



Ethical Principles for City Attorneys

(MCLE Specialty Credit for Legal Ethics)

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Ethical Principles for City Attorneys (Even More Chockful of Ethics)

League of California Cities
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On October 6, 2005, the City Attorneys Department of the League of California Cities adopted “Ethical Principles for City Attorneys.” The document was re-presented at the Spring League Conference in 2011 by Pasadena City Attorney Michele Bagneris. I was asked to re-present the document, as there might be some individuals in the Department who are not familiar with it. I was also asked if I could cross-reference any applicable California State Bar Rules of Professional Conduct, as new State Bar Rules were just promulgated in November of 2018. So here we go—Ethical Principles for City Attorneys; Even More Chockful of Ethics!

A Note on How to Use This Paper.

The Ethical Principles for City Attorneys document (“Principles”) has been broken up into its various sections and inserted below, with commentary discussing the interaction with the State Bar Rules. You are invited to re-familiarize yourself with the document by just reading the shaded text (i.e. the shaded text is the actual Principles).¹ Alternatively, if you want the “Chockful of Ethics” part, you can also read the commentary following each section, to watch me try to conflate the State Bar Rules of Professional Conduct (“Rules”) and the Principles. Note that the “conflation” (“conflagration?”) is intended to be selective, rather than comprehensive. Further, I have tried to avoid redundancy in the commentary—some of the State Bar Rules intersect with several of the Principles in the Principles, but I have avoided re-hashing the discussion of any particular rule in those multiple instances.

Some footnotes include citations to the State Bar Rules and the reports generated by the California State Bar Commission for the Revision of the Rules of Professional Conduct (“Rules Commission”). Rather than include the link every time in the footnote, you can find the referenced materials at <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Proposed-Rules-of-Professional-Conduct>.²

A further note—the Principles uses the term “city attorney” to refer to “all persons engaged in the practice of municipal law.” Given that definition, this paper will use the same vernacular.

First a Word About Ethics in General.

Before talking about the Principles, it is important to focus on what we are talking about when we say “ethical principles.” Being ethical is not the same as following the law.³ Apartheid, Jim Crow laws, pre-19th Amendment voting laws are all laws that today most, if not all, people would say are not “ethical.” Ethics are well-founded standards of right and wrong that prescribe what people ought to do. But they are not just “whatever society accepts,” as many issues do not have a societal consensus.

¹ Or just using the following link for an unadulterated copy: <http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys> (Accessed March 13, 2019)

² Accessed March 27, 2019.

³ The following discussion is paraphrased from the Markkula Center for Applied Ethics, “What is Ethics?” <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/what-is-ethics> (Accessed March 6, 2019)

In daily life, ethics involves decision making. In any given situation, we all decide whether to act or not to act. And if we decide to act, we then have to decide which action to take. And a force that can guide those decisions is “ethics.”

The Markulla Center for Applied Ethics at Santa Clara University⁴ focuses on ethics education, bringing the traditions of ethical thinking to bear on real world problems. They have prepared an app, and an article on their website about how to make ethical decisions.⁵ I have included a copy of that article at the end of this paper for your reference. You may also wish to utilize it as a resource in future AB 1234 training.

So Why Talk About Rules at All?

So if being ethical is not the same as following the law, why talk about the Rules of Professional Conduct, which are tantamount to laws, in connection with the Principles, which are largely aspirational?⁶ In fact, the Charter to the Rules Commission that drafted the new rules specifically provides that the rules should state clear and enforceable disciplinary standards as opposed to purely aspirational objectives.⁷

There are three reasons why the rest of this paper will try to compare the Rules and the Principles:

1. In some instances the Principles and Rules may overlap—in which case being “aspirational” will keep you from being disbarred.
2. Notwithstanding the language of the State Bar Rules Committee Charter, some of the comments to the new rules do include aspirational objectives.⁸ Further, the new rules indicate that not just laws and rules, but also the “opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.”⁹ Given the breadth of that catchall, it’s entirely possible that the Principles could be cited by some State Bar Court in the future.
3. Because Lynn Tracy Nerland asked me to.

⁴ More information about the Center is available at <https://www.scu.edu/ethics/ethics-resources> (Accessed March 6, 2019).

⁵ <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/a-framework-for-ethical-decision-making/> (Accessed March 27, 2019).

⁶ See first bullet, Preamble.

⁷ <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision/Rules-Commission-2014> (Accessed March 6, 2019).

⁸ See, for example, Comment [5] to Rule 1.0 which includes goals for pro bono work.

⁹ Rule 1.0, Comment [4].

The Principles and the Rules.

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.

The City Attorneys Department of the League of California Cities has therefore adopted these ethical principles to:

- ❑ Serve as an aspirational guide to city attorneys in making decisions in difficult situations,
- ❑ Provide guidance to clients and the public on the ethical standards to which city attorneys aspire, and
- ❑ Promote integrity of the city and city attorney office.

City attorneys are also subject to the State Bar's Rules of Professional Conduct. For an explanation of how the rules apply to city attorneys, please see *Practicing Ethics* published by the League of California Cities in 2004, available at www.cacities.org/attorneys¹⁰. These aspirational ethical principles are not an effort to duplicate or interpret the State Bar's requirements or create additional regulatory standards.

The role of the city attorney and the client city varies. Some city attorneys are full-time public employees appointed by a city council; some are members of a private law firm, who serve under contract at the pleasure of a city council. A few are directly elected by the voters; some are governed by a charter. When reflecting on the following principles, the city attorney should take these variations into account.

The city attorney should be mindful of his or her unique role in public service and take steps to ensure his or her words and deeds will assist in furthering the underlying intent of these principles.

The Preamble states that the Principles is being adopted for 3 reasons:

1. To serve as an aspirational guide to city attorneys in making decisions in difficult situations,
2. To provide guidance to clients and the public on the ethical standards to which the city attorneys aspire, and
3. To promote integrity of the city and the city attorney office.

With regard to the first point, I would again refer you to the discussion about ethics as a guide for decision-making and the article attached to this paper¹¹. With regard to the second and third points above, the Charter for the Commission for the Revision of the Rules of Professional

¹⁰ But note—*Practicing Ethics* has not been updated to reflect the current Rules.

¹¹ Honest, I'm not getting a commission from these people.

Conduct states in part: “The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.”¹²

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.

***Explanation.** The city attorney’s advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society. Because the public’s business is involved, within the city organization the city attorney should consistently point out clear legal constraints in an unambiguous manner, help the city to observe such constraints, identify to responsible city officials known legal improprieties and remedies to cure them, and if necessary, report up the chain of command to the highest level of the organization that can act on the client city’s behalf.*

Examples

1. The city attorney should give advice consistent with the law and the policy objectives underlying those laws, but may consider and explain good faith arguments for the extension or change of a legal principle.
2. The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney’s good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be “creative” to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city’s actions.
3. The city attorney’s guiding principle in providing advice and services should be sound legal analysis. The city attorney should not advise that a course of action is legal solely because it is a common practice (“everyone else does it that way”), a past practice (“we have always done it that way”), or because the risk of suit or other consequence for action is considered low.
4. The city attorney’s advice should reflect respect for the legal system.
5. If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city’s interests.
6. The city attorney should be willing to give unpopular legal advice that meets the law’s purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.

¹² <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision/Rules-Commission-2014> (accessed March 6, 2019).

7. The city attorney should not only explain and advise the city on the law, but should encourage the city to comply with the law’s purpose and intent.

This principle and the examples implicate several rules.

In terms of the Principle’s Explanation’s suggestion to “report up the chain of command to the highest level of the organization that can act on the client’s behalf,” Rule 1.13 (Organization as Client) now includes an express obligation to report legal violations that are likely to result in substantial injury to the organization up the food chain. However, notwithstanding that city attorneys work for public agencies and have a unique position of public trust, it is important to note that this is a report “up,” not report “out” obligation. The prohibition on disclosure of confidential client (here, the organization) information still governs over any sentiment that the public has a “right to know.”¹³ In fact, the Rules Commission considered whether to create a special carve out to the prohibition on disclosure for government attorneys as whistleblowers—but the Commission felt that the need for trust in the attorney-client relationship would be jeopardized in the government setting if the client knew that confidential communications could be disclosed by the government attorney.¹⁴

Example 1 above references the duty to follow the law, but also allows for good faith arguments to change the law. Example 2 clarifies this is not intended to encourage attempts to justify illegal conduct. Rule 3.1 (Meritorious Claims and Contentions) prohibits a lawyer from asserting positions in litigation that are not warranted under existing law, unless they can be supported by a good faith argument for an extension, modification, or reversal of existing law. Rule 3.3 (Candor Toward the Tribunal) requires a lawyer to disclose to a tribunal in any litigation adverse legal authority, and now requires the further step of taking remedial measures to clarify or correct for the court any material evidence that the lawyer knows to be false.

In terms of Example 6’s suggestion that the city attorney should be willing to give unpopular legal advice, note that Rule 1.4(c) (Communication with Clients) does allow a lawyer to delay communication of certain information where the lawyer reasonably believes that the client would likely react in a way that may cause imminent harm to the client or others. “Imminent harm” is not defined, and the report notes that this is an exception that could swallow the rule in terms of the duty to communicate with a client.¹⁵ Nevertheless, what constitutes “imminent harm” may be relevant when determining whether to communicate certain information during a public council meeting where emotions may be running high, for example.

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.

Explanation. *It is difficult for the city attorney to effectively represent the city if public officials do not trust the city attorney’s competence and professionalism.*

¹³ See Rule 1.13(c).

¹⁴ Rule 1.6 Report of the Rules Commission at p. 49.

¹⁵ Rule 1.4 Report of the Rules Commission at p. 9.

Examples

1. The city attorney should use available resources to maximize his or her ability to advise knowledgeable on issues of municipal law.
2. The city attorney should be clear with individual council members and staff on the extent to which their communications with the city attorney can and will be kept confidential. The city attorney should be especially clear when confidentiality cannot be lawfully maintained.
3. Sometimes the city attorney will be asked a question during a public or private meeting and the city attorney is unsure of the answer. When time permits, the city attorney should advise that additional time is needed to research the matter and provide an appropriate response. If extra time is not available, then the city attorney should be candid regarding any uncertainty he or she feels about the answer given.
4. When a question is posed and the city attorney knows there is no definitive, clear conclusion, the city attorney should describe the competing legal considerations, as well as inform the city of the legally supportable courses of action, together with an evaluation of the course that is most likely to be upheld.
5. In the event the city attorney is asked in a public forum to provide advice that could undermine the city's ultimate position, the city attorney should seek to meet in closed session, if legally permissible, or, if time permits, provide his or her opinion in a confidential memorandum. If the advice must be given during an open session, then the city attorney must be mindful of the impact that advice given in public may have on the city's ultimate position.
6. When the city attorney has a duty to provide documents or other information to outside law enforcement authorities, he or she should do so in a way to minimize harm to the city consistent with that duty.

The first rule implicated by this Principle is Rule 1.1 (Competence). The new Rules break this out from the former rule, which also included diligence and supervision, to more closely track the ABA Model Rules. The rule of competence requires that you possess the requisite learning and skill and mental, emotional and physical ability reasonably necessary to perform the requested legal services. If you do not have sufficient learning and skill, you are required to associate in others who do, or learn what you need to learn prior to the time of performance. For those technologically challenged, the rule of competence includes competence with relevant forms of technology.¹⁶

Example 2 above, deals with confidentiality of information. Confidentiality is covered in Rule 1.6 (Confidential Information of Client) and Business and Professions Code Section 6068(e)(1) "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Confidentiality is also potentially implicated by Example 5 above, and Rule 1.8.2 (Use of Current Client's Information) provides that confidential client information cannot be disclosed without the express consent of the client.

¹⁶ Rule 1.1 Report of the Rules Commission, p. 15.

Example 2 also relates to the identity of the client, in that only confidential information provided by the client is confidential—although ascertaining which constituent members of the political organization are the “client” in any given circumstance may be tricky. Rule 1.13 (Organization as Client) provides that when an organization is the client, the organization acts through its duly authorized directors, officers, employees, members, shareholders or other constituents overseeing the particular engagement. Interestingly and unhelpfully, comment 6 to that rule provides that “It is beyond the scope of this rule to define precisely the identity of the client and the lawyer’s obligations when representing a governmental agency.” So good luck.

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.

***Explanation.** The city attorney and the city attorney’s advice needs to be trusted as impartial by the entire council, staff and community.*

Examples

1. The city attorney should provide consistent advice with the city’s overall legal interests in mind to all members of the city team regardless of their individual views on the issue.
2. Each city council member, irrespective of political affiliation, should have equal access to legal advice from the city attorney, while legal work on a matter consuming significant legal resources should require direction from a council majority.
3. The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city’s officials, including candidates running for that city’s offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm’s attorneys.
4. When considering whether to become involved in policy advocacy on an issue that may potentially come before the city, the city attorney should evaluate whether such involvement might compromise the attorney’s ability to give unbiased advice or create the appearance of bias.

Example 2 above, again implicates both Rule 1.13, (Organization as Client), discussed above, and Rules 1.6 (Confidential Information of Client) and 1.8.2 (Use of Current Client’s Information) in terms of client confidentiality. Rule 1.13(f) (Organization as Client) requires the lawyer to make clear the identity of the client when the interests of the organization and the particular constituent with whom the lawyer is speaking may be adverse. At times making such a determination can be problematic, for example when speaking with an elected who is advocating a position with which the majority of the council does not agree.

Example 4 speaks to conflicts of interest. Rule 1.7 (Conflict of Interest: Current Clients), comment 1 indicates that loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Comment 4 provides that even where there is no directly adverse conflict, a

conflict may still exist where a lawyer's ability to advise a client will be materially limited as a result of other professional or personal interests.

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.

Explanation. The city attorney, by his or her acts and deeds, should demonstrate that his or her highest professional priority is to serve the city's needs.

Examples

1. The city attorney's operating and legal services budget requests should be based on the goal of efficiently serving the client city's realistic legal needs (*i.e.* avoid "empire building").
2. The city attorney should provide advice without a focus on garnering personal support or avoiding personal criticism.
3. While it is appropriate for a city attorneys to provide both advisory and litigation services, a city attorney should give the city a full range of reasonable options including alternatives to litigation for resolving issues.

Rule 1.5 (Fees for Legal Services) generally relates to Example 1, dealing with legal service budgets.

Rule 1.1 (Competence), Rule 1.3 (Diligence) and Rule 1.7 (Conflict of Interest: Current Clients) all speak to having the City's needs as the highest professional priority. Of note, the diligence rule does not require "promptness," that term (included in the ABA Model Rule) was specifically rejected in California, as the Rules Commission felt the "promptness" obligation is specifically referenced in other rules.¹⁷

Example 3 concerning the range of litigation and non-litigation options speaks to Rule 1.4 (Communication with Clients). Rule 1.4(a)(2) specifically requires a lawyer to reasonably consult with the client about the means by which to accomplish the client's objectives.

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.

Explanation. The city attorney should be a role model of decorum and composure.

Examples

1. The city attorney should provide advice and information to the council and individual council members in an evenhanded manner consistent with city policy governing the provision of legal services to the city.

¹⁷ Rule 1.3 Rules Commission Report, Executive Summary p. 2.

2. The city attorney should communicate in a way that is sensitive to both the context and audience, explaining the law in a way that is understandable.

3. In interactions with the public, the city attorney's role is to explain procedures and the law, but not engage in debate.

4. The city attorney should show professional respect for city staff, colleagues, the legal system and opponents. The city attorney should not personally attack or denigrate individuals, particularly in public forums.

5. The city attorney should not seem to endorse, by silence or otherwise, offensive comments made to him/her about others.

6. Sometimes the city attorney will provide advice in public, either because of a city's approved practices or as necessitated during a public meeting. Such advice should be provided in a low-key, dispassionate and non-confrontational manner.

7. The tone of the city attorney's advice and representation should not give the appearance of a personal attack on an individual, even when it is necessary to explain that a particular official's action is unlawful.

8. The city attorney should be open to constructive feedback and criticism.

In terms of communicating with members of the public, Rule 4.1 (Truthfulness in Statements to Others) prohibits lying (materially) to a third party or failing to disclose a material fact when acting on behalf of a client, tempered by the obligations of confidentiality. Of note, this restriction would also apply when appearing before another public body on behalf of a client.¹⁸

With regards to exhibiting professional respect for city staff, colleagues, the legal system and opponents, Rule 4.2 (Communicating with a Represented Person) governs communication with represented persons. Rule 4.3 (Dealing with Unrepresented Person) now requires a lawyer to clarify that they are representing an adverse party, if that is not understood by the unrepresented person.

Perhaps more interesting, Rule 8.4.1 (Prohibited Discrimination, Harassment, and Retaliation) prohibits unlawful harassment or discrimination based upon a protected characteristic in the representation of a client. This rule was just referenced in *Fernando Martinez v. Stephen Stratton O'Hara*, in which the language in the notice of appeal filed by plaintiff's attorney was determined by the appellate court to manifest gender bias. And even though the notice of appeal was filed before Rule 8.4.1 took effect, the Court referenced the rule in a footnote, and also reported the attorney to the State Bar.¹⁹

Apparently, the court of appeal did not appreciate the following line from the notice of appeal: "The ruling's succubustic adoption of the defense position, and resulting validation of the defendant's pseudohermaphroditic misconduct prompt one to entertain reverse peristalsis unto its four corners." The appellate court noted that the definition of "succubus" includes "a demon

¹⁸ See Rule 4.1 Rules Commission Report, pp. 7-8.

¹⁹ (2019) 32 Cal.App.5th 853.

assuming female form to have sexual intercourse with men in their sleep,” and that the trial court judge was female.

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.

***Explanation.** The city attorney must respect policymakers’ right to make policy decisions.*

Examples

1. The city attorney may offer input on policy matters, but should make clear when an opinion is legal advice and when it is practical advice.
2. The city attorney should not let his or her policy preferences influence his or her legal advice.
3. If a city attorney finds it necessary to advise the city that a particular course of action would be unlawful, the city attorney should strive to identify alternative approaches that would lawfully advance the city’s goals.

Rule 2.1 (Advisor) is described by the Rules Commission as a core duty of every lawyer:²⁰ “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” The comments to the rule indicate that a lawyer may refer to considerations other than the law, such as moral, economic, social and political factors. So even though the Principle indicates a city attorney should respect the rights of electeds to make policy decisions, Rule 2.1 recognizes that a lawyer can include non-legal factors in providing advice.

With regard to Example 2, comment 3 to Rule 1.2 (Scope of Representation) states that “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” That may give one comfort--when dealing with the State Bar--but I’m not sure that the public always shares the same view.

Finally, as mentioned before, Rule 1.4 (Communication with Clients) does require a lawyer to consult with a client about the means to accomplish the client’s goals.

Principle 7 (Consistency). The city attorney should conduct his or her practice in a way that consistently furthers the legitimate interests of cities.

***Explanation.** Consistency in the legal positions taken by city attorneys is vital to city attorneys’ credibility with the courts, clients, and the public.*

Examples

1. The city attorney should not represent a private client if that representation will necessitate advancing legal principles adverse to cities’ clearly recognized and accepted interests.

²⁰ Rule 2.1 Commission Report, p. 1.

2. When providing advice, the city attorney should inform his or her city of any far-reaching negative impacts a position may have on the city's own potential future interests as well as cities' interests in general, particularly when establishing legal precedent.

3. The city attorney should carefully consider whether to hire or recommend a firm that advances legal principles adverse to city interests on behalf of private clients.

With regard to Example 1 above, Rule 1.7 (Conflict of Interest: Current Clients) is a little more specific about that circumstance. Comment 6 to the rule indicates that advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client does not create a conflict that requires written consent. However, where the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client, or where the action on behalf of one client will materially limit the lawyer's effectiveness in representing another client, then a conflict would exist.

Principle 8 (Personal Financial Gain). The city attorney's primary responsibility is to serve the city's interest without reference to personal financial gain.

***Explanation.** An important aspect of the city attorney profession is public service.*

Examples

1. The city attorney should provide the highest possible quality work regardless of the remuneration received.

2. The city attorney's representation should be based on a realistic understanding of the city's needs in light of the city's fiscal and other constraints. However the city attorney should advise the city when additional resources are necessary to provide the level of legal services the city requires.

3. The city attorney should refrain from providing unnecessary or redundant services to the city.

4. The city attorney should never use the power, resources or prestige of the office for personal gain.

Rule 1.5 (Fees for Legal Services) prohibits the charging of "unconscionable" fees. An unconscionable fee is one that is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called²¹. The Rules Commission rejected a suggestion that the rule should prohibit "unreasonable" fees, based upon a concern that too many complaints to the bar would turn into fee disputes. California law has other methods to address fee disputes (arbitration, etc.).²² Regardless of the standard used by the Bar, the public, and non-lawyer electeds may have different measures that need to be taken into consideration.

²¹ Goldstone v. State Bar (1931) 214 Cal. 490, 498.

²² See Rule 1.5 Commission Report, p. 9.

In terms of financial gain from referrals, Rule 1.5.1 (Fee Divisions Among Lawyers) does now allow fee splitting among attorneys—but city attorneys may need to take into consideration the associated Political Reform Act and Government Code Section 1090 implications for such arrangements.

And one further note on a city attorney’s pecuniary interest, Rule 1.8.8 (Limiting Liability to Client) does not allow a lawyer to prospectively limit their liability for malpractice.

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.

***Explanation.** The public’s trust in the quality of the city’s legal services is undermined if it appears that considerations other than competence affected the decision to hire someone.*

Examples

1. The city attorney should engage staff and vendors based on objective standards relating to professional competence and experience.
2. The city attorney should avoid providing gratuities to decision-makers during the pendency of decisions relating to the city attorney’s employment.
3. City attorneys must keep employment negotiations separate from the city attorney’s role as the city’s legal advisor.
4. The city attorney should not undermine the employment of an incumbent city attorney. The city attorney may respond to unsolicited inquiries from a potential client about future representation.
5. The city attorney should maintain an office that is open to employees from diverse backgrounds and remove unnecessary barriers to success in his or her office and in the legal profession.
6. The city attorney should not award or recommend award of litigation or legal services-related contracts if the public could question whether the contract was awarded for reasons other than merit, such as the contractor (or member of the contractor) providing gifts to or participating in political campaigns of (including making campaign contributions to) officials with the power to award the contracts.
7. The city attorney should hire or recommend staff and consultants who adhere to these ethical principles and encourage existing staff and consultants to do likewise.
8. The city attorney should seriously consider refusing to represent cities that do not support the city attorney’s adherence to these principles

In terms of the city attorney hiring staff, Rule 8.4.1(b)(1)(iii) (Prohibited Discrimination, Harassment, and Retaliation) prohibits discrimination in hiring. This new rule eliminated the prior

threshold requirement of a determination by a court that the alleged unlawful conduct has occurred—thus the State Bar now has original jurisdiction to deal with claims of alleged discrimination in hiring.

Rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers) now imposes supervisory responsibilities on city attorney offices²³, and violations of the State Bar rules, including the prohibition against discrimination, harassment, etc. can be attributable to the head of the office. The supervisor must ensure that measures are in place to see that lawyers and non-lawyers in the office comply with the State Bar Rules. The supervisor must also take remedial action to correct or mitigate the consequences of a violation of the rules once discovered.

In terms of undermining the employment of the current city attorney set out in Example 4, Rule 7.3 (Solicitation of Clients) prohibits in-person, live telephone or real-time contact to solicit professional employment. “The concern is the ability of lawyers to employ their skills in the persuasive arts to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision.”²⁴ A prior similar rule against accountants was overthrown, but the U.S. Supreme Court has drawn a distinction between lawyers and accountants, finding that the latter, as opposed to the former, are not “skilled in the persuasive arts.”²⁵

And in terms of the issue of gifts mentioned in Example 2, Rule 7.2(b)(5) (Advertising) does allow gifts to a person who recommended hiring of the lawyer, after the lawyer is hired.

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.

***Explanation.** For city attorneys to remain a vital, positive part of municipal government, members of the profession should take affirmative actions to advance respect for and proficiency by its practitioners.*

Examples

1. City attorneys have a strong tradition of assisting their colleagues through formal or informal sharing of their knowledge and expertise, including active participation in the League of California Cities, the State Bar and a local municipal attorney group or bar association. This tradition also includes sharing of research and opinions when consistent with protecting client confidences.

2. The city attorney should continually strive to improve his or her substantive knowledge of the law affecting municipalities through presenting or attending appropriate educational programs.

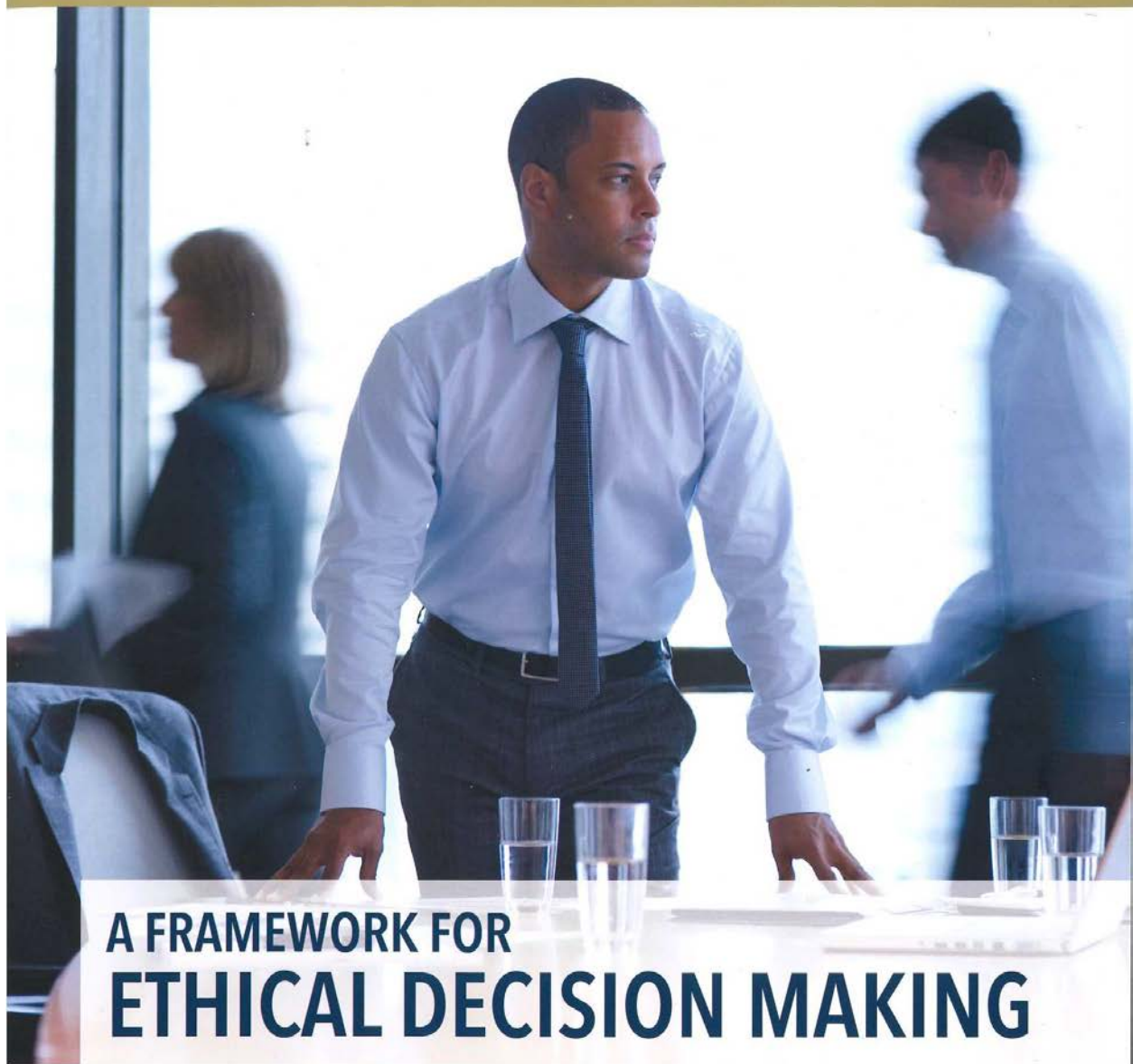
²³ The Rule speaks in terms of law “firms”, but the definition of firm includes the legal department of a government agency—see Rule 1.0.1

²⁴ Rule 7.3 Rules Commission Report, p. 12.

²⁵ *Edenfield v. Fane* (1993) 507 U.S. 761, pp. 774-775.

3. The city attorney should keep in mind the dynamic nature of municipal law and update his or her understanding of the law on an issue, rather than relying on past knowledge.

Rule 1.1, requires competence and Rule 1.3 requires diligence. Aside from that, I guess this Principle would be reason #4 as to why I wrote this paper...



A FRAMEWORK FOR ETHICAL DECISION MAKING

This document is designed as an introduction to thinking ethically. We all have an image of our better selves—of how we are when we act ethically or are “at our best.” We probably also have an image of what an ethical community, an ethical business, an ethical government, or an ethical society should be. Ethics really has to do with all these levels—acting ethically as individuals, creating ethical organizations and governments, and making our society as a whole ethical in the way it treats everyone.



MARKKULA CENTER
FOR APPLIED ETHICS

A FRAMEWORK FOR ETHICAL DECISION MAKING

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WHAT IS ETHICS?

Simply stated, ethics refers to *standards of behavior* that tell us how human beings *ought to act* in the many situations in which they find themselves—as friends, parents, children, citizens, businesspeople, teachers, professionals, and so on.

It is helpful to identify what ethics is **NOT**:

Ethics is not the same as feelings. Feelings provide important information for our ethical choices. Some people have highly developed habits that make them feel bad when they do something wrong, but many people feel good even though they are doing something wrong. And often our feelings will tell us it is uncomfortable to do the right thing if it is hard.

Ethics is not religion. Many people are not religious, but ethics applies to everyone. Most religions do advocate high ethical standards but sometimes do not address all the types of problems we face.

Ethics is not following the law. A good system of law does incorporate many ethical standards, but law can deviate from what is ethical. Law can become ethically corrupt, as some totalitarian regimes have made it. Law can be a function of power alone and designed to serve the interests of narrow groups. Law may have a difficult time designing or enforcing standards in some important areas, and may be slow to address new problems.

Ethics is not following culturally accepted norms. Some cultures are quite ethical, but others become corrupt—or blind to certain ethical concerns (as the United States was to slavery before the Civil War). “When in Rome, do as the Romans do” is not a satisfactory ethical standard.

Ethics is not science. Social and natural science can provide important data to help us make better ethical choices. But science alone does not tell us what we ought to do. Science may provide an explanation for what humans are like. But ethics provides reasons for how humans ought to act. And just because something is scientifically or technologically possible, it may not be ethical to do it.

WHY IDENTIFYING ETHICAL STANDARDS IS HARD

There are two fundamental problems in identifying the ethical standards we are to follow:

1. On what do we base our ethical standards?
2. How do those standards get applied to specific situations we face?

If our ethics are not based on feelings, religion, law, accepted social practice, or science, what are they based on? Many philosophers and ethicists have helped us answer this critical question. They have suggested at least five different sources of ethical standards we should use.

FIVE SOURCES OF ETHICAL STANDARDS

THE UTILITARIAN APPROACH

Some ethicists emphasize that the ethical action is the one that provides the most good or does the least harm, or, to put it another way, produces the greatest balance of good over harm. The ethical corporate action, then, is the one that produces the greatest good and does the least harm for all who are affected—customers, employees, shareholders, the community, and the environment. Ethical warfare balances the good achieved in ending terrorism with the harm done to all parties through death, injuries, and destruction. The utilitarian approach deals with consequences; it tries both to increase the good done and to reduce the harm done.

THE RIGHTS APPROACH

Other philosophers and ethicists suggest that the ethical action is the one that best protects and respects the moral rights of those affected. This approach starts from the belief that humans have a dignity based on their human nature per se or on their ability to choose freely what they do with their lives. On the basis of such dignity, they have a right to be treated as ends and not merely as means to other ends. The list of moral rights—including the rights to make one's own choices about what kind of life to lead, to be told the truth, not to be injured, to a degree of privacy, and so on—is widely debated; some now argue that non-humans have rights, too. Also, it is often said that rights imply duties—in particular, the duty to respect others' rights.

THE FAIRNESS OR JUSTICE APPROACH

Aristotle and other Greek philosophers have contributed the idea that all equals should be treated equally. Today we use this idea to say that ethical actions treat all human beings equally—or if unequally, then fairly based on some standard that is defensible. We pay people more based on their harder work or the greater amount that they contribute to an organization, and say that is fair. But there is a debate over CEO salaries that are hundreds of times larger than the pay of others; many ask whether the huge disparity is based on a defensible standard or whether it is the result of an imbalance of power and hence is unfair.

THE COMMON GOOD APPROACH

The Greek philosophers have also contributed the notion that life in community is a good in itself and our actions should contribute to that life. This approach suggests that the interlocking relationships of society are the basis of ethical reasoning and that respect and compassion for all others—especially the vulnerable—are requirements of such reasoning. This approach also calls attention to the common conditions that are important to the welfare of everyone. This may be a system of laws, effective police and fire departments, health care, a public educational system, or even public recreational areas.

THE VIRTUE APPROACH

A very ancient approach to ethics is that ethical actions ought to be consistent with certain ideal virtues that provide for the full development of our humanity. These virtues are dispositions and habits that enable us to act according to the highest potential of our character and on behalf of values like truth and beauty. Honesty, courage, compassion, generosity, tolerance, love, fidelity, integrity, fairness, self-control, and prudence are all examples of virtues. Virtue ethics asks of any action, "What kind of person will I become if I do this?" or "Is this action consistent with my acting at my best?"

PUTTING THE APPROACHES TOGETHER

Each of the approaches helps us determine what standards of behavior can be considered ethical. There are still problems to be solved, however.

The first problem is that we may not agree on the content of some of these specific approaches. We may not all agree to the same set of human and civil rights. We may not agree on what constitutes the common good. We may not even agree on what is a good and what is a harm.

The second problem is that the different approaches may not all answer the question "What is ethical?" in the same way. Nonetheless, each approach gives us important information with which to determine what is ethical in a particular circumstance. And much more often than not, the different approaches do lead to similar answers.

MAKING DECISIONS

Making good ethical decisions requires a trained sensitivity to ethical issues and a practiced method for exploring the ethical aspects of a decision and weighing the considerations that should impact our choice of a course of action. Having a method for ethical decision making is absolutely essential. When practiced regularly, the method becomes so familiar that we work through it automatically without consulting the specific steps.

The more novel and difficult the ethical choice we face, the more we need to rely on discussion and dialogue with others about the dilemma. Only by careful exploration of the problem, aided by the insights and different perspectives of others, can we make good ethical choices in such situations.

We have found the following framework for ethical decision making (see back page) a useful method for exploring ethical dilemmas and identifying ethical courses of action.

HOW TO MAKE AN ETHICAL DECISION

RECOGNIZE AN ETHICAL ISSUE

1. Could this decision or situation be damaging to someone or to some group? Does this decision involve a choice between a good and bad alternative, or perhaps between two "goods" or between two "bads"?
2. Is this issue about more than what is legal or what is most efficient? If so, how?

GET THE FACTS

3. What are the relevant facts of the case? What facts are not known? Can I learn more about the situation? Do I know enough to make a decision?
4. What individuals and groups have an important stake in the outcome? Are some concerns more important? Why?
5. What are the options for acting? Have all the relevant persons and groups been consulted? Have I identified creative options?

EVALUATE ALTERNATIVE ACTIONS

6. Evaluate the options by asking the following questions:
 - Which option will produce the most good and do the least harm? **(The Utilitarian Approach)**
 - Which option best respects the rights of all who have a stake? **(The Rights Approach)**
 - Which option treats people equally or proportionately? **(The Justice Approach)**
 - Which option best serves the community as a whole, not just some members? **(The Common Good Approach)**
 - Which option leads me to act as the sort of person I want to be? **(The Virtue Approach)**

MAKE A DECISION AND TEST IT

7. Considering all these approaches, which option best addresses the situation?
8. If I told someone I respect—or told a television audience—which option I have chosen, what would they say?

ACT AND REFLECT ON THE OUTCOME

9. How can my decision be implemented with the greatest care and attention to the concerns of all stakeholders?
10. How did my decision turn out and what have I learned from this specific situation?

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This Framework for Ethical Decision Making is the product of dialogue and debate at the Markkula Center for Applied Ethics at Santa Clara University. Primary contributors include Manuel Velasquez, Dennis Moberg, Michael J. Meyer, Thomas Shanks, Margaret R. McLean, David DeCosse, Claire André, and Kirk O. Hanson.



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