

**Ethics and Government Practice:
Navigating the Dangerous Waters of Defending a
Governmental Entity
or
How I Learned to Stop Worrying
and Love Ethics**



**83rd Annual Convention of the
Arkansas Municipal League**

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The Setting: 2010-2014



- Voters approved comprehensive Charter amendments to change to a Council-Mayor FOG
- City begins implementation of the new FOG
- First “strong” Mayor elected
- Wholesale changeover of CMs
- CAO leadership shuffle

Conflict/Tension



- “Munici-fest” Destiny
 - “If it wasn’t broken, they wouldn’t have elected me to fix it.”
 - Out with the old, in with the new.
- What’s good for the private sector . . .
 - Government should be run like business.
 - “What do you mean we can’t . . . ?”
- Public Scrutiny
 - Open meetings, open records, transparency in government.
 - The Fourth Estate and Facebook

Ground Rules



- **Charter § 4-40(f)(2):**
 - Subject to confirmation by a majority of City Council, the Mayor shall appoint a City Attorney to serve at the pleasure of the Mayor.
- **Charter § 13-80:** The City Attorney shall:
 - Conduct all cases in court in this State wherein the City shall be party plaintiff or defendant, or a party in interest.
 - Be the legal adviser of the Mayor, Council, Commissions, and Heads of Departments in relation to their duties.
 - Shall perform such other duties as required by ordinance.
 - Receive such salary as prescribed by Council ordinance.
- **City Code § 1.2.402:** When acting as legal advisor, the City Attorney shall comply with the Colorado Rules of Professional Conduct.

It's Mine!



- THIS COMMUNICATION IS BETWEEN AN INDIVIDUAL MEMBER OF CITY COUNCIL AND THE CITY ATTORNEY'S OFFICE. AS SUCH THE ATTORNEY-CLIENT PRIVILEGE BELONGS TO ME.
 - *Rule 1.13 - Organization as Client*
 - *Rule 1.6 - Confidentiality of Information*

Says Who?



- Council approved a rezoning ordinance on first reading, and an accompanying MP amendment was approved on motion.
- Rezoning and MP amendments are quasi-judicial matters.
- At second reading, CMX stated that he had spoken and corresponded with staff from a “large nearby federal installation.” He moved to postpone second reading pending resolution of the federal installation’s drainage concerns.
- How to address?
 - *Rule 1.13 - Organization as Client*
 - *Rule 2.1 - Advisor*

Not so Hypothetical: Other Counsel



- The Mayor asked CA for a legal opinion on separation/balance of powers related to a matter pending before Council.
- CA shared the opinion with the Council, but Council didn't like the opinion because the CA "always sides" with the Mayor.
- Council President suggested a Resolution authorizing the Council to retain independent counsel.
 - "The attorney retained shall perform such work on behalf of City Council and shall coordinate such work with the City Attorney in accordance with the City Charter, unless there shall arise a situation in the performance of the assigned legal tasks which necessitates that such outside counsel act independent of the office of the City Attorney in order to ensure continued compliance by the City Attorney with the Colorado Code of Professional Conduct."
 - Charter/Code/Statutory Authority
 - *Rule 1.13 - Organization as Client*

Turning Point



- Change is stressful
 - No frame of reference
 - Newly defined roles with real checks and balances
- Change requires hard work
 - Complicated issues and concepts need constant attention
 - Devil is in the detail

Stop Worrying



- You have a choice
 - Succumb to the madness
 - Find your footing

- Change the paradigm
 - Explain the Rules
 - Live by the Rules

Ethics Guidelines Elements



- Establish the basis for the attorney-client relationship
 - Charter/Code/Statutory authority
 - Specify duties/roles/functions – *Preamble: A Lawyer's Responsibility*
 - Make clear distinction between ethical responsibilities when serving in advisor and advocate roles
- Address client identification issues – *Rule 1.13*
 - Attorney for the governmental entity
 - Advise constituent client representatives
 - Individuals within the entity

Ethics Guidelines Elements



- Explain conflicts and how to resolve
 - Conflicts between constituent client representatives - *Scope [18]*
 - Ethical conflicts for the CAO – Rule 1.4
- Discuss communications and confidentiality
 - Attorney-Client Privilege
 - Waiving the privilege
 - Sharing information/communications among the constituent client representatives

Ethics Guidelines Elements



- Other CAO Responsibilities
 - Attorney Assignments
 - Supervising Attorney Responsibilities (Rules 5.1, 5.3)
 - Prosecutor Responsibilities (Rules 3.8, 4.1, 4.2)
 - Settlement Authority – *Scope [18]*
 - Administrative Reports

Learn to Love



- It feels like it's about you, but it's not about you.
- You took an oath to uphold the law and advance the profession.
- Cling to your colleagues.

Quick Case Study



- Citizen sues City, once in 2010 and once in 2013.
- City wins, twice.
- City is awarded attorneys' fees, twice.
 - First award reduced to judgment lien and recorded; attaches to Citizen's property.
 - City waiting for judge to sign second judgment for recording.
- Citizen under contract to sell property to third party.
- Title company contacts City about first judgment lien and City provides payoff information.

But, Wait, There's More



- Citizen finds out about first judgment lien prior to closing and conveys property to a CM in an effort to avoid the first judgment.
- Second judgment lien is recorded after CM takes title to Citizen's property, so lien does not attach to (now) CM's property. Citizen is not aware of the second judgment lien.
- Contract for sale to third party revised, and CM closes transaction with third party.
- At closing:
 - First judgment lien satisfied out of proceeds.
 - Proceeds paid over to CM.
 - Citizen brings check to CM at a Council meeting and CM endorses over to Citizen.

Navigating Dangerous Waters



- What are the facts?
- What is the law?
- Who is the client?
- Where does the duty of loyalty lie?
- Is there a conflict?
- Is there an obligation to report?