

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
COLORADO SPRINGS CONCERNING THE RETENTION OF
OUTSIDE LEGAL COUNSEL

WHEREAS, pursuant to section 13-80 of the City Charter of the City of Colorado Springs, the City Attorney has certain defined duties, including the duty to act as legal advisor to the Mayor, Council, and the Heads of Departments; and

The foregoing recital omits an important part of City Charter § 13-80 which clarifies that the City Attorney is the legal advisor to the various constituent representatives of the City only “in relation to their duties.” This omission is relevant because, absent accurate recital of the Charter, the proposed Resolution language implies the City Attorney has an individual attorney-client relationship with the Mayor, City Council, Commissions, and Heads of Departments. Legal authority is clear that the City Attorney generally only has one client, the City entity as a whole, and does not have attorney-client relationships with individual constituent representatives of the City. The legal authority supporting this conclusion was set forth in footnote 32 of the Office of the City Attorney Legal Ethics Guidelines and Richard Westfall’s June 20, 2014, memorandum, both of which were provided to City Council on June 20, 2014.

City Charter § 13-80 states in pertinent part:

“The City Attorney shall conduct all cases in court in this State wherein the City shall be party plaintiff or defendant, or a party in interest. The City Attorney shall be the legal adviser of the Mayor, Council, Commissions, and Heads of Departments in relation to their duties, and shall perform such other duties, not inconsistent herewith, as may be required of the City Attorney by ordinance” (emphasis added).

WHEREAS, pursuant to section 13-90(b) of the City Charter of the City of Colorado Springs, City Council may employ other counsel to take charge of litigation or to assist the City Attorney; and

WHEREAS, pursuant to section 1.2.402 of the City Code, the City Attorney must comply with the Colorado Rules of Professional Conduct, including abiding by a clients’ decisions concerning the objectives of representation, consulting with the client as to the means by which these objectives are to be pursued, and avoiding representation in the case of a conflict of interest, the latter to include where there exists a significant risk that the representation of one client

within the City will be materially limited by the City Attorney's responsibility to another client within the City; and

This recital erroneously assumes the City Attorney has individual attorney-client relationships with each constituent representative of the City. The recital includes language from Rules 1.2 and 1.7 of the Colorado Rules of Professional Conduct ("Rules of Professional Conduct" or "Colo. RPC"). However, Rule 1.2 and 1.7 cannot be considered in isolation. Rather, they must be read in conjunction with the other Rules including Colo. RPC 1.13, which defines a lawyer's responsibilities when an organization is the lawyer's client. Colo. RPC 1.13(a) states that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The Rules of Professional Conduct also recognize the unique authority of government attorneys to render legal advice to various constituent representatives without creating a conflict of interest. Colo. RPC Scope, cmt. 18, states that government attorneys "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients" and the "Rules do not abrogate any such authority."

Furthermore, legal authority interpreting conflicts of interest in the context of government lawyers clarifies that, outside the context of litigation between two or more constituent representatives, there is no conflict of interest in providing legal advice to multiple constituent representatives of a government entity. "Since the constituent sub-entities and officials of a city are normally not separate clients of the city attorney, a city attorney's provision of legal advice on the same matter to constituent sub-entities and officials will not necessarily give rise to a conflict of interest even if the constituent sub-entities and officials take contrary positions on the matter." CA Eth. Op. No. 2001-156, 2001 WL 34029610 (Cal. State Bar Comm. Prof. Resp.) (Emphasis added).

The recital also states that the City Attorney must abide "by a client's decisions concerning the objectives of representation." This statement is generally true in the context of litigation. Although the City Attorney is required to render legal advice or opinions on requested matters, he or she is not required to "abide by" a constituent representative's wishes regarding the substance of or the conclusion reached in the Office's legal opinion. To the contrary, as a legal advisor, the City Attorney is required by the Rules of Professional Conduct to "exercise independent professional judgment and render candid advice" and "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." Colo. RPC 2.1 & 2.1 cm.t 1. Colo. RPC Preamble, cmt. 2, further defines the various roles of a lawyer:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In sum, this recital is inconsistent with the law because a conflict of interest does not arise when the City Attorney provides candid legal advice to the various constituent representatives of the City.

WHEREAS, the City Council of the City of Colorado Springs desires to employ other outside counsel to assist the City Attorney with certain legal matters associated with the Council implementing an amendment to the budget and an ordinance amending the annual appropriation ordinance, including issues related to the legislative authority of the City Council concerning the budget process.

City Charter § 13-90(b) states "(t)he Council may also, at any time, employ other counsel, to take charge of any litigation or to assist the Attorney, whose compensation shall be fixed by the Council at the time of employment." (Emphasis added.) The online version of the Merriam-Webster dictionary defines "assist" as "to give support or aid." Based on the Charter language, it is clear the City Attorney has the ultimate authority to determine the need for assistance, define the scope of assistance, and decide if the assistance or work product is helpful in forming a final legal opinion of the Office. For example, pursuant to Colo. RPC 1.1., the City Attorney will engage outside counsel if the attorneys in the Office do not possess the legal knowledge or expertise to competently represent the City on a particular legal matter. Any research, advice, or opinion provided by other counsel becomes the work product of the City Attorney and such other counsel employed pursuant to Charter § 13-90(b) only has authority to render legal opinions to the City Attorney.

The City Attorney has the ultimate duty under the Charter to render final legal advice or opinions to the various constituent representatives of the City. City Charter § 13-80. Therefore, the City Attorney has authority to determine whether or not to incorporate the work product of other counsel, as well as other attorneys in the Office, into the final legal opinion of the Office. Release of "draft" opinions or "other counsel" opinions would have a chilling effect on the open and collaborative sharing of ideas and legal theories needed to generate well-reasoned and legally accurate work product on a particular matter.

In sum, the plain language of the Charter states that other counsel can only be hired to assist (which means support or aid) the City Attorney, not to provide an independent legal opinion to a constituent representative of the City. Any City funds expended in contradiction to the Charter are unauthorized.

NOW THEREFORE, BE IT HEREBY RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

Section 1. The City Council is authorized to employ an outside attorney for purposes of "assisting the City Attorney" in the preparation of legal opinions upon those matters identified by City Council and relating to the authority of the City Council to act in a legislative role with respect to the *sua sponte* introduction and consideration of an ordinance to amend the budget and amend the annual appropriation ordinance during a current fiscal year, or such related legal questions as they may determine appropriate.

See above responses. The City Attorney's Office possesses the competency and expertise required by Colo. RPC 1.1, and the comments to the Rule, to draft, issue, and discuss the legal opinion at issue. No assistance was or is necessary. Had assistance been necessary, the City Attorney's Office would have had an ethical obligation to retain counsel to assist with the legal opinion.

Section 2. The attorney retained shall perform such work on behalf of City Council and shall coordinate such work with the City Attorney in accordance with the City Charter, unless there shall arise a situation in the performance of the assigned legal tasks which necessitates that such outside counsel act independent of the office of the City Attorney in order to ensure continued compliance by the City Attorney with the Colorado Code of Professional Conduct.

See above responses. Outside the context of litigation, the phrase "unless there shall arise a situation in the performance of the assigned legal tasks which necessitates that such outside counsel act independent of the office of the City Attorney in order to ensure continued compliance by the City Attorney with the Colorado Code of Professional Conduct" is an illegal delegation of the City Attorney's Charter authority and duty to "be the legal adviser of the Mayor, Council, Commissions, and Heads of Departments in relation to their duties." City Charter § 13-80.

Section 3. The reasonable attorney's fees charged by such outside counsel shall be paid out of the Colorado Springs City Auditor budget, in an amount not to exceed \$25,000.

The City Auditor's budget is intended to support the functions and duties of the City Auditor as set forth in City Code §§ 1.2.701 through 1.2.711. Council's use of the City Auditor's funds to hire other counsel to render a legal opinion unrelated to the City Auditor's duties and functions is an inappropriate use of the City Auditor's funds.

Section 4. Copies of all draft and final legal opinions rendered by such outside counsel at the request of the City Council shall be timely provided to the City Attorney and shall be kept confidential to the extent appropriate under the attorney/client privilege.

See above responses.

Section 5. Colorado Springs City Attorney is hereby directed to retain outside counsel on behalf of the City Council in accordance with such practices and procedures established within the City for the contracting of such services.

Because the City Attorney's Office possesses expertise in the subject matter, meets the competency requirement of Colo. RPC 1.1, and has researched, drafted, issued, and discussed publicly the legal opinion at issue, no assistance from other counsel is ethically necessary or fiscally prudent.

DATED at Colorado Springs, Colorado, this _____ day of _____, 2014.

Keith King, Council President

ATTEST

Sarah B. Johnson, City Clerk