# LEAGUE OF CALIFORNIA CITIES SPRING 2019 CONFERENCE ETHICS UPDATE

Presented by:

JOSEPH MONTES

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# Ethical Principles for City Attorneys

## (Even More Chockful of Ethics)

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# WHAT ARE YOU TALKING ABOUT?

- 2005 City Attorneys Department adopts Ethical Principles for City Attorneys
- 2011 Michele Bagneris re-presents those
- Board wondering how to re-re present for those who may not be familiar or may have forgotten
- 2018 New California State Bar Rules of Professional Conduct
- How do the two intersect?

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# I KNOW WHAT YOU'RE THINKING

# Y.A.W.N.

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# ARE YOU SURE?

WELCOME TO TRAFFIC SCHOOL

# PROSELYTIZE

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# OVERVIEW

- WHAT ARE ETHICS?
- PRINCIPLES VERSUS RULES
- BOOK CLUB DIGRESSION
- PRINCIPLES + RULES

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# WHAT ARE ETHICS?

- Moral principles that govern a person's behavior or the conducting of an activity
- A guiding philosophy
- A consciousness of moral importance
- A theory or system of moral values

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# SCU SIDEBAR

# WHAT ETHICS ARE NOT…

- Following the law
  - Jim Crow
  - Apartheid
  - Pre-19th Amendment voting laws
- Whatever Society Accepts
  - Many issues don't have societal consensus

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# MORE SCU

- "Well-founded standards of right and wrong that prescribe what people ought to do."

- And no—I don't work for these guys.

# BUT MAYBE EVEN BETTER…

"The rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc."

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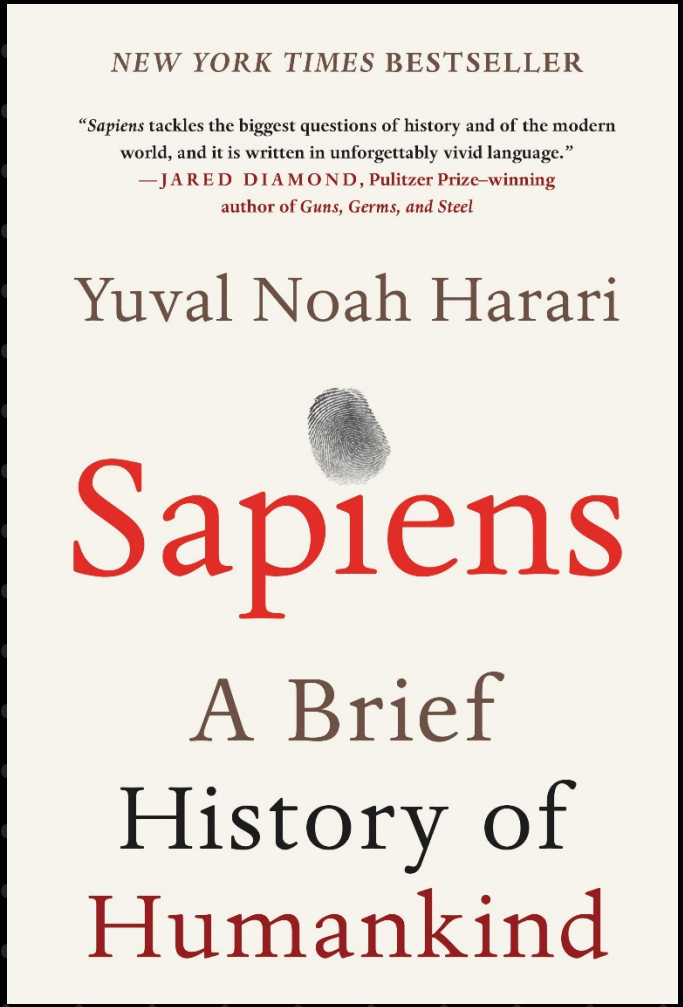
# RULES V. PRINCIPLES

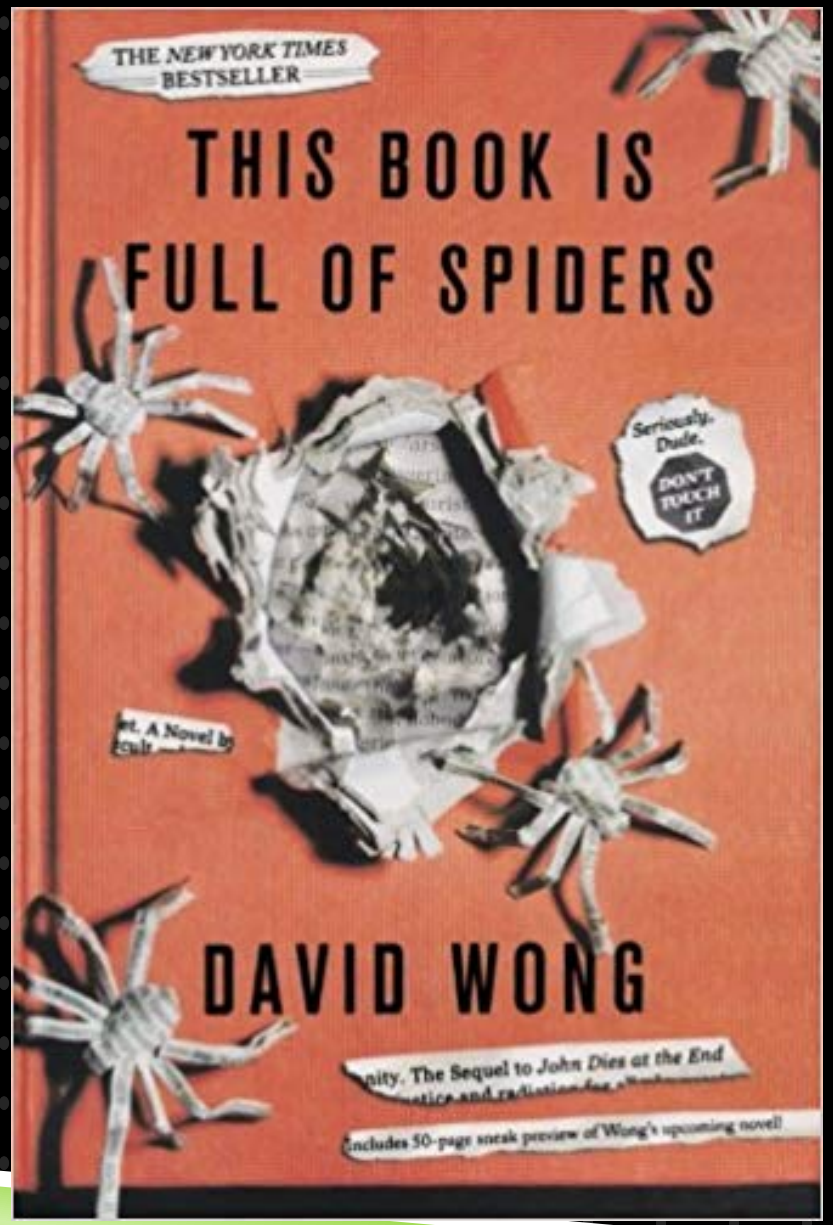
Some Blurred Lines here.

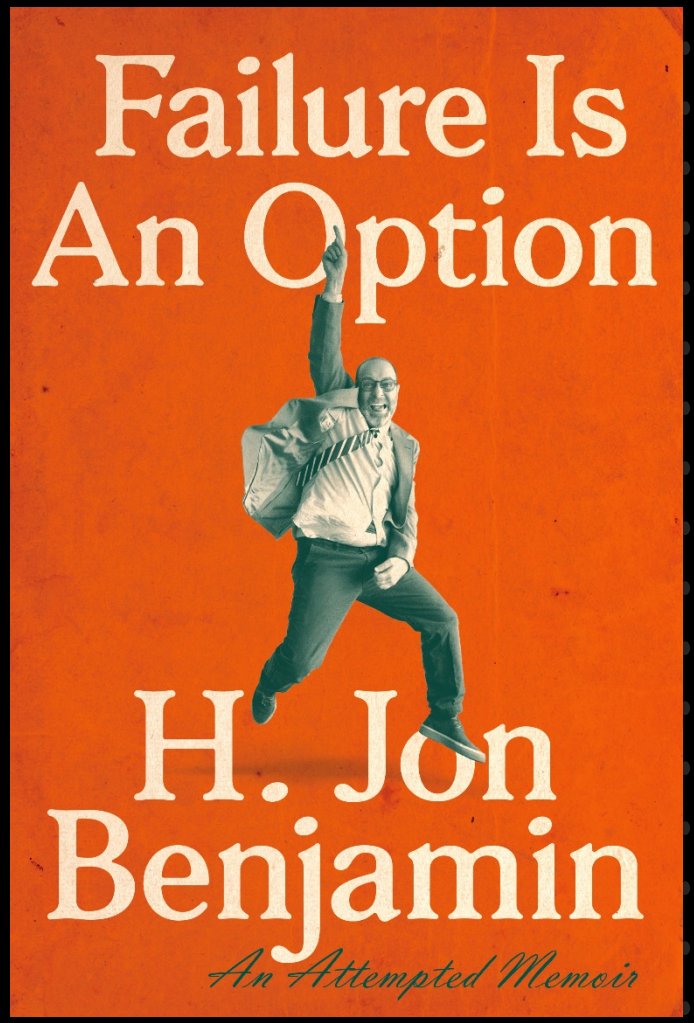
# BOOK CLUB

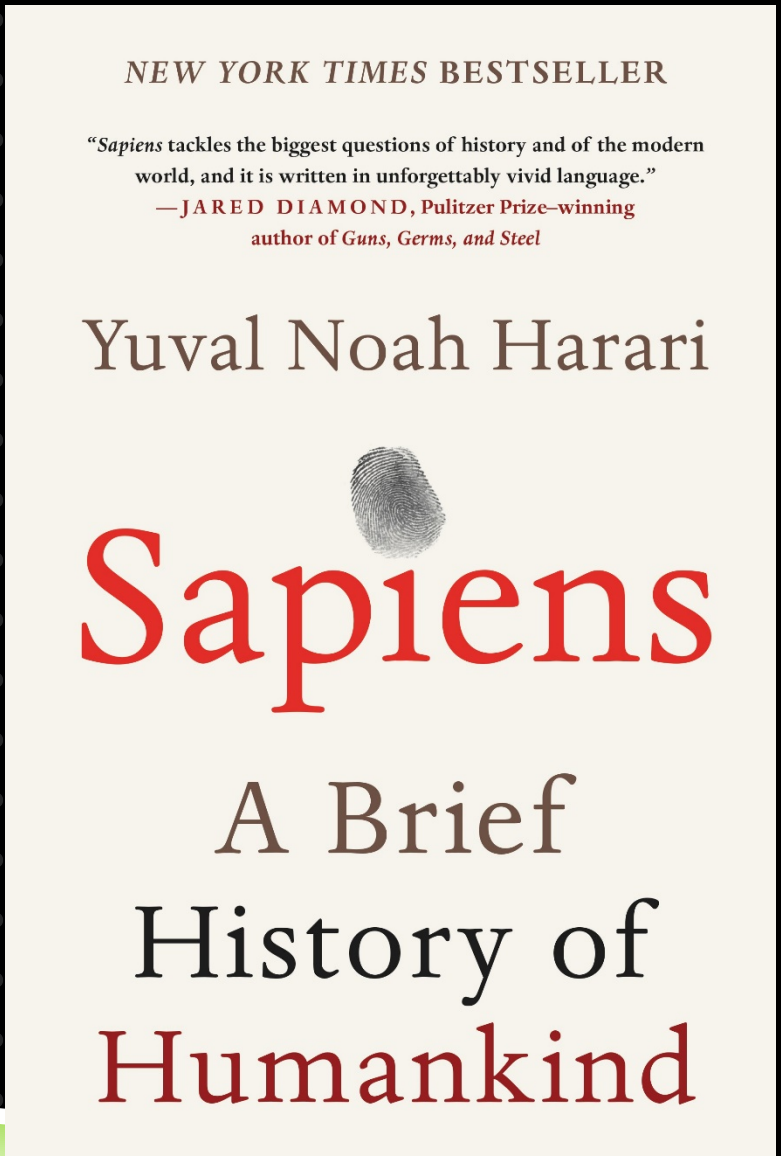

NEW YORK TIMES BESTSELLER
"Sapiens tackles the biggest questions of history and of the modern world, and it is written in unforgettably vivid language."
—JARED DIAMOND, Pulitzer Prize–winning author of Guns, Germs, and Steel
Yuval Noah Harari
Sapiens
A Brief History of Humankind

# MY 16 YEAR OLD DAUGHTER GAVE IT TO ME

DIANA
ROWLAND
MY LIFE AS A
WHITE TRASH ZOMBIE


THE NEW YORK TIMES
BESTSELLER
THIS BOOK IS
FULL OF SPIDERS
Seriously, Dude.
DON'T TOUCH IT
DAVID WONG
The Sequel to John Dies at the End
Includes 50-page sneak preview of Wong's upcoming novel!


Failure Is
An Option
H. Jon
Benjamin
An Attempted Memoir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It’s all make believe.

# EXAMPLE: THE ECONOMY

- 1 million
- 2 million
- 3 million
- …
- 10 million—can loan $10 for each dollar actually in the bank.

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# SO WHAT'S THE ECONOMY BASED ON?

- A shared Trust in an Imaginary Future.
- One where the Baker becomes profitable and pays off the loan, and where the Bank , based on that repayment , can pay back the Contractor.
- And all before a single loaf of bread is baked.

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# WHICH BRINGS ME BACK TO ETHICS

- Tempting to say not important because no consequences, unlike the Rules
- But even though Ethical Principles for City Attorneys are:
  - All Make Believe
  - Merely aspirational
- Book Club discussion makes clear,
  - without "The rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc."…

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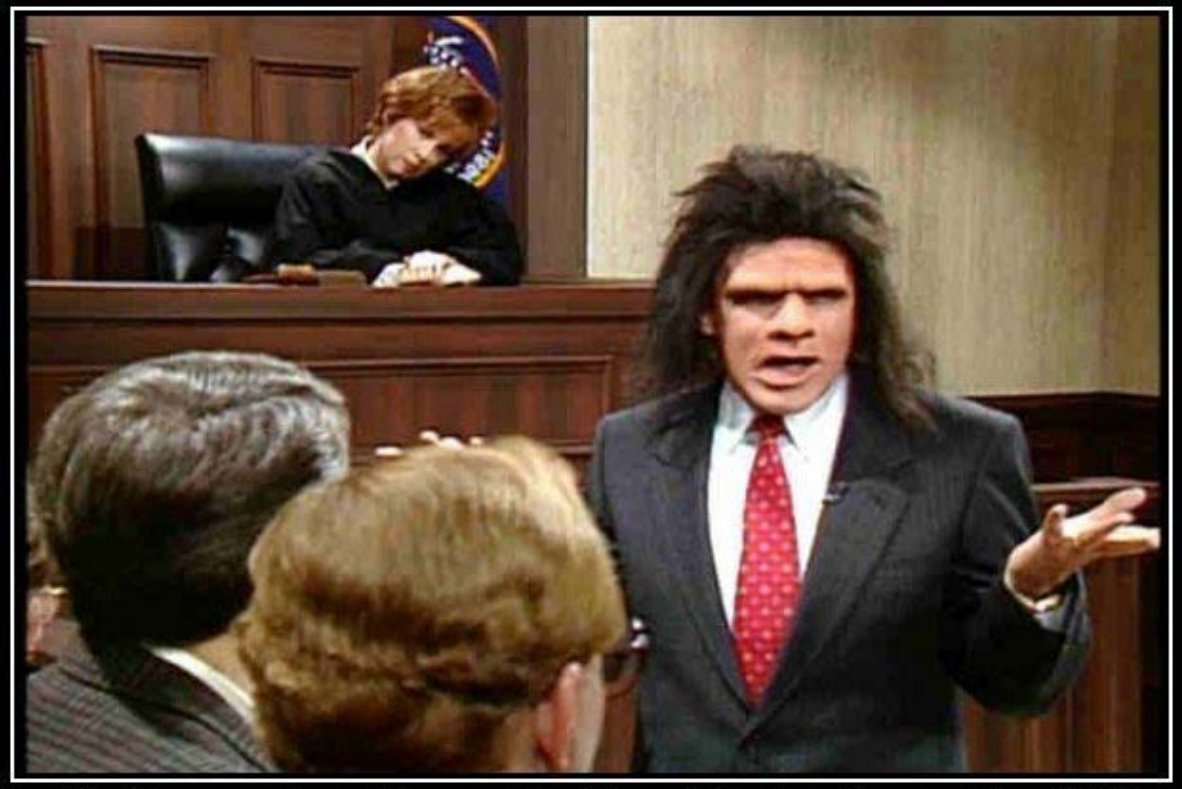
# WE ARE DOOMED TO REGRESS



UNFROZEN CAVEMAN LAWYER

# PRINCIPLES V. RULES

- Format
  - Principle, Explanation, Examples
  - Rule, Comments
- Aspirational v. Disciplinary
- Preamble + 10, v. 69 Rules
- 8 pages v. 60 pages
- "City Attorney" v. "Government Lawyer"

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# PRINCIPLES + RULES

- Re-re-present each Principle and explanation
- Highlight where a Principle/Rule intersect
- Not all examples covered

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# PREAMBLE

A city attorney occupies an important position of trust and responsibility within city government. Central to that trust is an expectation and commitment that city attorneys will hold themselves to the highest ethical standards. Every effort should be made to earn the trust and respect of those advised, as well as the community served.

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# PREAMBLE

- Purpose:
  - Aspirational Guide for decision-making
  - Guidance to clients and public re ethical standards
  - Promote integrity of the City and City Attorney Office

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# PREAMBLE/RULE INTERSECT

"The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public."

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# PRINCIPLE 1 (RULE OF LAW)

"As an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law's purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations."

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# PRINCIPLE 1/RULE INTERSECT

- Explanation and Rule 1.13 Organization as Client
  - Report "up" but not "outside" obligation
    - Constituent violating law and
    - Action likely to substantially injure organization

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# PRINCIPLE 1/RULE INTERSECT

- Example 1 (duty to follow law, but can argue for change)
- Example 2 (shouldn't justify illegal conduct)
- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.3 Candor Toward the Tribunal

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# PRINCIPLE 1/RULE INTERSECT

- Example 6 (willing to give unpopular advice)
  - Rule 1.4 Communication with Client

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# SOME THERAPY

- Unpopular advice can be unpopular with the client—but also with public
  - Not just in the public—but in an arena

# NEED SOME PERSPECTIVE

- % of population that are…
- Certain % that don't want to be appeased, just want to be critics
- Civic engagement is a tweet for certain % of people
- If not in the arena, not interested in your feedback

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“It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming;  but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

# PRINCIPLE 2 (CLIENT TRUST)

The city attorney should earn client trust through quality legal advice and the manner in which the attorney represents the city's interests.

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# PRINCIPLE 2/RULE INTERSECT

## Rule 1.1 Competence

"I am, as I've said, merely competent. But in an age of incompetence, that makes me extraordinary."
- Billy Joel

# PRINCIPLE 2/RULE INTERSECT

- Example 2 (confidentiality of information)
- Example 5 (open session versus confidential advice)
- Rule 1.6 Confidential Information of Client
- Rule 1.8.2 Use of Current Client's Information
- B&P 6068(e)(1)
- Rule 1.13 Organization as Client

# PRINCIPLE 3 (NO POLITICIZATION)

The city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust.

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# PRINCIPLE 3/RULE INTERSECT

- Example 2 (equal access and use of resources)
  - Rule 1.13 Organization as Client
  - Rule 1.6 Confidential Information of Client
  - Rule 1.8.2 Use of Current Client's Information
- Example 4 (bias and wading into policy)
  - Rule 1.7 Conflict of Interest: Current Clients

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# PRINCIPLE 4 (NO SELF AGGRANDIZEMENT)

The city attorney should discharge his or her duties in a manner that consistently places the city's interests above self-advancement or enrichment.

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# PRINCIPLE 4/RULE INTERSECT

- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.7 Conflict of Interest: Current Clients
- Example 1 (legal services budget)
  - Rule 1.5 Fees for Legal Services
- Example 3 (range of litigation and non-litigation options)
  - Rule 1.4 Communication with Clients

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# PRINCIPLE 5
# (PROFESSIONALISM AND COURTESY)

The city attorney should conduct himself/herself at all times in a professional and dignified manner, interacting with all elected officials, city staff, members of the public, and the media with courtesy and respect.

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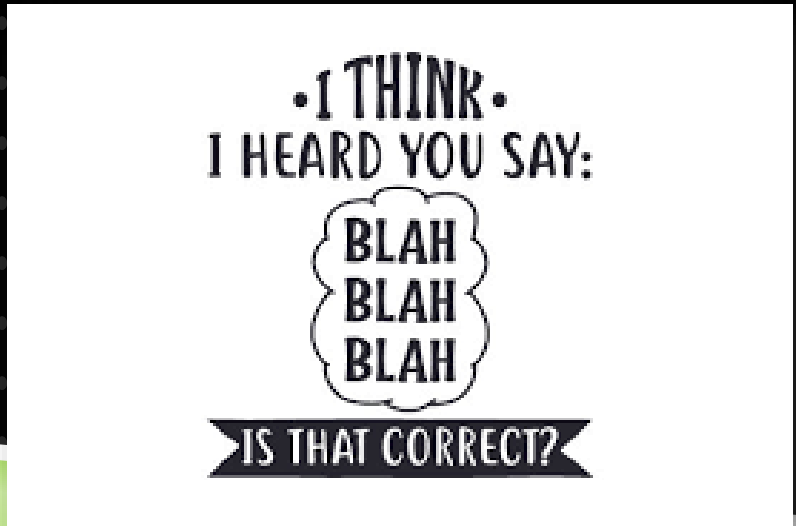
# PRINCIPLE 5/RULE INTERSECT

- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.2 Communicating with a Represented Person
- Rule 4.3 Dealing with Unrepresented Person

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# PRINCIPLE 5/RULE INTERSECT

- Rule 8.4.1 Prohibited Discrimination, Harassment, and Retaliation
- *Fernando Martinez v. Stephen Stratton O'Hara*

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# PRINCIPLE 6 (POLICY VERSUS LAW)

The city attorney's obligation is to understand the city's policy objectives and provide objective legal advice that outlines the legally defensible options available to the city for achieving those objectives.

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# PRINCIPLE 6/RULE INTERSECT

- Rule 2.1 Advisor
- Example 3 (options to illegal conduct)
  - Rule 1.2 Scope of Representation
- Rule 1.4 Communication with Clients

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# PRINCIPLE 7 (CONSISTENCY)

The city attorney should conduct his or her practice in a way that consistently furthers the legitimate interests of cities.

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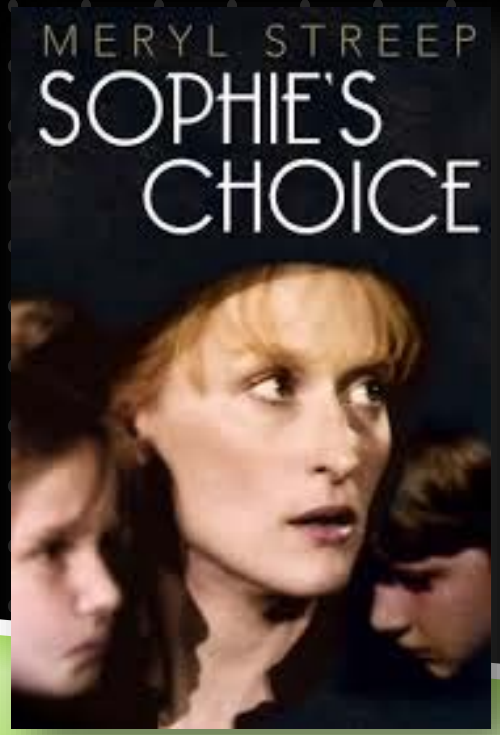
# PRINCIPLE 7/RULE INTERSECT

- Example 1 (private client adverse to cities)
  - Rule 1.7 Conflict of Interest: Current Clients

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# PRINCIPLE 8
# (PERSONAL FINANCIAL GAIN)

The city attorney's primary responsibility is to serve the city's interest without reference to personal financial gain.

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# PRINCIPLE 8/RULE INTERSECT

- Rule 1.5 Fees for Legal Services
- Rule 1.5.1 Fee Divisions Among Lawyers
- Rule 1.8.8 Limiting Liability to Client

# PRINCIPLE 9
# (HIRING BY AND OF CITY ATTORNEYS)

The selection and retention of the city attorney and city attorney staff should be based on a fair process that emphasizes professional competence and experience. The process should not include inappropriate considerations such as political, personal or financial ties.

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# PRINCIPLE 9/RULE INTERSECT

- Rule 8.4.1 Prohibited Discrimination, Harassment, and Retaliation
- Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
- Example 4 (undermine incumbent)
  - Rule 7.3 Solicitation of Clients
- Example 2 (gratuities to decision-makers)
  - Rule 7.2 Advertising

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# PRINCIPLE 10
# (PROFESSIONAL DEVELOPMENT)

The city attorney should contribute to the profession's development by improving his or her own knowledge and training and by assisting other public agency attorneys and colleagues in their professional development.

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# PRINCIPLE 10/RULE INTERSECT

- Rule 1.1 Competence
- Rule 1.3 Diligence

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# PASS IT ON…

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# THANK YOU.

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