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August 9, 2013

Mr. Chad Childers, Administrative Attorney  
Office of the Chief Disciplinary Counsel  
State Bar of Texas  
P.O. Box 12487  
Austin, Texas 78711-2487

*Via facsimile*  
(512) 427-4167

RE: 201302596 – Ty Odell Clevenger – Bryan Franklin Russ, Jr.

Dear Mr. Childers:

I write in response to Mr. Russ's letter dated July 31, 2013. As an initial matter, I note that Mr. Russ ignored the vast majority of the violations identified in my July 16, 2013 letter. He does not, for example, dispute the impropriety of his actions vis-à-vis Alan Weise (or *City of Hearne, et al. v. Nolan Griffin; Velnon, L.L.C. vs. Unknown Heirs of Elizabeth Warren; Nancy Erickson and Janna Gossen v. Mark Milstead*; etc.). Instead, he narrowly focuses on his simultaneous representation of Mr. Paschall and the City of Calvert.

Mr. Russ argues that his municipal client could not have brought and cannot bring claims against Mr. Paschall (or the trust) because the City of Calvert is not a charitable organization. This argument defies both the law and common sense, as municipalities routinely provide charitable services such as parks, museums, after-school child care, zoos, public concerts, and the like<sup>1</sup>:

Where the question of whether a given purpose is or is not charitable arises, the words "charitable purpose" have a definite ascertainable meaning in law, and a judicial determination may be made with satisfactory certainty in every case. *See Boyd v. Frost Nat'l Bank*, 145 Tex. 206, 196 S.W.2d 497, 501–03 (1946). Legal concepts of what are "charitable purposes" are categorized in section 368 of the Restatement Second of Trusts. *Id.* at 502. Section 368 provides as follows:

Charitable purposes include  
(a) the relief of poverty;

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<sup>1</sup> In fact, Texas courts predating the Civil War have recognized that local governments may perform charitable functions. *See Bell County v. Alexander*, 22 Tex. 350 (1858) (upholding a charitable devise to a county "for the benefit of public schools").

- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the promotion of health;
- (e) **governmental or municipal purposes;**
- (f) other purposes the accomplishment of which is beneficial to the community.

Restatement (Second) of Trusts § 368 (1959); *see Boyd*, 196 S.W.2d at 502.

*Marsh v. Frost National Bank*, 129 S.W.3d 174, 177-178 (Tex.App.–Corpus Christi 2004) (pet. denied)(emphasis added); *see also Powers v. First National Bank*, 137 S.W.2d 839 (Tex.App. –Waco 1940), *aff'd* 161 S.W.2d 273 (Tex.Com.App. 1942).

Mr. Russ further argues that the city would lack standing to sue Mr. Paschall, allegedly because any claims against Mr. Paschall must have been brought by the trustee, who is now (conveniently) deceased. Not only is this argument wrong, Mr. Russ knew it was wrong when he sent his July 31, 2013 letter to you. I have enclosed a draft motion that I sent to Mr. Russ via e-mail on July 15, 2013, and I wrote to Mr. Russ as follows:

I have attached a draft motion to compel production of discovery responses. Per the cases I cited, I think it is well established that a trust beneficiary can bring claims where the trustee cannot or will not act. I am hoping we can resolve this by agreement, because I'd rather not have to drive back to Texas for a hearing. Please let me know Mr. Paschall's position. Thanks.

The cases in that motion conclusively establish that a trust beneficiary, including a contingent beneficiary (such as my client or the City of Calvert), may bring claims against an executor where the trustee is unable or unwilling to act. Obviously, the trustee cannot act when he is dead. Thus the City of Calvert has standing to sue Mr. Paschall.

The bar need not, however, try to determine who is right and who is wrong with respect to the foregoing legal dispute, and that is not my point (incidentally, the trial court will decide who's right at its August 14, 2013 hearing). My primary point is that no attorney, under any circumstances, should be advising one of his clients about whether to sue another of his clients *in the same case*. *See* Rule 1.06. My secondary point is that the City of Calvert, at the absolute least, had (and has) at least a *colorable* claim against Mr. Paschall, and the city was entitled to independent and unconflicted legal advice regarding the merits of that claim. Rule 2.01 obligates a lawyer to “exercise independent professional judgment and render candid advice,” and “candid advice” would have included all the arguments and authorities set forth above.

Mr. Russ's July 31, 2013 letter actually demonstrates the dangers that give rise to Rules 1.06 and 2.01. If Mr. Russ had zealously represented the interests of his original client (the City of Calvert) from the outset, then he would have found the same cases that I did. Instead, he forged ahead with representing Mr. Paschall. After Mr. Russ was warned that the city had potential claims against Mr. Paschall, he just dug in deeper. Even now, he is zealously representing the interests of his subsequent client (Mr. Paschall) and

himself (to the extent is trying to play down the existence and consequences of his conflicts of interest) over the interests of the city because he is grasping around for arguments *against* the city's right to bring claims against Mr. Paschall.

As Mr. Russ knows, the 1992 Marium Oscar Trust document expresses Ms. Oscar's primary wish that some of her property (one building in particular) be used to create a museum in Calvert, with any remaining proceeds distributed to charitable organizations in the City of Calvert. I was informed by a local official several years ago that the city expected to receive the building for purposes of establishing the museum. Instead, Mr. Paschall sold the building, and he has yet to explain what he did with the money. If that does not describe a conflict between the interests of Mr. Paschall and the City of Calvert, I am not sure what would.

I have noted before that this is all part of a pattern, as illustrated by the fact that Mr. Russ and the members of his firm routinely represent private clients against their municipal clients. I have now heard from all four of the firm's municipal clients, and none of them have any record that Mr. Russ informed them that he would be representing private parties against them, much less did he advise them to seek independent legal advice regarding the potential conflict. Per my earlier letter, I still expect to be in Franklin next week, where I will retrieve the names and cause numbers of the relevant cases.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ty Clevenger', with a long horizontal flourish extending to the right.

Ty Clevenger

cc: Mr. Bryan F. Russ, Jr.