

Government Attorney Ethics or How I Learned to Stop Worrying and Love the Bomb

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The Story

- Dr. Strangelove:
 - An insane general triggers a path to nuclear holocaust that a war room full of politicians and generals frantically try to stop. (IMDb)
- Colorado Springs:
 - A sudden change in the form of government triggers a path to dysfunction and impasse that an office full of municipal attorneys frantically try to slow down and reverse.

The Players

- 9 Councilmembers
 - 3 at-Large Members, 6 District Councilmembers
- Mayor
 - First “Strong” Mayor under new FOG
- City Attorney’s Office
 - Leadership shuffle

The Setting

- November 2010
 - Voters approved comprehensive Charter amendments to change to a Council-Mayor FOG
- January 2011
 - City begins implementation of the new FOG
- April-June 2011
 - First Council-Mayor election, run-off
- October 2011
 - New City Attorney
- April 2013
 - 6 new District Councilmembers elected and sworn into office to join 3 sitting at-large members

The Conflict/Tension

- “Munici-fest” Destiny
 - “If it wasn’t broken, they wouldn’t have elected me to fix it.”
 - Out with the old, in with the new.
- What’s good for the private sector . . .
 - Government should be run like business.
 - “What do you mean we can’t . . . ?”
- Public Scrutiny
 - Open meetings, open records, transparency in government.
 - The Fourth Estate and Facebook.

Scene Selection: BARAAHP



WELL, F****.

Scene Selection: BARAAHP

- Charter § 4-40(f)(2):
 - Subject to confirmation by the concurring vote of a majority of the members of City Council, the Mayor shall appoint [a City Attorney] to serve at the pleasure of the Mayor
- Charter § 13-80:
 - 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.
 - The City Attorney shall receive such salary as the Council by ordinance shall prescribe

Scene Selection: It's Mine



Scene Selection: It's Mine!

- THIS COMMUNICATION IS BETWEEN AN INDIVIDUAL MEMBER OF CITY COUNCIL AND THE CITY ATTORNEY'S OFFICE. AS SUCH THE ATTORNEY-CLIENT PRIVELEGE BELONGS TO ME.

Scene Selection: Says Who?



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- Planning Commission recommended approval of a rezoning and master plan amendment for the Farm. Council approved the rezoning ordinance on first reading.
- At second reading, Councilmember D stated that he had spoken and corresponded with staff from a large nearby federal installation and moved for postponement of second reading pending resolution of the federal installation's drainage concerns.
- CAO reminded Council that the rezoning and the master plan amendment were both quasi-judicial items and that *ex parte* communications could trigger recusal.

Scene Selection: Other Counsel



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- The Mayor asked the City Attorney to research a question regarding separation/balance of powers. Because the issue impacted a pending act of the Council, the City Attorney shared the opinion with the Council.
- City Council didn't like the opinion because the CAO "always sides" with the Mayor.
- Council President suggested the answer was a Resolution "concerning the retention of outside legal counsel."
 - "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."

Turning Point



Turning Point

- Change is stressful
 - No frame of reference
 - New, defined roles with real checks and balances
- Change requires hard work
 - Complicated issues and concepts need constant attention
 - Devil is in the detail

Stop Worrying

- You have a choice
 - Succumb to the madness
 - Find your footing
- Change the paradigm

CAO Ethical Guidelines



Guideline Elements

- Set out Charter/Code authority
 - Specify duties/roles/functions
 - Make clear distinction between ethical responsibilities when serving in advisor and advocate roles
- Address client identification issues
 - Attorney for the governmental entity
 - Advise constituent client representatives

Guideline Elements

- Explain conflicts and how to resolve
 - Conflicts between constituent client representatives
 - Ethical conflicts for the CAO
- Discuss confidentiality
 - Attorney-Client Privilege
 - Waiving the privilege
 - Sharing information/communications

Guidelines Elements

- Other CAO Responsibilities
 - Attorney Assignments
 - Supervising Attorney Responsibilities
 - Criminal Prosecution Responsibilities
 - Settlement Authority
 - Administrative Reports

Learn to Love

- It feels like it's about you, but it's not about you.
- You took an oath to uphold the law and advance the profession.
- Cling to your colleagues.

The Sequel ???

