.*

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Officer Involved Shooting
Outside Counsel for Officers is a Paramount Consideration

Conflicts in Litigation:
 Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. See Comment 3, Rule 1.06. *Conflict of Interest: General Rule*

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SCENARIO #2
 Officer observes a traffic violation and engages lights and siren. Suspect vehicle accelerates to unsafe speeds. Supervisor calls off pursuit however officer continues to pursue at reduced speed and without lights. Suspect vehicle runs a red light and hits a motorist causing injuries to occupants of the vehicle. Without any specific inquiry, the pursuing Officer tells the advisor at the scene that he did not follow pursuit policy.

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Texas Disciplinary Rules of Professional Conduct
Organization as a Client

Comment #4. There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the 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 cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case. **Rule 1.12 Conflicts of Interest**

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SCENARIO #3
 Officer is dispatched to an accident involving a police officer. Officer engages lights and sirens. Officer exceeds speed limits, disregards a traffic light, and is involved in an accident.

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Texas Disciplinary Rules of Professional Conduct
Advisor

Comment 1. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. **Rule 2.01**

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TIPS: PURSUITS / FLEET ACCIDENTS

- *Outside Counsel for officers*
 - (See Rule 1.06. Conflict of Interest: General Rule)
- *Always assume that the incident will be litigated*
- *Look to memorialize all aspects of the incident*
- *Utilize Checklists for Pursuits and Fleet Accidents*
- *Press releases and notifications to the public*
- *Notifications to management*
- *Post operational briefing with command/City Attorney/City Manager*
- *Verify actual operations reflect applicable agency policy*
- *Drug Screening for employees involved in the accident*

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Training & Policy Development

See Comment 8, Rule 1.01. Competent and Diligent Representation. Tex. Disciplinary Rules of Professional Conduct

To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction. **Comment 8, Rule 1.01**

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TIPS: TRAINING & POLICY DEVELOPMENT

- *Participate in ride-a-longs and training at the academy.*
- *Teach Supervisory courses related to operational management and employment related matters.*
- *Post-incident briefings are critical to address training issues and provide opportunities for policy development.*
- *Be active members of Police Legal Advisor groups and law enforcement related associations (Phone a friend option)*
- *Track and follow new legislation and anticipate the operational impacts of the same.*
- *Draft legislative memos to Chiefs, command staff, and/or other City officials.*

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QUESTIONS?

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