Essential Skills: Developing the City Attorney and City Manager Relationship

Attorney Development and Succession Committee -- Spring 2020 Conference

I. City Attorney role

A. Client is ultimately the City itself

1. "A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement." Cal. Rule of Professional Conduct 1.13(A)

2. "If a lawyer representing an organization knows that a constituent is acting, intends to act or refused to act in a matter related to the representation in a manner the lawyer knows or reasonable should know is (i) a violation of a legal obligation to the organization or a violation of a law reasonably imputable to the organization and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law. Cal. Rule of Professional Conduct 1.13(B)

3. For most cities, the highest official or body with the requisite authority to oversee the representation is the City Council. Municipal Law Handbook (MLH) §2.176A

4. The City Council Member and the City Manager are both duly authorized officials through which the City acts - both are authorized representatives of the client city.

5. In most cities, both the City Manager and the City Attorney report to the City Council as peers. "The City Manager may appoint and dismiss . . . subordinate appointive employees except the City Attorney." Gov't Code §34856

6. In most cities, it is a majority of the Council, acting as a body, not a single member, that has the authority to direct staff, including the City Manager.

B. What role does City Manager want the City Attorney to play?

1. Strictly legal advice – "bowl in your own lane"
2. Legal and general advice – "consigliere"

C. Access: ability to talk to City Manager about critical matter without waiting for an appointment

D. Can't promise confidentiality

E. A contract city attorney may have more distance from the management team

II. **Some City Manager Considerations**

A. Protect the General Fund – "who is going to pay for that?"
B. Political considerations – at least 5 elected bosses
C. Judged on *what* is accomplished often more than *how* it is accomplished
D. Respect for chain of command but no surprises

III. **Additional Resources**: The following documents are also attached as reference:

A. 50+ Questions to Ask the City Manager (but maybe not all at once)

B. ICMA City Manager Code of Ethics with Guidelines (revised 2019)

C. Sample City Manager Charter provision from the City of Alhambra

D. "The Role of the City Attorney and Development of the City Attorney/City Manager Relationship" by Jeff Kolin and Jonathan P. Lowell for the 2013 Annual Conference

E. "Innovative Approaches to City Attorney-Client Relationships: Fees, Services and Communications" by Molly S. Stump and Eric S. Vail for 2013 Spring Conference

F. "Stepping Into the Evolving Role of City Attorney: Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder – What Roles Can or Should You Play?" by Sonia R. Carvalho, John Guinn and Marsha Jones Moutrie for 2012 Spring Conference

G. "The Role of the City Attorney: Relationships with Other Municipal Actors" by Robert D. Herrick and Michelle Marchetta Kenyon for 2007 Spring Conference based on 2003 paper prepared by Michael Colantuono

IV. **Brown Act and New Topics at a City Council meeting**

A. Exceptions to Requirements for the Agenda from Municipal Law Handbook §2.24:

(1) Brief or Limited Communications

Limited questions, requests, and responses on matters not appearing on the posted agenda are allowed under Govt C §54954.2(a)(3) as follows:

- Brief responses by members of the legislative body and staff to statements or questions posed by the public;
- Questions for clarification;
- References to staff or other resources for factual information;
- Requests to staff to report back on an issue at a subsequent meeting [THIS IS A GOOD WAY TO PUNT]
- Requests or actions to agendize a matter of business for some future meeting; and
- Brief announcements by members of the body or staff and brief reports on their activities.

PRACTICE TIP: Responses, reports, and directions to staff should be brief and not entail lengthy discussion. See generally *Cruz v City of Culver City* (2016) 2 CA5th 239, 250 (approving limited discussion of such matters). If there is disagreement over whether to place a matter on a future agenda or whether to have staff return with a report, the matter should be put to an immediate vote without discussion. Note that the provisions allowing individual members of the body to give direction to staff do not override the city's procedural rules governing the authority of individual members to give such directions.

B. Are there grounds to add something to the agenda?

If the agency needs to take immediate action on a need that came to the attention of the legislative body after the agenda posting (or there is a true emergency). Govt C §54954.2(a)(3), (b).

C. What is the practice for placing items on future agendas?

1. Practices vary depending on city
2. Does it require a vote, or do councilmembers do their colleagues the courtesy of allowing them to place anything on a future agenda?
3. Practice tip—Come into the meeting knowing the policy for getting items places on a future agenda.

50+ Questions to ask the City Manager:

The City Attorney- City Manager Relationship

A. Personal

1. Did you grow up in California?
2. What was your college major? Do you think it helped in becoming a City Manager?
3. How did you become a City Manager?
4. Did you have any professional mentors?
5. Are you a morning person or night person?
6. What is your commute to work like?
7. What is your favorite meal?
8. If you unexpectedly had a free day, what would you do?
9. How do you feel your work-home balance is?
10. Are you a dog or cat person?
11. When was your last vacation and what did you do?
12. Do you follow politics at the state and local level?
13. What is your favorite sports team?
14. What is your favorite TV show?
15. What is your favorite movie?
16. Who is your favorite musician?

17. What is your favorite season of the year?

18. If you won the lottery, what would do and where would you live?

B. <u>City Manager Form of Government</u>

1. How do you describe your management style?

2. What percentage of the time do you feel that you spend handling Council, managing the City and doing individual work?

3. What do you see as the best thing you have done for the organization so far?

4. What is the most important achievement that you hope to accomplish this year – and then during your tenure?

5. What is your least favorite part of being the City Manager?

6. What last made you angry as a City Manager?

7. What is your greatest personal strength as a City Manager? Greatest personal challenge or limitation?

8. If the City had the budget for one thing to make the City operate better, what would you want?

9. Do you look to the City Attorney for general advice and feedback or just specifically legal advice?

10. How do you want to be apprised of legal issues: more formally with regular updates (or perhaps copied on Council updates); monthly meeting; etc.?

11. How do you and the Department Managers wish legal services be delivered to staff; e.g. formal written opinions; emails; etc.?

12. What are the City's priority issues from your standpoint?

13. What can the City Attorney do to make the City Manager successful? What can the City Manager do to make the City Attorney successful?

14. Is there something that you wish the City Attorney would stop doing or do differently?

15. How should we handle media inquiries about legal issues?

C. City Council

1. What are the most important priorities for the City Council as a whole and individually?

2. Any particular challenges with any Council Member?

3. How do you think each Council Member best receives and processes information?

4. Is the City Attorney involved in reviewing agendas and staff reports and if so what is the best method of providing comments in advance?

5. Does the City Council look to the City Attorney or the City Manager as the parliamentarian?

6. If the City Council is veering off-topic at a Council meeting, do you want the City Attorney to pipe up about the Brown Act or is that something you as City Manager typically does perhaps after a whisper in the ear from the City Attorney?

7. How do you like to handle public comments for follow up at Council meetings?

8. What are expectations about copying you on the City Attorney's communications with the City Council?

D. City-Wide

1. What do you see as the best thing s/he has done for the organization so far?

2. At an Executive Staff meeting, if the City Attorney prefaces a non-legal comment with something like: "This isn't a legal comment, but . . .", does that work for you?

3. Any particular concerns with Departments or staff members? Do you think there is a risk of someone leaving the City?

4. Who do you view as the top performers in each Department?

5. What are your biggest financial concerns for the City– i.e. what keeps you up at night?

6. If the City Attorney hears about concerns from the "rank and file," do you want to discuss those with you?

7. Do you think there are racial issues in the community? among City staff?

8. Do you think that there have been sexual discrimination or other discrimination issues at the City? Do they still exist?

9. Are you concerned about a particular claim or lawsuit from a financial, City organizational or public relations standpoint?

10. How do you feel about settling claims, particular against the Police Department?

ICMA | ethics

ICMA Code of Ethics with Guidelines

The ICMA Code of Ethics was adopted by the ICMA membership in 1924, and most recently amended by the membership in October 2019. The Guidelines for the Code were adopted by the ICMA Executive Board in 1972, and most recently revised in June 2019.

The mission of ICMA is to advance professional local government through leadership, management, innovation, and ethics. To further this mission, certain principles, as enforced by the Rules of Procedure, shall govern the conduct of every member of ICMA, who shall:

Tenet 1. We believe professional management is essential to efficient and democratic local government by elected officials.

Tenet 2. Affirm the dignity and worth of local government services and maintain a deep sense of social responsibility as a trusted public servant.

GUIDELINE

Advice to Officials of Other Local Governments. When members advise and respond to inquiries from elected or appointed officials of other local governments, they should inform the administrators of those communities.

Tenet 3. Demonstrate by word and action the highest standards of ethical conduct and integrity in all public, professional, and personal relationships in order that the member may merit the trust and respect of the elected and appointed officials, employees, and the public.

GUIDELINES

Public Confidence. Members should conduct themselves so as to maintain public confidence in their position and profession, the integrity of their local government, and in their responsibility to uphold the public trust.

Influence. Members should conduct their professional and personal affairs in a manner that demonstrates that they cannot be improperly influenced in the performance of their official duties.

Length of Service. For chief administrative/executive officers appointed by a governing body or elected official, a minimum of two years is considered necessary to render a professional service to the local government. In limited circumstances, it may be in the best interests of the local government and the member to separate before serving two years. Some examples include

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refusal of the appointing authority to honor commitments concerning conditions of employment, a vote of no confidence in the member, or significant personal issues. It is the responsibility of an applicant for a position to understand conditions of employment, including expectations of service. Not understanding the terms of employment prior to accepting does not justify premature separation. For all members a short tenure should be the exception rather than a recurring experience, and members are expected to honor all conditions of employment with the organization.

Appointment Commitment. Members who accept an appointment to a position should report to that position. This does not preclude the possibility of a member considering several offers or seeking several positions at the same time. However, once a member has accepted a formal offer of employment, that commitment is considered binding unless the employer makes fundamental changes in the negotiated terms of employment.

Credentials. A member's resume for employment or application for ICMA's Voluntary Credentialing Program shall completely and accurately reflect the member's education, work experience, and personal history. Omissions and inaccuracies must be avoided.

Professional Respect. Members seeking a position should show professional respect for persons formerly holding the position, successors holding the position, or for others who might be applying for the same position. Professional respect does not preclude honest differences of opinion; it does preclude attacking a person's motives or integrity.

Reporting Ethics Violations. When becoming aware of a possible violation of the ICMA Code of Ethics, members are encouraged to report possible violations to ICMA. In reporting the possible violation, members may choose to go on record as the complainant or report the matter on a confidential basis.

Confidentiality. Members shall not discuss or divulge information with anyone about pending or completed ethics cases, except as specifically authorized by the Rules of Procedure for Enforcement of the Code of Ethics.

Seeking Employment. Members should not seek employment for a position that has an incumbent who has not announced his or her separation or been officially informed by the appointive entity that his or her services are to be terminated. Members should not initiate contact with representatives of the appointive entity. Members contacted by representatives of the appointive entity body regarding prospective interest in the position should decline to have a conversation until the incumbent's separation from employment is publicly known.

Relationships in the Workplace. Members should not engage in an intimate or romantic relationship with any elected official or board appointee, employee they report to, one they appoint and/or supervise, either directly or indirectly, within the organization.

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This guideline does not restrict personal friendships, professional mentoring, or social interactions with employees, elected officials and Board appointees.

Conduct Unbecoming. Members should treat people fairly, with dignity and respect and should not engage in, or condone bullying behavior, harassment, sexual harassment or discrimination on the basis of race, religion, national origin, age, disability, gender, gender identity, or sexual orientation.

Tenet 4. Serve the best interests of the people.

GUIDELINES

Impacts of Decisions. Members should inform their governing body of the anticipated effects of a decision on people in their jurisdictions, especially if specific groups may be disproportionately harmed or helped.

Inclusion. To ensure that all the people within their jurisdiction have the ability to actively engage with their local government, members should strive to eliminate barriers to public involvement in decisions, program, and services.

Tenet 5. Submit policy proposals to elected officials; provide them with facts and advice on matters of policy as a basis for making decisions and setting community goals; and uphold and implement local government policies adopted by elected officials.

GUIDELINE

Conflicting Roles. Members who serve multiple roles – working as both city attorney and city manager for the same community, for example – should avoid participating in matters that create the appearance of a conflict of interest. They should disclose the potential conflict to the governing body so that other opinions may be solicited.

Tenet 6. Recognize that elected representatives of the people are entitled to the credit for the establishment of local government policies; responsibility for policy execution rests with the members.

Tenet 7. Refrain from all political activities which undermine public confidence in professional administrators. Refrain from participation in the election of the members of the employing legislative body.

GUIDELINES

Elections of the Governing Body. Members should maintain a reputation for serving equally and impartially all members of the governing body of the local government they serve, regardless of party. To this end, they should not participate in an election campaign on behalf of or in opposition to candidates for the governing body.

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Elections of Elected Executives. Members shall not participate in the election campaign of any candidate for mayor or elected county executive.

Running for Office. Members shall not run for elected office or become involved in political activities related to running for elected office, or accept appointment to an elected office. They shall not seek political endorsements, financial contributions or engage in other campaign activities.

Elections. Members share with their fellow citizens the right and responsibility to vote. However, in order not to impair their effectiveness on behalf of the local governments they serve, they shall not participate in political activities to support the candidacy of individuals running for any city, county, special district, school, state or federal offices. Specifically, they shall not endorse candidates, make financial contributions, sign or circulate petitions, or participate in fund-raising activities for individuals seeking or holding elected office.

Elections relating to the Form of Government. Members may assist in preparing and presenting materials that explain the form of government to the public prior to a form of government election. If assistance is required by another community, members may respond.

Presentation of Issues. Members may assist their governing body in the presentation of issues involved in referenda such as bond issues, annexations, and other matters that affect the government entity's operations and/or fiscal capacity.

Personal Advocacy of Issues. Members share with their fellow citizens the right and responsibility to voice their opinion on public issues. Members may advocate for issues of personal interest only when doing so does not conflict with the performance of their official duties.

Tenet 8. Make it a duty continually to improve the member's professional ability and to develop the competence of associates in the use of management techniques.

GUIDELINES

Self-Assessment. Each member should assess his or her professional skills and abilities on a periodic basis.

Professional Development. Each member should commit at least 40 hours per year to professional development activities that are based on the practices identified by the members of ICMA.

Tenet 9. Keep the community informed on local government affairs; encourage communication between the citizens and all local government officers; emphasize friendly and courteous service to the public; and seek to improve the quality and image of public service.

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Tenet 10. Resist any encroachment on professional responsibilities, believing the member should be free to carry out official policies without interference, and handle each problem without discrimination on the basis of principle and justice.

GUIDELINE

Information Sharing. The member should openly share information with the governing body while diligently carrying out the member's responsibilities as set forth in the charter or enabling legislation.

Tenet 11. Handle all matters of personnel on the basis of merit so that fairness and impartiality govern a member's decisions, pertaining to appointments, pay adjustments, promotions, and discipline.

GUIDELINE

Equal Opportunity. All decisions pertaining to appointments, pay adjustments, promotions, and discipline should prohibit discrimination because of race, color, religion, sex, national origin, sexual orientation, political affiliation, disability, age, or marital status.

It should be the members' personal and professional responsibility to actively recruit and hire a diverse staff throughout their organizations.

Tenet 12. Public office is a public trust. A member shall not leverage his or her position for personal gain or benefit.

GUIDELINES

Gifts. Members shall not directly or indirectly solicit, accept or receive any gift if it could reasonably be perceived or inferred that the gift was intended to influence them in the performance of their official duties; or if the gift was intended to serve as a reward for any official action on their part.

The term "Gift" includes but is not limited to services, travel, meals, gift cards, tickets, or other entertainment or hospitality. Gifts of money or loans from persons other than the local government jurisdiction pursuant to normal employment practices are not acceptable.

Members should not accept any gift that could undermine public confidence. De minimus gifts may be accepted in circumstances that support the execution of the member's official duties or serve a legitimate public purpose. In those cases, the member should determine a modest maximum dollar value based on guidance from the governing body or any applicable state or local law.

The guideline is not intended to apply to normal social practices, not associated with the member's official duties, where gifts are exchanged among friends, associates and relatives.

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Investments in Conflict with Official Duties. Members should refrain from any investment activity which would compromise the impartial and objective performance of their duties. Members should not invest or hold any investment, directly or indirectly, in any financial business, commercial, or other private transaction that creates a conflict of interest, in fact or appearance, with their official duties.

In the case of real estate, the use of confidential information and knowledge to further a member's personal interest is not permitted. Purchases and sales which might be interpreted as speculation for quick profit should be avoided (see the guideline on "Confidential Information"). Because personal investments may appear to influence official actions and decisions, or create the appearance of impropriety, members should disclose or dispose of such investments prior to accepting a position in a local government. Should the conflict of interest arise during employment, the member should make full disclosure and/or recuse themselves prior to any official action by the governing body that may affect such investments.

This guideline is not intended to prohibit a member from having or acquiring an interest in or deriving a benefit from any investment when the interest or benefit is due to ownership by the member or the member's family of a de minimus percentage of a corporation traded on a recognized stock exchange even though the corporation or its subsidiaries may do business with the local government.

Personal Relationships. In any instance where there is a conflict of interest, appearance of a conflict of interest, or personal financial gain of a member by virtue of a relationship with any individual, spouse/partner, group, agency, vendor or other entity, the member shall disclose the relationship to the organization. For example, if the member has a relative that works for a developer doing business with the local government, that fact should be disclosed.

Confidential Information. Members shall not disclose to others, or use to advance their personal interest, intellectual property, confidential information, or information that is not yet public knowledge, that has been acquired by them in the course of their official duties.

Information that may be in the public domain or accessible by means of an open records request, is not confidential.

Private Employment. Members should not engage in, solicit, negotiate for, or promise to accept private employment, nor should they render services for private interests or conduct a private business when such employment, service, or business creates a conflict with or impairs the proper discharge of their official duties.

Teaching, lecturing, writing, or consulting are typical activities that may not involve conflict of interest, or impair the proper discharge of their official duties. Prior notification of the appointing authority is appropriate in all cases of outside employment.

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Representation. Members should not represent any outside interest before any agency, whether public or private, except with the authorization of or at the direction of the appointing authority they serve.

Endorsements. Members should not endorse commercial products or services by agreeing to use their photograph, endorsement, or quotation in paid or other commercial advertisements, marketing materials, social media, or other documents, whether the member is compensated or not for the member's support. Members may, however, provide verbal professional references as part of the due diligence phase of competitive process or in response to a direct inquiry.

Members may agree to endorse the following, provided they do not receive any compensation: (1) books or other publications; (2) professional development or educational services provided by nonprofit membership organizations or recognized educational institutions; (3) products and/or services in which the local government has a direct economic interest.
Members' observations, opinions, and analyses of commercial products used or tested by their local governments are appropriate and useful to the profession when included as part of professional articles and reports.

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City of Alhambra Charter regarding the City Attorney and City Manager

City Manager:

Editor's note: *This section was amended by the voters of the city on March 26, 1996.*

SEC. 75. POWERS AND DUTIES GENERALLY; BOND.

SEC. 75. POWERS AND DUTIES GENERALLY; BOND.

Except as otherwise provided by this Charter, the powers and duties of the city manager shall be:

1. To see that the laws and ordinances are enforced.

2. To appoint, subject to the approval of such appointments by the council, all chief appointive officials except the city attorney.

3. To appoint all subordinates and employees in all departments, not otherwise provided for in this Charter, and to determine their duties and fix their compensation. All such appointments and the fixing of compensation shall be subject to the approval of the council and shall not be effective without such approval. To remove any appointee and no removal shall be made without his or her consent.

4. To have supervision and control of all departments, boards and divisions created herein or that may be hereafter created by the council except as otherwise provided by this Charter.

5. To examine and make to the council, reports in regard to any matters requested by it, and also of his or her own motion, and recommend to that body for adoption such measures as he or she may deem necessary or expedient.

6. To sign such contracts, licenses and other public documents and instruments on behalf of the city as the council may authorize.

7. To attend all meetings of the council with the right to take part in the discussion but having no vote.

8. To have supervision and charge of the city attorney insofar as his or her duties pertain to the departments of which he or she has charge and supervision.

9. To exercise such other powers and perform such other duties as are herein conferred or imposed upon him or her by this Charter or may be conferred or imposed upon him or her by the council under the provisions of this Charter.

10. Before entering upon the duties of his or her office, he or she shall take the official oath required by law and execute an official bond in such sum as shall be determined by the council.

City Attorney:

SEC. 64. POWERS AND DUTIES GENERALLY.

The city attorney shall be appointed by the council and shall hold office at its pleasure, and his or her compensation shall be fixed by ordinance or resolution of the council. During the absence or temporary disability of the city attorney, the council may designate a qualified person to execute the functions of his or her office.

It shall be the duty of the city attorney to act as legal advisor of the council, and of any other officer of the city who requests his or her advice and he or she shall give such advice or opinion in writing when so requested. He or she shall prepare all ordinances, contracts, resolutions, bonds and written instruments which may be required of him or her by the council, and shall approve the same as to form, in writing.

When requested to do so by the council, he or she shall prosecute all criminal cases arising out of violations of this charter and ordinances of the city, and, when requested by the council, shall prosecute any or all misdemeanor offenses arising out of violation of the laws of the state. The city attorney may perform any of the functions of his or her office through any deputy, assistant or associate city attorney when such performance has been authorized by the council.

The city attorney shall attend to all suits, proceedings and matters in which the city is legally interested; provided, that the council shall have control of all litigation of the city and may employ other attorneys to take charge of any litigation or to assist the city attorney therein.

He or she shall report to the council all items of the city's business coming to his or her knowledge, and perform such other duties as are or shall be required of him or her by this charter or by the laws of this state and ordinances not in conflict with such charter.

All deputy and assistant city attorneys and all other professional employees of the city attorney's office shall serve at the pleasure of the city attorney and shall not be or become a part of the city's civil service system.

THE ROLE OF THE CITY ATTORNEY:
Relationships with Other Municipal Actors

League of California Cities
City Attorneys Department Spring Conference
Portola Plaza Hotel, Monterey
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Presented by

Robert D. Herrick
City Attorney
City of Moreno Valley

and

Michelle Marchetta Kenyon
City Attorney
Calistoga, Moraga, and Rohnert Park

This paper originally was prepared by Michael Colantuono for presentation at the 2003 Spring Conference. With the author's permission which is gratefully acknowledged, it is been updated with minor revisions for this year's conference.

Introduction. This paper is intended to provide an outline of some of the issues that arise in a City Attorney's relationship with the other actors in municipal government – the public, Mayors and Commission and Board Chairs, Councilmembers and members of Commissions and Boards, the City Manager, department heads, and other staff. Some aspects of the City Attorney's role apply generally to any of these relationships, but each relationship is unique.

This is not intended as a well-documented analysis of the legal and ethical issues which pertain to the role of a City Attorney in California. Excellent resources on that topic are available from the League of California Cities, including the following publications which are available via the City Attorneys Department website (www.cacities.org/attorneys):

Counsel and Council: A Guide for Building a Productive Employment Relationship
Practicing Ethics: A Handbook for Municipal Lawyers
Ethical Principles for City Attorneys

The bibliography for the latter publication references several other useful papers which have been prepared from time to time by city attorneys:

Mark C. Allen, Jr., "*Knowing the Law is not Always Enough*;"
Michael H. Miller, "*The Use and Control of Outside Counsel*;" and,
William J. Adams, "*The City Attorney and Media Relations: Practicing Law in a Fishbowl*"

There are also several excellent publications on topics related to ethics for local public officials available through the Institute for Local Government (www.ca-ilg.org).

The Public. Some legal authorities suggest that the City Attorney has ethical and moral obligations to the public as a whole. However, with the notable exception of the state's eleven elected City Attorneys, most members of our profession structure their relationship with the public on the premise that, pursuant to Rule of Professional Conduct 3-600, the client is the city government as a whole, and not the residents or businesses that rely upon it for services. That institutional client gives direction to counsel through its authorized officers and agents, most typically via a quorum of the legislative body acting as such. Many of us fear that grounding our relationship with the public on some understanding of a higher ethical or moral obligation to the public is at variance with our role as appointed staff serving elected officials in a representative form of government. Put more bluntly, many of us believe that nobody elected us to know what is best for the City and that our clients have chosen, most often, the Council – Manager form of government – not the "City Attorney form of government." Occasional criticism of some City Attorneys from within the profession as "too political" or as "acting like a sixth Councilmember" reflects this understanding of our role. Job advertisements tell us that many of our clients view

this issue similarly, as they express a desire for an attorney who is "politically astute, but not political."

However, we can be quite valuable to our clients by building a relationship with the public. We can explain and rationalize – in the best sense of the word – what local government does and how it does it. It is therefore helpful to speak in plain language accessible to most people and to avoid legal jargon when dealing with the public. We can help persuade the public of the appropriateness and reasonableness of the course of conduct the City has chosen. We can build confidence in the City by being scrupulous about duties of disclosure under the Brown Act and the Public Records Act. We can attain credibility, which will be of value to our clients down the road, by never misleading the public. This is easier said than done – a staff member of a public client might on occasion want you to assist in misleading political critics of the incumbent majority – but one's credibility is lost but once and it is an invaluable asset for a public attorney.

Remember, too, that we are the public face of the City when dealing with members of the public in our role as prosecutor or defense counsel. How we behave reflects on the City. If we violate social expectations, the elected officials who hire and fire us will hear about it. Of equal importance, you may find that a member of the public who seems to represent an unwanted and annoying distraction because of his/her intrusive questions and suggestions about municipal issues may one day be elected to serve on the City Council. Overnight, those same questions and suggestions may be transformed from ludicrous to worthy of consideration!

Many members of the public will confuse the City Attorney's office with the Legal Aid Society. It is inappropriate, not to mention an insurance risk, to give advice to members of the public – who are not your client and who may have interests adverse to it. Depending on the structure of your relationship with your City, it may be appropriate to refer members of the public to legal and social service agencies which can assist them or to give other city staff (often the Clerk's office or the main receptionist) the resources to do so. Some in-house city attorney offices develop hand-outs and other resources, and invest in training for receptionists, to provide appropriate service to those in need of legal assistance while remaining focused on the core mission of their office.

Mayors and Commission and Board Chairs. While much of what is said below regarding your relationship with City Councilmembers and Board and Commission members is equally applicable to Mayors and Board and Commission Chairs, there are a few unique issues in this relationship. Most obviously, these officials bear responsibility for the effective conduct of public meetings. Thus, they are most sensitive to your role in such meetings. There is no formula for that role – some cities prefer a City Attorney who speaks only when spoken to; others want the attorney to weigh in with practical or procedural advice whenever the discussion seems to bog down. Their expectations may vary from board to board or from subject to subject. Two simple pieces of advice here: First, observe what the practice of your agency has been from the conduct of your predecessor and from non-verbal signals such as the placement of your chair

vis-à-vis those of the Councilmembers. Second, ask! Each Mayor and Chairperson has different strengths and weaknesses and it never hurts to ask them what role they wish you to play.

Most meeting chairs look to the City Attorney to serve as parliamentarian. Accordingly, it is important that you know the procedural rules that govern your client's meetings, whether they take the form of a charter provision, an ordinance, a procedural resolution, or **Robert's Rules of Order**, or some combination of these. While most agencies have adopted **Robert's Rules**, many have adopted – both by formal action and by custom – other procedural rules that you must also be familiar with. I find it helpful to carry copies of **Robert's Rules** and any locally adopted Council procedures policy in my briefcase so I have them at hand during meetings. Another useful publication which has been posted on the City Attorney's website is entitled *Rosenberg's Rules of Order: Simple Parliamentary Procedures for the 21st Century*. This originally appeared as an article in *Western City* magazine. Many local officials have found this to be a digestible source of practical advice on public meeting procedures.

One of the most important functions of a City Attorney is to provide advice as to "who's in charge" at any given time and on any given issue. Thus, you should be familiar with any special roles afforded your Mayor or Board or Commission chairperson via charter, the statute governing the directly elected Mayor of a general law city, or by ordinance, resolution or practice. In general, the Mayor of a general law city has very limited powers beyond those afforded all councilmembers. This same need arises when dealing with other elected officials, such as City Clerks and City Treasurers.

At the risk of mentioning the obvious: be aware of the difference between providing advice privately and doing it on television. However sound and helpful the advice, most elected officials would prefer not to hear it for the first time on television.

More broadly, it is important to remember that the Mayor or a single Council member is not your client – the City is. It will be important to remind elected officials of this fact from time to time, especially if their conduct creates a diversity of interest between the elected official and the institution. This can be as obvious as criminal activity, a suit against the City, or an "appeal (as opposed to a "request for review") of a Planning Commission decision. This can be as subtle as a request for advice on a potential conflict of interest issue with an assurance that the conversation will not be shared with other City officials. City Attorneys differ in their treatment of such requests for confidentiality. Some refuse to provide individual advice and provide advice only in writing circulated to the entire council. My own practice is to warn the elected officials that the Council as a whole can compel me to share the conversation (but that I would advise against doing so) and, with that warning, to provide as much confidentiality as the rules of ethics permit. I do copy my written conflicts advice to the City Manager – and tell Councilmembers in advance that I will do so. It is important, of course, to make sure your elected and appointed officials know that you may be obliged to act on the information they give you for the protection of the City's legal interests whether they wish you to or not. When an

official appears to be on the verge of sharing information that the City might need to use to the detriment of that official, it is vital that you warn the official that they cannot expect the attorney-client privilege to apply.

This whole subject is tricky – one needs to strike an appropriate balance between the ethical obligations to serve the entity first and foremost and to avoid misleading anyone about when the attorney-client privilege does and does not apply with the need to maintain the confidence of the elected and appointed officials with whom you work and to give them the advice they need to be successful. In general, I find the line easier to maintain with Councilmembers with whom I have developed a trusting relationship and a greater need for caution when dealing with new relationships.

City Councilmembers and Members of Boards and Commissions. Much of what is said above regarding Mayor's and Board and Commission chairs is applicable here: you should know what role you are expected to play during meetings and should try to give advice in private before you must give it in public. When dealing with Councilmembers, however, there is the added complication that they will often seek to use your advice to limit the discretion of the Mayor or of a Council majority of which they are not a part. In general, it is best to resist the temptation to convert every policy dispute into a subject on which the City Attorney must opine. "That's a policy question as to which the Council has discretion" is a frequent, and necessary, refrain. Sometimes, in the heat of debate, it is best to simply be slow to react to a question. This gives the Mayor or Council majority a chance to decide whether they really want to cede you the floor at the moment and gives you a moment to collect your thoughts. However, when a legal issue is posed, each member of the Council is entitled to your advice.

Some thought needs to be given to how to give that advice. My own practice is to reduce to writing advice on important or controversial issues (and these terms are not coincident much of the time!), copied to the entire Council. You will likely note that the City Manager often does the same – written advice to the whole Counsel protects you from the otherwise inevitable criticism that some members have preferential access to your advice. When advice is sought in a public meeting, one must strike a balance among competing goals: (i) being responsive and helpful, (ii) provide accurate advice that reflects study and analysis as needed; and (iii) providing risk analysis without broadcasting the City's vulnerabilities on television. Sometimes it is possible to be explicit on this last point: "I have said as much on this subject as is advisable in a public setting." Other times indirection is in order, "I'd like an opportunity to review these issues and provide more thorough advice in writing."

There is no simple summary of the complexities of your relationship with elected and appointed officials. However, forthright advice on an equal basis to all officials, provided in light of your ethical obligation to serve the institution as a whole, is a useful objective.

I generally meet with newly elected Councilmembers and newly appointed Commissioners to provide an orientation. I review these issues about my role and my ethical obligations, review the Councilmember's and Commissioner's obligations under the Brown Act and Political Reform Act, and the other laws which apply to them. I invite their questions about these subjects and generally try to begin the process of developing a trusting relationship in which I can provide appropriate advice to them while staying out of the political fray among elected and appointed officials. If they are familiar with the limits on your role in advance of any particular dispute (and you told them in writing!), it will be easier to deal with those issues when they do arise.

The City Manager. Your relationship with the City Manager may be the single most critical relationship of all in terms of your personal satisfaction and your ability to contribute meaningfully to the work of the City. Thus, this relationship is worthy of thought and effort.

First, put yourself in the shoes of the Manager. What is his or her political position with respect to the Council, staff, and the public? A well-respect, long-tenured Manager has a very different set of needs and expectations than a newly hired manager or a manager who has just received a "needs improvement" review from the Council. What are his or her objectives? What does he or she need you to do to assist? While it is best to ask the Manager these questions directly, it doesn't hurt to give them some thought in advance. Moreover, you should listen carefully to the Manager's response – what is said, what is not said, and what is communicated nonverbally and subliminally.

In general, a Manager is hired to get things done. Managers are trained to identify objectives, develop strategies to attain those objectives and, to get the job done "on time and under budget." Often, outcomes are far more important that procedural regularity. You may find it helpful to read the resume your Manager submitted when he or she was hired and the advertisement your Council used to find the Manager. These tell you in the language of the Manager and the Council how they collectively view the Manager's role.

Attorneys, by contrast, are retained to "keep us out of trouble" and to prevent negative consequences. Thus, we are trained to focus on *how* things are done and, for us, the nonoccurrence of a negative event, such as a subpoena or a lawsuit, is proof of the value of our efforts. These two cultural perspectives differ so fundamentally that conflict is difficult to avoid. Here are some tips:

First, every manager I have ever worked with has told me, in so many words: "I don't like surprises." Thus, it is important to keep the Manager informed about the work you are doing which can affect his or her ability to deliver a desired outcome on time and under budget. This can include providing information (consistent with your other obligations discussed above) about what the Councilmembers' attitudes about a particular project. As a contract City Attorney who is not in my client City Halls on a daily basis, I try to report every substantive contact with

Councilmembers to the City Manager, so he or she knows what the Council's concerns are. This, of course, is limited by the need to protect the Councilmembers' requests for confidentiality. Full-time City Attorneys who are City employees often have more extensive contact with their Councilmembers. This can be a blessing or a curse, depending upon the quality of your personal relationships with the particular Councilmembers.

Second, as much as law, reason, and ethics permit, do not advise your Manager of what he or she cannot do, but instead advise them of how they might accomplish what they are trying to do; or most of it, if it cannot be accomplished entirely. For example, if a Manager needs to replace a vehicle more quickly than his or her own procurement authority will allow, it is more helpful to consider whether a joint procurement under a state contract is authorized by your local ordinance than to just say "no." If a quick purchase is not permitted, how about a lease? If a purchase is a must, how about a special Council meeting? If you stay focused on how to safely and permissibly attain the Manager's goals, rather than telling him or her that they cannot be attained, the Manager will appreciate it. Moreover, he or she will be more likely to consult you before legal problems have arisen when there is still time to prevent them.

Third, City Attorneys – and lawyers in general – are much resented by our clients when we contribute to unwelcome delay. Sometimes we are blamed for delays caused by others as a convenience to the organization. While it is sometimes a service to allow someone else to hide behind you in that way, it can seriously undermine your relationship with the City Manager and the City Council if they are mislead about your responsiveness. Indeed, a Manager who wishes to undermine a City Attorney can easily blame the Attorney for all sorts of delays – even those caused by the failure of the Manager and others to make a timely request for advice or to provide all the needed information. Thus, the advice here is simple: meet your deadlines, give early warning when you cannot, and don't make commitments you cannot keep. One useful tool for me has been to call the City Manager and say, "I've got these three priorities for you and am running out of time. What's your order of priority?" While this is not as good as meeting the deadline in the first place, it signals clearly that you want to be responsive to the Manager's priorities.

One aspect of your role complicates your relationship with the City Manager. The City Council may want or expect you to "keep an eye" on the Manager for them. When a Manager is hired, his or her contract is up for renegotiation, and when his or her departure is imminent, you will be obliged to represent the City adversely to the Manager. Some City Attorneys rely on outside labor counsel for these roles to avoid impairing their relationship with the City Manager and to give the Council confidence that the advice provided is not biased by personal feelings. Others do not have this luxury. The City Attorney as Inspector General, however, is a very problematic role. I try to discourage my Councils from placing me in that role and encourage them to police their employee directly. However, at bottom, we face an ethical obligation to report conduct which creates jeopardy to the legal interests of the City to the highest official with the authority to prevent that jeopardy – typically, the Council.

Frequent communication with the City Manager is crucial to your success. Communication is, of course, a two-way street. We City Attorneys tend, as a group, to be pretty talkative and must work hard on our listening skills. There is an important difference between listening for the purpose of understanding the other person's point of view and accommodating his/her concerns and listening to assess the weak spots in that person's position so that effective counter-arguments can be formulated. The latter approach is rarely well-received from one's clients.

I find it helpful to review the agenda – especially the closed session agenda – with the Manager before every meeting, telling him or her the gist of the advice I expect to provide the Council. This allows us to develop a consistent approach to the City's goals so that public friction between the Manager and me is minimized. Whenever I find it necessary to give advice at variance to an objective of the City Manager's, I do my utmost to make sure that he or she is the first to hear that advice. Often, I never have to give the advice to anyone else, as the Manager and I are able to find another way to accomplish most or all of his or her objectives without triggering the cautionary advice.

Department Heads. Much of what is said about the City Manager relationship is applicable to department heads. Elected department heads, such as City Clerks and Treasurers in many cities, raise issues similar to those discussed above for Mayors and Councilmembers – you will be involved in authority-demarcating exercises. Appointed department heads raise the issue of how the City Manager expects you to relate to department heads who typically report to him or her. I generally try to stay in frequent communications with the department heads who regularly rely on my advice, either by walking the halls during office hours or catching up with them before the meetings of the Commissions and Boards that we jointly staff. If you find a staff member seeking advice for actions at variance with what you understand to be the Council's or Manager's intention, you should feel comfortable telling the staff member so. Again, there is a cultural issue here: to what extent does your Council and management team expect you and your office to play a role in enforcing adherence to organizational policies, procedures, and objectives? In-house City Attorneys are more likely to be expected to play this role. As a contract city attorney, I find that it is less often my responsibility to do so. One practice that works for me is this: I routinely copy all written legal advice – even emails – to the City Manager. Thus, when I need the Manager to know that I have told a department head the risk of doing something I deem unwise, I can see that the Manager is "in the loop" without being obvious that I am doing so.

Other Staff. There is not much to add here that has not been said above with respect to other members of the City organization. One important point does need to be made – don't wall yourself off from lower-level staff. There may very well be important budgetary and management reasons to restrict to department heads the right to make requests for service. However, there should be some opportunity for lower-level staff to get informal advice from

your office. I make myself available before and after Council and Commission meetings and try to make myself available during office hours. Informal conversations around the water cooler or elsewhere can often help you identify an emerging problem early enough to prevent or resolve it well before the official "chain of command" would bring that issue to your attention. Moreover, lower-level staff often become higher level staff eventually and it is useful for them to get training on the roles and uses of legal advice and it is useful for you to build relationships with folks who will take on increasing responsibility for your client.

The Other Members of Your Office. You know more about the nature of your own organization than I do, but a few thoughts are worth considering. First, your clients will commonly assume that information provided to your office is provided to you. Thus, you are held responsible for the quality of the communications within your office. Second, some clients have a tendency to opinion-shop. Thus, if you are not a one-person legal staff, you need to be sure that you are aware of the advice given by other lawyers on your team and vice versa. Although there is often more than one right answer to a given question, the credibility of your office will turn on the consistency of the advice you provide. Finally, if you are new to your office, you should give thought to the culture of that office and the role you are expected to play.

For example, an in-house attorney recently told me of his move from a one-person office to a larger office. In the smaller office, he was free to come and go as he pleased, because the organization could generally find him somewhere in City Hall and there were relatively few claimants on his time. In addition, he did not often have the luxury of providing written legal advice and did not need to do so in order to maintain consistent advice across the organization. When he moved to the larger organization, he found that his predecessor had established a culture in which he was expected to check in and out with his own secretary so that the organization could find him and that he was expected to provide his advice primarily in writing shared with his assistants. No one told him of these expectations. Indeed, the organization may not have known that these practices are not "how everyone does it." Thus, it will be helpful to ask your own team members what they expect of you and to find their answers not only in what they say, but in what they do not say, and what they say only indirectly.

Conclusion. Much of what is said here can be boiled down to a few basic principles:

(1) Attend to your ethical obligations as to who is your client and who is or is not entitled to the protections of the attorney-client privilege.

(2) Communicate early and often; don't be afraid to ask questions, especially questions about how others would like you to assist them; listen.

(3) Think about your role from the perspective of the people who rely on you for advice. This is, after all, a service profession.

(4) Treat others with respect and act with integrity and make clear your expectation that they do the same**.**

This paper is an idiosyncratic expression of my own experience in a variety of mostly smaller, general law cities. Larger, charter cities have legal, political, and practical complexities not addressed here. Your own experience will depend on the culture of your organization, your personality, and your relationships with the other members of your organization. However, I do hope these ideas are of some value to you.

Good luck!

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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?

Wednesday, May 2, 2012 Pre-Conference Session; 10:30 – 11:45 a.m.

Sonia R. Carvalho, City Attorney, Azusa and Claremont
John Guinn, City Manager, Shafter
Marsha Jones Moutrie, City Attorney, Santa Monica

Notes . . .

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?

Presented at:
City Attorneys' Department
League of California Cities
Spring Conference May 2012

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Best Best & Krieger LLP

Marsha Moutrie
City Attorney
City of Santa Monica

EVOLVING ROLE OF THE CITY ATTORNEY:

Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder. What Roles Can or Should You Play?

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. <u>The City Attorney</u>

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 employee 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. <u>What is the City Attorney's Role</u>?

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. <u>The Role of the In-House City Attorney: Special Opportunities and Challenges</u>

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 authorssee 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.

<u>How Being In-House Impacts Our Job Duties: Possibilities and Pitfalls</u>

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 Monican'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.

Innovative Approaches to City Attorney-Client Relationships: Fees, Services and Communication

Wednesday, May 8, 2013 Pre-Conference Session; 10:30 – 11:45 a.m.

Molly S. Stump, City Attorney, Palo Alto
Eric S. Vail, City Attorney, Hemet and Temple City

Notes:

Innovative Approaches to City Attorney – Client Relationships: Fees, Services & Communications

Presented at the
League of California Cities
2013 City Attorneys Spring Conference
Meritage Hotel, Napa, California
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INTRODUCTION

The past six years have proven to be extremely challenging for California cities. A poor economy has driven property values down and unemployment up, resulting in municipal tax and fee revenue shrinking precipitously. At the same time municipal labor, retirement, health insurance and operating costs have continued to rise. And the need for city services has never been greater.

Different cities find themselves in very different situations. In many cities, a proliferation of foreclosures and property related crimes have created a growing sense of unease and fear. Labor negotiations and political contests have become increasingly heated. Cities continue to scramble following the State's dismantling of redevelopment. All of this has germinated a climate of political divisiveness, recrimination, mistrust and in the worst cases social upheaval. A handful of cities have even suffered either ethical or financial suicide, or both.

Other cities have largely escaped the worst of the downturn. Through a combination of good fortune and early action to reduce costs, these cities weathered the down years and budgets are now returning to more normal cycles. Employment is recovering, housing markets are rebounding and tax revenues are beginning to rise. In these cities, however, councils face high and rising citizen expectations for local government services. The public remains impatient with high labor costs. Forecasts of sharply rising retirement and health costs continue to cloud long-term budgets projections.

Throughout the state, at a time when cities find themselves most in need of quality legal counsel, they are struggling to pay for our services. Too often cities are having to prioritize services they can fund. No city attorney ever wants their budget weighed relative to the need for police officers or fire fighters, and all too often the public views it in just those zero sum terms. Such is the environment in which city attorneys of today must operate.

The purpose of this paper is to explore situations in which city attorneys have employed innovation, efficiency, communication, and flexibility to navigate these challenges. Two case studies are presented, one featuring an in-house City Attorney's office, and the other a contract City Attorney's office. In both instances, the attorneys were required to employ different means of adapting to changing circumstances while continuing to provide quality legal services.

The first case study "Redemption Song (Hemet 2007-2012)" explores one contract city attorney's journey of trial and error and redemption in the face of financial and political upheaval.

The second case study "The Leading Edge of the New Economy (Palo Alto 2008-2012)" explores an in-house City Attorney's attempts to use multiple tools to meet high and increasing demands for legal services without adding resources.

1.0 Case Study: Redemption Song (Hemet 2007 – 2012)

1.1 Background

Situated in a picturesque valley within southwest Riverside County, the City of Hemet has been home to agriculture, business, and families since 1910. Beginning in the late 1960's and continuing through today, Hemet has also attracted a flourishing senior community. By early 2007, the City of Hemet was growing rapidly but still offered good schools, low crime and opportunity. It became a favored destination for "drive till you qualify" commuters looking to stretch their earnings into home ownership. The City provided full services, including police, fire, water, and refuse and had its own new library and abundant parks. At the height of residential development, the City's population had reached just over 80,000 people, the City employed 420 fulltime employees with a General Fund Budget of $42 million and a total Budget of $82.4 million.

Unfortunately, underlying this seemingly tranquil exterior lay structural concerns that would be laid bare in the years of the Great Recession. The City over relied upon enterprise funds to support its general fund. It had been unsuccessful in obtaining voter approval for increasing assessments to match actual costs in its numerous Pre-Prop 218 districts. Instead, it was subsidizing them out of its general fund. These misallocation issues also hindered the City from completing a comprehensive user fee study to ensure it was covering its actual costs with its fees. Hemet also had brewing labor issues. As a full service City, it had eight different recognized bargaining groups and one "informal" employee group. Although Hemet had traditionally paid lower employee salaries, it had offered generous employee benefit packages as a trade-off. This served the City well when the cost of health insurance, retirement packages, and leave accrual were relatively low, but the City had never begun to transition itself toward a more "salary-centric" model even when confronted with tremendous cost increases. The bargaining units were, understandably, protective of their benefits.

The trouble started FY 07/08 and continued unabated thereafter. New management was required to tackle the Prop 218 allocation issues at the same time that tax and fee revenues were declining precipitously. The City went from year on year surpluses to serial deficits. Reorganization, elimination of vacant positions, and early retirements were not sufficient to keep pace with declining revenues causing the City to go through several rounds of lay-offs (including police officers and fire fighters), salary and benefit cuts, and service reductions. The financial decline happened with such rapidity and was so prolonged that the City could not get ahead of it and was forced to make deeper cuts and reductions year after year just to play catch up. This in turn lead to deterioration of morale, confusion, and mistrust among City officers and employees and the community. Labor negotiations became unusually contentious causing the City to come to the brink of impasse with several of its unions and actually imposing deals in

a few instances. Continuity of management was also a critical problem with Hemet having six (6) different City Managers, three of whom were interims, and three different iterations of its City Council, between 2006 and 2012. By the end of FY 10/11, the City had been crippled mentally and financially. At the low point in 2011, City hall was only operating four days a week and the Library only three. Over the course of four years the City had reduced its full time employees by more than half -- 222 positions.[1] The General Fund Budget had shrunk by nearly $10,000,000 over five fiscal years[2] and the City was left with a General Fund reserve of only $165,000.

It was within this context that costs for legal services became first a fiscal concern, and then a political concern. The firm of Burke, Williams & Sorensen, LLP has served as the contract city attorney for Hemet since the summer of 1998. In 2005, Eric Vail transitioned into the position of City Attorney which was formerly held by his partner Julie H. Biggs. The firm and both City Attorneys enjoyed the support of the Council and a strong relationship with City management. During the development boom years, costs for all legal services (general, development services, litigation, personnel, labor, etc.) averaged about $1.35M per year, but reached $1.6M by fiscal year 06/07, due largely to the volume of development and litigation work. These costs, however, were not viewed as a critical concern even though cost consciousness was always stressed.

As the City's financial condition deteriorated into 2008, legal services became a critical and politically charged issue. In the November 2008 election, the platform of two candidates included going out for RFP to replace the City Attorney. This was fueled by a spike in attorney's costs of $600,000 over the previous year's budget and the City Manager's separation from the City, which the community wrongly viewed as the result of some skullduggery. The spike in costs related to the then City Manager's effort, backed by the Council, to effect a complete reorganization of the City, complete new personnel rules and policies, an FLSA audit of each department, an early retirement program, realignment of enterprise funds, and litigation challenging the rights of retirees to certain medical benefits. The firm played a central role in each of those projects, as well as the resulting discussions with the bargaining units.

The fundamental problem was that the City's poor financial condition required it to cut "essential services" to save money to address its structural deficit, yet at the same time it was spending demonstrably more money for City Attorney services. Residents felt their services going down, but saw that the City Attorney bills were going up. Frankly, it probably did not matter to community members that the six new City Managers relied heavily upon the City Attorney's Office for historical knowledge, to fill the experience and manpower gaps caused by lay-offs, and to handle increasingly complex organizational, labor, and litigation matters. The 2008 comments of one public speaker summed up the mood elegantly: "*I would rather you close down the City Attorney's Office than lay-off police officers*."

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[1] Total fulltime employees in FY 2006-2007 where 420. By 2011, fulltime employees were down to 198.
[2] FY 2010-2011 General Fund Budget $31.7 Million down from $42 Million in FY 2006-2007.

Given this widely held view, the new Council seated in late 2008 could not help but pick up the chant and in early 2009 they voted to issue an RFP for City Attorney services. Mr. Vail and Burke, Williams & Sorensen, LLP were ultimately successful in retaining the City Attorney contract and successfully rebuilt a relationship of trust with the Council. However, the path to success did not begin with the RFP process; rather it commenced even before the fiscal crisis started to unfold. The evolving situation gave rise to several critical problems that we determined had to be confronted directly, but non-confrontationally. We employed a multi-faceted approach to address problems and because most problems were interrelated, our efforts had to be part of an integrated strategy, not just ad hoc responses. However, as the situation changed, we also had to reprioritize, shift direction, and modify our approach. We made mistakes along the way and on occasion we resorted to trial and error to determine the path that would work. What we clearly did right was refuse to throw in the towel.

For purposes of this paper, we have selected elements of the strategy we pursued for ease of illustration. Below we present the problem we identified and our response and any adaptation to changing circumstances.

1.2 Problem & Responses

1.2.1. Real Client Feedback & Trust

a. *Issue: Client Discomfort with Critical Feedback*.

In order to function optimally, City Attorney/Client relationships require open communication and trust. At the first signs of fiscal deterioration, we decided to test whether we were getting real feedback from the client. Having enjoyed a long and amicable relationship with the City, we were concerned that some Councilmembers might be uncomfortable telling us they had concerns or that there were significant problems.

b. *Response: Openness to Criticism & Facilitated Evaluation*.

In early 2007, we set the stage by casually, but intentionally, cultivating an environment friendly to constructive criticism. In conversations with Council and management, we mentioned that as service providers critical feedback was not only welcome but was an essential element of our business. It was pointed out that our business model embraced change and new ideas. We stressed that we had “thick skin” and that we did not take offense at critical feedback. At every appropriate opportunity, we softly repeated this theme in individual conversations and group meetings. After about three months, we began to actively elicit critical feedback about our service how we could improve it.

Another key decision we made was to “own” the increase in fees by not seeking to blame the increase on external circumstances. This is not to say that we refused to explain the increase by reference to external circumstances – we did – but

we also decided to acknowledge that fees were "too high" and that we would take responsibility for methods to bring fees back in line with budget reality. This was an absolutely critical feature in establishing communication and trust because it put us into the role as a team member who was acknowledging the problem and trying to solve it, rather than simply feeding off of the problem.

In late 2007, the Council decided to evaluate the City Manager using a third party facilitator. We recommended that the Council evaluate the City Attorney concurrently. The facilitator interviewed the City Attorney and worked with us to define areas that we and the facilitator agreed we needed feedback. The Council was given an evaluation form integrating questions to elicit quality feedback both positive and negative.[3] We made sure to elicit "need to improve" or "would like more of this done" comments as well as what we were doing right. Finally, the facilitator presided over a guided closed session evaluation with Council and the City Attorney where comments and ideas were discussed. We kept a positive and open attitude throughout the evaluation.

While verifying the strong support and appreciation for our work we learned that legal costs were a much larger issue than had previously been conveyed, and that the Council had several misconceptions about where our work came from and what factors contributed to higher legal expenses. The lesson was that routine business communications and even our effort to express a willingness to accept criticism and work on issues, had not been effective enough. We took the comments and turned them into an improvement plan highlighting three areas: (i) Budget involvement and tracking; (ii) reduction of staff reliance on the City Attorney's Office; and (iii) minimize "optional" projects. Our responses to these issues are described in more detail in the sections below.

c. *Problem: Client Trust Issues*.

The election of November 2008 brought three new Councilmembers who criticized the City Attorney's Office for overly high fees and "mishandling" the previous City Manager's separation from the City. At one point, we were accused of cutting the City Manager a "sweet deal" as quid pro quo for continued high legal fees, which of course was not true. This lack of trust and confidence was a radical departure from what we enjoyed with prior Councils. Reestablishing trust was imperative or we would not survive an RFP process.

[3] In years following, we developed a more detailed City Attorney evaluation form intended to focus on issues unique to the City Attorney -- Client relationship. Often consultants will default to using a standard staff or City Manager evaluation form which is not adequate for or relevant to the City Attorney relationship. The form we prepared was based on review of over twenty-five different city attorney and attorney evaluation forms as well as our own insights. We offer it for you review and use. See attached.

d. *Response: Establishing a New Trust Relationship*.

Demonstrative expressions of our personal ethics and integrity, both of which had been impugned, were the first priority. Fortunately, this mistrust was borne of misconceptions and not based on real legal missteps. We were presented with several opportunities to prove ourselves. Two examples illustrate this point.

A new Councilmember was offered a "consulting contract" by one of the City departments, without consultation with our office. The Councilmember was keen to take the contract and had "called the FPPC helpline" and was allegedly told "there was no conflict of interest." The City Attorney stepped in to avoid any violation of Gov't Code Gov't Code § 53227(a).[4] Here the "consulting contract" would not have protected the Councilmember from being deemed an employee or from the prohibitions of Gov't Code § 53227(a). We had several tense meetings with the Councilmember in which we counseled against the contract stressing the resulting consequences and perception problems. Ultimately, we persuaded the Councilmember of our view. Although not happy with the result, the Councilmember did appreciate the fact that we were willing to protect the City against even a Council request, even at the cost of alienating the Councilmember.

In perhaps the biggest test of our personal integrity, the City Attorney was directly accused in closed session by a Councilmember of quid pro quo conduct (described above). On the spot, the City Attorney offered to resign effective immediately if the Council truly held that view, as we could not operate without the respect and trust of the Council. Fortunately, the Council did not hold this view and we learned we had more support amongst the Council than we had thought. Whew!

Revamping our concept to encourage Council to express critical feedback, we began engaging in one-on-one meetings with the Councilmembers in which we encouraged a no-holds barred dialogue. We encouraged them to pose any question and we would respond directly, provide data to support our position, or acknowledge the point and come up with a plan to improve or change. As a service professional being a whole person in the eyes of your Client can also help, so the City Attorney also engaged in social or casual conversations whenever possible, in the hopes of rounding out the Council's perception of him so that he was not simply seen as a contract attorney, but as a real feeling, caring person. The phrase "its just business" is cliché, but it is also dangerous to the service professional whose persona is inseparable from the service they provide. You cannot just be your business persona.

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[4] Government Code section 53227(a)provides:
"An employee of a local agency may not be sworn into office as an elected or appointed member of the legislative body of that local agency unless he or she resigns as an employee. If the employee does not resign, the employment shall automatically terminate upon his or her being sworn into office."

Ultimately, we realized that most of the Council felt they had no control over legal services or the cost and, based on this, characterized those costs as being "out of control." We set about finding a mechanism to provide the desired feel of control. The solution was actually provided by one of the new Councilmembers who suggested the creation of a two-member Council Ad-Hoc committee. We jumped on this and suggested that the committee meet regularly with the City Attorney, City Manager and Finance Director to discuss pending and anticipated work, progress in implementing cost control measures, and meeting budget milestones.

We embraced the meetings as a real opportunity to work constructively with members of the Council. The process became invaluable in expanding the Councilmembers' knowledge of our work and the costs inherent in legal services, but also gave them the needed element of control. Over time, the members became convinced that we were earnestly trying to manage costs, that decisions the Council made influenced how much work we needed to perform, and that some items, like the filing of lawsuits, were beyond our control. The committee also spent a lot of time discussing what information the Council needed to see on a regular basis and revising the City Attorney Budget to Actual Report, which is discussed below.

1.2.2. Informational Misconceptions

a. *Problem: Council and Community Misconceptions*.

Throughout our experience in Hemet, we experienced misconceptions about the nature and necessity of the work performed by the City Attorney. The major misconceptions appeared to be:

- No one at the City reviewed our bills, and that consequently no City Officer managed – restrained – the work of the City Attorney's Office.
- The City Attorney's Office self-initiated or self-generated its own work.
- Junior City staff members had a direct line to the City Attorney and were making decisions to assign lengthy, and unnecessary, projects.
- Work that could be done by City staff was instead being referred to the City Attorney's Office because staff was "too busy."
- The City was paying more for legal services than neighboring and "comparable" cities were paying.

The first four misconceptions may sound ridiculous, but they had a real impact on how Council and the community at large viewed the total cost of legal services. To most, the reason legal costs were so high was due to "mismanagement" of

the contract by the City. Unfortunately, this blinded them to the real reasons for the mounting costs, which included numerous litigation matters, the personnel work occasioned by a full service city, the cost of dealing with nine separate bargaining groups, as well as legal issues related to multiple reorganizations and complex development issues, not to mention start-stop-start again projects.

b. *Response: Clarity, Communication & Engagement*.

In order to dispel the negative myths about the nature of our work and its relative cost, we took the following measures. First, we gathered data about our services to Hemet, including total costs, the allocation of those costs and corresponding attorney hours by department or by issue. Since 2006, we had been improving our data collection and sorting abilities. We created billing numbers corresponding with City budget codes and used searchable identifiers (e.g. [Personnel Grievance] or [SEIU Negotiations]) in our billing entries to be able to sort data in different ways. For example, we could track the cost of all labor negotiations per bargaining group per year, as well as all legal services provided to the City Council or individual development projects.

The data was used to provide periodic reports to the Council and management staff. We varied the content and frequency of the reports over time in reaction to Council interest, input from the Council Ad-Hoc and management staff, and depending on the circumstances. The basic reports we provided were:

- Litigation Status Report. This report included a brief description of all pending litigation by type, the current status, as well as costs and fees incurred to date. The report was provided monthly. We began providing this report in 2005, as a quick reference for Council. The report does not take the place of periodic in-depth case reporting by the responsible litigator. A copy is attached.

- Annual City Attorney Report. We began providing this report in 2006 to highlight performance during the year, major projects undertaken, total legal service costs, and costs allocated by type (i.e. police, development services, etc.)

- Budget to Actual Report. In early 2008, we began providing a monthly report comparing fees billed for each month to the total legal services budget pro rated for each month with the corresponding overage or underage. The report also offered hours billed for each month by category, and a projection on what total fees would be by year end. This report became the focus of the City Attorney Ad-Hoc Committee, and its content was changed numerous times to try and depict graphically what the Council wanted to see. Eventually, the Annual City Attorney Report was incorporated into this report, and instead of monthly, it was provided quarterly. A copy is attached.

To augment the reports, we tried to schedule meetings with Councilmembers to review the reports and answer questions. This worked through perhaps the second round of reports, at which point interest waned on the Council.

In January of 2009, we prepared a major presentation for the City Council delivered in open session at a regular Council meeting. The presentation combined a PowerPoint with a written report. We used the opportunity to demythologize our practice and put the aggregate costs into context, and also to present the human side of our office. Information we provided included:

- Table of Organization of the 15 core attorneys providing services. Biographical statements of each were included in the written report.

- Major accomplishments achieved for the City, and any revenue or costs savings yielded for the City.

- Activities undertaken on behalf of and services provided to the City.

- Systems in place for the City to review legal bills and types of adjustments and corrections made.

- Systems in place to receive work, and the cross checks we used to confirm work with the Council and City Manager.

- Bar chart showing total legal service costs covering six fiscal years. We used this information to explain the trends and the reason for peaks and valleys by tying them to specific large projects, labor negotiations, or high development activity. Importantly, we showed that per capita costs were between $12.25 and $26.25 per resident per year.

- Provided information on cost cutting and efficiency measures undertaken since 07/08.

- We showed a definite downward trend in total costs beginning in 08/09 and projected to continue for 09/10. Included were actions taken and recommended to help reduce legal costs.

- We also broke down total costs and attorney hours per year into “cost centers” (e.g. development services, labor, personnel, general, etc.), using colored pie charts so the Council could see where the cost centers were and to distinguish routine recurring costs from the costs of major projects, periodic labor issues, and litigation.

- We provided a history of litigation cases and costs demonstrating the heavy litigation load carried by the City (between 15 and 25 active cases annually) but that our average cost per case was only $25,500.

Finally, in the Spring of 2010, we decided to speak to key members of the community, both in the legal profession and business community, and also key management personnel at the City, all of whom we knew provided advice and shared opinions with Councilmembers. The point was not to advocate any position with these individuals, rather our intent was to elicit feedback on how the City Attorney's Office was perceived by this group. We discovered that there were several misconceptions and rumors prevalent in the community that were shaping our Councilmembers understanding of how our office functioned and why costs were what they were. These are discussed in the following section.

1.2.3. Faulty Budgeting Process.

a. *Problem: No-Involvement In Budget Process*.

In 2005, we inquired about becoming more involved in the process to establish the budget for legal services. The message we received was "*you worry about the service and we will worry about the budget*." So we concentrated on service. This was a huge error. We should have engaged on the budget more insistently. We found out that the legal services budget was being created by simply taking the prior years budget and adding 1% to 3% depending on the amount of the overall budget, regardless of anticipated projects, existing case loads, labor negotiations and so on. Unfortunately for us, since the City Attorney budgets were not based on real data, that tended to exaggerate cost overruns.

b. *Response: Engagement*.

The introduction of a new Finance Director and City Manager in late 2007 presented an opportunity for us to be involved in the budget and we jumped at the chance. We had been tracking data for two years and were able to make better projections on estimated legal needs. See *Monitoring, Reporting & Managing City Attorney Costs in Challenging Times*, Eric S. Vail (2011 League of California Cities, City Attorneys' Department Spring Conference). http://www.cacities.org/UploadedFiles/LeagueInternet/e4/e4c90f27-e6ed-4a9e-96e2-5cda5a302c4f.pdf. In general terms, we implemented the following:

- Changed billing codes to match City's General Fund and Special Fund codes to ease allocation by City and tracking by us.

- Reviewed data from past years to determine average per case and per project costs, determined average negotiation costs per collective bargaining unit and personnel matter, and average number of hours spent on general projects.

- Projected number of cases, projects, negotiations, personnel matters, and anticipated workload.

- Adjusted the number based on decreased development activity, increased litigiousness, and increased tension with bargaining groups.

The 2007/2008 budget was the first year we had significant input. Unfortunately, the new City Manager – to his credit – decided several months into the fiscal year that the City needed to tackle a whole slough of issues: completely revise the City's personnel rules and policies; perform a FLSA audit of each of the City's eleven (11) departments; and do a comprehensive study of retiree medical benefit programs at the City and the policies to implement them (which were believed to be providing benefits beyond program requirements). Our firm was selected to complete all of this work, with Council approval. This caused the 2007/2008 budget to spike and to overshoot the budget by nearly 50%. As the work was completed, the City Manager and City parted way under tense circumstances. This focused extreme scrutiny on the City Attorney budget, such that it became an election issue in late 2008.

However, the effort was not wasted. In subsequent years, we were able to keep legal expenses to within the budgeted amounts, except for additional projects specifically approved by Council. It also allowed us to work with City management to identify critical services and optional services and to reduce the legal services budget significantly over the next few years. Completion of large projects and implementation of efforts resulted in reduction of the budget from $2.1M in 07/08 to $1.2M in 08/09 ($800K less than the previous FY, and $300K less than the last development year). By 09/10, it was reduced to $1,080,000. Subsequent budgets have remained at $1.1M.

2.2.4. Self Help.

a. *Problem: Over-utilization*.

One of the "misconceptions" that actually had a significant basis in reality was the overutilization or mis-utilization of the City Attorney's Office. As a contract provider paid by the hour, it is often deceptively easy to "over serve" your client. The client asks, you provide, and provide it quickly and superbly. The cycle repeats itself. However, City Attorneys need to ask whether their office "should" do all such tasks or whether there is a more economical means of completing the task. In our case, there was a lot of work that City staff was capable of doing, that was being sent to our office to do. Drafting of basic resolutions, drafting of staff reports, negotiating and drafting simple routine contracts, being involved in numerous policy oriented meetings.

b. *Response: Focused Utilization*.

One of the primary budget reduction measures we pursued was what we called "focused utilization." We performed what we described as "critical functions" (litigation, major transactions, general counsel advice, etc.), "valuable functions" (not

critical but beneficial), and "supplemental functions" (work that could be performed by City staff, but was not). In 2007/2008, we highlighted the over utilization problem with the Council and City Manager, without pointing a finger at City staff. We had developed a large reservoir of department head and staff support and we benefited greatly from their willingness to work with us on this. We approached the issue as "right-sizing" the level of service to the City's budget. We agreed to focus on critical functions, to present valuable functions as options that could be selected by Council and staff, but to reduce and finally cease supplemental functions.

We gradually educated department heads and managers on what these supplemental functions were, and then trained their staff (at no cost) on how to handle the matters. For example, how to correctly complete our form professional services agreement. We reduced our time billed on each such agreement from 1 to 1.5 hours (depending on the scope of work and changes) to between twelve (12) and twenty-four (24) minutes. This also had the effect of hyper-sensitizing staff to the cost of legal work.

Also, we worked closely with City management, making sure the valuable functions we provided were what the City really needed. A simple example of this was office hours. We had been providing office hours three days per week on average during the peak times. These days were not fully utilized. Also, the more we had a physical presence on site, the more work ended up coming our way. City management worked to consolidate meetings on our office hour days and we worked to be more efficient during our office hours. This all created a natural selection process for work that would have come to the City Attorney's Office. Over time, supplemental work was weeded out, critical work was prioritized, and department heads made better decisions about what valuable functions they would utilize.

2.2.5 <u>It's Impossible To Escape the Rate</u>**.**

a. *Problem: Where Efficiency Is Not Enough*.

All of the efforts discussed above were successful in reducing the total cost of legal services to the City. These were, however, savings yielded by either service reductions or achieving greater efficiency in those services. Unfortunately, given the City's need for a substantial amount of legal services and the seemingly never-ending downward spiral in revenues, service reductions and higher service efficiencies were not going to create enough savings. The conclusion was inescapable. Rates were going to need to be reduced.

In 2007, our fee structure offered a fixed hourly rate for all services of the City Attorney at $X, the Assistant City Attorney as $X-15; and general services at $X-20. Special services where provided at hourly rates $X-5 for partners and $X-15 for associates. Our contract provided for an automatic CPI increased upon notice to the City Manager. In 2006/2007 fiscal year, the City required 7,000 hours of attorney services. The following year the City utilized 9,000 hours of attorney services. Even after implementing budget projections and focused utilization, we anticipated the City

would continue to need 6,000 hours of attorney services. It became obvious that service reductions and greater efficiency were not going to provide the City with the necessary amount of services at the needed cost.

b. *Response: Proactive Right Pricing*.

Beginning in 2006/2007 we deferred all CPI increases. Although a solid cost containment measure, the City's subsequent precipitous decline in revenue completely overwhelmed its efficiency. By early 2007, we were internally exploring options to reduce rates or restructure our fees.

In June of 2008, we voluntarily implemented a voluntary rate reduction. We proposed to retain the same fee structure, hoping that the measures above would be adequate to fix the revenue shortfall if given time to take effect. We offered the City Attorney at $X-10, the Assistant City Attorney as $X-25; and general services at $X-25. Special services where provided at hourly rates $X-10 for partners and $X-25 for associates. On average, this was a $10 per hour or 12.5% reduction in all rates, which was more than any bargaining group took in cuts at the time. This put rates back to where they had been in 2001, eliminating 7.5 years of CPI and negotiated increases. Assuming the City's average annual consumption of legal services (approximately 7,000 hours) remained constant, and that the average hourly rate reduction was $15 per hour, this would yield an annual savings of $105,000. Unfortunately, even this significant reduction turned out to be too little under the circumstances.

Concurrent with our voluntary rate reduction, City Attorney rates were becoming a political issue. Ultimately, the political climate and public perception mandated that the City issue a Request for Proposals for legal services. We had three Councilmembers leaning this direction after the election of November 2008. No service provider enjoys an RFP process when you are the one servicing the client. Initially we thought that establishing a relationship with the new Council and educating them about measures we had already taken to reduce costs would address their concerns. Instead, the lack of trust issues we experienced in early 2009 lead us to conclude that to survive as City Attorney we needed to embrace the RFP and demonstrate an eagerness to compete So the message communicated was that we welcomed the opportunity to prove to the Council that we were the best value.

Throughout the process we were very open with the Council about the revised fee structure we would present in response to the RFP to demonstrate our willingness to assist our long-time client. Our proposal was simple. We knew the City was going to need a tremendous amount of continued legal services, so we assessed our cost structure and offered the client an hourly rate structure at a little over cost. We created an expansive list of general services that we would provide at the discounted flat hourly rate of $X-50. Specialty services would be provided at the discounted flat hourly rate of $X-35. Our categorization of general and special services is attached. This rate structure would remain in place for two fiscal years. Any increase would be tied to a rate comparison study. We also agreed that we would not exceed the approved budget by 10%, without express permission of the Council, and when it

appeared to the City Manager and Ad-Hoc Committee that it was likely the budget would be exceeded, we would prepare and present a budget management and reduction plan.

We were successful in the RFP process, and were unanimously reappointed by the new Council. In the years to come, our initial critics on the Council would become our greatest advocates and two would even express the thought that the RFP process had been a mistake and the same results could have been achieved by working together. However, given the lack of trust and the deteriorating financial condition, we remain convinced that it was the right course for the City. It yielded a better rate structure and ultimately a much more stable relationship.

In the following years, we stayed tight on the budget and declined allowable rate increases for two years. We also began working on various alternative rate structures and service provision models to address continuously changing circumstances. Four years after the RFP, we worked out a new fee structure with the City that included a substantial fixed cost retainer for all general services regardless of the hours required. The new structure was based on the realization that the City was going to continue to require extensive legal services for the years to come. An hourly rate for non-reimbursable legal services that would stair step down as the litigation matter or project increased in fees (e.g. $Y/hr to $75,000; $Y-10/hr to $125,000; and $Y-20 over $175,000). In exchange we would be able to charge a higher rate for special services that were reimbursable to the City (e.g. reimbursement from development fees paid to the City, or reimbursement from grant funds) or where legal costs were absorbed by an enterprise fund (e.g. water or refuse).

The fixed retainer provided the City with cost stability for general services, while centering the risk of loss and opportunity for reward with us. This creates a wonderful incentive to closely manage work and to work very efficiently. The stair stepped rate provided us with a reasonable return on our service, but insured that as a matter became more protracted, the rate would reduce, reducing the relative financial burden of the matter. After a year under this new structure, it appears the structure is working for both parties.

2.0 Case Study: The Leading Edge of the New Economy (Palo Alto)

2.1 Background

Palo Alto is a leading center of commercial innovation that is also a traditional residential suburban community. The city has 65,000 residents and swells to over 120,000 during the day as workers, academics and visitors flood into the city to take advantage of its prime Silicon Valley location. The city boasts a premier research university, a major medical center, and a thriving environment for tech start-ups. The University Avenue Caltrain station is the busiest in the system outside of the San Francisco terminus and downtown commercial rental rates are among the highest in the nation. With no major undeveloped land areas available for commercial or residential development, demand is soaring for increasingly dense infill development. At the same

time, Palo Alto is known for a high-quality of residential living. Citizens enjoy high-quality public schools, safe streets, pedestrian and bike-friendly neighborhoods, and numerous recreational and enrichment activities. Under these circumstances, Palo Alto's neighborhoods are under growing stress from commercial and infill development.

Palo Alto residents are among the most highly educated in the nation. They are famously engaged in civic and community activities. Interest in government and citizen expectations are extremely high. Four daily newspapers cover the City.

With approximately 1,000 employees, the City of Palo Alto is a full-service city, providing police and fire services, five libraries, extensive parks, open space, science and arts programs and a full suite of public utilities, including water, wastewater, gas, electric, refuse and a dark fiber-optic backbone. The annual general fund budget is $153 million and enterprise budgets are $300 million.

In 2008, Palo Alto, like other jurisdictions, experienced significant declines in most revenue sources. The Council moved swiftly to make structural changes to contain costs. These included eliminating vacant positions, seeking total compensation concessions from employees, adopting lower pension tiers and seeking cost sharing on health benefits. In 2009, the City's largest employee group launched a brief strike. Relations with public safety unions were also strained as the City moved to repeal binding interest arbitration from the Charter.

By 2012, the situation was somewhat stabilized. The City' workforce had shrunk from 1123 FTE in 2003 to 1016 FTE in 2012, and real compensation was down slightly. The City continued to balance its annual budgets with ongoing revenues and maintain appropriate reserves. Revenues began to rise modestly. On the negative side, savings achieved through employee concessions were outstripped by rising pension and health care costs. At the same time, citizen demands for increased services were growing. Long-deferred infrastructure projects generated heated calls for the City to respond. Palo Altans loudly rejected attempts to consolidate or reduce traditional pubic services to cut costs.

This year, the recovery is in full swing. Silicon Valley leads the state and the nation in job growth. City revenues are showing healthy increases. At the same time, demand for City services has soared. Development applications are increasing at a rapid rate and generating acute needs to address parking, traffic mitigations and service demands from residents. Palo Alto's electric utility will achieve 100% carbon neutrality this year, and ambitious new sustainability goals are on the horizon. Palo Alto is moving towards restoring city operation of the local general aviation airport, building numerous major public works and becoming a leading digital city. With the need to hold labor costs down and retirement and health care costs continuing to rise rapidly, new services and programs will have to be achieved with no new staffing.

2.2 Issues and Responses

2.2.1 Excellent Service for the Council, City Manager and Department Heads

The Palo Alto City Attorney's Office has 10 in house employees: 6 attorneys, a legal administrator, claims investigator and two secretaries. The Office has an in-house budget of $2.5 million and an outside counsel budget of $.5 million (both exclusive of enterprise, cost-recovered and bond-funded services). The Office has gone through several rounds of downsizing. Both the budget and size of the office are smaller now than ten years ago, though the quantity and pace of the work continues to accelerate.

2.2.2 Issue – Meet Exploding Demand for In-House Services with No Additional Resources

The number of large and complex projects requiring legal services has expanded significantly. In addition, in the modern communication world, our clients expect near-instantaneous round-the-clock responses to their questions and concerns. We are called on to respond to these challenges with high-quality, responsive, customer-service oriented legal services, all without added resources at this time.

2.2.3 Response – Improve Processes, Prioritize, and Leverage Resources

In Palo Alto, we are using a variety of approaches to maximize our effectiveness without adding resources.

a. *Design Process Improvements to Streamline Recurring Work*

Where possible, we are creating and improving processes to handle routine or recurring work. Like many jurisdictions, we use templates for recurring legal documents that can be filled in or customized to fit particular needs. These include:

- Contract documents, such as RFP's, short and long Professional Services Contracts, Construction Contract Documents, Purchasing documents, Leases, Loans, etc.
- Resolutions and Ordinances
- CEQA and land use documents
- Public Records responses
- Rate setting notices
- Common personnel documents, such as Skelly notices and investigative reports

We also maintain an area in our data management software for agenda items that recur annually or periodically, such as Mayoral scripts for recurring hearings.

Where possible, we make these templates available to our client departments for their use in preparing draft documents. Some documents are "locked," with selected areas open for the client to insert their work. We update the templates frequently and hold periodic trainings – from formal training to brown-bag discussions – to refresh the staff and teach new employees how to use the templates.

b. *Turn Non-Legal Tasks Back to Staff*

From time to time, our clients look to the City Attorney's Office to help them with non-legal tasks, such as drafting staff reports, contract scopes of work, and personnel investigations, or interfacing with the public on standard service issues. Like us, department managers are being asked to do more with a smaller staff, and may have other challenges such as retirements of experienced senior staff. The city attorney's office may house some of the jurisdiction's most effective and facile writers, and we tend to be service oriented and reluctant to say "no." To stay focused on legal work where we can add the most value, we are politely returning non-legal work to the departments with a request that they do an initial draft for our review.

c. *Engage Clients in Prioritizing Their Work*

City departments may have a variety of items they would like to use legal resources on. To manage deadlines and balance competing needs, we try to engage the client in prioritizing their work. This involves frequent short conversations at all levels of the organization, from managers in the operating departments, to the City Manager and the Council.

d. *Use Technology for Flexibility and Planning*

We are upgrading our data management software to reduce paper and the staff time required to manage it. We are investing in mobile device technology so lawyers can work efficiently from any location.

We also are moving towards accounting for time. While there is no reason for an in-house legal department to use the tortuous tenth-of-the-hour reporting standard that forms the basis of private firm hourly billing, it is very useful to track time on a half or quarter hour basis, pegged to department and project, with short general descriptions. The data generated by a time reporting system allows the City Attorney to have intelligent conversations with the Council, the Manager and department heads

about where legal resources are being expended, where they should be going, and whether needs or usage are increasing or decreasing in various areas.

e. *Keep Focused on Significant Risks, Complex Problems and Big Opportunities*

One of the hazards of the in-house legal department is the possibility of expending most or all of your resources on minor and day-to-day tasks that do not reduce significant financial or policy risks, contribute to solving complex or large-dollar problems, or take advantage of big opportunities that advance the public interest. If you allow it, day-to-day tasks, last minute emergencies, and generalized policy meetings will consume all available resources. We remind ourselves that the City's lawyers are a high-priced professional resource. The City's managers are not always incentivized to shape our work appropriately because they are not paying by the hour for our services. It is up to us to focus on the important things that lawyers are uniquely capable of doing for the City, while still providing excellent customer service to our client departments.

I find it helpful to keep a bullet list of my top 5 to 10 worries about my jurisdiction, and a smaller list of 3 to 5 affirmative opportunities that I could initiate to significantly advance the City's policy goals. I keep these lists at the top of my daily and weekly task list. There are days, and even weeks, when I spend zero time on any of these items. But at least a couple of times a week I review this list to remind me what I should be focusing on.

f. *Leverage Resources*

We take advantage of numerous opportunities to leverage our paid staff with additional resources at little or no cost.

Like many city attorney offices, we run a law student extern program for one or two law students each term. We recently expanded the law student program to include volunteer post-graduate attorneys. Law schools often fund new graduates to work in the public interest until bar results are published, or longer. We also have had good experiences working with volunteer lawyers who have become disillusioned with big-firm private practice and are looking to gain experience in the more rewarding field of municipal law, and with lawyers who are returning to practice after periods of hiatus to raise families or attend to other personal needs.

On the staff side, we have hosted externs from paralegal certification programs who have added value on targeted projects.

Finally, we have engaged in cooperative exchanges with other public law offices. No-fee exchanges with other public law offices can provide skilled representation in the event of conflicts, or where there is a need for specialized expertise not currently available in house.

2.2.4 Outside Counsel – Improving Results, Containing Costs

2.2.4.1 *Issue – Achieve More Through Outside Council while Managing Costs*

In Palo Alto, the Council holds the City Attorney accountable for all legal work, whether performed in house or by outside counsel. While budgets are not increasing, expectations of successful outcomes continue to rise.

2.2.4.2 *Response – Evolving When and How We Use Outside Counsel*

By thinking strategically about when and how to use outside counsel, and by closely managing our engagements, we hope to improve our results while keeping costs down.

a. *When – and How – to Use Outside Counsel*

Many city attorneys have little discretion whether or when to use outside counsel. Some have little or no budget for outside help and must complete all work with in-house staff. Others have little or no internal capacity in key areas, such as litigation.

In Palo Alto, where we have both an in-house staff and a budget for outside counsel, we are fortunate to be able to think strategically about when and how to use outside counsel for maximum impact. We think of our outside counsel engagements as fitting into several distinct models:

> FULL-SERVICE REFERRAL. This is the traditional model of outside service, where outside counsel performs all aspects of a given engagement, subject to oversight by the city attorney. In litigation, outside counsel recommends a strategy, gathers the facts, propounds and responds to discovery, drafts and argues motions, and takes the matter to trial. On advice matters, such as negotiating and drafting complex and specialized financial documents or contracts, outside counsel performs the work subject to strategic guidance from the city attorney. Because hours can be high, rates may be an important factor. At the same time, experienced counsel may work efficiently, helping to keep overall costs down.

CO-COUNSEL. In this model, we are partnering with outside counsel on a matter. In litigation, we may divide briefs or claims, or do initial drafts of briefs that are edited and refined by outside counsel. When we retain outside counsel to conduct an arbitration or other hearing, we may ask our outside counsel to work with one of our in-house lawyers instead of an associate from the private firm. This model keeps our costs down and involves a significant secondary benefit for a small office – training our in-house lawyers. Both rate and expertise are important in selecting appropriate outside counsel for this model of work.

OUTSIDE COUNSEL AS CONSULTANTS. In this model, in house staff is primary. Outside counsel is used as behind-the-scenes consultants on a limited basis. In a litigation matter, for example, in house attorneys will design a strategy and then check in with outside counsel for areas we may have missed. We may prepare a summary judgment outline or fully-drafted brief to outside counsel for consultation and comment. We may ask outside counsel to research and draft a narrow issue. On an advice matter, we will work up the issue and then confer with seasoned experts for suggestions on strategy, timing, etc. In this model, as with the prior one, in house staff benefit from exposure to outside experts. Because the hours are fewer, hourly rate (while always important) may be less critical than specialized expertise and experience.

Assuming you have some choice in the matter, when should you use outside counsel versus handling a matter in house, and which model is most appropriate? There are several considerations.

COST. Legal services are one area where fully-benefited in-house lawyers may provide services at a cost that is lower than outsourcing, though this is not true in all areas. I found it useful to obtain from my finance director the fully-loaded hourly rate of in-house staff, as a guide for making cost comparisons with outside counsel. It is important, however, to consider both hourly rate and efficiency. An in-house lawyer is going to spend many more hours on their first misdemeanor prosecution than an outside lawyer who specializes in that work.

EXPERTISE. In most small and mid-sized cities, in-house staff are legal generalists, or at most specialists in several areas at once. Outside counsel may have a career's worth of experience in a single complex area. At the same time, in-house staff often have deep knowledge of the city's business, culture, personnel and goals. Consider what the engagement requires.

CAPACITY. In-house staff may have substantial constraints in capacity. In particular, it can be difficult for in-house staff, who often have daily responsibilities for reviewing contracts, approving staff reports, and responding to other day-to-day client needs, to devote the concentrated time needed for complex projects, including brief-writing or evidentiary hearings.

OTHER GOALS. These may include everything from staff development and training, to the desire for an "outside" opinion, to concerns that the city attorney speak directly on behalf of the city on matters of significant local concern.

In addition, I find it helpful to ask two questions about a legal task: Will the legal task pose a high risk if performed poorly? And will performance of the legal task contribute to the city meeting important policy goals? The following is a chart that attempts to organize these factors in a systematic way as an aid to decision making on when to send projects out and how to structure them.[5]

	Less tied to important city goals	**Closely tied to important city goals**
Higher risk	Work closely with outside counsel • High-dollar one-off litigation (police civil rights, HR litigation involving leadership) • Ethics • Regulatory compliance	Handle internally, or use outside counsel as consultants or co-counsel if highly specialized expertise needed • Challenges to city ordinances • Writs & appeals • Land use litigation • Elections matters • Labor negotiations • Major real estate and development agreements

[5] Adapted from a private-sector matrix prepared by Mark Chandler, General Counsel, Cisco Systems, published in *Unbundling Corporate Legal Services to Unlock Value*, Harvard Business Review, July-Aug 2012, p. 132.

Lower risk	Outsource • Torts • Most HR cases • Muni code prosecutions • Grievances • Most code enforcement	Manage through templates, self-service and quick reviews • Routine transactions • Staff reports • Correspondence • Policies • Public records • Personnel advice

b. *Actively Manage the Engagement*

Once we've made the decision to send a matter out and have defined the scope of outside counsel's work, managing the engagement appropriately improves the quality of the work and allows oversight of work product and costs.

First, we've found it is important to set clear expectations at the beginning of an engagement:

- Clarify who outside counsel reports to. It should almost always be the city attorney, not the manager, the council or a department head. Most councils will hold the city attorney accountable for all legal work, whether performed in house or by outside counsel. You should feel comfortable with the advice before it is given. It is also up to you to decide who delivers the message – the city attorney or outside counsel directly.
- Clarify whether you want to take an active role in strategic decision making, such as removal, whether/when to file narrowing or dispositive motions, the discovery plan, retention of experts, use of investigators, and trial strategy.
- Explain how involved you want to be in the progress of the matter – do you want to see periodic status updates or only be contacted when there is a major development, problem or decision to be made. If you want to receive copies of all filings, get on the service list. Clarify whether you want to receive other documents, such as discovery. Make it clear if you want to review drafts of key filings and how much time you expect to have to do that.
- Let outside counsel know whether you expect them to contact city officials directly for needed information, or do you want to be copied or included. If outside counsel is working with a staff attorney, clarify roles and communication between outside counsel, the supervising attorney and the city attorney. Give outside counsel a

contact in your office if they are not receiving needed documents, information or support from city staff.

- Some outside counsel will be reluctant to tell you about the city's errors or weaknesses in the city's position unless you make it clear that you expect and want to receive this information. Tell outside counsel that you want their frank assessment of the work of city employees and your staff, including things that went wrong and how to improve processes for the future. Similarly, some outside counsel will feel constrained to stick to the specific question asked, unless you tell them you want their proactive advice. If the city can make changes that will mitigate risk in the future, tell outside counsel you want to know.
- Emphasize the importance of submitting monthly billings so that you can monitor costs and work product. Between billing cycles, outside counsel should be aware of and give you advance warning if the work performed is approaching contract/budgeted amounts.
- Ask them what they need from you to be successful.

During the engagement, respond to outside counsel's questions, monitor their billings and provide frequent feedback, both negative and positive. If outside counsel isn't getting needed information from city staff, jump in and solve the problem.

Stay on top of reviewing monthly billings. Pay promptly. If you have questions or concerns about the bills, raise them right away. But don't just read invoices to monitor costs. A well-drafted invoice is a treasure trove of information about the engagement: what is the status of the matter, how far has the work progressed, are there unexpected or unusual challenges that are requiring lots of hours, who is actually doing the work on your matter.

Don't be afraid to make a change if you need to. Sometimes the fit is not right for the assignment, key relationships sour or time demands shift. If you make a change at the right time, you may be able to work productively with that counsel on other assignments in the future. If you hang in there and end up dissatisfied, the relationship is likely broken for good.

After the engagement, recognize and thank the entire team, including junior lawyers and staff. If there were issues with the work product or the process, most outside lawyers appreciate hearing a frank assessment of that from you. You might also ask them for their perspective on the engagement. What worked well and what didn't. What lessons learned emerged from the project. How can the city and the city attorney's office be a better partner in the future?

2.2.5 Working with the Council – Communication, Accountability, Responsiveness

2.2.5.1 *Issue – Increase Communication and Responsiveness to Elected Officials*

Councilmembers are under increasing scrutiny from their constituents, especially over their leadership on containing costs and achieving tangible results. An in-house legal department is a significant investment and a powerful tool. The council needs to understand what the office does, have confidence in the quality and responsiveness of the work, and feel that their priorities are being served.

2.2.5.2 *Response – Use a Range of Communication Tools, from Informal Conversations to Formal Evaluations to Elicit and Respond to Elected Officials' Concerns*

In Palo Alto, we prioritize responsiveness and communication with the Council. We use a variety of tools to enhance accountability and alignment with the Council's goals.

a. *Lots of Communication, Careful Attention to Protocols*

It is critical to have open and frequent communication with Councilmembers. It is important that each knows: (a) that they have access to you to air their legal questions and concerns; (b). that none of their colleagues has special access; (c) that you will not take sides on policy issues; (d) that you will call legal issues straight and give the same legal advice to all Councilmembers on the same issue; and (e) that, while you are the City's lawyer and do not serve them personally, you will never embarrass them and you will treat their communications with you with discretion and tact.

Palo Alto has nine Councilmembers. I communicate with them regularly in a number of ways:

- Pre-Meeting Advice. If there is a legal risk issue related to an item of business on the Council's agenda, I give confidential advice to the Council before the meeting by formal written memo, email or phone. I encourage Councilmembers to contact me before the meeting if they have any legal questions or concerns about an item of business. If I get a question that I believe others may also have, or where the answer would benefit others, I usually provide the answer to the whole Council without identifying the original source, such as by email beginning: "A Council Member has asked whether . . . ." Where there is no particular legal issue but the agenda includes a challenging item, I sometimes telephone

Councilmembers the day before or day of the meeting to check in. These calls can surface and resolve legal issues that would otherwise be raised in public at a meeting.

- Regular reports. My office provides twice-yearly litigation and claims reports that summarize the City's open and resolved matters.
- Ad hoc updates. We try to be very prompt in informing our Council of any item that their constituents may raise with them. This includes major developments in litigation or significant transactional matters, as well as statutory, regulatory or judicial developments that may impact our city, even where we are not a party. We also alert Council to all media contacts.
- Brief Individual Consultations. In Palo Alto, the Council has imposed on itself a "one-hour rule" that allows any Councilmember to use one hour of staff resources to explore a policy initiative that they may want to pursue. This allows an initial consultation that can shape ideas in productive directions while putting reasonable limits on work not authorized by the Council as a whole. While no individual Councilmember has a privileged relationship with the City Attorney, we treat these consultations as confidential under a rule of comity.
- Breaking Bread. I try to meet informally with each Councilmember at least quarterly, usually over lunch or coffee. These meetings are an opportunity to check in about broader or longer-term concerns that may not be connected to any particular item of business. I keep a short running list of items to raise in this forum. I find that Councilmembers look forward to these opportunities and come prepared with their own list of nagging concerns, areas of confusion, constructive feedback and thanks.

b. Formal Performance Evaluations

Done right, formal evaluations are an invaluable tool for the Council and the City Attorney. Palo Alto has a long-standing tradition of annual formal performance evaluations for all officers appointed by the Council (City Manager, City Attorney, City Auditor, Clerk). During negotiations over my contract, I asked the Council to increase the frequency of those evaluations. The Council appreciated that I was eager to hear and respond to their concerns, and agreed to add an informal mid-year check-in in addition to the formal annual evaluation process.

I've found that there are several elements that are important for a successful process:

First, evaluations must be regularly-scheduled, not ad hoc. If there is no regular schedule for evaluations, they will only occur when the Council or key Councilmembers are unhappy enough to tear themselves away from other pressing business and overcome the natural disinclination to engage in performance feedback. In other words, you will only be evaluated during or after a crisis. At that point, it may be too late to identify and respond to Councilmembers' needs and educate them about your perspective. Frequent regularly-scheduled evaluations make feedback and improvement a routine part of the relationship. Concerns surface and are resolved easily, without becoming major obstacles.

Second, evaluations should be structured. Use agreed-upon forms and tools to shape feedback. Ideally, if there is a budget for it, encourage your council to use a consultant to facilitate the process and keep comments and feedback on track and constructive. In Palo Alto, the City Attorney begins the process with a self-evaluation on a pre-agreed form.[6] A consultant then gathers from each Councilmember comments and numerical ratings about the prior year and proposed goals for the coming year.[7] The Consultant meets with the Council in closed session to amalgamate the comments into a single set of feedback and direction, and then the City Attorney joins the meeting to receive the feedback.

Third, the City Attorney should be a pro-active part of the process. I use the twice-yearly performance evaluations to educate the Council about the work of the office (some parts of which they have little to no direct knowledge of), what my protocols are and why, and what I need to be more effective. The closed sessions are a rare opportunity to have a frank and broad conversation with the Council about the City's legal program – where are the big and increasing risks? What progress has the legal office and the staff made in the prior year and where do we need to go this year? What should the Council be mindful of? Finally, I take an especially active role in setting goals for the City Attorney. I suggest projects that I think are the right areas to spend discretionary legal resources on. For example, I have suggested goals such as updating the City's construction contract templates, building an enhanced website to educate and assist the public, designing and delivering regular Brown Act training to city boards and commissions, etc.

Fourth, it is important to communicate an attitude of openness to criticism. Acknowledge areas where improvements can be made. After the evaluation, work to

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[6] Prior to the evaluation, which is a confidential personnel matter, the Council should adopt these forms by resolution in open session. In addition, if you use a consultant, the consultant's contract and work plan are open session items.

[7] Palo Alto also uses a modified 360 degree evaluation tool. Our consultant asks everyone in the office to fill out a short form answering a handful of questions about my leadership and management. The consultant follows up with short phone interviews to flesh out and clarify comments. The feedback is anonymous. The consultant compiles it for the Council, as part of their evaluation of me. The consultant also provides a summary to me. I have found this process extremely valuable. No matter how open your door is, most employees will not be frank with their supervisor. The 360 review is an opportunity to discover and reflect on things your employees will not tell you directly. It also provides a valuable insight into who they are and what motives them.

resolve any issues that were raised. If Councilmembers displayed misconceptions about the office or the city's legal work, gather and communicate the facts.

Finally, to the extent possible, consider sharing the non-personal aspects of the evaluation with the team. After all, the Council is evaluating not only the City Attorney but also the performance of the office. When things go well, team members deserve to share the credit. When adjustments are needed, everyone must be on board.

EVALUATION OF CITY ATTORNEY

The Office of the City Attorney is responsible for providing legal advice to the City, reviewing and preparing resolutions, ordinances and legal opinions and in certain instances undertaking or managing litigation on behalf of the City. The City currently contracts with the law firm of Burke, Williams & Sorensen, LLP ("Burke") for City Attorney and other legal services and service at the pleasure of the City Council. The appointed City Attorney, Eric S. Vail, serves as the City's chief legal advisor and reports directly to the City Council, while working closely with the City Manager and City staff. Mr. Vail supervises and is responsible for all legal services provided under the City Attorney services contract with Burke, Williams & Sorensen, LLP.

This evaluation is intended to address:

(1) the performance of **Eric S. Vail,** as the appointed City Attorney; and,

(2) the legal services provided by **Burke,** as a whole, under their contract with the City, recognizing that the City Attorney is ultimately responsible for all such services.

This Evaluation Form is intended to be used by individual Councilmembers in conjunction with a dialogue between the full City Council and the City Attorney. The purpose of this exercise is to give the City Attorney critical feedback concerning his performance and the performance of his firm overall, as well as directives regarding conduct the Councilmembers would like to further encourage because the conduct is at or above the level of City Council expectations, or regarding conduct that needs correction because it falls below the level of City Council expectations.

A three (3) point rating system is used for each of the X categories. Space is provided for additional written comments under each category. Councilmembers should feel free to add any comments to the evaluation form.

RATINGS

1. Below Expectation: Performance generally falls below the level of City Council expectations, is erratic or inconsistent, and needs significant improvement.

2. Meets Expectations: Performance generally meets City Council expectations, is consistent and of dependable qualify. Minor improvement areas may be noted.

3. Exceeds Expectations: Performance exceeds City Council expectations, is superior in terms of service and quality and is an exemplar of professional legal services.

FACTORS		RATING		
A.	**Confidence in your City Attorney**	**3**	**2**	**1**
1.	What is your level of confidence that the City Attorney understands the City Council, as a whole, is the client?			
2.	To what extent do you have confidence in the advice and guidance provided to the City Council by the City Attorney?			
3.	To what extent do you have confidence in the legal abilities of your City Attorney?			
4.	How would you rate your level of confidence in your City Attorney's ability to resolve problems in the best interests of the City?			
5.	To what extent do you have confidence that the City Attorney implements policy decisions of the City Council within the law?			
6.	To what extent is the City Attorney able to maintain the City Council's confidence while informing them of the different legal risks that proposed actions might generate?			
7.	Does the City Attorney exercise good judgment?			
8.	How do you rate your overall confidence in Eric S. Vail as your City Attorney?			
9.	How do you rate your overall confidence in legal services provided to the City by Burke?			
	COMMENTS:			
B.	**Understanding and Carrying Out City Council Directive/Policy.**	**3**	**2**	**1**
1.	Does the City Attorney understand and accurately interpret City Council direction?			
2.	How effective is the City Attorney in carrying out the directives of the whole City Council?			
3.	Even if the City Attorney has privately criticized a proposed City Council decision, once the City Council has made that decision, does the City Attorney publicly advocate and support the City Council's decision?			

4.	To what extent does the City Attorney help the City Council reach difficult decisions by providing constructive legal advice, risk assessment, and practical alternatives?			
5.	Do you view the City Attorney as a trusted advisor, assisting the City Council in making tough decisions (score a 3 or 2) or as a constant hindrance to making decisions (score a 1)?			
6.	To what extent does the City Attorney respect and facilitate the City Council's decision making process?			
7.	Do you feel that the City Attorney knows the boundary between giving legal advice and giving advice regarding matters of policy?			
8.	Does the City Attorney make a positive contribution to the development of the overall policy, laws and philosophy of the City of Temple City?			
	COMMENTS:			
C.	**Legal Advice, Knowledge & Skill**	**3**	**2**	**1**
1.	Does the City Attorney provide competent, correct and consistent legal advice?			
2.	Does the city attorney provide legal advice in decisive, understandable language with clear recommendations or alternatives?			
3.	To what extent is the City Attorney's legal advice practical, recognizing City Council policy objectives, political issues and resource constraints.			
4.	To what extent do you find the legal advice of the City Attorney useful in making decisions or in explaining issues?			
5.	Does the City Attorney have adequate knowledge of the laws and legal issues affecting Cities?			
6.	Does the City Attorney's advice reflect an understanding of practical government operations?			
7.	How would you rate the strength and quality of the City Attorney's legal analysis?			
8.	How would you rate the City Attorney's handling of complex and controversial issues?			

9.	To what extent do you view the City Attorney as a skilled legal practitioner?			
10.	Does the City Attorney demonstrate effective negotiating skills in bargaining between the City and other public/private organizations?			
	COMMENTS:			
D.	**Communication & Availability**	**3**	**2**	**1**
1.	Is the City Attorney easy to talk to?			
2.	Is the City Attorney a good listener?			
3.	Does the City Attorney keep the City Council informed of the City's legal affairs, including present and potential litigation?			
4.	Does the City Attorney keep the City Council apprised of recent court rulings and legislation affecting the City?			
5	To what extent does the City Attorney maintain effective communications with the City Council?			
6.	Does the City Attorney keep you informed, in a timely manner, of the things you want to know about?			
7.	Are the reports provided to you by the City Attorney easy to read and provide the information you want?			
8.	Does the City Attorney make oral presentations clearly and concisely?			
9.	To what extent does the City Attorney maintain appropriate availability to City Council?			
10.	Does the City Attorney respond promptly and thoroughly to City Council inquiries?			
11.	Does the City Attorney and other attorneys of Burke, respond timely to requests for legal services?			
12.	Is the City Attorney accessible to, and work effectively with, the City Manager and Department heads?			

	COMMENTS:			
E.	**Problem Solving & Innovation**	**3**	**2**	**1**
1.	To what extent is your City Attorney a problem solver (score 3 or 2) or a problem maker (score 1)?			
2.	Does your City Attorney assist in resolving problems administratively to avoid unnecessary litigation?			
3.	To what extent does the City Attorney emphasize preventative legal services as opposed to after the fact corrective services?			
4.	Does the City Attorney have a proactive approach that helps guide the City Council and staff with alternatives and innovative legal solutions?			
5.	How do you rate your City Attorney's ability to be a forward or proactive thinker?			
6.	Does the City Attorney plan ahead, anticipate needs and recognize potential problems?			
7.	Does the City Attorney develop and implement creative and innovative strategies?			
8.	Does the City Attorney demonstrate insight, flexibility and creativity in strategic planning sessions?			
9.	Is the City Attorney receptive to constructive criticism and advice; and accept responsibility to keep changing and evolving as required?			
	COMMENTS:			
F.	**Ethics and Professionalism.**	**3**	**2**	**1**
1.	To what extent do you view the City Attorney as honest and ethical?			
2.	Does the City Attorney perform all services for the City in a manner consistent with the highest standards of professional conduct?			

3.	To what extent does the City Attorney act in a professional manner with the City Council, City staff, and the general public?			
4.	To what extent does the City Attorney avoid bias and conflicts of interest in dealing with City issues?			
5.	Does the City Attorney demonstrate drive, enthusiasm and initiative in providing legal services and ensuring high quality?			
7.	Does the City Attorney protect confidentiality of issues?			
8.	Does the City Attorney demonstrate leadership and command respect from staff, peers/colleagues?			
	COMMENTS:			
G.	**Management of Legal Services.**	**3**	**2**	**1**
1.	Does the City Attorney effectively work with City Council and City Management to prepare a realistic legal services budget?			
2.	Does the City Attorney provide periodic budget reports that are effective or useful in tracking and managing legal service costs?			
3.	Does the City Attorney effectively manage the operations of the City Attorney Office to provide quality, cost effective, services?			
4.	To what extent does the City Attorney apprise the City Council of work that is outside of the anticipated budget for legal services, and work to minimize those additional costs?			
5.	Does the City Attorney identify cost-cutting strategies?			
6.	To what extent are you comfortable with the City Attorney's approach to budget preparation and management?			
7.	Does the City Attorney have the ability to select responsible outside legal and other consultants, and is he able to monitor the work and costs?			
8.	Does the City Attorney assure that his staff covering other City legal matters are skilled, timely, and professional?			
9.	Does the City Attorney consider himself part of a team in City Hall and extend full cooperation to other departments?			

10.	Does the City Attorney respond to new demands and, where necessary, modify established priorities?			
11.	Are legal tasks performed with appropriate authorization according to established procedures and contract requirements?			
12.	How would you rate the overall legal services provided by Burke?			
H.	**Other Comments.**			
	List two things that the City Attorney does very well that you would like him to continue.			
	List two things that the City Attorney does, but that you would like to see improved upon or more emphasis given to.			
	List two things that the City Attorney does not do that you would like him to begin doing.			

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Our File No.: 0000-0001
evail@bwslaw.com

May __, 2013

City Manager
City Council
City of _____
_____
_____

Re: Litigation Status Report – May 2013

Dear City Manager and City Council Members:

Please accept this letter as the May 2013 update on the status of pending litigation involving the City. There are currently 11 pending matters. This letter addresses all current litigation to which the City is a party, including litigation being handled by counsel other than Burke, Williams & Sorensen, LLP. The cases being handled by outside counsel are presented in a separate section at the end of this report. This litigation status report is intended as a brief update on the progress of pending matters listed and not as an exhaustive review of the merits or strategy of any particular case.

Be advised that this litigation status report contains attorney-client and attorney work product information that is confidential and privileged from disclosure to the public. You are advised not to disclose this letter or its contents without prior consultation with the City Attorney. Please do not file or store this letter with publicly accessible records.

CASES BEING HANDLED BY BURKE, WILLIAMS & SORENSEN

GENERAL LITIGATION

Gordon Gadfly v. City
Case No._____; (File No. _____)

Plaintiff: Gordon Gadfly

Defendants: City, et al.

Resp. Attys: Attorney A, Attorney B

Description: Plaintiff filed an action alleging civil rights violations, based on an alleged pattern of code enforcement harassment against him. He contends that the City illegally took code oaths against him in retaliation for his criticism of the City and the City Council over the years.

Status: ***Motion for Summary Judgment Granted.*** At the City's direction, we vigorously defended this case, including preparing and filing a summary judgment motion, which was heard on April 1, 2010. The court has granted that motion in full and has entered judgment in the City's favor, dismissing Plaintiff's lawsuit. We filed a costs bill seeking cost recovery from Plaintiff.

Fees & Costs: Incurred to date: Legal fees: $125,763.60; Costs: $15,294.12

PUBLIC WORKS LITIGATION

John Q Property Owner v. City
Case No._____; (File No. _____)

Plaintiff: John Q. Property Owner

Defendants: City

Resp. Attys: Attorney C

Description: This is an action for inverse condemnation, dangerous condition of public property, and nuisance. Plaintiff alleges

that a City water leak caused soil subsidence and damage to its insured's building. .

Status: ***Discovery Underway.*** We inspected the property on February 15, 2010, and March 1, 2010, have propounded written discovery and taken two depositions. In connection with this analysis, we are working with expert witnesses on evaluating Plaintiff's claims and possible defenses. A trial setting conference is scheduled for June 13, 2013.

Fees & Costs: Incurred to date: Legal Fees: $45,778.50; Costs: $7,274.30

PERSONNEL

Johnny B. Gone v. City, et al.
Case No. _____; (File No. _____)

Plaintiffs: Johnny B. Gone

Defendants: City, City Police Department, HR Director

Resp. Attys: Attorney E

Description: Plaintiff has brought a petition for writ of mandamus seeking to overturn an arbitration decision in favor of the City upholding former employee's discharge.

Status: Oral argument on the Writ was held on March 15, 2013. After the argument, the judge held in favor of the City and denied Plaintiff's petition in all respects. Former employee's time to appeal will expire on April 1, 2013.

Fees & Costs: Incurred to date: Legal fees: $24,156.00; Costs: $1,093.48

TORT LIABILITY LITIGATION

Tommy Tortfeaser v. Defendant, City, et al.
Case No. _____; (File No. _____)

Plaintiffs: Tommy Tortfeaser

Defendants: Plaintiff, City, Defendant A, Defendant B, County

Resp. Attys: Attorney A, Attorney B

Description: Plaintiff was a passenger in a car accident that occurred when Defendant A struck Defendant B's vehicle, which was parked outside of Defendant B's home on Main Street. Plaintiff is suing the City for negligently maintaining the portion of East Stetson where the accident occurred.

Status: ***Trial Setting Conference Set.*** A trial setting conference will be held on May 20, 2013. We have given Plaintiff until May 1, 2013 to dismiss the City from this case or else we will file a Motion for Summary Judgment.

Fees & Costs: Incurred to date: Legal fees $5,917.50; Costs: $540.99

POLICE MISCONDUCT/CIVIL RIGHTS CASES

Smokey Dubage v. City
Court Case No. _____; (File No. _____)

Plaintiffs: Smokey Dubage

Defendants: City, Officer A

Resp. Attys: Attorney A, Attorney B

Description: Complaint for Damages was removed to federal court. Plaintiff alleges that a Police Department Officer unlawfully arrested him for possession of marijuana. He alleges he was an authorized user of medical marijuana, obtained a medical marijuana ID card from his doctor and showed the card to the arresting officer.

Status: ***Discovery Continuing and Trial Date Set.*** The Court issued a scheduling order on February 16, 2013. Amongst other things, the Court's order set a number of dates and deadlines, including trial on October 31, 2013. We plan to file a motion for summary judgment before the motion cutoff date.

Fees & Costs: Incurred to date: Legal fees: $49,579.00; Costs: $2,246.26

We hope that this Report provides you with a brief overview of the pending litigation that our firm is handling. If you would like to receive additional information, please contact me.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN, LLP

Eric S. Vail

ESV:meh

City of Ethics

City Attorney Fees / Actual to Budget

Fiscal Year 2010-2011

(July – April)

A. Summary

Original Annual Budget: $ 1,200,000.00

Fees Billed to February 28, 2011: $ 973,511.00 (does not include costs disbursed)[1]

Cumulative Variance to date: $ <52,237> (under budget)

B. Budget Table

Month	Actual (fees)[2]	Budget	Variance
July	$ 90,937	$ 100,000	$ <9,063>
Aug	$ 121,441	$ 100,000	$ 21,441
Sept	$ 101,028	$ 100,000	$ 1,028
Oct	$ 99,850	$ 100,000	$ <150>
Nov	$ 71,809	$ 100,000	$ <28,191>
Dec	$ 65,927	$ 100,000	$ <34,073>
Jan	$ 121,483	$ 100,000	$ 21,483
Feb	$ 106,758	$ 100,000	$ 6,758
Mar	$ 98,051	$ 100,000	$ <1,949>
April	$ 101,527	$ 100,000	$ 1,527

[1] Costs advanced by Burke on behalf of City and reimbursable costs to date are $28,128.20 (e.g. court costs, filing fees, expert witness fees, mileage, & copying costs).
[2] Id.

May	$	$ 100,000	$
June	$	$ 100,000	$
Cumulative Variance			$ <52,237>
Cum. Total	$ 973,511	$1,200,000	<-$ 226,489>

C. Budget Projections

Fees for Fiscal Year to Date Annualized:

Ave. Per Month	$ 97,351	($973,511/10 months)
Annualized	$ 1,168,212	($97,351 x 12 months)

Fees for Last Six (6) Calendar Months (November through April) Annualized:

Ave. Per Month	$ 94,250	($565,555/6 months)
Annualized	$ 1,131,120	($94,250 x 12 months)

D. **Hours Tracker**

Month				Number of Hours
July				**404.2**
Council & Manager			25.2	
Development Services			35.0	
HR / Labor			98.0	
General Research & Advice		13		
Personnel Matters		40		
Labor Negotiations		45		
Police Officers Assoc.	25			
SEIU	20			
Litigation (0001 / 0038)*			236.0	
Tommy Tortfeaser v. City of Ethics (P)		70		
John Gadfly v. City of Ethics (City Council)(CC)		70		
Johnny B. Gone v. City of Ethics (P)		25		
Smokey Dubage v. City of Ethics (P)		25		
J.Q. Property Owner v. City of Ethics (PW)		20		
Tracy Tripster v. City of Ethics (PW)		20		
Danny Developer		6		
Other[3]			10	
Total				**404.2**

*CC = City Counsel
CD = Code Enforcement
PW = Public Works
P = Police
DS = Development Services

[3] The Category "Other" includes time billed to the following budget fund numbers: City Clerk, Finance, Housing (RDA LOW/MOD), Risk Management/Claims, Police, Fire, Building, PW Administration, RDA Administration, Water Public Utility

Hours Tracker

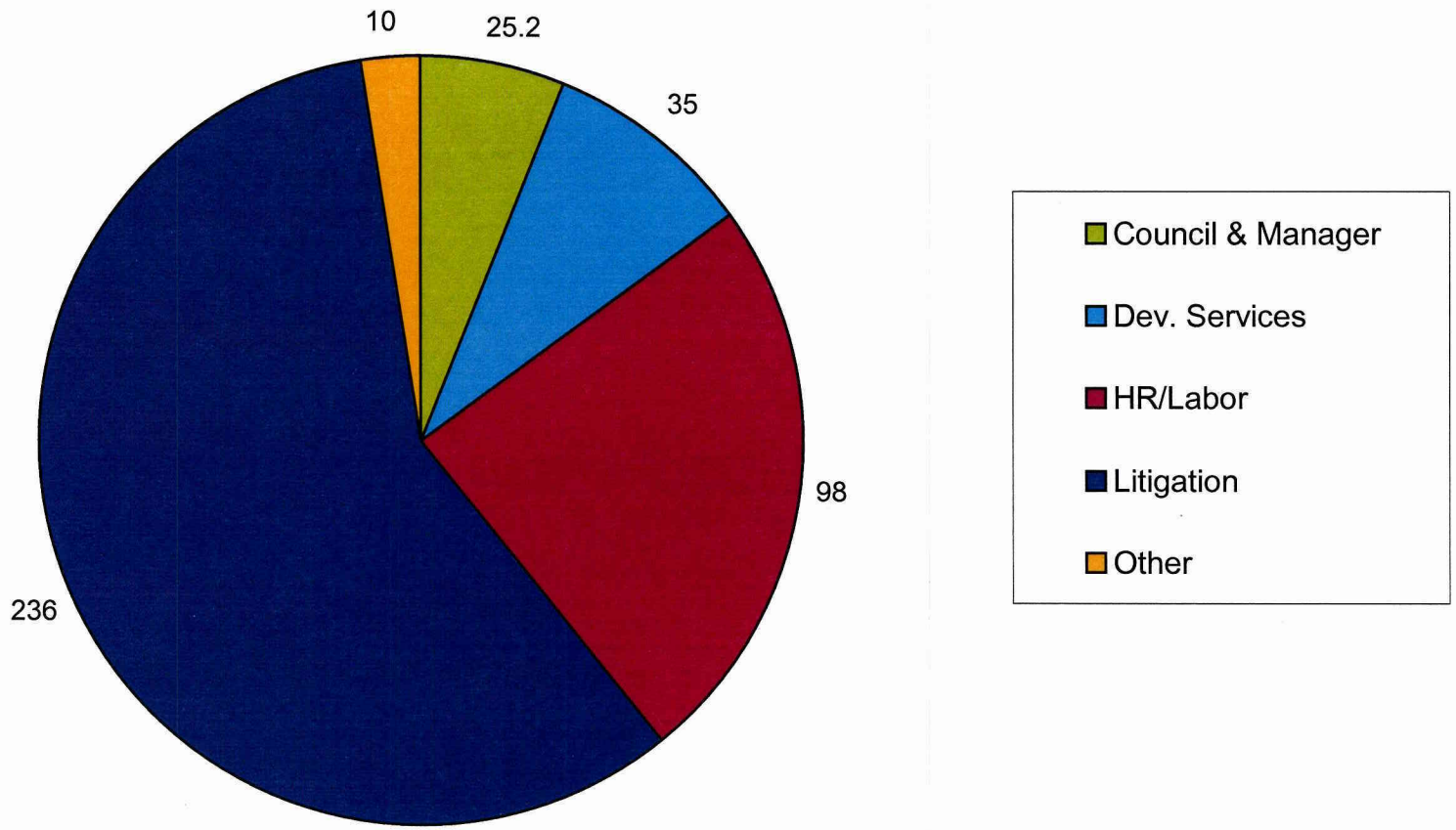

Exhibit A

General Services

Attend regular and special Council and commission meetings.

Attend Executive Team and other similar meetings, as requested.

Office hours, at least one day per week.

Agenda review and follow-up.

Standard contract review and revision.

Standard ordinance/resolution review and revision.

Standard conflict issues.

Brown Act issues.

Public Record Act request issues.

General legal advice and counsel on matters pertaining to the City, not involving more than three (3) hours of research.

Research and opinions on issues of General Municipal Law, not involving more than three (3) hours of research.

Risk management services - preparation of Litigation Status Report.

Risk management services - consultation with City's third-party claims adjustor and department heads.

Risk management services - review of claims.

Risk management services - response to City and insurer audits.

Routine personnel and labor questions, which can be responded to orally, not involving more than one (1) hour of research.

Code Enforcement issues - City Code interpretation.

Code Enforcement issues - consultation with staff and city prosecutor.

Code Enforcement issues - preparation and review of notices, demands, and orders.

Personnel services - revision or drafting at-will personnel contracts.

Transactions - purchase and sale agreements.

Transactions - options.

Transactions - leases.

Transactions - statutory development agreements.

Transactions - specialized fee credit or reimbursement agreements.

Redevelopment services - OPAs, DDAs, and similar Redevelopment agreements.

Redevelopment services - research regarding RDA issues.

Public safety practices and procedures.

Public works - bid disputes.

Public works - drafting construction and similar contracts and conditions.

Public works - prevailing wage issues.

Public works - special conditions of approval.

Public works - right-of-way acquisition.

Public works - relocation issues.

Development services - CEQA issues and document review.

Development services - non-routine Subdivision Map Act issues.

Development services - zoning and land use issues.

Development services - review of General and Specific Plan amendments and documents.

Development services - review of special conditions of approval.

Ordinance and resolutions - drafting or compilation of non-routine ordinances and resolutions; review and analysis of non-routine ordinances and resolutions drafted by City staff or other jurisdictions.

Appearances before other public entities or governmental agencies on behalf of the City.

Review of Pending legislation

Review of JPA Agreements and Amendments

CDBG, Home Loan and other State and Federal Programs

Exhibit B

List of Special Services

Burke defines "special" services to include those legal services that require more than a general municipal practitioner to adequately perform. In short, they require a specialist in the discipline or area of law. Special services will include all services indicated as not included within the retainer on the "Cost Proposal Submittal Worksheet," including the following:

- Litigation & Appellate work
- Eminent Domain
- Complex Personnel work[1]
- Labor Negotiations
- Structuring and Documenting Complex Financial Transactions[2]
- Complex Redevelopment Matters[3]
- Affordable Housing Transactions
- Wage and Hour Determinations by the DIR
- Assessment District and Community Facilities District issues
- Complex Environmental Matters[4]
- Regulatory hearings and procedures[5]
- Water rights issues

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[1] We include initial consultations and the fielding of routine personnel questions under "general" services. Complex Personnel Work includes personnel investigations, grievances, arbitrations, retirement and medical benefit issues, drafting and implementing personnel rules and regulations, FLSA, FMLA, ADA & HIPAA issues, and Police Office and Fire Fighter Bill of Rights issues.

[2] We include the drafting and negotiation of standard purchase and sale agreements, options, leases, and licenses within "general" services.

[3] We include the drafting and negotiation of standard redevelopment transactions such as façade agreements, owner participation agreements, and basic disposition and development agreements within "general" services. "Special" Services would include redevelopment plan amendments or mergers, issues related to tax increment financing, pass through agreements, disputes with affected taxing entities, and transactions involving multiple funding sources or multiple parties.

[4] Complex Environmental Matters include MSHCP implementation issues, Endangered Species issues, environmental permitting and regulatory issues, Clean Water Act compliance issues, NPDES compliance, and representation in front of federal regulatory agencies.

[5] We are happy to include representation of the City in front of other public bodies and agencies for standard or routine appearances. If the City becomes involved in a regulatory, permitting, or dispute proceeding these would be special services.

- First Amendment Land Use issues[6]
- Complex Code Enforcement remedies[7]
- Franchising
- Telecommunications[8]

[6] These would include representation of the City regarding group homes, mobile homes, parolee and sex offender housing, adult businesses, massage establishments, signs and bill board and other land uses or businesses involving the First Amendment, ADA, FHA, and RIULPA.

[7] This category includes trial preparation, trial, appointment of receivers, levy and attachment of assets and other complex remedies.

[8] We include routine review of cell tower permit applications within "general" services. "Special" services would include negotiation with telecommunication and cable providers and compliance with state and federal telecommunications laws and regulations.

The Role of the City Attorney and Development of the City Attorney/City Manager Relationship

Friday, September 20, 2013; 8:00 – 8:45 a.m.

Jeff Kolin, City Manager, Beverly Hills
Jonathan P. Lowell, City Attorney, Pleasanton

League of California Cities

2013 Fall Conference

Sacramento, CA

City Attorneys' Department

September 20, 2013

Role of the City Attorney and Development of the City Attorney/City Manager Relationship – It's All Good, or Should Be

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Introduction

In practically all California cities it is the city council that appoints the city attorney. Good relations with one's employer are crucial. However, for many of us the most important professional relationship the city attorney has is not with city councilmembers, as they tend to come and go, but rather with the city manager. A positive working relationship with the city manager allows you to provide reasoned, sound legal advice, assist the city manager in implementing policy set by the city council, and effectively defend your city against lawsuits. A bad working relationship with your city manager, on the other hand, makes you not want to get out of bed in the morning, and your client's legal needs soon start to be neglected. So, what happens when you find yourself in a situation where you and the city manager truly don't see eye to eye? How does one cope, and still properly serve the interests of your client?

In this paper, and in our presentation, we will review a city attorney's legal and ethical obligations in serving his or her client. We will then discuss means of dealing with problem city attorney/city manager relationships. The input from a city manager in the preparation of this paper and presentation will aid city attorneys in better understanding those difficult working relationship situations they sometimes face and where their city managers may be coming from.

Everyone's situation is different. For those that find themselves in an awkward working relationship like those we describe here, we encourage you to consider the various suggestions we offer. Ultimately, you must serve the best interests of your client. Sometimes to do that, you must make some difficult decisions that may not appear to align with your best legal advice or own personal self-interest.

The Law

A quick review of the law is warranted. It is important that you understand the law regarding your and the city manager's authority and know what you are obligated to do, and what you may and may not do. It is helpful to be able to clearly explain to your client, be that through the city council or the city manager, why you might take a strong position on a matter that is contrary to the city manager's opinion or a city council's direction. None of what is reflected here is new – it comes from a variety of sources you are familiar with or have read before. Still, it is good to revisit it, especially when dealing with problem relationships between the two top appointed officials in your city. It is also very important that you consider the ethical principles that California municipal lawyers operate under as you deal with these types of issues. Several references regarding city attorney ethics are included in the bibliography at the end of this paper.

State law provides a city council may appoint a city attorney. Government Code §36505. (Note the use of the permissive. We are not essential (or we weren't in 1949 when this provision was last revised) and retaining us is not mandated by law.) A city attorney's duties include framing ordinances and regulations and providing other legal advice, and may include prosecuting misdemeanors with the

consent of the district attorney. Government Code §§41801-41805. The law vests wide latitude in city councils to define and control the duties of their city attorneys. This is consistent with the general principle that an attorney's duties are ordinarily defined and controlled by his or her client. [1]

Under the city manager form of government (Government Code §§34851-34859), the city manager has the power to administer the day-to-day affairs of the city, hire and fire city employees (except the city attorney), and perform such other functions as the council chooses to authorize by ordinance. The charters of most charter cities contain similar language. Thus, the city manager's duties are broad and far reaching, as they need to be able to carry out the important and many functions assigned to him or her. From time to time you should re-familiarize yourself with your city's charter or municipal code provisions governing the powers and duties of the city manager.

If you have a dispute with your city manager, you need to consider who your client really is. Rule 3-600 of the California Rules of Professional Conduct governs the ethical obligations of the city attorney. Sub part A of that rule provides: "[i]n representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."

This rule makes good sense as it obviates the need for the disqualification of the city attorney when council members are at odds with one another over an issue, or when the council and city manager have a dispute. Put another way, because the city attorney represents a *single* client entity – manifested in different officials at any given time – there can be no conflict of interest caused by the adverse interests of two or more city officials.

Rule 3-600 provides further:

> (B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)[2]. Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

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[1] *Montgomery v. Superior Court (1975) 46 CA3d 657, 670, 121 CR 44.*

[2] Business and Professions Code section 6068, subdivision (e) provides it is the duty of an attorney: (1) to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

When a city attorney learns that the conduct of a city official or employee is or may be a violation of law that may be "reasonably imputed to the organization" or is "likely to result in substantial injury to the organization," Rule 3-600 expressly authorizes the city attorney to take the matter to the "highest internal authority within the organization."

However, if the highest city officer or body refuses to act, or is also guilty of malfeasance, should the city attorney keep quiet and knowingly allow his or her client, the city, to suffer due to the purportedly illegal actions of its individual representatives? While rule 3-600(B) permits, but does not require, the city attorney to go up the chain of command, it prohibits the city attorney from disclosing any confidential information beyond the organization. Usually, the city attorney should conclude that the highest authority is the city council, and not a particular individual within city government. If that is the case, the city attorney may then address his or her concerns to the council itself. However, if the highest representative of city government chooses not to act and therefore allow the unlawful activity to proceed, and the city attorney is not required by statute to report the malfeasance to another agency, the attorney's only recourse under part C of Rule 3-600, if he or she feels something must be done about it (obviously, such a determination depends upon the nature of the wrong doing or potential substantial harm), is to resign his or her position.

What the above paragraphs and citations tell us is that we must provide the best legal advice we can for our client, the city. If there is a problem with the city manager such that it interferes with one's ability to do one's job, one may take it to the city council. But, if the city council doesn't take action to your satisfaction, there is no other forum to have your concerns heard. You can't reveal client confidences to others, and usually inherent in your difficulties with the city manager are client confidences. Ultimately, if there are issues of violations of the law or substantial injury to the organization, and you feel you must do something to separate yourself from such activity, you have to withdraw from representation. But, if the issues don't quite rise to the level of serious violations of law or substantial harm to the city, are there other ways of addressing this problem? Of course, there are!

The Practical

If you find yourself in an awkward working relationship with your city manager, there are various means of approaching the situation so as to improve that relationship. Here are some suggestions.

First, you know this already, but remind yourself again that you and the city manager have different roles. Almost all of us operate under the city manager form of government; it's not the city attorney form of government. The city manager is hired to get things done. He or she is trained to identify objectives, develop strategies to attain them, and then to accomplish them. To the city manager, outcomes are far more important than dogged adherence to every statutory requirement. City attorneys, on the other hand, are retained to keep the city out of trouble and point out negative consequences. City attorneys are trained to focus on how things are accomplished. We look for and warn of potential legal pitfalls. It is important that we aid the city manager by giving this advice in a timely manner and in plain English that the city manager understands. This is especially true when your advice threatens a city manager's important objective. Early warning of a legal obstacle allows the city manager to develop effective alternate means of obtaining an objective.

One purpose of this suggestion is to get you to see how your city manager views his or her role and relationship with you. Another is to get you to consider your own role in the relationship between you and the city manager: are you helping or hindering good relations? Attached, as appendices to this paper, are two lists: Best Practices for City Managers in Dealing with City Attorneys and Insights into City Managers. These lists expand further upon the points raised by this suggestion. Review these lists to better understand where your city manager might be coming from and how you might better work with him or her.

Second, if you work in-house and have other attorneys in your office, you can talk with them about the difficulties you are having with your city manager. Yes, they report to you and therefore are more likely to have a bias in favor of you, yet, most will try to assist you, and that may include sharing ideas on how best to effectively work with the city manager. They, too, work and interact with your city manager, and as a result may have some useful information to offer. Listen carefully to what they have to say, as they could be subtly telling you that you need to change your approach or attitude. And, if you are with a law firm, are there other partners whose practice is similar to yours that you can confer with? Have they worked with your city manager in the past? What insights might they offer you?

If you think it appropriate under the circumstances, talk with another trusted official within the city, usually a department head. Your focus should be on increasing communication effectiveness with your city manager. This person may be in a better place than your staff to suggest that you might want to handle the situation with the city manager differently. (Note that these suggestions have you communicating with others where your discussion with them does not run afoul of Business and Professions Code section 6068, subdivision (e), as they are all attorneys to your client or representatives of your client.) You may also feel comfortable in reaching out to a trusted mentor, previous co-worker,

law school classmate, or City Attorneys' Department Officer, but in these instances you must be careful not to reveal any client confidences.

And, there is another resource to turn to in this regard, i.e. discuss the matter with one or two city council members. But, this carries with it great risk of harm to your city manager and to your relationship with him or her, especially if you don't timely let him or her know you are talking with a council member or two about the issues between you and him or her. The better practice is to follow suggestion three below.

Third, talk with your city manager. Even if you don't get along with the city manager, it is in the best interests of your client that you communicate regularly with the city manager. A regular weekly meeting with the city manager is a way to address issues before they become problems. It also keeps both of you better informed. And, it helps the two of you find common ground between yourselves – there are many issues that you will approach in the same way and agree upon. This can result in building (or rebuilding) trust between you.

If you have a specific problem issue with the city manager, explain to him or her what the problem is (or problems are, but keep the list short). If necessary, you may have to declare that you must serve the city as your client, which may require that you have to go to the city council and recommend against a course of action the city manager wishes to pursue that in your opinion violates the law. Usually, this declaration from you is enough to get a city manager to modify his or her handling of a situation. Still, if your words don't sink in, then try it again a day or two later. Sometimes city managers, like lawyers, need a little time to fully process information, especially if it's bad news.

The discussion with the city manager may open your eyes to some things. His or her approach may stem from direction from a majority of the city council. If that's the case, you need to work with him or her to educate the council (including regarding the Brown Act, as there is a potential for a violation raised in the latter sentence). Realize that your city manager wants to remain employed. He or she may not cooperate, but most reasonable, thinking city managers will. You two need to work jointly in making the council understand the legal pitfalls its apparent direction to the city manager contains. You need to express this in a way that does not point a finger at the city manager; remember, he or she is just doing his or her job, and you need his or her cooperation in getting the council to come around. And, if it turns out your city manager has a repeated pattern of getting into this type of situation, you will realize it, and adjust your actions accordingly (e.g. ensuring you communicate frequently with council members about these volatile issues in person and or in writing, and letting the city manager know you are engaging in these communications).

Fourth, somewhere along the way, and the earlier the better, you must ask yourself: Am I off base here? What am I missing? What can I be doing differently? Often the city manager will have a broader perspective on the practical implications or consequences of the advice the city attorney has provided based on a specific context or set of factual assumptions. That perspective can be valuable for the city attorney in shaping the advice given.

Fifth, put it in writing. If the city manager refuses to follow your sound advice, let him or her know you will be communicating with the city council in writing about the matter. If you and the city manager still cannot agree, follow through and send your confidential, attorney client privileged memo to the council, with a copy to the city manager. Whether or not the council reacts is another thing, but you have properly advised your client about potential legal pitfalls, and it is now up to the city council to decide what to do. (This is sometimes referred to as a CYA memorandum.)

Sixth, consider whether you and city manager could benefit from a team building session. Would your city manager be willing to participate? Will your city council be amenable to it and to funding it? Might it be encompassed within an overall city council/city manager/city attorney team building session? (The latter would be subject to the Brown Act once a majority of the city council is involved. You would not be able to discuss specifics that reveal client confidences with an outside counselor/facilitator or in a public meeting. Still, relationships can be talked about generally, but any actual legal problem involving the city manager is something the city attorney and city manager would need to discuss privately outside of and after the open to the public team building session involving the city council.) This suggestion won't work in all organizational cultures, but in some it can make sense.

Seventh, evaluate how important the issue in dispute between you and the city manager really is. Does it involve an actual violation of law or likely result in substantial injury to the city, as contemplated under Rule 3-600(C)? If something less, is it worth losing sleep over, jeopardizing your health, making you and those around you miserable? Can you discharge your legal duties to your client without feeling so emotionally invested? If you can't reach agreement on an issue with the city manager, have you sent that CYA memo referred to in suggestion five above? The first time you do that, it will be hard; it will get easier with time. But, if there is no improvement in the situation with the city manager, especially if the city council doesn't follow your advice, think about whether you are OK with operating under such conditions. Sometimes one is: you've got a family to support, a mortgage and other financial obligations, and so the tradeoff of sticking with the job is worth it. Still, consider the hidden costs. If there is a constant undertone of stress between you and the city manager, it is ultimately going to affect your health (and probably your city manager's) and it impacts city operations since those who work with you and the city manager are likely feeling it, too. Clearly, these are personal, and fact and circumstance specific, determinations.

Eighth, cultivate good working relationships with others around you. So, you don't always get along with the city manager, but you do with most everyone else…then you have plenty of reason to come to work each day! Others need and rely upon you, and that's great.

Ninth, maintain your health. Exercise regularly. Get enough sleep. Don't rely on caffeine and alcohol, or any other substance, to get through the day or work week; your judgment is clouded if the latter are issues for you.

Tenth, repeat suggestion three, early and often. That is, communicate with your city manager!

The Extreme

If, despite your best efforts, your relationship with the city manager has become completely dysfunctional and you decide to leave, remember your ethical obligations as a lawyer practicing in California. Under Business and Professions Code section 6068, subdivision (e) you cannot reveal client confidences. This means that even if you believe your client is engaging in malfeasance, you cannot report such conduct to other authorities, the media or anyone else. California Rules of Professional Conduct, Rule 3-600. *See also*, 71 Ops. Cal. Atty. Gen 255 (1988) (Opinion 87-302) regarding whistleblowing, in which the Attorney General cited the rule of statutory reconciliation (of Business and Professions Code section 6080(e) and different whistleblowing statutes) and the lack of express intent by the Legislature to supersede the "strong and long established public policy" of client confidentiality.

You are a professional, you practice a profession, and you are bound by the Rules of Professional Conduct. When the tide turns against you, and you find yourself caught in it with seemingly no escape, recognize that you aren't going to drown. Follow the Rules of Professional Conduct, extricate yourself from that bad situation, and then let the tide carry you. It might deposit you somewhere much, much better.

Conclusion

The relationship between the city attorney and city manager is extremely important to the effective operations of a city. City attorneys and city managers are human – sometimes conflicts arise. Review the suggestions here and in the appendices and sources in the bibliography, along with those discussed in our presentation, should you want some guidance during a rocky patch with your city manager.

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Appendix A

Best Practices for City Managers in Dealing with City Attorneys

[This appendix is aimed at our city manager colleagues, but city attorneys need to keep these practices in mind.]

Meet with your city attorney on a regular basis.

Share information on current projects, priorities and issues.

Ask questions.

Listen to advice.

Discuss your concerns with your attorney. If you feel the advice is overly conservative, be prepared and provide examples or citations which support your concerns.

Ask your attorney to identify options or alternatives to help you achieve your objective.

Invite your attorney to participate in department head meetings.

Include your attorney in your retreats.

Include your attorney in the city council goal setting process or strategic planning.

Remember that the city attorney represents the interests of the city and works for the city council – a situation that is shared by the city manager.

Do not confuse legal advice with ethical advice. Both are critical for a City Manager to consider.

Appendix B

Insights into City Managers

[This appendix is written by city managers with city attorneys in mind. City attorneys are advised to frequently consider these insights.]

City managers are hired to get things done.

City managers don't like surprises.

City managers don't like unreasonable delays.

City managers understand priorities and deadlines (which they are expected to meet).

The city council agenda is the vehicle for formal action, policy decisions and legislative actions – city managers want to know about concerns and legal issues before the city council meetings and expect the city attorney to actively review the agenda and participate in the review of the agenda and items on it.

City managers appreciate confidentiality and the ability to have frank discussions. They understand when told a matter cannot be treated as confidential.