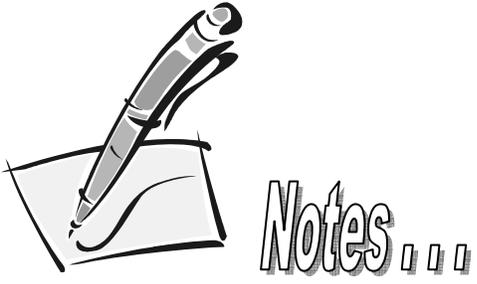




Stepping Into the Evolving Role of the City Attorney: Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder – What Roles Can or Should You Play?

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Introduction

Much is written about the role of corporate attorneys in their attorney-client relationships, but municipal lawyers have much less guidance and we have much more to offer than simply providing legal advice. The role that a city attorney plays in a city organization is impacted by whether the city attorney is a full-time employee, with or without in-house staff, or a part-time contract employee. The purpose of this presentation is to provide a summary of different perspectives on the role of the city attorney in local government and some suggestions on how city attorneys can, during these challenging economic times, use their extraordinary talents to better serve cities.

Every city attorney should reflect on what his or her role is in the organization they serve:

- Do you consider yourself a member of the Executive Management team?
- Do you serve as a crisis manager when necessary?
- Do you simply provide legal advice when asked?
- Do you contribute leadership skills and help the organization develop?

1. The City Attorney

Every general law city in California may appoint an attorney to be its legal advisor. *See* Govt. Code Section 36505 [providing that a city must appoint a police chief, but may appoint a city attorney and other subordinate officers]. Charter cities, on the other hand, generally

mandate the appointment of a city attorney. *See, e.g.,* Riverside City Charter Section 700 [stating that there shall be a city attorney appointed by the City Council.] Given the varying legal needs of cities in California we see many diverse legal representation arrangements. The typical city attorney is an independent practitioner or a member of a law firm who provides legal services on a contractual basis. Other cities have one or more full-time attorneys who are employees of the city and work exclusively on the one city's legal matters.

City Attorney Arrangements

The typical city attorney in California is an independent contractor. *See e.g.,* the League of California Cities Roster of City Attorneys. In many cities, the city attorney and the city enter into a professional services agreement. The agreement often provides that the city attorney will provide basic services, as defined in the agreement, for a yearly retainer. If a yearly retainer is not used, then the services are provided solely on an hourly fee basis. A basic retainer generally provides for the following services:

- *attendance at all city council and planning commission meetings
- *phone call and email responses to staff and elected officials
- *drafting basic resolutions and ordinances
- *preparing routine contracts

The retainer may provide for a maximum number of service hours or unlimited hours for the basic services. If a maximum number of hours is provided for, then the city attorney may be paid on a per hour basis once the maximum hours are reached each month. In this typical arrangement, the attorneys do not receive health care insurance coverage, disability or life insurance, contributions to retirement plans or auto allowances. The attorney must also provide his or her own office space, equipment and legal research resources to provide legal services to the city.

Cities with larger populations or charters, often have full-time, employee, city attorneys. Some smaller cities do, too, depending upon community expectations and traditions of governance. In these in-house arrangements the city attorney may also have assistant or deputy city attorneys to handle the full-time needs of the city. In addition to paying employee salaries, the city provides fringe benefits, office space, professional association and continuing legal education, supplies and secretarial assistance.

Finally, some cities retain a member of a law firm to serve as city attorney, but also employ full-time deputies or assistants. This type of arrangement may best serve a city with specific legal needs where the resources of a law firm and the day-to-day presence of full-time city attorney staff create efficiencies.

2. What is the City Attorney's Role?

The starting point for answering this question is the law. All city attorneys, whether appointed or elected, in house or contract, share certain basic responsibilities imposed by city charters or by state law. *See, e.g.,* Govt. Code Sections 41801- 41803.5 We all advise city officials on all types of legal matters pertaining to the city business, draft ordinance and resolutions, and perform other series required by our councils. *Id.* Some of us also serve as municipal prosecutors. *See* Govt. Code Section 41803.5 We all advocate before judicial or quasi-judicial tribunals and advise our colleagues – sometimes our offices even do both in the same case. *See Quintero v. City of Santa Ana*, 114 Cal.App. 4th 810, (2003) *review denied*, [explaining how a city attorney's office may both represent a party and advise the decision maker in the same case]. But, our specific responsibilities and our roles and relationships within our client cities vary, partly depending on the structure of our city governments.

In general law cities, the city attorney is categorized by state law as a "subordinate officer", who serves "at the pleasure of the council." Government Code Section 36505-6. *People v. Chacon*, 40 Cal. 4th 558,571 (2007)[noting that possibility that the advice of a city attorney in a general

law city could be influenced by a council members because he served at council's pleasure]. In contrast, city attorneys whose offices are created by city charter are not subordinate officers, and charter provisions often accord them job security to ensure their ability to provide objective advice. *See, e.g.,* Santa Monica City Charter Section 700 [requiring a supermajority vote by the City Council to discharge the city attorney]. And, a city charter's specification of the city attorney's duties may even confer some budgetary independence in that the council may not have the authority to diminish the budget to the point that the attorney cannot fulfill those responsibilities. *See Scott v. Common Council of City of San Bernardino*, 44 Cal. App.4th 684 (1996) [holding that city council could not use budgetary authority to eliminate positions in city attorney's office because doing so eliminated his ability to discharge duties assigned by the city charter]. Finally, in cities where the city attorney is elected, he or she answers to the electorate -- not the city council -- and thus is even more independent. These significant differences in cities' governmental structures yield varying challenges and opportunities for serving our cities both in the tradition roles of legal counselor and advocates and also in the evolving role of management team member.

Our ethical obligation of zealous advocacy requires that the city attorney, the city manager, and the city council have a clear understanding of whose position the city attorney is obligated to advocate. All should understand the process for obtaining city council concurrence on marching orders and the means for developing that concurrence when one or more of the organization's members are at odds.

3. The Role of the In-House City Attorney: Special Opportunities and Challenges

In-house city attorneys in both charter and general law cities have special opportunities to serve as city team members. For those that work in-house, you know that we work in city hall with our fellow city staffers -- the people we most frequently advise. We see them every day. This proximity and exposure creates the possibility for forming strong and satisfying personal

relationships. Also, because we are on staff, there is no immediate financial disincentive or barrier to keep us apart. (The meter is always running.) These realities give us special opportunities to participate in staff's work as team members, provide assistance daily, and identify and resolve problems early. Even when we cannot, and litigation ensues, we have special opportunities for resolving cases efficiently. We understand the context, have fairly ready access to the records, and know the potential witnesses; and our hourly rates are lower than private firms'. Finally, just as we can enjoy particularly close relationships within city hall, we also have special opportunities to bond with the community and thereby promote its trust in local government.

But, along with these big plusses come significant perils. Familiarity may breed contempt. Proximity can certainly breed frictions and resentments. City attorneys are among the highest paid city workers, and are too often perceived as naysayers. We may be resented and shunned as both: overcompensated workers who get paid to impede others' work. While a contract city attorney from a private firm may be seen as a white knight, a rescuer from afar who displays polished manners and wears a nice suit, an in-house attorney may be seen as a fussy co-worker who, worst case, gets paid to pick nits and point out colleagues' errors. In the litigation arena, we may be perceived by our adversaries (or even some of the elected officials we work for) as second-rate (because if we were first-rate legal champions we would be working in large, private firms). And, in our relations with the community, we may become lightning rods, partly because we must often serve as the bearers of unwelcome news about what the city cannot do for community members.

Whether in-house familiarity breeds regard or contempt depends in large measure on how we interact with our colleagues in city hall, our city's officials and the community. So, here's the question: how can in-house city attorneys maximize the special opportunities and challenges of practicing law in city hall?

The In-house City Attorney's Relationships: Possibilities and Perils

One answer is: by steadfastly focusing on building and nurturing our relationships with our fellow city employees. Of course, because we are always present at city hall, we cannot expect to get by on the "company manners" that might serve if we only saw our clients occasionally. But, we aren't guests; we are family. And, our colleagues in city hall will come to know us very well, including our strengths and weaknesses. Over enough time, so will local officials and the community. Here are some thoughts on how to best deal with the possibilities and perils of sharing our work lives with our clients, day in and day out.

The City Manager and City Staff

While the client is the city (acting through the council), the people that we advise every day are fellow city employees; and, in the typical council-manager form of government, their leader is the city manager. We agree with our many colleagues who have observed that this is our single most important, professional relationship. *See, e.g., "The Role of the City Attorney: Relationships with Other Municipal Actors", Michael Colantuono, 2004.*

The authors see each one of us, together with a city manager, every day, in a yoke, working to pull a city forward; and, the city's progress depends on our pulling in the same direction. The quality of this relationship is probably the best predictor of our overall success, perhaps including our success with the council. As a practical matter, city managers probably have much more contact with the council members and much more influence with them than we do, especially since the Court of Appeal decided *Wolfe v. Fremont*, 144 Cal.App.4th 533 (2006) [holding that it was not a Brown Act violation for a city manager to meet individually with council members to discuss policy-related information, partly because the manager was not serving as a "personal intermediary" for council members].

Building and maintaining a good relationship with the manager, requires ensuring that he or she understands our role and what we can and cannot do to provide assistance. We can be

readily available to quickly provide succinct advice and propose practical alternatives. We can make sure that the legal work gets done promptly and accurately. We can monitor the organization for problems and risks and help the manager address them early. We can also respect the manager's perspective, which will inevitably differ from our own.

But, there are also things we cannot do. Especially in these hard economic times, there may be significant pressure from the manager, especially upon in-house attorneys, to "help out" or "be creative" or "cut through red tape" by blessing the circumvention of legal requirements. We can try to see these words as a signal of frustration -- a plea for help rather than a pressure tactic or condemnation. And, although we cannot help the manager evade state or local process requirements because that would pose risks for your client, we can probably offer some alternatives. Similarly, if the manager exerts pressure to embrace or continue unlawful or risky practices with these words: "everyone else does it this way" or "we have always done it this way" or "we did it this way in my last city", we can explain the risks and try to provide other options. But to minimize the tensions inherent in our disparate responsibilities, we must help the manager by drawing the lines we cannot cross early; gently explaining them (probably repeatedly); and sticking to them unswervingly.

The opportunities and challenges of dealing with other senior staff members are similar. Because we are in-house, we can, over time, form relationships with all of them. For one of the authors, it's been particularly important to work with the human resources director, planning director, and police chief (partly because their departments' work poses the biggest risks) and with the city clerk (who is a partner in safeguarding process). But, all of our colleagues on the city management team will need our help at some point, and they all should know that we are available to them and welcome the chance to help them and work together to serve the city.

The Council and Other Officials

Because we are on the premises daily, we need to somehow radiate competence and availability, but also manage expectations. This can be particularly tricky with councilmembers. Those who habitually roam city hall may expect us to be at their individual beck and call and available for drop in visits. Others, who spend their days off site but continuously on e-mail, may expect us to provide responses to their many questions, every day and within minutes. Failing to set limits is risky. It jeopardizes our ability to focus on our legal projects and staffs' needs. Also, responding immediately to every demand of individual officials may create the impression that we have closer relationships with some than with others. Those who initiate fewer contacts could fear favoritism and come to doubt our objectivity.

To avoid this plight, we can take steps to manage expectations by sharing more information about what we do and how we do it. If I am working on a time-consuming project and so am a little slow responding to e-mails, I try to share that information about why I've taken more time than usual to respond. (Most council members like being offered brief information about what staff is doing, including attorneys.) Also, we can develop practices or conventions about meetings and other individual contacts with council members. And, we can share these with everyone and explain why we follow them.

Also, we can and should share information equally with all members of the council. If one of them asks for legal advice about a matter on the agenda, I offer the advice to all of them, usually with an e-mail beginning: "One of you has asked about" *See Roberts v. Palmdale*, 5 Cal.4th 363 (1993) [recognizing a city attorney's legal authority to communicate by confidential writing with the city council members]. Some in-house city attorneys prefer to provide legal memoranda. You know your own council best. Consider whether they have sufficient time and interest to read a memorandum and whether that type of formality best facilitates their work.

Because we are always in city hall, officials, staff and others have myriad opportunities to witness our conduct. We want our officials to be ethical. So, we must be faultlessly ethical ourselves – or lose our credibility and all possibility of moral suasion.

We have many opportunities to explain laws relating to public sector ethics and process. We should take every opportunity to provide training in these areas personally, including to all new officials and to all city officials every two years, as required by Government Code Section 53235. Of course, this ethics training is readily available to city officials on line and in the convenience of their own homes. But, it is far more engaging and enlightening to tailor a class to the (sometimes hilarious) facts and circumstances of your own city and using examples of interest to your community. Also, this gives our public officials in different departments and serving on different boards and commissions the chance to meet one another and learn about each other's work. And, it gives the city attorney the opportunity to meet board and commission members, explain the attorney's office's role, and encourage officials to contact the city attorney with any process or conflict questions. In Santa Monica, it is thought of as the bi-annual ethics party; officials ask a lot of questions, and people actually laugh a lot, even though everyone seems to understand the seriousness of the topic. (This might not work in cities less addicted to governmental gatherings and process as Santa Monica; try bringing coffee and donuts or croissants, depending on your community's tastes.)

Opportunities and Challenges With The Community

In-house attorneys also have a unique opportunity to build trust in local government through their relations with the community. And, we all need to use this opportunity to maximum advantage in this time when so many Californians have lost trust in local government and government workers.

We city attorneys can do our part to rebuild trust by vigilantly safeguarding the processes which allow community members to participate in and monitor their local government. We can

also explain our roles as process guardians (not policy makers) and respond to general inquiries about process, the Brown Act and the Public Records Act. We can also let everyone know that, although our offices do not provide civil representation or legal advice to members of the public, we do share information about local law. After all, our local laws apply in our communities; so let those in our communities know what those laws provide.

Of course, there's a down-side to our visibility. Because we are constant fixtures in the community, in-house attorneys may become lightning rods on certain community issues with significant legal ramifications. For instance, a neighborhood group may blame one of us because the city "allowed" another adult entertainment venue to open near their homes. Or, the business community may blame the city attorney for resisting its proposal for a law banning panhandling in the downtown. We can deal with this hostility by providing clear, concise explanations of the law and our roles in a non-defensive manner. That is, we can explain that we do not advance or oppose policies. Rather, in the cases of these examples, we are simply discharging our duty to uphold the constitution. And, of course, we can offer the council the option of considering an ordinance establishing time, place and manner restrictions on adult entertainment and panhandling.

Again, it may be advisable to establish flexible customs or protocols covering how and when we will participate (or not) in community meetings and our availability to meet with community representatives. Then, we have to explain them and take care to treat all groups and similarly situated community members equally.

How Being In-House Impacts Our Job Duties: Possibilities and Pitfalls

Another way to consider how we can use our talents to better serve our cities is by focusing on the tasks we perform.

Advisory Work

When should we offer advice to staff without being asked? Certainly we should offer advice whenever it's needed to protect our client, the city. This may cause friction with staff members who see us every day and expect us to facilitate, not impede, their work. We have to address these concerns patiently and respectfully (and likely repeatedly) in order to nurture the relationships upon which our success depends. Fortunately, daily proximity and the myriad opportunities for communication which it affords are on our side. We have the time and opportunity to start gently with oral advice about the risks and an explanation of our legal concerns. We can repeat that advice and respectfully work our way up the chain of command to the city manager, if necessary.

Also, we have to consider who should receive the advice. Is it the person making the misstep or their boss? Of course, we want to avoid creating mistrust and resentments. After all, we need to continue working together. On the other hand, our fellow members of the management team may depend upon us to share concerns with them. So we need to focus on what to say, how to say it and who to say it to. In particular, we need to make sure that our fellow city workers understand that we must put the city's interests first.

There is also the question of when to put advice in writing and when to give it orally. Again, proximity is a big advantage. It gives us lots of chances for talking before writing. Of course, some things should be in writing, such as a legal opinion issued to preserve or clarify an ordinance. And, if advice is requested in writing, it should probably be provided that way, unless there's a reason not to (which needs to be explained). On the other hand, if the person in the role of client does not want written advice, we need to consider whether a writing is nonetheless necessary. The authors have done only a few writings over the years that their colleagues did not want, and we remember each of them because they were a last resort, utilized only because our earlier attempts to persuade had failed.

In some difficult areas of law, where there have been repeated questions and persistent incomprehension, we have offered fellow management team members lunch and training about the substantive law – particularly the basics of municipal and constitutional law. To our surprise they accepted each offer and were very interested. (Again, we mentioned that Santa Monica's love to meet.) As with the community ethics party, we actually had a good time. Our clients may have found our fascination with the law a bit nerdy, but we think they were pleased by our willingness to share time, knowledge, and food.

Litigation

In this time of fiscal crisis for so many cities, our role as in-house litigator affords significant possibilities for savings. The cost-differential between the hourly rate of in-house litigators and private attorneys is usually substantial. Moreover, our familiarity with city hall operations and our relationships with city staff should situate us to gather and evaluate the facts and the evidence much more rapidly than outside counsel could. So, at least as to routine cases, one of the authors is a strong proponent of handling litigation in house, if practicable.

Of course, as with any division of labor, this approach has both pluses and minuses. We in-house attorneys may appear to be less objective in our assessment of a litigation risk than an outside attorney – especially if we participated in the underlying city action that is the subject of the case and did not sufficiently identify risks at that time. So, we must be prepared to fully explain our analysis of the case, own up to any past missteps of our own, and avoid being critical of our clients whose conduct we are defending. If there is skepticism about our analysis, we can always offer to get a second opinion.

There will be times when our clients will prefer, or be required, to use outside litigation counsel. Special expertise may be necessary and conflicts may exist. In those cases, if there is no conflict and the office has the capability, consider arranging to share the work with outside counsel to conserve resources. At minimum, we can try to limit litigation expenditures by

negotiating retainer agreements, carefully reviewing and questioning billings, and monitoring cases actively.

Also, along with handling the litigation, we may be able to follow through and avert future risks and expenditures by supplying any advice that the case suggests is warranted. Litigation may reveal conduct, practices or policies (or the lack of policies) that will continue to expose the city unless modified. We can minimize recriminations and reduce anxiety about future losses by advising our colleagues, early on, that changes may be in order, and we will help suggest them. Of course, decisions will be required about how and when to discuss and make these changes. Litigation counsel should be consulted to avoid complicating the existing case, and the city's risk manager can be a partner in any long-term fix.

Staffing Meetings

More than any aspect of our work, staffing public meetings -- particularly council meetings -- raises the question whether we should offer advice or speak only when spoken to. As in other contexts, formulating, explaining and consistently adhering to conventions or practices helps, as does displaying unswerving respect for others' roles. For instance, we can explain to the council that we offer unsolicited advice about process for the purpose of protecting the process and the record and thereby insulating the council's actions against potential legal challenges. Likewise, we can explain that we offer unsolicited advice about substantive law to avoid legal risk and not to advance a political agenda.

For example, suppose the agenda item before council is an application for a CUP for a condominium project that neighbors oppose because of concerns about traffic and "neighborhood compatibility". The staff recommendation is to grant the permit, but the neighbors are numerous and vocal; and they appear to have persuaded the council. The council needs advice about the limitations state law imposes on council's discretion to reject housing projects. Govt. Code Section 65589.5(j). Or, suppose council is in closed session, discussing whether to initiate

litigation to keep a measure off the ballot and one of them (an attorney) suggests that the city attorney simply refuse to submit the legally required ballot title and summary to the registrar, thereby keeping the measure off the ballot, and forcing the proponents to file suit. The full council warmly embraces this suggestion. *Cf. Los Angeles Times Communications v. Los Angeles County*, 112 Cal.App.4th 1313 (2004) [discussing an attorney fee award against the county arising from somewhat similar facts; though in the actual case county counsel made the suggestion, later tried to change it, and a supervisor actually reported the Brown Act violation]. Or suppose, it comes to your attention during a meeting, perhaps through public testimony, that one of the council members has extreme personal animosity against the applicant for a permit to build a project that will block the view from the council member's apartment. *cf. Clark v. Hermosa Beach*, 48 Cal.App.4th 1152 (1996) [similar facts to the example, but the personal animosity--though raging--was unknown to the city attorney]. In each of these situations, the city attorney would need to jump in and offer possibly unwelcome advice to protect the council's ultimate decision and limit the city's exposure to liability.

Of course, we should always strive to avoid surprising our clients at public meetings. Sometimes, we can avoid such surprises by contributing carefully worded segments to staff reports. Sometimes, we can provide advice about agenda items that pose significant legal risks in closed sessions on anticipated litigation. We can also provide advice and warnings in writing. And, we can encourage Council members to contact us, before meetings, if they have questions about the law relating to particular agenda items, the process, or conflicts.

Finally, and perhaps most important, to avoid unwelcome surprises at meetings, it is strongly recommended that you meet with the city manager before every council meeting to discuss any issues or concerns. And, though it is time consuming, it is also recommended that you review draft staff reports during the agenda preparation process so that concerns can be identified and addressed early.

Some Tips, Especially for In-House City Attorneys

Our fellow city attorneys have produced many excellent writings for the City Attorneys' Department about our evolving roles and how best to serve our cities. We want to acknowledge three articles that have been particularly helpful to us, reiterate some of the tips from those articles that seem particularly applicable to in-house city attorney's work, and add a few of our own.

1. Make the most of your [daily] opportunities to bond with the city manager and other members of the management team.

See "The Role of the City Attorney: Relationships with Other Municipal Actors", Colantuono, M., 5/04.

2. Scrupulously maintain your objectivity and leave policy to policy makers.

3. Be politically aware, but apolitical. *See "The City Attorney/Client Relationship", Bart Thiltgen, 10/99*

4. Avoid just saying "no"; try to offer alternatives, and always offer explanations.

5. Explain your role to city officials, city staff and the community, gently and repeatedly. *See, "The City Attorney – Monitor, Mentor or Meddler", Albuquerque, M., 10/99*

6. Explain when and why you offer unsolicited advice and do so in a manner that respects others' turf.

7. Be especially vigilant about adherence to the Brown Act, Public Records Act, conflicts laws, Due Process and other laws that ensure fairness and transparency and thereby promote trust in government.

8. Do your job on the move – visit other people's offices in city hall, be physically visible and available.

9. Always, be scrupulously ethical.

10. Be respectful, patient and forthright; treat your colleagues in city hall, public officials, and community members the way you want them to treat you, and enjoy your time with them.

4. Engaging the City Attorney in Non-Conventional Ways

Regardless of whether the city attorney serves as an independent contractor or employee, he or she is a very valuable member of the city team. In some cities, a contract city attorney may

be asked to place an emphasis on advising the city council and the city manager in order to minimize legal fees. The city attorney may attend city council meetings only when asked to and may not have any day-to-day contact with staff. The benefits of daily staff contact and community awareness, as previously described in this paper, are lost. Such a penny-wise and pound-foolish approach may not only prove detrimental in the long run, it completely dismisses the added-value that a professionally trained lawyer may bring to an organization.

The role of general counsel in private, corporate situations has greatly expanded beyond serving as the chief legal officer of a company. General counsel in the private arena may oversee governance and compliance while also serving as a member of the executive management team, developing strategy, implementing policy and providing trusted guidance. Has the role of the city attorney similarly expanded?

Some city managers and city council members may say yes. Shafter City Manager John Guinn, for example, believes that the city attorney should be viewed in the same light as other city executives. He believes that during these difficult economic times city managers must look at the talents of all employees and ask whether these talents can be used in non-conventional ways that increase efficiency. He believes that if the city attorney has a special talent and the city has a special need then, as the manager, he will look at ways to get the most out of that person to benefit the city and the community.

If city attorneys are approached to serve in a broader role, should they do so? If a contract city attorney is asked to attend all department head meetings because his or her input on implementing policy is valued by the management team should they attend? In such a case the city will be paying for attendance at the meeting where the attorney is providing more than legal advice. If an in-house attorney is asked to lead the city's strategic planning workshop for the community should he or she do it? What if the city attorney is asked to draft a press release or hold a press conference?

Conclusion

In the ever-changing, complex environment of local governance in California, cities need the very best legal advisors. Whether contract or in-house, city attorneys must research and fully understand their roles and the ways that they can contribute their talents to the success of the cities they serve. City attorneys should also be willing to serve in non-conventional ways because oftentimes the special contributions they make in those situations are invaluable. Finally, city attorneys should always keep in mind our “tips”, page 16 *supra*, as they are truly rules to practice municipal law by.