

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

League of California Cities
City Attorneys' Department Spring Conference
Santa Barbara, CA
May 5, 2010

Presented by

Amy Albano
2010 President, City Attorneys' Department
City Attorney, Thousand Oaks

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 has 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. It may be helpful to have copies of **Robert's Rules** and any locally adopted Council procedures policy on 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. Others warn the elected officials that the Council as a whole can compel the attorney to share the conversation and, with that warning, to provide as much confidentiality as the rules of ethics permit. Another common practice is to copy written conflicts advice to the City Manager – and tell Councilmembers in advance that this will happen. 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, the line is easier to maintain with Councilmembers with whom you 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. A best practice tip is to reduce to writing advice on important or controversial issues, copied to the entire Council. You will likely note that the City Manager often does the same – written advice to the whole Council 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.

Another good practice is to meet with newly elected Councilmembers and newly appointed Commissioners to provide an orientation. You can review issues about the City

Attorney's role and 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. Invite their questions about these subjects and generally try to begin the process of developing a trusting relationship in which you 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-respected, 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 than 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, nearly every City Manager will tell you, 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 are about a particular project. Contract City Attorneys, who are not in a client's City Hall on a daily basis, should 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 misled 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 is 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. Try to discourage your Council from placing you in that role and encourage them to police their employee directly. However, at bottom, we face an ethical obligation to report conduct that 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.

City Attorneys generally 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 you expect to provide the Council. This allows the two of you to develop a consistent approach to the City's goals so that public friction between the Manager and you is minimized. Whenever it is necessary to give advice at variance to an objective of the City Manager's, do your utmost to make sure he or she is the first to hear that advice. Often, you will find that you never have to give the advice to anyone else, as the Manager and you 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. Generally try to stay in frequent communications with the department heads who regularly rely on your advice, either by walking the halls during office hours or catching up with them before the meetings of the Commissions and Boards that you 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. One practice that works is to routinely copy all written legal advice – even emails – to the City Manager. Thus, when you need the Manager to know that you have told a department head the risk of doing something you deem unwise, you can keep the Manager “in the loop” without being obvious.

Other Staff. There is not much to add here that has not been said above with respect to other members of the City organization. But 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. Some City Attorneys have made it a practice to be available before and after Council and Commission meetings and during office hours. In addition, 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 claims 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.

Role of the City Attorney:
Relationships with Other Municipal Actors
May 5, 2010
Page 9

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!