



City Attorney Escape Room: Packaging Legal Advice for Non-Attorney Clients

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City Attorney Escape Room: How to package legal advice for non-attorney clients

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Attorney Development and Succession Committee
Subcommittee on Essential Skills

INTRODUCTION

Through a simulation in three acts, the program follows a hypothetical land use issue from first discovery of the (urgent) problem, gathering facts and performing legal research, and packaging options and advice for a City Council in closed session. The simulation involves three characters: the City Attorney, a mid-level Senior Assistant City Attorney, and a junior-level Assistant City Attorney. With the understanding that mistakes are a learning opportunity, the characters make some mistakes. Periodically a commentator appears to highlight good practices.

This paper summarizes the simulation and identifies best practices implicated by the action. A summary of each act is followed by a list of associated practice tips. The paper offers suggested approaches on the steps covered in the simulation—starting with receipt of an assignment, issue identification, preserving and managing relationships, information gathering, delegation of work, generating of opinions and options, and giving advice to non-attorney clients. Footnotes list additional resources on these subjects.

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ACT 1

ASSIGNMENT INTAKE

SUMMARY

A contract City Attorney and her Senior Assistant City Attorney, a senior associate at their municipal law firm, meet in the City Attorney's office to discuss a pressing legal matter. The Senior Assistant reports that the City has just received a lawyer letter from a developer whose mixed-use project the City approved recently. The developer has pulled building permits for the project, and the City imposed a \$500,000 in-lieu fee for park and recreation infrastructure using the City's nexus study as the basis. The developer has argued that the nexus study is inapplicable to the project because the study was done before the previously unincorporated lands, where the project is sited, were annexed into the City. The developer has threatened to file a lawsuit raising various constitutional and statutory claims within a week, if the City does not rescind the in-lieu fees and refund the developer's payment, which it made under protest.

Together the City Attorney and Senior Assistant City Attorney immediately identify the main legal issue: whether the City's nexus study is still valid as applied to the project. They then identify various sub-issues, for example, in the event the nexus study is not valid, what corrective action can the City lawfully take besides simply rescinding/refunding the fees?

Next, the City Attorney and Senior Assistant City Attorney identify the administrative issues that led to their legal dilemma. The City Attorney's junior deputy, the Assistant City Attorney, who is a relatively new associate at the firm, had identified the potential problem with the nexus study prior to project approval and raised it with the Community Development Director. However, when the Community Development Director waived the Assistant City Attorney's question off, and accused the Assistant of questioning her expertise, the Assistant dropped the issue without telling his colleagues. The City Attorney and Senior Assistant agree that the Assistant made a tactical and professional error not to share his concerns about the nexus study with his colleagues in the City Attorney's Office.

However, the Senior Assistant recognizes that the Assistant might have been cowed by the community development director's defensive response and so refrained from pressing the issue further. The Senior Assistant offers to talk with the Assistant about what he could do differently the next time this situation arises. The City Attorney supports this approach and advises the Senior Assistant to tell the Assistant that the Assistant made an error, while also commending the Assistant's instinct to nurture positive relationships with City staff.

The City Attorney and Senior Assistant next discuss how they are going to gather the facts, research the law, package the City's legal options, and present this information to their client. The City Attorney and Senior Assistant agree that the City's basic options are to litigate over whether the nexus study applies to the project, or take a more conciliatory approach, including agreeing the nexus study does not apply and refunding the fees. Not wanting to leave any options off the table, the Senior Assistant identifies a third approach, redoing the nexus study and re-imposing the in-lieu fees on the approved project. Each of these options will require legal

research and analysis, which the City Attorney authorizes the Senior Assistant to delegate to the Assistant (under the Senior Assistant's supervision). Although the City Attorney and Senior Assistant are thorough in their preliminary analysis of the *legal* issues, they fail to discuss or establish parameters (e.g., time, page length, budget) around the Assistant's work. This becomes a problem when the Assistant returns a work product (in Act 3) that is too unwieldy to present to the client in its initial form.

The Senior Assistant again offers to work closely with the Assistant to ensure the Assistant gets the information he needs from staff, given the community development director's earlier refusal to cooperate with the Assistant.

The City Attorney and Senior Assistant then discuss how to gently inform the Community Development Director that her brusque attitude toward the Assistant was counterproductive, and that their respective departments need to foster a relationship of trust in order to best serve the City. Once again, the Senior Assistant offers to take the lead in talking with the Community Development Director. The City Attorney and Senior Assistant agree that casting blame in this situation will just impede their goal of effectively counseling City staff.

The meeting ends with the City Attorney telling the Senior Assistant that the City Attorney trusts her and is enjoying working on this issue with her. Although the City Attorney has delegated most of the work on this issue to the Senior Assistant and Assistant, in cases where the city staff-outside counsel relationship has been more deeply compromised or the legal and administrative problems are more severe, it may be necessary to start the communication higher up the chain, for instance at the City Attorney/City Manager level.

PRACTICE TIPS

- **Expect to deal with problems—a lot**

As the old bumper sticker says, “@#\$\$% happens.” The practice of municipal law is no stranger to this adage. The reality is that much of our practice is spent “putting out fires.” Whether those are caused by our own acts or omissions, or by those of others within the organizations we serve, we should expect that a good portion of the time we spend will be *reactive*—focused on responding to problems—rather focused on implementing the goals and objectives we set.

- **Accept that you will make mistakes**

The practice of municipal law is fast-paced, requires learning numerous areas of law, and exposes practitioners to a wide range of personality types within and outside their organizations. Rarely will there be enough time or resources to devote to the myriad of issues you may be asked to deal with at any one time. In this environment, accept that you will make mistakes.

Think of professional sports. The best athletes in the world are not consistently perfect. Even in games their teams win, they throw interceptions, make fielding errors, commit turnovers,

or give up goals. In a dynamic and competitive environment—and that describes our profession as much as it does professional sports—it is not realistic to expect that any one person can be consistently perfect all of the time.

- **Early and regular communication is critical**

Because we learn from experience, young attorneys should strive to communicate about any conversations with staff and other matters that *could* have legal consequences. In this case, the Assistant City Attorney’s conversation with the department head is something that should have immediately been communicated to the City Attorney and Senior Assistant City Attorney. Critical time was lost between when that conversation occurred and when the higher-ups within the office were made aware of it. It’s possible the harm from the department head’s action could have been avoided or minimized had the more experienced attorneys been able to intervene sooner. Younger attorneys should recognize that there are a lot of practical lessons to be learned in a law office serving municipal clients. Until they’ve had time to gain the experience that comes with years of practice, they should err on the side of “oversharing” with their superiors.

- **Encourage a culture in which attorneys are not afraid to immediately report mistakes**

Because mistakes will be made within organizations—particularly in governmental agencies—subordinates should be encouraged to immediately report errors and omissions, including their own. One way to do this is for senior attorneys to make problem solving the focus (see note below). In this simulation, the Senior Assistant City Attorney reported both the community development director’s error (not updating the nexus study) and the Assistant City Attorney’s omission (not reporting his discussion with the director). The Senior Assistant did this even though she may have committed an omission of her own in not properly supervising the Assistant. The result is that the City Attorney and Senior Assistant were able to begin planning their response to the problem before options might be lost due to the passage of time.

- **Make problem solving the focus**

When problems arise, the focus should be on solving the problems, rather than assigning blame. In this simulation, after they become aware of the problem, both the City Attorney and Senior Assistant immediately began assessing the issues and scoping out potential responses rather than figuring out whom to try to hold responsible. Working together, the City Attorney and Senior Assistant will be able to much more quickly and effectively resolve the problem than if they are divided.¹

¹ See generally, Institute for Local Government, *Working Together to Achieve One’s Goals: Some Strategies for Success* (May 2012). Available at: https://www.ca-ilg.org/sites/main/files/file-attachments/working_together_may_2012_ht_updated.pdf?1446510619 (last accessed April 12, 2021).

- **Learn from mistakes**

There are lessons for all attorneys in this example. As noted above, the Assistant City Attorney should recognize he does not yet have the practical experience that is essential for success practicing in a law office serving a municipal client. The Senior Assistant City Attorney should recognize she was not spending sufficient time communicating with a junior attorney who, due to his very short time in practice, required greater supervision. The City Attorney should identify not only a breakdown in communication in her office, but between her office and another office within her organization (the Community Development Department).

- **But also recognize that mistakes have consequences**

The immediate focus for both the City Attorney and Assistant City Attorney is to deal with the problem at hand—the developer’s threatened lawsuit. But both must identify and implement longer-term strategies for responding to the deeper communication problems that led to this specific incident. The mistake here will have not only short-term, but long-term consequences.

How the potential lawsuit with the developer plays out may adversely affect the relationship of the City Attorney’s Office and the head of an important city department. Here, an *intra*-office communication breakdown may lead to an unfortunate—but not uncommon—*inter*departmental dispute that could adversely affect relationships within the overall city organization. The City Attorney may have now been put in a potentially adversarial position with a key city staff member. And others within the organization—the city manager, mayor, or councilmembers—may fault her for not earlier recognizing and dealing with the liability exposure the city may now have.

As the old saying goes, an ounce of prevention is worth a pound of cure. Here, an ineffective chain-of-communication within the City Attorney Office may lead to consequences that extend well beyond the immediate problem.²

² See, e.g., Valerie J. Armento, et al., *Counsel and Council: A Guide for Building a Productive Employment Relationship*, at p. 23 (League of California Cities, 2004). Available at: https://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys-Department/Publications/Counsel-and-Council_-A-Guide-for-Building-a-Produc.aspx (last accessed April 12, 2021).

ACT 2

WORKING THE ISSUE

SUMMARY

The Senior Assistant City Attorney and Assistant City Attorney discuss the interaction that the Assistant City Attorney had with the Community Development Director. The Assistant admits that he was caught off guard by both the substantive legal question presented to him, and by the Community Development Director's demeanor when presented with legal advice contrary to the desired outcome. The Assistant admits that his unpleasant interaction led him to believe he had done something wrong, and he therefore did not communicate the interaction to the City Attorney team. The Senior Assistant is understanding that the interaction was uncomfortable for the Assistant, and conveys that the Assistant's experience is a fairly common conundrum in which new lawyers may find themselves. The Senior Assistant makes clear that the Community Development Director should not have treated the Assistant the way she did.

The Senior Assistant also tells the Assistant that, in the future, whenever he has a contentious conversation with the client—especially when there is potential for legal exposure involved, he should let the Senior Assistant and the City Attorney know. That way, the City Attorney team has the opportunity to problem-solve, and raise the issue with higher level city management if necessary.

With respect to the relatively common occurrence of municipal lawyers being asked unexpected legal questions, the Senior Assistant offers tips to the Assistant on how to buy time, including by signaling that that the issue requires City Attorney review. The Senior Assistant also notes that taking additional time to review an issue has the added benefit of allowing the Assistant to determine whether another attorney has worked on a related piece of the project or has addressed a similar issue. The Senior Assistant also enlightens the Assistant about the practice of staff to sometimes reach out to another attorney in the same office that they think will give them a particular answer. This is called “attorney shopping.”

After addressing dynamics with city staff, the Senior Assistant and the Assistant then discuss the legal research that needs to be completed. They start by identifying the scope of the research, and then divide up research tasks.

In preparing for their research, they discuss how important it is to gather all of the relevant documents from city staff, including the nexus study, project files, and meeting minutes, and to review them independently rather than simply rely on what staff presents as pertinent facts and circumstances. Staff can sometimes misremember or misinterpret things, and accordingly, it is up to the attorney to verify important information.

Later in the Act, they discuss how best to present the results of the research. They agree that the Assistant should write a memo and send it to the Senior Assistant and the City Attorney so that they can discuss it internally and come up with a game plan.

The Senior Assistant and the Assistant then discuss on how to make sure that they both have a good rapport and working relationship with the Community Development Director moving forward. The Senior Assistant says that she will reach out to the Community Development Director to talk about how they can prevent this from happening in the future. The Assistant however is concerned that if only the Senior Assistant reaches out to the Community Development Director, the Assistant's own working relationship with staff would remain damaged. And if left unaddressed, the Community Development Department staff would likely only reach out to the Senior Assistant for legal needs, and the Assistant would be left in a weak position to help on projects.

Recognizing that the Assistant's point has merit, the Senior Assistant suggests that the Assistant call the Community Development Director to let her know that the Assistant is working on options. The Senior Assistant gives examples of what the Assistant may want to say in order to ease tensions and not blame the Community Development Director for the bind that the City is in.

Finally, the Senior Assistant and the Assistant talk about how best to make sure that the City Manager is not taken by surprise by the situation the City is in. They also discuss the options available. This is important because the issue will likely come up before the City Council.

PRACTICE TIPS

- **Check in early and often with your team**

When an issue arises, it is important to check in early with your supervisor or team. Your supervisor or another member of your team may already know the answer, or they may have already been asked the question. "Attorney shopping" does occur, so it is important to have good communication within your office. Additionally, if an unpleasant interaction with staff occurs, it is best to apprise your team of that fact, because it may be indicative of a deeper issue that the City Attorney needs to resolve.

In order to facilitate communication with newer lawyers and enhance their learning, supervisors might consider establishing regular meetings, or "check-ins," where junior attorneys have the opportunity to raise issues with the supervisor.

- **Make sure there is clear direction on the work product**

This includes direction on timing and what form the final advice will take. Will it be given in writing or orally? Does your supervisor expect a brief email or a lengthier memo? Also, will it be followed-up or presented at a meeting with staff?

- **Work with city staff to set realistic deadlines and communicate early if the deadlines can't be met**

It is important to check in early with city staff to let them know what you will be working on and when they can expect the advice. If the deadlines can't be met it is always good to let staff know as early as possible. Checking in early with staff also allows the staff person to inform their supervisors so they are not surprised.

- **Double-check the facts**

Double-check the information you receive from staff. City staff may not have historical knowledge of an issue or may view the facts in a different light than you do as an attorney. Therefore, independently review the relevant documents, ordinances, resolutions, and meeting minutes.

- **Conduct thorough legal research**

When you are conducting your legal research make sure to make use of the helpful resources of Cal Cities. This includes the Municipal Law Handbook and on-line resources such as the City Attorneys Forum, Cal Cities subject-specific publications (e.g., Open and Public, and The People's Business), and Cal Cities conference papers. It is also helpful to reach out with a phone call or email to other municipal law attorneys that may be dealing with, or have dealt with, a similar issue.

- **Focus on solutions and options**

As has been noted by one City Attorney:

One frustration the public seems to have with attorneys in general is the perception that attorneys focus on why something cannot be done. This can be especially frustrating to elected officials and City department heads, whose jobs are to get things done. The successful City Attorney will determine what the problem or objective is and provide advice on how the problem can be lawfully addressed or how to lawfully achieve the objective.

The City Attorney is the chief legal counsel for the City. Keep in mind the kind of communication the word "counsel" suggests when providing legal advice.³

³ Mark C. Allen Jr., *Knowing the Law is Not Always Enough*, p. II-2 (League of California Cities, *The City Attorney's Deskbook* 1994 ed.).

- **Know when it is appropriate to include the department head**

Consider if, when, and how the issue should be communicated to the appropriate department head. This is sometimes tricky if the issue was the result of a misstep by a staff member:

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.⁴

- **Know when it is appropriate to include the City Manager**

City Managers do not like surprises. So, as with department heads, consider if, when and how the issue should be communicated to the City Manager. Bringing up an unpleasant legal issue with the City Manager early on also helps when the issue is later presented to the City Council:

Taking the City Manager aside at the earliest moment to point out the problem and devise a solution, can almost always result in ensuring that the City Manager does not feel undermined before the council. Even where the City Manager may have to bring the matter to the council, when he [or she] is the one who does so it sets up a different dynamic; the City Attorney and the City Manager appear to be cooperating in the best interests of the City rather appearing to be at odds.⁵

⁴ Sonia R. Carvalho, John Guinn, and Marsha Jones Moutrie, *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*, p. 14 (League of California Cities, Spring Conference Paper, May 2012).

⁵ Manuela Albuquerque, *The City Attorney - Monitor, Mentor or Meddler?*, p. 7 (League of California Cities, Annual Conference Paper, October 1999).

ACT 3

PRESENTING OPTIONS TO THE CLIENT

SUMMARY

The Assistant City Attorney has researched and drafted a 20 page memo that he proudly hands over to the City Attorney. The Senior Assistant City Attorney expresses appreciation to the Assistant for putting in the effort. The City Attorney, however, adds that there is still work to be done. The memo will have to be significantly shortened and refined to be fit for its intended use by the City Attorney and the Council at the closed session. The City Attorney shares some ideas on how to compress a 20-page memo with 7 options into a 3-page outline with the top 3 issues presented clearly and succinctly. If the law does not compel a single approach, the attorney should anticipate what approaches would conform to the Council's policy goals and are consistent with adopted legislation and Council decisions.

The Assistant shares that he spent about 40 hours researching and writing the memo. The City Attorney points out that at a billing rate of \$200 per hour, this is an \$8,000 memo. The City Attorney explains that she cannot justify charging this much to the client for that work and that the firm will write down a portion of this time as "training." The City Attorney acknowledges the effort the Assistant put into the work and the experience the Assistant has earned in the process.

The Assistant's memo identified 7 different alternatives to be considered by the Council. The City Attorney explains that that is too many to present to the City Council, and not only because time is short. Providing too many options may suggest to the Council that the City Attorney does not know the law and does not understand the Council's policy goals. Presenting a shorter set of options will likely help focus the Council's discussion at closed session and build confidence in the City Attorney's office. The City Attorney emphasizes that the selection of a few options to present to the Council should be informed by the City Attorney's understanding of the Council's policy goals. Knowing the law is not enough. Councilmembers want to know if there is a legal path to accomplish their policy goals.

The City Attorney then shares with the Senior Assistant and Assistant that the City Manager does not want to return the in-lieu fee payment, as it is earmarked for much-needed park improvements. Given the City Manager's position, the City Attorney states that she will take care to ensure that the legal team's conclusion—that the payment must be refunded to the developer until a nexus study is completed—is 100% supported by the law. If the City Attorney confirms that, then the Council should be told that refusing to refund the payment in the meantime will draw a lawsuit the City is likely to lose. The Council should be presented with alternatives that are legally supportable. The City Attorney explains that she will talk to the City Manager before the closed session and that both the City Attorney and City Manager will have the opportunity to present their views to the City Council.

The City Attorney observes that it is the threat of litigation that makes it possible under the Brown Act for the Council to discuss the matter in closed session. She acknowledges that the Office of the City Attorney may get blamed for the City having to give back half a million dollars in revenue.

PRACTICE TIPS

- **Clear direction and clarification are key no matter what your role in the office**

If you are a newer member of the team you wish to be seen as ready to take on any assignment, no matter how complex, and able to see it through. But if you have questions about an assignment, trust your instincts and seek input. Attorneys who are more senior may wish to let junior attorneys own a project, but too little direction can result in unnecessary or wasted effort for all concerned.

- **Achieving professional growth (and fostering it) doesn't happen in a vacuum**

Asking questions or seeking input does not convey a lack of skill or confidence. Rather, it is a means for all those involved in a project to maintain a desired focus of effort and reach goals without wasted steps. Project objectives and professional growth for all will best be achieved with clear direction and as-needed adjustments for work being performed.

- **Be mindful of how the work product will be utilized**

Whether you are an attorney who is new to the field, or are transitioning into an advisory position, you may wish to show that you can spot all the issues and find all of the relevant law, so your work reflects mastery of the subject matter. The more senior reviewers can assist by being clear about the scope and focus of the work. If a project needs a certain type of treatment due to timing or other constraints, the newer members should be provided with that information, as well as samples of the type of work product desired, if available.

- **Clients generally don't want (or need) to know absolutely all of the applicable law**

Depending on the circumstances, what would demonstrate admirable dedication and enthusiasm for a scholarly article, a training session, or a background memorandum may not work for hectic pre-meeting preparation on a specific potential litigation matter. Be mindful that in addition to intellectual overload, clients may also view the work with the dollar signs attached. How much of it will be needed for the task at hand?

- **Relations with city staff are important to effective client representation**

In the practice of municipal law, relationships with city staff are critical. They affect how staff absorb legal advice and recommendations, and may also affect how and whether they are implemented. For those interacting with the Council, how you address policy objectives that may differ from the recommendations of the City Attorney's Office can affect your working relationship, and how future recommendations are viewed. There will be times when your advice differs from decision maker objectives, but it is how you handle it that counts. Successful city operations ultimately require decisionmakers and staff all working together, in the near term and the long term. Consider proactively nurturing relationships over lunches and coffee and count it as client development and team building.

- **Provide information, recommendations, and consequences in an accessible format**

As attorneys, we get wrapped up in legalese, Latin terminology, and/or long explanations that begin with words such as "accordingly," or "thus." If you view it from the perspective of the client, that may make the material less accessible. To ensure a good working relationship, provide the necessary information in a format that is logical, understandable, and direct, and that clearly provides direction or requests the direction that the City Attorney needs.

- **Understand that providing every single available alternative can be "too much information," aka "TMI"**

Particularly in a closed session context, even if a memorandum has been provided in advance, councilmembers often will not have time to completely digest and absorb all of the information contained in it. They often seek to have recommendations made up front, both in the written materials and in the meeting, so they can efficiently delve into the matter. If you have too much information to provide, particularly on infeasible or unlikely alternatives, by the time you share it all you may have affected their ability to focus. If you are direct, specific, and focused in your presentation, the client will likely have more confidence in your recommendation.

- **Sometimes you don't have good news**

In a perfect world, you would have the time to fully evaluate all potential issues before problems occur and provide legal advice that is welcomed and implemented to avoid undesirable results. In our practicing City Attorney world, sometimes client objectives cannot be achieved, money has to be returned, errors have been made, or there is exposure to attorneys' fees or other penalties. How you handle giving bad news is important. Approaching the issue as described in all of these practice tips will help you and the client get through tough experiences.

Experienced City Attorneys know that how they advise the client, and how effectively they build rapport within the City Attorney's Office and throughout the City organization are

every bit as essential to success in their role as proficiency in municipal substantive and procedural law. It is never too early to assist junior member of the City Attorney's Office in developing the essential relational and teamwork skills that, in addition to substantive legal knowledge, will help them, the City Attorney's Office, and the entire City government succeed.