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Building an Effective City Manager-City Attorney Relationship: The City Manager Perspective

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Working Toward an Effective City Manager -City Attorney Relationship: The City Manager Perspective

In 2001, I was appointed Chief Administrative Officer (CAO) for the City of El Paso, Texas, after serving a long career as City Attorney. My tenure as the City's CAO was under the strong mayor system, with my duties, obligations, and authority flowing by mayoral appointment, rather than from our City Charter (in 2004, El Paso voters elected to adopt the council-manager form of local governance). In 2004, I came out of retirement to again serve as the City Attorney. As a 'survivor' of this reversal of municipal roles, I have a unique perspective on what a City Manager is looking for in a City Attorney and the law department in general. The purpose of this paper is to highlight just a few of the insights I've learned from my experience wearing the CAO/City Manager hat, and particularly, the often-unappreciated challenges that a City Manager faces and his or her expectations of the City Attorney in meeting these challenges.

What the City Manager Expects from the City Attorney and How to Respond

As local government lawyers, we are all keenly aware of our professional and legal duties to our client the organization, which necessarily acts through its authorized officers, directors, employees, and other constituents. *See* ABA Model R. Prof. Conduct 1.13(a) (2009). Commentary to Rule 1.13 reminds us that, "[w]hen 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 R. Prof. Conduct 1.13, Comment 3. We also know, however, that the exception to this guidance is "when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization." *Id.* Further, in representing the organization, we must exercise independent professional judgment and render candid advice and at times, refer not only to the law, but also to other considerations, "such as moral, economic, social and political factors that may be relevant to the client's situation." ABA Model Rule Prof. Conduct 2.1 (2009). With that said, I'll now take off my City Attorney hat for a moment and speak from the City Manager perspective.

1. Appreciate the Tough Calls the City Manager (or Mayor and City Council) Has to Make

When hotly contested or politically controversial administrative or city policy matters are being debated and decided at the City Council or other public meetings, it's certainly the City Manager who is sitting in one of those hot seats. Perhaps the City Attorney has just informed the City Manager (or City Council) that the case law on the

matter is unsettled or the applicable statute is ambiguous and has gone on to offer an educated guess as to how a court in the jurisdiction may interpret the governing law. After the City Attorney has done his or her duty to render professional independent legal advice on the matter, the decision has to be made. On those occasions, the City Manager wants the City Attorney to appreciate that the City Manager (or City Council) must not just consider the legal aspects (e.g., risk, potential liability to the City), but also important non-legal concerns (political, financial, organizational, public confidence, impact to city services and functions) that must be weighed into the final decision. Not all risks to the City are legal risks. City Managers want to say don't be so judgmental of legislative or administrative decisions, which while perfectly legal, may seem a bit harebrained in practice (to the attorney). Meeting this expectation will require adopting an attitude that is sensitive to the challenges facing city administrators and certainly devoid of any smugness then and later down the road ('I told you so').

On the other hand, there may be times when the City Attorney, acting in her or his role as an advisor, offers conservative or cautious legal advice. From the attorney's perspective, his or her focus is on rendering advice that considers the best interest of the organization as a whole, considering potential or existing liability and other legal risks. On those occasions, the City Manager wants the City Attorney to comprehend and appreciate the consequences of following such legal advice, which while perfectly thorough and precise, may seem a bit overly conservative (to the City Manager) in light of other compelling and relevant factors. In all matters, there is much at stake for the City Manager (and City Council)--and the City Manager's expectation is that the City Attorney will convey a respectful attitude toward the tough choices to be made and having to later live with the consequences of those decisions.

2. <u>Drop (or Don't Deny Having) a 'Can't Do' Attitude a/k/a "Think Outside the Box"</u>

On behalf of City Manager-types everywhere, I confess --we want our City Attorneys to say "yes" and on top of that, confirm that our particular administrative or policy process is legal, on track, and that there will be no legal problems in its implementation and enforcement. But, let's get back to reality. We all know that excellence in local governance is a moving target. The policy making process itself involves some level of creativity, innovation, flexibility, initiative and risk-taking to accomplish Council and City Manager objectives and long and short-term goals for the local community. In keeping his or her charge to run a dynamic organization both smoothly and efficiently, the City Manager does expect the City Attorney to 'think outside the box' by providing alternative ways to resolve problems or to further Council and Manager objectives, instead of merely saying, "no, it can't be done" (In all fairness, her City Attorney probably said, "no, it can't be done *that way*," but I'll get to that shortly).

Probably the simplest solution to this inevitable roadblock to an effective City Attorney-City Manager relationship is for the City Attorney to (kindly) clarify the City Attorney's role in policy formulation and encourage administrators to communicate early

and often with the attorney in the initial and determinative stages of the policy process, so that the City Attorney can be in a position to provide preventive rather than reactive legal advice. The objective is solid communication at the onset (e.g., regularly scheduled status meetings) is to avoid being caught in a situation where administrators have become adamantly committed to one approach that in the end, turns out to be either just plain illegal or otherwise fraught with significant legal consequences, local law hurdles, potential risk, and probable liability that it works against the organization's best interests. In these instances, the City Manager (or administrators), may say to her City Attorney, "just make it legal" or "be creative."

Here are a couple of points to keep in mind if you too find yourself confronted with the "make it legal- be creative" expectation. The job of City Attorney requires the lawyer to be helpful and cooperative in administrative efforts to formulate policy recommendations for the City Council, but the lawyer must all the while maintain his or her limited and well-defined role in the policy process. *See* (again) ABA Model R. Prof. Conduct 1.13, Comment 3. The goal is to effectively communicate to the City Manager the limits of the City Attorney's role (e.g., no usurpation of the decision-making in policy matters) and to help the City Manager accept that the City Attorney is not a full-fledged member of the 'policy team' and see the value in the City Attorney's detached perspective, extensive knowledge of public law, and the honed analytical skills that the City Attorney can contribute to the process--without stereotyping the lawyer as the 'nay-sayer' when issues arise along the way. In sum, be cognizant of (and communicative about) the limitations of the City Attorney's role and remember that sometimes 'thinking outside the box' means not only assisting in the policy process and working toward an effective solution, but also helping the City Manager (or administrators) to avoid feeling 'boxed in' in the first place.

3. (When Possible) Give On the Spot Advice a/k/a "Think on Your Feet"

To be successful, the City Manager must be a dedicated public servant who is committed to an effective and democratic local government. In that role, the City Manager must be committed to working closely with elected officials to develop and implement a sound and efficient policy agenda and consistent delivery and coordination of services in order to serve the best interests of the community. Given the hefty job of the City Manager, it's understandable that he or she may expect quick answers from the City Attorney on whatever is the pressing legal matter of the day. Depending on the area of law, it may well be possible to give a quickly reasoned response, but it's just as likely that the answer turns on the particular facts (that have yet to be fully disclosed), unsettled or conflicting case law or an ambiguous statute or involves discovery on underlying legal issues or complexities.

Bottom line, there will be times when the City Manager (or City Council) wants 'on the spot' advice and better yet, a clear, concrete, and decisive response from the City Attorney. As we all know, municipal law is a complex creature, being simultaneously both dynamic and yet arcane. Rarely are matters clear-cut. Here are some thoughts on

how best to respond to this predicament. First, as a general matter, resist pressure to give on the spot answers (or so-called 'shooting from the hip') unless you are absolutely sure. Dealing with this expectation will involve clearly communicating to the City Manager (or Council) that some legal issues require adequate time to research before the City Attorney can provide thoughtful and appropriate legal advice. Second, a preliminary response (that later must be corrected or revised) may quell the City Manager's frustration or impatience, but in the end, may hinder the City Attorney's ability to do his or her job well. Getting the City Manager (or Council) to recognize and appreciate the benefits of solid, thoughtful legal advice provided under more realistic time constraints is a continuous, yet worthy task in building an effective City Manager-City Attorney relationship.

4. Explain the Dual Role of the City Attorney (One More Time)

As local government lawyers, we understand that we wear two hats in representing our organizational clients- one as advisor, and one as counselor and advocate. As the client's lawyer, we are charged to "exercise independent professional judgment and render candid advice." *See* (again) ABA Model Rule Prof. Conduct 2.1 (2009). Under that charge, we know that in advising the City Manager (or Council) on legal issues, our candid advice may sometimes make us unpopular and will occasionally go unheeded. As advisors, our duty is to communicate the legal ramifications of the City Manager's (or Council's) actions, including potential liability against the organization. In that role, we find ourselves taking a conservative posture. Sometimes the advice boils down to handling questions of real and potential liability and providing our best educated guess as to what the court would do or how a jury will react to the particular facts based on precedent. However, once an authorized decision is made (and assuming the action taken is not illegal or otherwise ethically questionably), the City Attorney has to fulfill the duties of his or her other role as counselor and advocate, to defend the authorized action, advance the case, enforce and prosecute violations of local law, while remaining in conformance with the applicable rules of professional conduct with his or her ethical compass in hand. *See e.g.*, ABA Model Rule Prof. Conduct Rule 3.1, Comment 1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed…").

Now the difficulty is explaining (and reminding) the City Manager (or Council) the nature of the legal services provided by the City Attorney and the nuances of this dual role in the midst of Council governance actions and City Manager administration. The City Manager may not admit it, but for his or her own good, the City Manager should want the City Attorney to clarify, where necessary, when and why the City Attorney is acting as an advisor or acting in his or her capacity as counselor. If the City Attorney's advice is placed in the proper context, perhaps when the City Attorney takes a conservative posture rather than a zealous advocate posture the City Manager (or Council) won't ask with bemusement, "hey, I thought you were on our side."

5. Help the City Manager (or Council) Recognize the Long-Term Consequences to Short-Term Solutions

Believe me when I say that despite the various stresses and practical (or political) interests affecting city administration, deep down inside your City Manager as a professional really does want to comply with the local, state, and federal laws governing the organization and have its administrators and elected official do the same. If your City Manager doesn't seem to care in a consistent manner, he or she ought to care and then it becomes the City Attorney's job to build trust and develop credibility in the City Manager-City Attorney relationship by providing practical and sound advice, adopting a cooperative attitude, showing a willingness to work towards finding solutions, and developing a track record that demonstrates that commitment.

There will be times where the City Manager (or Council) may not even recognize the legal issues underlying the proposed action or policy recommendation. There will be other times where the City Attorney will have to thoroughly communicate the potential long-term consequences and liability that may result if the City Manager (or Council) opts for the short-term solution in a particular decision. The City Manager (or Council) really does want the City Attorney to lay out the costs/benefits of any particular decision that may in the long-term be disadvantageous to the organization. To be effective counsel, the City Attorney just needs to keep on trying to communicate and clarify the legal concerns at stake even when it looks like that they've all stopped listening.

6. Be Cognizant (and Wary of) the Confiding (a/k/a "Don't Say Anything") Employee

As we know, advising the organizational client necessarily means working directly with the organization's administrators and employees to implement or develop policies and procedures that is supported by law and in conformance with the governing body's directives. The City Manager expects the City Attorney (and assistant attorneys) to succeed in that task while at the same time avoiding problematic situations or, worse legal entanglements involving city employees who have adverse interests to the organization. ABA Model Rule 1.13(f), explains that "[i]n 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." ABA Model Rule Prof. Conduct 1.13(f) (2009) (Emphasis added).

Comment 10 to Rule 1.13 provides further guidance on our duty to clarify the lawyer's role: "There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when

there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged." ABA Model Rule Prof. Conduct Rule 1.13, Comment 10 (2009).

I offer a few steps to aid in meeting this ethical obligation with respect to the duty to clarify our role to the organization:

Step 1: Repeat like a daily mantra: "My client is the organization, my client is the organization…" Always keep in mind the requirements stated above in ABA Model Rule 1.13(f) and Comment 10 (and in the corresponding state professional conduct rule) so that you can consistently spot or, better yet, preempt those situations in which the client's administrators or employees may believe that you are their independent (personal) attorney or when they are not following legal advice in a manner clearly contrary to the best interests of the organization.

Step 2: Be ready to use that "I'm not your Lawyer" speech in all dealings with the organization's employees. If and when the constituent's interests become adverse to the organization, be prepared to inform the constituent candidly that you do not represent the constituent and that she or he may wish to obtain independent representation. You may to skip to the next section (Section 7) of this paper, if the situation triggers other ethical obligations.

Step 3: Read (or read again) *State v. DeAngelis*, 116 S.W.3d 396 (Tex.App.--El Paso, 2003, no pet.). The *DeAngelis* case (and its companion case *State v. Martinez*, 116 S.W.3d 385 (Tex.App--El Paso 2003, no pet.), painfully illustrates the consequences of an assistant city attorney failing to abide by the lawyer's ethical duty to disclose in adverse interest situations and the dangers of creating an inappropriate attorney-client privilege vis-à-vis the organization's lawyer and the organization's employee. In *DeAngelis*, the city's assistant police chief was indicted for aggravated perjury based on inconsistencies between sworn statements concerning leaks of confidential information and surreptitiously tape-recorded conversations with El Paso assistant city attorney Stephanie Osburn (conducted <u>without</u> the City Attorney's knowledge or assent). *DeAngelis*, 116 S.W.3d at 399. In *DeAngelis*, the appellate court affirmed the lower court's suppression of DeAngelis' statements to Ms. Osburn as privileged based upon her failure to notify DeAngelis that she was not his attorney and by implicitly forming an attorney-client relationship with DeAngelis in the matter. *DeAngelis*, 116 S.W.3d at 405-06. Without belaboring the many missteps taken by Ms. Osburn in the *DeAngelis* case from which we can all learn a valuable lesson, I'd like to highlight the following from the appellate court's opinion as a <u>forewarning</u>:

> …[Osburn] testified that although DeAngelis was talking to private attorneys about representation in a civil suit against the City, he still communicated with her. She emphasized that DeAngelis never asked her to be his personal attorney and she never represented DeAngelis in his individual capacity. Yet she admitted that she had referred to DeAngelis

> as her client on many occasions. DeAngelis apparently believed her, because in one of the many letters and cards she had received from him, he told her, "I know you can't say anything because you are my attorney." In another note, he wrote: "I trust you and know that it's privileged communication between attorney and client." By the time of the suppression hearing, Osburn expressed an understanding of how DeAngelis could assume that the privilege existed and that his comments to her were made in confidence.

DeAngelis, 116 S.W.3d at 402.

7. Despite Management Subterfuge and Complaints, Continue to Function as the Watchdog Envisioned by ABA Model Rule 1.13

The City Attorney plays the critical and sometimes unpopular role of keeping the organization as a whole, honest, ethical, and as important, in compliance with federal, state, and local laws, regulations, and rules. If the City Attorney does his or her job well, the City Attorney can expect to feel like the City Manager thinks of him or her more like a wolf in watchdog's clothing waiting to pounce rather than viewing the City Attorney's watchdog role as an integral component of the organization's capacity to function well. For the City Manager's own good, however, and despite various and inevitable acts of subterfuge and vociferous complaints, the City Manager still expects the City Attorney's conduct to reflect the watchdog function and the ethical obligations mandated by the legal profession.

I'm most familiar with the Texas Disciplinary Rules of Professional Conduct version, but subsections (b) and (c) of ABA Model Rule 1.13 are just as instructive with respect to the lawyer's ethical obligation to report certain violations by the organization's 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 that 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. 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 authorization 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.
>
> (c) Except as provided in paragraph (d) [information relating to the lawyer's investigation of an alleged violation of law or organization's defense related thereto], 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 [Confidentiality of Information] permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

ABA Model Rule Prof. Conduct Rule 1.13 (b) & (c) (2009) (Emphasis added).

Comment 4 to Model Rule 1.13, gives greater guidance on the types of progressive remedial actions the lawyer should take when confronted with such situations, namely, 1) attempting to resolve the violation internally, usually by asking for reconsideration of the matter; 2) seeking a separate legal opinion; and 3) "referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law." ABA Model Rule Prof. Conduct Rule 1.13, Comment 4(2009). When all such attempts fail, the lawyer may be under a legal obligation to reveal information relating to the representation, but only if and to the extent the lawyer reasonably believes such disclosure is necessary to prevent substantial injury to the organization. *See* ABA Model Rule Prof. Conduct Rule 1.13 (c).

While the City Manager may regard this aspect of the City Attorney's role to the organization as a source of frustration, or secretly (or not so secretly) want the City Attorney to refrain from serving in this watchdog capacity, ultimately the best interests of the organization must trump. The difficult task for any City Attorney is negotiating how to juggle his or her multiple roles and obligations to the organizational client and listening to that inner ethical voice, while at the same time fostering and building a communicative, appreciative, and respectful relationship with the City Manager, administrators, and City Council.