

ANNUAL SEMINAR ON MUNICIPAL LAW

When Things Go South

Navigating Client Conflict as a Municipal Attorney

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Legal Role Can Invite Controversy

- Advise on the most controversial, sensitive topics
- Represent the City's interests, not a political position or any elected official
- Public blame by citizens, officials ...
 even for correct legal advice
- Often prohibited from responding

In wake of controversial election, Fort Lauderdale commissioners vote to fire city attorney

Odessa City Council votes 5-2 to fire top officials for a second time

Atlantic Beach city attorney is rehired -- for now

Apopka city attorney announces resignation during meeting

Controversial Eureka City Attorney Resigns, Effective Immediately

Alice City Council fires City Attorney, City Manager in heated meeting

North Miami Beach city attorney resigns ahead of seemingly certain termination

Hewitt: Council cements firing of longtime city attorney, hires new one



Rule 1.13. Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best 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.

Rule 1.13. Organization as Client Continued

- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

Rule 1.13. Organization as Client Continued

- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal...
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Organization as Client

 Deceptively simple: just do what a majority of City Council says, right?

· NO

- Must use own discretion to determine best interest of the organization and proceed "as is reasonably necessary" to protect that interest
- Exception to Rule 1.6: CAN disclose confidential information

Organization as Client, Comment

Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. ... Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. ...

ABA Model Rule 1.13, Comment 9

Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

...

- (2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;
- (3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

Rule 1.6. Confidentiality of Information Continued

- (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;...

Rule 1.6. Confidentiality of Information Continued

- This means ALL client information is confidential—even information in public legal proceedings or disclosed in open meetings, open records.
- To the extent presenters may disclose confidential information otherwise protected under Rule 1.6, presenters obtained client authority for the disclosure.
 No really, we did.

Rule 1.3.
Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication

(a) A lawyer shall:

• • •

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;

...

- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.16. Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer ... shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.

Rule 1.16. Declining or Terminating Representation Continued

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - ...(7) other good cause for withdrawal exists.

Rule 4.1. Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct ...

But even when you follow the rules ...



Disclaimers

The following are all hypothetical scenarios, and any similarity to real events is merely a coincidence.

When faced with an ethics conundrum, carefully review the rules, do your own research, and seek legal advice.

Attorney discovers criminal violations



City Attorney discovers (1) a City employee awarded a public contract to their own company in violation of law, and (2) the majority of City Council knew it when awarded (but presumably did not realize it violated applicable law). Attorney notifies City Council this violated the law and recommends it be self-reported to an outside agency. The majority of City Council directs Attorney to "kill it". Attorney is conflicted: the law was violated, City Council knew, self-reporting minimizes potential political backlash and possibility of prosecution/penalties, and this suggests City Council may be trying to cover it up. Is the City Attorney required to report it?

Is the City Attorney required to report it?

No. Or maybe.

Nothing requires the City Attorney to report knowledge of a past potential legal violation UNLESS attorney concludes this is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, THEN the lawyer **shall** proceed **as is reasonably necessary** in the best interest of the organization. Rule 1.13(b).

May the City Attorney report it, despite this **City Council** majority direction?

Yes, if City Attorney determines City Council's actions are a violation of law (conspiracy? Accessory to public contracting violation?) and City Attorney "reasonably believes" it will result in substantial injury to the City, City Attorney clearly may report and disclose confidential information "necessary to prevent substantial injury to the organization." Rule 1.13(c). As a government lawyer, the balance favors disclosure of confidential information to assure

"the wrongful act is prevented or rectified, for public business is involved." ABA Model Rule 1.13, Comment 9.

But could it result in the attorney being fired by the majority of **City Council?**

Yes. But this is outside the scope of this presentation. See an employment lawyer.

Conflict Among Council Members



After a contentious political year, a Council Member initiates a recall against another Council Member, and they both inundate the City Attorney's office with legal questions on both sides of the issue: What is required for a successful recall petition? What can they legally say during Council Meetings and in their magazine columns about the recall or about each other? What is required for campaign finance law compliance? Whether one or the other committed FCPA violations?

Aultiple Analyses Required

- Who is the Client
- Scope of representation: City
 Council vs personal legal issues
- How does CA adequately advise the client, when client constituents conflicting
- When to get outside counsel

Legal analysis, ecommendation lisregarded



City Council prays publicly during meetings. City Attorney advises that while public prayer can be legal, City's current practice likely is not. At Council request, City Attorney gives a public presentation on the current law on public prayer [ROOKIE MISTAKE]. In response, the widespread local religious community unites and vigorously advocates against change, and questions the City Attorney's morals. City Council decides to maintain status quo despite potential liability. Does City Attorney have an ethical obligation to ensure strict compliance with case law holdings on public prayer?

Does City Attorney have an ethical obligation to ensure strict compliance with case law holdings on public prayer?

Nope. "When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." ABA Model Rule 1.13, Comment 3.

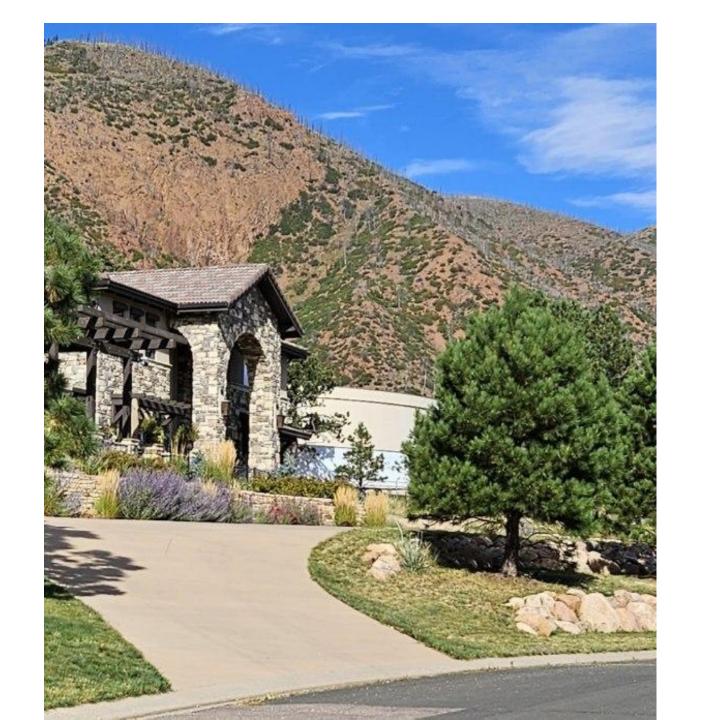
Attorney should follow Rule 1.3, Diligence. Make sure City Council knows potential liability. Consider repeating the analysis and advice upon new Council taking office, so each Council can make the same informed decision that subjects the City to potential liability.

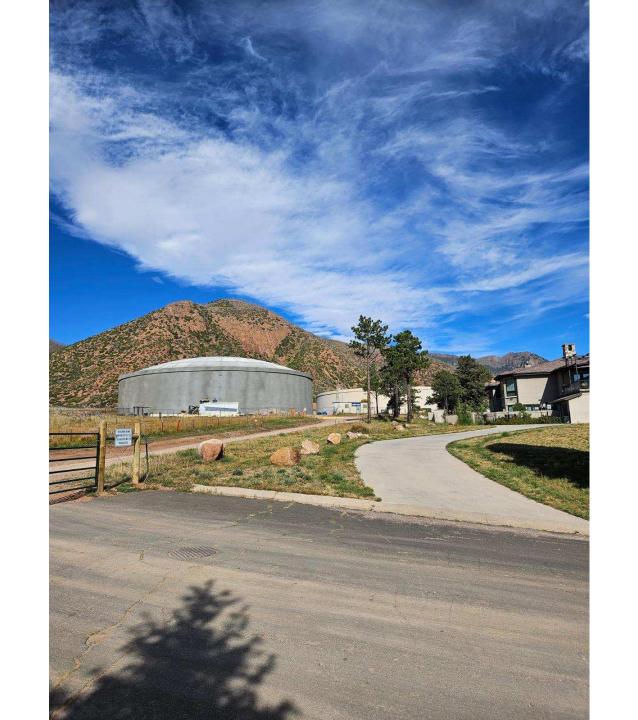
Advice to City
Enterprise,
Client
Constituents in
Conflict



City enterprise seeks to replace failing facility; its consultant prepares plans and obtains a City building permit on plans for height of 60'. Existing approved development plan (DP) limits height to 45'. After \$6M in construction, neighbor complains, enterprise-planning fight ensues, planning confirms height exceeds the DP limit and issues stop work order. Enterprise seeks to amend DP height limit, appeals and ignores stop work order. Both enterprise and Planning ask CA to help with DP amendment and appeal of stop work order, both of which will most likely end up in front of Council, which has ultimate authority over land use decisions and enterprise operations. Can CA provide legal advice? If so, to whom?







Can CA
provide legal
advice? If so,
to whom?

Client constituents. Rule 1.13(f) and (g).

Responding to Public Criticism



City Attorney logs on to the local NextDoor page [ROOKIE MISTAKE] and discovers to their shock a large number of entries calling City Attorney profane names, misstating facts, alleging false conflicts of interest, and claiming legal opinions are erroneous. Can the City Attorney respond?

Can the City Attorney respond?

A hesitant yes. But just because you can, doesn't mean you should.

Information learned during representation—even if public—is still confidential. Rule 1.6

ABA Proposed Responses

- Seek removal of the information from the online platform [GOOD LUCK]
- Ignore it
- Respond without referring to a client matter that could lead to the discovery of confidential information
- Issue an invitation to contact the lawyer privately to resolve the matter
- Indicate that professional rules prohibit a response
- Respond directly to the client or former client who posted the criticism

ABA Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021).

Penn. Bar Assn. Proposed Response

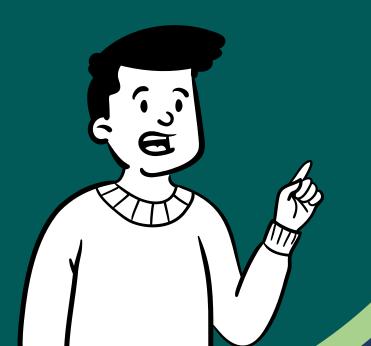
"A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

Pa. Bar Ass'n, Formal Op. 2014-200 (2014).

If Posts are Made by a Client

- If posts are made by a client, attorney could argue NextDoor statements present a "controversy" under Rule 1.6(b)(5) that authorizes limited disclosure in response. Colo. Bar Ass'n Ethics Comm., Formal Op. 136 (2019).
- But just because you can, doesn't mean you should: responsive public comments should be very carefully considered before made. People v. Isaac, 470 P.3d 887 (Colo.2016) (suspending bar license for 6 months after posting details of 2 criminal representations in response to online criticism by former clients)

Conflicting Client Direction



City enterprise has leased out operations to a City-created 501(c)(3), which now has over \$100M due to the arrangement. Seeing potential \$\$ for City projects, a Council Member claims this is City money, and requests a City Attorney legal opinion. While others don't voice support, if request for an opinion is not formally addressed and denied, the CM is likely to keep pushing the issue. The City Attorney formally takes the request to the entire Council which is not in favor of seeking an opinion; Mayor supports the structure and function of the 501(c)(3), is curious about the answer and supports getting an opinion from outside counsel. What should the CA do?

What should the CA do?

Council-Mayor form of government where CA appointed by and reports to Mayor after Council confirmation. If Mayor asks and CA does get an opinion, CA acting against a majority of Council and the Council Rule. If Mayor asks and CA does not get an opinion, CA supporting a majority of Council but potentially insubordinate to Mayor.

But: Englewood MC 1-5-7 (any CM may call upon CA to give an opinion on any municipal matter)

Attorney Resignations



The end of the road has come, and after a contentious year, City Attorney drafts a long, eloquent CYA resignation letter describing in detail every possible offense by an elected official, failure to follow legal recommendations, waste of public resources, and facts supporting every basis for an employment claim. Attorney submits the letter to the mayor, hoping it is produced under open records act and they will be vindicated. Does including confidential information in a letter of resignation violate ethics rules?

Does including confidential information in a letter of resignation violate ethics rules?

No, this doesn't violate Rule 1.6 because there is no disclosure to third parties. City has responsibility to redact attorney-client privilege and other confidential information for documents produced under open records laws.

But just because you can doesn't mean you should. Many a City Attorney have resigned upon significant conflict with their client. HOW you resign no doubt will be considered by future employers.

BREAKING NEWS: KEY WEST CITY ATTORNEY SUBMITS SCATHING RESIGNATION LETTER

"At this point I have serious concerns about the directions this council is taking ... I ultimately fear that I can no longer ethically represent this council. I fear this council can be on the verge of conducting ultra vires action and I cannot remain as its city attorney."

"I'm deeply troubled with the direction, or lack thereof, of our City. ... To say we are internally dysfunctional is an understatement. Worst of all, is the rarity in which the truth enters the mayor's vocabulary..."



"Mayor, I just wanted to thank you, Commissioner Glassman, and former commission, it was a privilege serving as your city attorney all these years," Boileau said Tuesday night. "It's been a wonderful experience, we accomplished a lot. And we survived a lot."

In his resignation letter, Peppler said, "In line with your statement to me on March 2, 2023, that you desire "to go in a different direction" as to my being the City Attorney, I am resigning effective April 30, 2023." He added, "It has been my great honor and privilege to serve as City Attorney, and I will always cherish my time serving in that role."

Sheffel said he believed it might be time to leave. "I believe strongly that it is the client's right to choose an attorney," he said. "I love Hollywood but sometimes relationships change."





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Thank You!

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