# CAUGHT IN THE MIDDLE: ETHICS AND GOVERNMENT PRACTICE

Institute for Local Government Lawyers
International Municipal Attorneys Association
2024 Annual Conference

Wynetta Massey, City Attorney
Colorado Springs, CO

# THE SETTING

- New F.O.G.
  - 9 Councilmembers
    - 3 at-Large Members, 6 District Councilmembers
  - Mayor
    - First "Strong" Mayor under new FOG
  - City Attorney's Office
    - Leadership shuffle

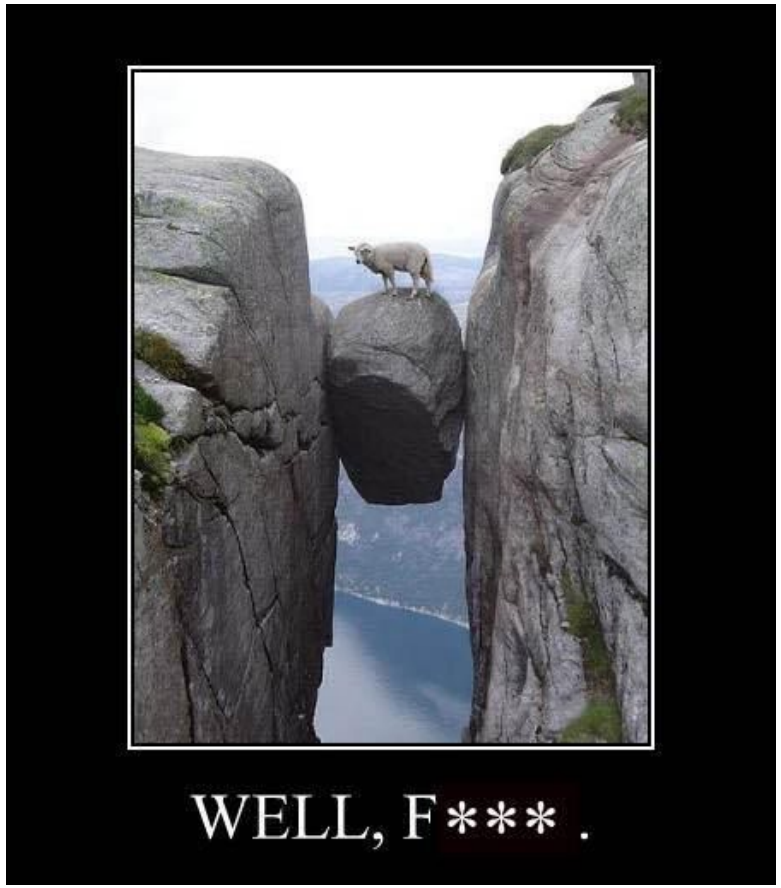
# GROUND RULES

- Charter § 4-40(f)(2):
  - City Attorney is appointed by the Mayor and confirmed by a majority of Council.
- Charter § 13-80:
  - Attorney-client relationship created.
  - CA conducts all cases where the City shall be party plaintiff or defendant, or a party in interest.
  - CA is the legal advisor of the Mayor, Council, Commissions, and Heads of Departments in relation to their duties.
  - CA performs other duties required by ordinance.
  - CA receives a salary set by Council by ordinance.
- Charter § 13-90:
  - Council may employ other counsel "to take charge of litigation or to assist" the CA.

# 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."
  - The Fourth Estate and Facebook.

# ATTORNEYS BE LIKE



# NOT SO HYPOTHETICAL: 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.

# NOT SO HYPOTHETICAL: SAYS WHO?

- 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.

# NOT SO HYPOTHETICAL: OTHER COUNSEL

- 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."
  - "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 POINTS

- 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

# ETHICS GUIDELINE ELEMENTS

- Set out Charter/Code authority
  - Establish the attorney-client relationship
  - Specify duties/roles/functions
  - Make clear distinction between ethical responsibilities when serving in advisor and advocate roles
- Address client identification issues (Rules 1.13, 1.6)
  - Attorney for the governmental entity
  - Advise constituent client representatives

# ETHICS GUIDELINE ELEMENTS

- Explain conflicts and how to resolve (Rules 1.7, 1.11)
  - Conflicts between constituent client representatives
  - Ethical conflicts for attorneys

- Discuss confidentiality (Rules 1.6, 1.13)
  - Attorney-Client Privilege
  - Waiving the privilege
  - Sharing information/communications

# ETHICS GUIDELINE ELEMENTS

## Other CAO Responsibilities

- Attorney Assignments
- Supervising Attorney Responsibilities (Rules 5.1, 5.3)
- Criminal Prosecutor Responsibilities (Rules 3.8, 4.1, 4.2)
- Settlement Authority
- Administrative Reports

# AND REMEMBER . . .

- It feels like it's about you, but it's (mostly) not about you.
- You took an oath.
- Communicate with your constituency.
- Cling to your colleagues.