

A word cloud on a black background. The words are arranged in a roughly triangular shape, with 'VIRTUE' being the largest and most central word. Other prominent words include 'CHARACTER', 'ETHICS', and 'CONFUCIUS'. Smaller words include 'INTENT', 'ARISTOTLE', 'INTENTION', 'MORALS', 'MOTIVATION', 'GOODNESS', and 'BUDDHA'. The text is in a clean, white, sans-serif font.

CONFUCIUS
CHARACTER
INTENT VIRTUE
ETHICS
ARISTOTLE INTENTION
MORALS
MOTIVATION GOODNESS
BUDDHA

IF A TREE FALLS IN THE FOREST.....(YOU KNOW THE REST)

IF A ROOMFUL OF LAWYERS LEAVE AN ETHICS PRESENTATION EARLY, BUT CLAIM THE ENTIRE TIME FOR MCLE PURPOSES.....(YOU KNOW THE REST)

COMMONALITY? BOTH ARE NOTHING MORE THAN AMUSING PHILOSOPHICAL DISTRACTIONS BECAUSE WE DON'T CARE ABOUT THE FORMER AND WE KNOW THE LATTER NEVER HAPPENS

A DISCUSSION OF ETHICS FOR POLICE LEGAL ADVISORS

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WHAT CONSTITUTES THE STUDY OF ETHICS?

A quick internet search reveals the study of ethics is: (1) a popular topic – 905,000,000 hits, (2) amorphous in nature, and (3) frequently uses the words “moral,” “philosophy,” “dilemma,” and “behavior.”

My personal favorite: “[E]thics refers to the study and development of one's ethical standards.” Who knew?

Apparently, there is even a field of ethics study called “metaethics.” It focuses not on the relative goodness or badness of a decision - “rather it tries to define the essential meaning and nature of the problem being discussed.”*

* https://www.philosophybasics.com/branch_ethics.html.

ISN'T ETHICS JUST DOING THE "RIGHT THING"? SOLVING A KIDNAPPING – YOU CHOOSE

HARRY CALLAHAN – "DIRTY HARRY"

Shoot the suspect in the leg, then stand on the injured leg in order to get the location of the kidnap victim.

Behavior is unethical, illegal, unconstitutional, and viscerally satisfying because the bad guy gets his comeuppance right away.

Audience goes wild!



MAHATMA GANDHI

Organize a sit-in against violence and kidnapping. Trust the bad guy's conscience will assert itself. Trust the rule of law.

Behavior is ethical, legal, constitutional and frustrating because the kidnap victim dies and the bad guy escapes – for now.

Audience leaves the movie early.



PROBLEMS WITH DOING THE “RIGHT THING”

Many people argue that the world would be a better place if everyone would just do the “right thing.” The problem with this argument is selecting whose perception of the “right thing” should control.* Consider the following example. Note - the statute was amended following the ruling.

In 2004 the Court of Criminal Appeals held that Article 14.03(g) did not authorize a municipal police officer to stop a driver for violating the rules of the road in another municipality.**

In 2004, a police officer, upon learning of this ruling, loudly states he intends to continue making such stops because it is the “right thing” to do to catch drunk drivers. He makes the statement to his supervisor, his shift mates and to you, the legal advisor.

You have assisted with handling employment issues concerning this officer. You are of the opinion that these are not idle threats.

What, if anything, do you do?

*Obviously, the correct choice would be to use my perceptions as the template, but that is a different conversation for a different time, perhaps over drinks.

**State v. Kurtz, 152 S.W.3d 72 (Tex. Crim. App. 2004)

YOU DECIDE TO ACT

FIRST QUESTION - WHO'S YOUR CLIENT?

You are concerned the officer will act on his assertions. You decide to do something about it.

You are the police legal advisor, so who is your client? The chief, individual officers, the department, the city? Are you bound by the chain of command?

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 1.12. 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.

COMMENT TO RULE 1.12

Government Agency

9. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. **Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule.** Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

SO, WHO IS YOUR CLIENT?

1. The Chief?
2. The police department?
3. The municipality?

SECOND QUESTION – WHAT IS YOUR OBLIGATION?

Rule 1.12.

(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.

WHAT TYPE OF CONDUCT IS THE AGGRIEVED OFFICER PROPOSING?

Remember, your officer is very upset that the Court of Criminal Appeals and the Legislature had the audacity to limit his discretion and authority when it comes to arresting evil doers. He has promised to ignore the ruling limiting his authority.

1. Has he arguably stated he “intends to commit a violation of law which reasonably might be imputed to the organization”?
2. Would such an arrest, if made, result in a “substantial injury” to the organization?
3. Would such a violation be related to the “scope” of your representation of the organization?

DISCUSSION

The answers to numbers 1 and 3 are probably yes. The officer has stated unequivocally he intends to violate the law as handed down by the CCA at the first opportunity. Certainly, such an intention would fall within the scope of your representation as the lawyer advising the police department – we usually tell our clients to not violate the law.

What about the substantial injury component? What are the possible injuries for your client?

1. Evidence suppression?
2. Training or policy deficiencies?
3. Reputation?
4. Liability for false arrest?
5. Internal discipline?

RESOLUTION

What are you going to do? The conservative reading of Rule 1.12 (b) & (c) requires you to tell someone. Who do you tell? Comment 9. to Rule 1.12 sheds some light on this question.

“...In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.”

Who do you report to in your agency? The city attorney? The chief? A senior partner at your firm? Rule 1.12 suggests you figure out your reporting requirements.

MURKIER WATERS

What if you inform the chief of the officer's intentions to ignore the law and the chief says she has no problem with that position – “It's about time someone had the guts to stand up and do the right thing!”

Since you informed the chief of the potential for illegal activity, have you fulfilled your obligation under the Rules?

YOU'RE GOING TO HATE THE ANSWER

Rule 1.12(c) states:

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

BABY STEPS

Subsection (1) tells us we should ask the chief to reconsider her approach. So, the conversation following her initial comment might start like this:

“I’m sorry Chief – I must have misheard....”

“Ha! You had me going there for a second, but seriously...”

“I’ll come back when you’ve had your coffee....”

“Chief, did you remember to take your meds this morning...”

“I see you stayed up late watching “Dirty Harry” movies again.....”

If the chief stands fast, you should certainly document your request for reconsideration of her decision in writing. But what next.....?

PUNT

Subsection (c)(2) tells us to advise that a separate legal opinion be sought, you know, just in case the chief didn't like your answer and is sure you're wrong.*

This course of action is prudent and is part of a progressive response to what could turn into a major kerfuffle down the line. The Rule is silent on the identity of this outside party, but it should be someone knowledgeable in the area of police matters.

Once the outside opinion is obtained and, assuming it concurs with your advice, if the chief sees the error of her ways all is well. If the opinion disagrees with your position, what do you do?

The Rule suggests you could recommend the two opposing opinions be presented to the "appropriate authority" in the organization. The Rule is silent on the appropriate authority, but in a governmental entity in a traditional setup that would most likely be the city manager's office or the governing body.

*I know that never happens, it's just a hypothetical for purposes of the discussion.

DAMN THE TORPEDOS.....

You're not finished yet. What if the chief refuses to reconsider her position and refuses to seek a second opinion?

As previously determined, your client is not the chief, it is at a minimum the department, and by extension the local government/municipality. Rule 1.12(c)(3) states the scorched earth final option:

“(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.”

Ouch. Next stop, the city manager or the city council. Good luck.

I'M THE NEW LEGAL ADVISOR PLEASE LIKE ME

You are the new legal advisor. You have only been with the department one week when an issue arises. The issue deals with the legality of entering backyards when responding to burglar alarm calls.

The question is whether the department should continue its practice of entering the curtilage to check both the front and back doors when responding to these alarms.

You are in a staff meeting with the chief, assistant chief, and deputy chiefs. Opinions are running hot on this question as it has already been picked up by the grapevine and passed around, with varying degrees of gloom and doom attached.

The discussion in the meeting is equally charged. Only one deputy chief thinks the practice should be halted or at least adjusted. The others turn on him like junkyard dogs on a piece of raw meat.

You have been silent up to this point. The chief calls a halt to the discussion and turns to you, the new legal advisor, for words of wisdom that will calm the stormy waters and make everyone happy.

BEFORE THE MEETING

Being the good lawyer you are, you did research before the meeting. Your research can be synthesized into four salient points:

1. The United States Supreme Court has plainly stated that the curtilage of a dwelling is subject to the same protections as the dwelling itself.*
2. The backyard of the home is curtilage.
3. If the curtilage has the same protection as the dwelling, then it can only be accessed with a warrant or a valid exception to the search warrant requirement.
4. There is no case law directly holding that a burglar alarm standing alone qualifies as an exception to the warrant requirement of the Fourth Amendment.

*Fla. V. Jardines, 133 S.Ct. 1409, 1414 (2013)

BACK TO THE MEETING...

Well.....? The chief is expecting an answer. She may have prefaced her request with words to the effect of “I’m not a lawyer, but anyone with a lick of commonsense can see we are authorized to go into the back yard.”

Sometimes clients are not seeking information, they are seeking validation.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 2.01. Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment: Scope of Advice

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.

2. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied....

BACK TO THE MEETING...

Your options are limited. Indeed, even without the Rule prodding us along, isn't it the "right thing" to do to be candid and forthcoming with your client?

1. Explain your research to the group.
2. Is it a tenable position to advise your client that a warrantless entry into the backyard is never permissible?
3. Options? Multi-tiered approach? Training? Policy change?
4. Do societal expectations enter the discussion?
5. Potential use of force issues?
6. If your research supports advising your client that wholesale, unqualified entry into the curtilage is not sanctioned by the law, then so be it.

AFTERMATH OF THE MEETING...

You'll be fine. There are some benefits to always eating lunch alone. It gives you time to reflect on your career choices.....Anyway, you'll always have the satisfaction of knowing you did the "right thing."

ONE MORE HYPOTHETICAL

Officers from your department responded to a domestic disturbance. The complaining witness was in the master bedroom when the officers arrived. When they stepped into the room, they saw the witness was in a state of partial undress. The senior officer quickly exits the room, taking his recruit with him and waits in the hall while the witness gets covered. The officers return to the master bedroom to interview the witness. The recruit's body camera has been on the entire time, unbeknownst to the officers.

The next day the chief is contacted by the media and is told the complaining witness told them the officers barged into her room while she was naked, refused to leave, and subjected her to embarrassing questions and stared at her.

The chief opens an investigation. The video is soon located and refutes every aspect of the complaining witness's account to the media. The chief is understandably upset and wants to put together a response.

THE RESPONSE

The chief understands that releasing the video made in the bedroom would be problematic without the consent of the complaining witness.* However, the chief wants to defend her officers against patently false claims.

The chief, against her better judgement, has grown to trust you as an advisor. She calls you into her office and seeks your input.

She understands the statutory restriction on the release of the tape. She is asking you not only for legal advice, but for guidance navigating moral perceptions, expectations of transparency, and other societal matters. Can you offer such mixed guidance in your role as an advisor?

*Tex . Occ. Code section 1701.661(f)

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IS THAT YOUR FINAL ANSWER...

Comment 2 to rule 2.01 tells you that you can indeed put legal advice into perspective vis-à-vis non-legal considerations. As the attorney you must decide if or when the advice being sought exceeds your knowledge comfort zone.*

*For example, I would never assume to give advice on a question of a religious nature – my tongue would burn down to a charred stump in my head if I tried. We must be aware of our limitations.

THE AFTERMATH OF THIS MEETING

The chief invited you to lunch. Welcome to the fold.

NON TE OCCIDIT, FORTIUS ME*

There was a small well on the outskirts of a village. Travelers had refreshed themselves for years at the well. One day a young man who was well liked in the village fell into the well and drowned. The villagers rose up in anger, demanding that the evil, murdering well be filled in and covered up. Before this could happen, a well-respected villager came forward and told the others that the young man who fell in the well had been drinking heavily that night and had assaulted two elderly villagers on his way home and one had died from his injuries. Upon hearing this, the villagers praised the justice-dispensing well.

NACHAOSTE

*What doesn't kill me makes me stronger

