

PRACTICE TIPS

Navigating Dangerous Waters: Defending a Governmental Entity

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I. Summary

At one time or another, every municipal lawyer has asked, "Who is the client?" When the City of Colorado Springs Charter was amended to abandon the council-manager form of government (FOG) in favor of a council-mayor FOG, the city attorney was no longer appointed by the city council, but rather by the mayor with the consent of the city council. Using the Model Rules, this article discusses ethical considerations when representing a municipal entity in the context of a change in the FOG and also highlights the need for a clear understanding of the municipal attorney's role. This article outlines the circumstances leading to the promulgation of the "Office of the City Attorney Legal Ethics Guidelines,"[1] and provides suggestions for the development of jurisdiction-specific ethics guidelines.

II. Council-Manager FOG

When the citizens first approved a City Charter in 1909, Colorado Springs, Colorado was organized as a council-manager FOG. The city manager was appointed by a majority of the city council, as were the city attorney, city auditor, city clerk, and city treasurer, and each served at the pleasure of the city council.

In addition to four district councilmembers, four at-large councilmembers and a mayor were elected to four-year terms. The mayor was the chair of the city council, and the official head of the government for certain purposes (signing intergovernmental agreements, executing official documents, etc.).

The city manager had full City Charter authority to run the operations of the municipal government, including:

- Holding and exercising all executive and administrative powers.
- Enforcing laws and ordinances.
- Hiring, firing, and supervising all city employees.
- Organizing departments.
- Delegating certain authorities, but regardless of delegation, "responsibility for the proper and effective administration of the city remains always with the city manager and none other."
- Negotiating, executing, administering, and enforcing contracts.
- Attending and being heard at council meetings and participating in discussions without having a vote.
- Recommending legislative measures the Manager deemed "necessary or expedient."
- Preparing and submitting an annual budget.

This system worked well for 100 years – with the occasional political, social, economic, or moral hiccup. The Great Recession, however, presented a challenge that the council-manager FOG could not overcome.

In light of the worsening economic conditions, the city manager recommended broad cost-savings measures. By 2010, the city had cut 550 jobs, closed swimming pools and restroom facilities, turned off streetlights and fountains, removed trash cans from parks, cut 100,000 hours of transit services, and sold its police helicopter. The public's dissatisfaction with government's response to the economic downturn took root in an effort to restore political accountability for management decisions. In November 2010, the voters approved comprehensive amendments to the City Charter to implement a council-mayor FOG and to separate legislative and executive functions more clearly.

III. Council-Mayor FOG

To accommodate a change in the FOG, several Charter amendments were necessary.[2] Since the new "strong mayor" would no longer be a voting member of the city council, it was necessary to add a fifth at-large councilmember.[3] City council's authority was limited to legislative matters unless otherwise set forth in the Charter,[4] and the mayor's authority and responsibilities were delineated. In addition to all the executive and administrative functions formerly exercised by the city manager listed above, the FOG Charter amendments contained additional powers and duties for the mayor:

- Veto authority over certain city council ordinances.[5]
- Appointing a chief of staff.[6]
- Appointing, subject to city council confirmation, the city clerk, city attorney and municipal court judges, chief financial officer, police chief, fire chief, and certain department heads.[7]
- Preparing and submitting a strategic plan to the citizens.[8]
- Receiving an annual salary.[9]
- Being an *ex officio* non-voting member of the Utilities Board.[10]
- Having "direct control over city revenue."[11]
- Being succeeded by the president of council, as acting mayor, until an election could be called to fill a vacancy in the office of mayor should he or she be unable to perform the duties of office for more than a temporary or short-term absence.[12]

The city attorney's office (CAO) set about analyzing the Charter amendments, reviewed the City Code, and set about helping the elected officials understand the significance of the change in the FOG and navigate a course forward. The CAO recommended several City Code amendments to implement the new FOG that city council approved prior to the April 2011 municipal election.[13]

IV. Balancing the Separated Powers

The fast-paced implementation of the new FOG left little time for elected and administrative officials to adapt. Relations between the branches of government were initially respectful and optimistic. All seemed eager to fulfill the voters' intent and make the new FOG work. Tensions started to rise, however, when the new mayor embraced the "strong" descriptor. Elected just seven months after the voters approved the FOG Charter amendments, the new mayor had no previous government experience and believed the city should be run like a private business. The council, not content with being limited to legislative affairs, differed with the mayor on most questions of governance. Both sides engaged in less than cordial rhetoric.

Over the course of his four-year term, the mayor replaced the city clerk, the city attorney (2x), the chief financial officer, the public works director (2x), parks director (2x), planning director (2x), and the aviation director, along with other non-confirmation department senior management.[14] The mayor drew key personnel from the private sector—the first chief of staff was from the hospitality industry, and the new city attorney had most recently served as general counsel for a private liberal arts college. Like the mayor, the new city attorney approached his government service with reliance on his private practice experience.

As the mayor's term progressed, open conflict between the council and mayor escalated. When their differences rose to the level of a dispute, the council or mayor would call upon the new city attorney for an opinion. On questions specifically addressed by the Charter, such as those related to the separation of legislative and administrative or executive powers, both branches would acknowledge the plain language of the Charter. For those questions not specifically addressed in the Charter, often pertaining to the balance of power, there was a perception that the city attorney advocated and argued for expanded mayoral authority.

Perhaps the most contentious issue arose over a matter not specifically addressed in the City Charter or the City Code: The mayor broke with long-standing practice and identified five large "appropriating departments" in his annual budget.[15] The appropriating departments were:

- The Police Department,
- The Fire Department,
- The Parks, Planning & Public Works Department (P3),
- The City Council Department, and
- The Administration Department.[16]

The City Charter provided that "the city council *may* establish departments, divisions, offices, or agencies" by ordinance.[17] By codified ordinance, the city council provided that the mayor "*shall* establish departments, divisions, offices, and agencies for municipal operations." [18] Neither the Charter nor the City Code defined what "departments" meant, or whether there was a difference between an "appropriating department," "operating department," or "administrative department."

The legal effect of identifying appropriating departments came into question during the fiscal year administration of the budget. The City Code permitted funds to be moved within a department at the mayor's direction, but required a city council resolution to transfer funds between departments.[19] Because the "appropriating departments" in the mayor's budget did not mirror the operational department organization of the city, city council became concerned that the mayor had free rein to move considerable funds between operational departments yet within one appropriating department. The council asked the new city attorney whether the appropriating departments were legal, and how the council could change them to ensure transparency.

As this and other balance/separation issues arose, the city attorney became more closely aligned with the mayor and the council began to question the new city attorney's loyalty. A little over two years after being appointed, the new city attorney resigned, and the mayor appointed his second city attorney (CA) from within the CAO. CA had been serving as the legislative counsel during the new city attorney's tenure and had drafted several of the separation/balance opinions. Because the council had doubts about CA's loyalty, they decided to conduct a "confirmation interview" before it acted on CA's appointment.

V. Office of the City Attorney Legal Ethics Guidelines

It became clear during the confirmation interview that councilmembers did not have an understanding of the ethical obligations borne by attorneys in general, or municipal attorneys in particular. Councilmembers believed that CA would be loyal to the mayor because CA was "hired and fired" by the mayor, and of course CA would do anything to keep a paycheck. Council renewed its belief that it needed separate, outside counsel who would be loyal to the council and advocate its position against the mayor.

CA set about to rebuild the relationship between council and the CAO after her confirmation. She formed a committee internal to the CAO to draft a document that would serve as a statement of purpose for the CAO while also educating the elected officials, administrative officers, staff, and the public on the role of a city attorney and the nature of the municipal attorney-client relationship. The committee brainstormed the elements of the relationship that needed to be addressed, researched the Code of Professional Responsibility, and used the Colorado Attorney General's 1998 "Legal Representation: Memorandum and Guidelines" as a model.

A draft document was circulated within the CAO and attorney comments, questions, and edits were reviewed and considered by the committee. CA retained a former solicitor general from the Colorado Attorney General's Office as ethics counsel to review the proposed

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Guidelines and provide feedback. After engaging with the committee and reviewing with the Deputy City Attorney, CA had final review, approval and promulgation authority.

The resulting document, "City of Colorado Springs Office of the City Attorney Legal Ethics Guidelines" (Guidelines), identifies the following mission:

> The mission of the Office of the City Attorney (the "Office") is to provide the highest quality legal advice to the City of Colorado Springs, acting through its various elected officials, enterprises, appointees, and employees. All attorneys employed by the Office shall comply with the Colorado Rules of Professional Conduct ("Rule of Professional Conduct" or "Colo. RPC"). A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> Each attorney in the Office has an ethical obligation to exercise independent professional judgment and to give consistent, objective legal advice to all constituent representatives of the City.

Colorado initially adopted the Model Rules in 1992.[20] The following topics and issues are addressed in the Guidelines:

- Functions of the CAO-Roles and responsibilities of the atto ney (Charter, Code, Statute)
- Attorney assignments-Hiring, assignments, collaborativegoals
- Advisor vs. advocate-Rules Preamble, Rule 2.1, Rule 3.1
- Client identification-Rule 1.13, Rule 1.6,
- Client conflicts - Rule 1.7
- Attorney conflicts -Rule 1.11
- When and how to employ ethical screens ("Chinese walls")-Rule 1.10, Rules Scope
- Outside counsel-Authority to hire, when to hire, how to hire
- Confidentiality-Rule 1.6, Rule 1.13
- Supervisor responsibilities-Rule 5.1, Rule 5.3
- Prosecutor responsibilities and interactions-Rule 3.8, Rule 4.2, Rule 4.1

Although CA had final approval authority, she presented the Guidelines to the council as a courtesy briefing. She also asked retained ethics counsel to prepare an independent analysis and evaluation of the Guidelines for the city council. Not surprisingly, more than one councilmember suggested that council ought to be able to modify the Guidelines because they didn't go far enough. The Guidelines, it was argued, were insufficient because the document failed to address a legal advisor for city council independent of the CAO or, at the very least, should have been more restrictive on the disclosure of communications between individual councilmembers and the CAO.

VI. Practice Pointers When Drafting Ethics Guidelines

Although necessitated by political pressures that made the job more difficult, the Guidelines project was a grounding experience for the CAO—an opportunity to step back, consider the big picture, and publicly recommit to the profession and to the client. Promulgating the Guidelines was the first step in rebuilding credibility, reliability and trust in the CAO that had suffered in the chaos that immediately followed the change in the FOG.

Consider the following practice pointers when deciding whether or how to draft ethics guidelines for your office.

- Creating ethics guidelines is not a novel idea. In addition to local and state codes of ethics, the APPA, ICMA, GFOA, APWA, state bars, state attorneys general, and a host of other organizations have codes of conduct, practice standards, and core competencies for their members and practitioners. There are plenty of examples out there.
- As you begin your research, if you find ethics guidelines that you like, use it as a model. Read every word carefully and give due consideration to what meaning the provisions have for your office and your municipal practice. Avoid the temptation to simply reproduce someone else's guidelines for your purposes.
- Consider the types of attorney-client issues you have experienced in your municipal practice. Can you use the guidelines to educate the client on your roles, duties, and responsibilities? Use real examples when describing communications, privilege, conflicts, and representation issues.
- Do not draft guidelines in a vacuum. Create a group to tackle the project. Involve the attorneys in your office. If you don't have other attorneys in your office, reach out to your colleagues in other cities or to your state municipal league. Buy-in is important.
- Have a clear understanding of what is needed for final approval. Is this within the city attorney's purview, or must another level or branch of government review and approve or consent?
- Think about how you will use the guidelines in the future. Guidelines can be both a shield and a sword. Consider providing



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