International Municipal Lawyers Association

2014 Annual Conference
Baltimore, Maryland

Panel Discussion: Representing Your Legislative Branch - Special Challenges

Institutional Arrangements And Legislative Bodies

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Most of the unique problems that arise in providing legal services to a legislative body arise from the bifurcation of government responsibilities into two functional segments: a legislative function and an executive function. It is clear the two functions are inter-related. The ends of government can only be attained when both operate together. Yet, institutional characteristics drive them apart, making legal representation problematic. First, the corporate nature of the government client creates a client whose voice continually shifts, depending on the "constituents" who speak for the corporate entity. Accordingly, government representation is inherently unstable since various agents at various times speak on behalf of the client. Second, in the name of checks and balances, these constituent interests become segmented and antagonistic to one another under the two leading forms of local government organization in the United States: the council-manager form and council-executive form of government.[1]

In both forms, the legislative body is separated from operations that implement the policies and programs established by the legislative body. By design, the legislative function is to be conducted at arms-length from day-to-day management. Yet, instead of viewing the separation of functions as a beneficial division of labor, as envisioned by the framers of these systems,[2] a legislative body often sees itself as somewhat impotent vis-à-vis the executive[3] and looks covetously on the powers granted it. Councils would prefer to control the implementation of the policies and programs they frame, if such control is possible. The executive in turn often views the legislative body as an irritant, a body that looks for problems when none exist, a body that is slow or unwilling to cooperate and embrace solutions to outstanding problems. The political and legal wrangling that follows are key sources of problem in representing legislative bodies. In the words of *McQuillin The Laws of Municipal Corporation*:

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[1] According to the National League of Cities, all but one of the 30 most populous cities in the United States use one or the other form of government. *See* http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/forms-of-municipal-government

[2] The separation of functions allows the executive to focus on day-to-day affairs and the legislative body to take a more deliberative, methodical approach to evaluating the long term needs of government as well as securing the needed resources. In contrast, the alterative third form of local government – the commission form - with its focus on day-to-day management and the entire scope of on-going government operations, is criticized for its inability to find time to take a deliberate, methodical account of the long-range needs of the government.

[3] This, despite its usual control over purse strings. The typical council establishes the annual budget and controls whatever taxing powers are delegated to the government.

> *Oftentimes the administrative agents do not co-operate with the legislative body and this results in no action. Each department is disposed to extend its province, and sometimes the legislative seeks to subject the executive officers to its will. Hence, by trying to separate these powers and placing them in independent bodies in order that one may be a check upon the other, and thus prevent abuse of public power, complication, and blocking of public service frequently result.*

2A McQuillin Mun. Corp. § 9:23 (3d ed.).

This paper explores both the forms of government and the corporate personality of the government client. Both contribute to the special challenges faced by the government attorney serving a legislative body. First, the corporate personality segments the client into diverse parts. Second, the form of government institutionalizes the divisions. Ultimately, the segmented parts must work cooperatively if the public is to be served. Yet, it is not unusual for the client to remain polarized over issues, which raises the chief question at issue: How can the government attorney best serve a divided client?

Serving a legal fiction

In whatever form it takes, the legal fiction that underlies a local government is an inescapable complexity in representing the client. The Model Rules of Professional Conduct tell the government attorney the client is the corporate entity, the government itself. Rule 1.13 states that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Unlike a natural person, the corporate personality is incapable of articulating its aspirations and goals.[4] As Rule 1.13 suggests, the government attorney must rely on the client's "duly authorized constituents" – its agents – to identify client interests. Depending on the form of government served, these agents might include a chief executive officer, a council or legislative body, various legislators and agency officials. The government's attorney often is included in this group when the officer is recognized in law as exercising independent control over some or all of the client's legal affairs.[5]

As long as a consensus exists among these various agents, that is, as long as these individuals have a unified view of the client's interests, the client's corporate structure should not present significant obstacles to its representation.

[4] For an illuminating discussion of representing a corporate client *see,* Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation,* 68 Tenn. L. Rev. 179 (2001).

[5] *See Bd. of Sup'rs of Maricopa Cnty. v. Woodall*, 586 P.2d 628 (Ariz. 1978), *infra*; *City of Redfield v. Wharton,* 115 N.W. 2d 329 (S.D. 1962)

For example, consensus often characterizes routine litigation. The government litigator typically defends an existing policy or program or asserts the client's right to act in a specific manner. The existence of an established policy or program suggests the client's "duly authorized constituents" have reached a consensus about the program or policy. In effect, they have agreed, more or less, to speak with one voice on that particular subject. The consensus allows the litigator to be a zealous advocate on behalf of the client.

The environment in which a government attorney will continually observe fragmented consensus is when the attorney performs as government counselor. The government attorney acts in a counselor role whenever the client is in the midst of formulating a new policy or program, when the client is implementing a policy for the first time, or when the client is weighing its response to an emerging situation. In all of these circumstances, various options likely are under discussion, options which are being presented by different agents with different perspectives and different interests. In the most complex situations, the executive, members of the legislative body, key public managers and certain members of the public may all have a stake in the decision. All may see the client's interests in slightly different ways. Or worse, the interests of one may be directly antagonistic to another. Nowhere is this lack of consensus more evident than in legislative bodies.

The advocacy card, so boldly and facilely played by the government litigator, is unavailable when counseling a legislative body. By definition, the legislative process is a search for consensus among participants. The process begins without consensus and ends only when consensus is reached and legislation, outlining everyone's understanding of a new policy or program, is adopted. Until that point, no one agent authoritatively speaks on behalf of the government client. Its goals and aspirations, its fundamental interests in the matter at hand, remain open to debate and change. How then, under these conditions, can an attorney assume the posture of a zealous advocate for his client? The attorney cannot, even though the counselor may be pressed to perform as an advocate for one side or another.

This sort of pressure is one of the pitfalls endemic in serving as government counselor. There is personal and often political pressure exerted to align the attorney's view of the law with the views expressed by one or more constituents. If the attorney is an in-house attorney or even a private attorney whose income is largely dependent on satisfying the agents who speak on behalf of the government client, the pressure to advocate for one interest or another is always present. Taking an independent stance can be challenging and often isolating. From time to time it also can lead to lawsuits.

This situation arose in *Salt Lake Cnty. Comm'n v. Salt Lake Co. Atty*., 985 P.2d 899 (UT. 1999). The Salt Lake County Commission filed a declaratory judgment action against the Salt Lake County Attorney in an effort to resolve a

number of outstanding disagreements. Among the issues was the Commission's assertion that as an attorney, the County Attorney was subject to the direction of the Commission as in any traditional attorney-client relationship. *Id*. at 900. The County Attorney disagreed and asserted that he was legal counsel for the County, not for the Commission or its individual Commissioners; therefore, he owed a professional duty only to the County. *Id.* at 901.

The Court agreed with the County Attorney that he served the corporate entity, not its individual constituents. "The County Attorney has an attorney-client relationship only with the County as an entity, not with the Commission or the individual Commissioners apart from the entity on behalf of which they act." *Id.* at 905. The Court disagreed, however, that the County Attorney could refuse to take direction from the Board. It held that the County Attorney was "obligated to follow his client's instructions. In practical terms, the County Attorney does not have the right to second-guess the agent, so long as the agent is acting within the scope of the agent's legal authority." *Id.* The County Attorney could act independently, the Court said, only when he operated under the powers granted to the office." 985 P.2d at 906.

Given a government counselor's inability to advocate during the legislative process, the only available practical alternative is for the attorney to render a neutral service. In this model of behavior, the counselor approaches the work as a disinterested, impartial observer, who attempts to render advice based on the "best" reading of the law, as he or she understands it. Since the views expressed are, in most situations, unlikely to be judicially reviewed, the attorney must strive for an outcome a court might reach.[6]

While eminently logical and practical, this model of behavior often strikes constituents - legislators - as too sanitized and cold blooded to bear. It engenders attack by those disadvantaged by the advice rendered. Legal skills vary among attorneys, a fact known to all. A lawyer's "best" reading of the law may conflict with another's. Consequently, any advice given using a neutral approach always is open to a 2-pronged attack: (1) The attorney's skills can easily be labeled insufficient to the task at hand; and (2) the attorney can be alleged to have rendered biased advice, despite claims to the contrary. A case in point arose in the City of Baltimore when the Law Department ventured a legal opinion that a local hiring bill, as drafted, was unconstitutional.

Criticism of this nature is inherent in the work. There is no escape from it, given the legal fiction that underlies the government client. Governments are many-headed beasts. A subset of the government client – a legislative body - by definition is a collection of individuals. Any advice that conflicts with member

[6] For a critique of the advocate model and the neutral model for counseling government clients, *see* Note, *Government Counsel and Their Obligations,* 121 Harv. Rev. 1409 (2008).

interests will not be greeted warmly, especially if it conflicts with publicized agendas of elected officials.

Forms of government – institutionally induced fragmentation

Besides the challenges of working with corporate bodies that exhibit inter-personal discord are those inflicted by the form of government. Even if the client's constituent interests are aligned and in agreement, the form of government can pit the legislative arm against the executive arm. A case in point is *County of Kaua'i ex rel. Nakazawa v. Baptiste*, 165 P. 3d 916 (Haw. 2007).

This complicated case began with apparent confusion over the client's corporate nature, which resulted in Kuai'i County virtually suing itself. No adversarial parties initially existed in the case until the court reorganized the law suit. The Court agreed to drop the county's legislative body as a defendant and make it the plaintiff. This action resulted in the legislative body suing the executive, which allowed the case to be heard. It also set in motion the odd condition in which both sides of a lawsuit agreed on all the important facts, allegations and interpretations of law presented in the case.

A successful ballot initiative aimed at amending the County charter provoked the lawsuit. *Id*. at 920. If approved, the Charter amendment would decrease and limit real property taxes for certain county residents. *Id*. When it was placed on the ballot for the 2004 election, the County, through the County Attorney, sought declaratory relief from the circuit court, alleging that the proposed Charter Amendment was a violation of the Hawai'i Constitution and existing Charter provisions. *Id*. When the amendment was approved by the voters, the County Attorney amended the earlier complaint and named the Mayor, the Finance Director, and the County Council as defendants. *Id*. Thus, the corporate client sued the very agents who spoke for the client, suing themselves to provide relief from themselves.

The defendants, represented by the Deputy County Attorney, exploited the confusion over the client's corporate identity. They argued that no actual controversy existed. "The County Attorney, the Mayor, the Finance Director, and the County Council are not adversaries or contending parties with antagonistic claims," the Deputy County Attorney insisted. *Id*. at 931. In fact, all of them supported the lawsuit "wholeheartedly," he asserted. *Id*. at 932. All agreed the charter amendment violated the State Constitution and County Charter. *Id.* at 951. Nonetheless, the County, represented by the County Attorney, argued that all the County officials named in the suit were legally charged with implementing the Charter Amendment. Therefore all of them had concrete interests in the validity or invalidity of the Charter Amendment. *Id*. at 932.

The Court agreed with the defendants. "The County, as an artificial entity, acts through the officers of its executive and legislative branches." *Id*. at 929.

Both were defendants in this case. Thus, the Court said, "the above construction leads to the conclusion that the County is, in essence, suing itself." *Id. at 930*.

The Court determined, however, that the County actually brought this suit on behalf of the County Council, even though the County Attorney had not so named it. *Id.* at 928-929. The Court said the County Council had a "personal stake" in the outcome of the suit because "it is the entity responsible for setting increases or decreases to the real property tax rates." *Id*. at 929. Furthermore, the Court said "the Kaua'i County Council is the primary governing body of the County of Kaua'i." *Id.* Yet, there was no denying that "the presence of the County Council as a defendant in this case destroys the existence of an actual controversy." *Id.* at 933. Given the circumstances presented, the Court considered "whether it is appropriate, at this stage of the proceeding, for this court to 'drop,' *i.e.*, dismiss, the County Council to cure the 'spoiler' problem." *Id*. at 934. In the end, the court dismissed the County Council as a dispensable defendant in order to create an adversarial relationship between the County Council and Mayor. *Id.* at 936. Ultimately the case concluded with the Charter amendment being declared a violation of the Hawai'i Constitution. *Id*. at 949.

Council- manager form – the awkward position of the council

A rich environment to engage an attorney's legal talent is serving a council-manager form of government.[7] Different types of council-manager plans exist, but the essence of the model separates an elected council, which establishes the policies, budget and scope of government operations, from an appointed executive, hired by the council, who exercises legal control over operations.[8] A New Jersey statute illustrates the power typically conveyed to the professional manager in a council-manager government:[9]

The municipal manager shall:

[7] According to the International City Managers' Association (ICMA), 58% of the cities with populations that exceed 100,000 employ this form of government and 49% with populations exceeding 3,500.

[8] Some municipalities claim to have adopted a council-manager form when no law or charter provision designates the manager or administrator as the chief executive officer or provides powers to that effect. In these instances, the manager is merely exercising informal control over the administrative apparatus and thus, the form cannot be considered to be significantly different than a typical commission form.

[9] For other examples of the language used to empower managers in a council-manager form see, e.g., National Civic League, Model City Charter; S.C. Code Ann. § 4-9-630; Dallas City Charter; and Phoenix City Code, Chapter III.

(a) Be the chief executive and administrative official of the municipality;

(b) Execute all laws and ordinances of the municipality;

(c) Appoint and remove a deputy manager if one be authorized by the council, all department heads and all other officers, subordinates, and assistants…;

(d) Negotiate contracts for the municipality subject to the approval of the municipal council…;

(e) See that all terms and conditions imposed in favor of the municipality or its inhabitants in any statute, public utility franchise or other contract are faithfully kept and performed...;

(f) Attend all meetings of the municipal council with the right to take part in the discussions, but without the right to vote;

(g) Recommend to the municipal council for adoption such measures as he may deem necessary or expedient, keep the council advised of the financial condition of the municipality, make reports to the council as requested by it, and at least once a year make an annual report of his work for the benefit of the council and the public;

(h) Investigate at any time the affairs of any officer or department of the municipality;

(i) Perform such other duties as may be required of the municipal manager by ordinance or resolution of the municipal council.

The municipal manager shall be responsible to the council for carrying out all policies established by it and for the proper administration of all affairs of the municipality within the jurisdiction of the council.

N.J. Stat. Ann. § 40:69A-95 (West). The New Jersey State law makes clear that in a council-manager form of government:

> *The municipal council shall act in all the matters as a body, and it is contrary to the spirit of this article for any of its members to seek individually to influence the official acts of the municipal manager, or any other officer, or for the council or any of its members to direct or request the appointment of any person to, or his removal from, office; or to interfere in any way with the performance by such officers of their duties. The council and its members shall deal with the administrative service solely through the manager and shall not give orders to any subordinates of the manager, either publicly or privately….*

N.J. Stat. Ann. § 40:69A-91 (West).

The separation of the legislative and the executive function in a council-manager form sets up an interesting dynamic. The only ones accountable to the voters - the elected council members- control the scope of government operations but not the actual operations themselves. The day-to-day provision of government services, an activity that is most emblematic of the government, are legally the responsibility of an unelected official.[10] Accordingly, the elected body is placed in an awkward position. Its members are held accountable for governmental performance when much of the performance is beyond their control.

As good stewards of the public interest, council members in a council-manager form are challenged to ignore the legal separation of functions and interfere with management. When interference occurs, logic dictates and practice invariably demonstrates that a council will justify the interference by pointing to the fact that its members are elected to "run the government," whereas the appointee is merely an appointee, elected by no one and accountable to the council and serving at its pleasure. Yet, if the government is to remain a true council-manager form of government, the acquisition of managerial powers by the council is beyond the council's reach. The council's frustration, inherent in the form, generates law suits as councils try to wrest control from the hands of the appointee.

Townsend v. Pequannock Twp., 135 A.2d 708 (N.J. 1957) illustrates the dynamic. In *Townsend*, despite the New Jersey State law (reproduced above) providing the manager control over the appointment and removal of all department heads, the city council by ordinance required all such appointments to be subject to council confirmation. The Judge wasted little time on arguments favoring the ordinance, stating. "I have not the slightest doubt that [the ordinance] is illegal as an invasion of the manager's power of appointment given him under the statute…." *Id*. at 713. Besides the express statutory language at issue, the court relied on an earlier case where it was argued that an attempted usurpation of management authority was justified because the municipal manager worked under "the direction and supervision" of the municipal council. *Id*. at 712. The justification was rejected. The earlier court had ruled that this type of general language could not be read to affect specific statutory authority delegated to the municipal manager. *Id*.

[10] The councils in these types of governments often believe that language in the enabling law or charter provision granting the council supervisory control over the manager extends the reach of the council into administrative affairs. The belief often is illusory as indicated in the case discussed *infra, Townsend v. Pequannock Twp*., 135 A. 2d 708 (1957).

Similarly, in *Wilson v. Preston*, 662 S.E. 2d 580 (S.C. 2008), a law suit emerged when a county administrator, in a county-manager form of government, refused to disclose certain financial and legal information to a council member. Specifically, the councilmember sought an unaudited version of the county's financial report immediately at the end of the fiscal year as well as legal bills in which a narrative of billable hours supported each payment. *Id* at 584. The County Administrator refused to provide either, although he assured the council member the audited financial report would promptly be delivered after all accounts were closed out and the external audit finalized. *Id*. at 583. As for the legal bills, they were provided promptly but without the narrative.

On the advice of the County Attorney, the Administrator took the position that the narrative descriptions involved legal strategy. *Id.* at 584. Both the Administrator and County Attorney therefore considered the narratives to be attorney-client privileged information with the County being the client. *Id*. The Administrator conceded that if the Council, acting as a corporate body on behalf of the client, authorized the release of the narratives to the council member, the Administrator would release them. *Id*. But the Council, acting as a body, failed to authorize the release. *Id*.

The councilman thereafter filed a petition for writ of mandamus. *Id*. at 581. With respect to the financial audits, the Court noted that it was unlawful for an Administrator to completely deny a council member access to county financial documents. *Id*. at 583-584. However, the Court viewed the Administrator's duty to deliver documents to be a "quasi-judicial duty." It was not a ministerial act. It was a discretionary act. *Id.* at 583. Thus, as a discretionary act, the Administrator controlled the time and manner of delivery. *Id.* at 584.

As for releasing the narrative information on legal bills, the court agreed with the Administrator. The Court held that the Administrator, in contending the material was privileged information, was correct. *Id.* at 585. Furthermore, a council member cannot independently review attorney-client privileged documents. *Id.* "The privilege belongs to the client County; and the Council, as a whole, is authorized to release that information and has to waive the privilege before an individual council member can review privileged documents." *Id.*

Council – executive form – the pinnacle of complexity

The problems in representing legislative bodies take a sharp turn upwards in a council-executive form. In this form the executive is an elective office, as accountable to the voters as any elected council member. Moreover, the executive has been elected specifically to function as the chief executive officer who, upon election, will control the operational efficiency and effectiveness of government on a day-to-day basis. This fact undercuts any claim by the council, used in a

council-manager setting, that the executive's control over operations is somehow illegitimate. Nonetheless, the struggle for operational control is as endemic here as it is there.

The Council performs three basic roles in this form of government.[11] First and foremost it serves as the legislative body of the government, creating its programs and policies - its strategies – for achieving the ends of government. Second, it establishes the annual budget and exercises whatever powers of taxation are available to the government. Third, through its investigative function, the Council oversees executive operations as a check and balance against mismanagement and the abuse of power by an office headed by a single individual given extraordinary governing powers.

Each of these activities engenders a degree of conflict with the executive since each is performed or dependent on actions taken by the executive. Specifically, the success of the legislative function is ultimately dependent on the implementation of the policies and programs approved by the legislative body. The budget may be fashioned and approved by the council, but its implementation on a day-to-day basis is shaped entirely by executive decision-making.[12] Thus, in both areas of activity, legislative intent may escape being fully embraced or wholly realized by an independent executive. Finally, the oversight function is inherently adversarial as councils seek to critique executive performance in a public setting. The case *Matter of Shain*, 457 A.2d 828 (N.J. 1983), illustrates the vigorous in-fighting that may arise in a council-executive form of government.

In *Matter of Shain*, the City Council of the City of Orange, New Jersey established a special investigatory committee, comprising the entire Council, to investigate allegations that the new Acting Police Director had interfered with the duties of the Orange Chief of Police. *Id.* at 829. A number of officials voluntarily testified before the committee, but several police officers testified under committee-issued subpoenas. *Id.* at 830. When the committee issued more subpoenas to more police officers, the Mayor issued an executive order that prohibited police officers from testifying before the Committee. *Id*. The Mayor later stated in an affidavit that he had issued the order "because he believed the Council was not acting in good faith and had gone beyond the scope of its original resolution." *Id*. In response, the City Council subpoenaed the Mayor. *Id*. When the Mayor failed to appear before the Committee, the City Council filed suit to compel the testimony. *Id.* The Mayor responded "with an answer and a counterclaim for an order…to stop the investigation and to quash the subpoena, asserting that the issuance of the subpoena was not authorized by statute." *Id.*

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[11] *See generally* 4 *McQuillin Mun. Corp.* § 13:3 – 13.7(3d ed.).

[12] In governments such a Baltimore City, charter provisions require a Board of Estimates to control the City's financial affairs, rather than the City Council or the Mayor, although both are represented on the Board.

The Court held that it was "clear under a Mayor-Council form of local government, the elected Council exercises the municipality's legislative power" and that a "concomitant of the power to legislate is the power to investigate for legislative purposes." *Id*. at 830-831. "Thus, legislative investigations, whether by standing or special committees, are an established part of representative government." *Id.* at 831. The Court further recognized that New Jersey State law implicitly conferred on legislative bodies the power to investigate. *Id.* The Court noted the Mayor's claim that a state stature must expressly permit the issuance of subpoenas, but disagreed with it. *Id.* at 832.

> *No specific statutory grant is necessary to vest a legislative body with subpoena power. While a subpoena must be issued pursuant to constitutional and legislative authority [citation omitted], such authority may be fairly implied from the legislative scheme without being expressly stated within the four corners of a statute. [citation omitted]. The power to compel testimony is inherent in the legislative power to investigate.*

Id.

The Mayor also argued that even if the Council had the right to issue subpoenas to municipal officials, "the separation of powers doctrine strictly prohibits the issuance of a subpoena to a Mayor." *Id.* at 834. The Court disagreed. *Id*. It noted that the formal separation of powers doctrine is generally inapplicable to local governments. *Id.* at 835. Yet, the separation of functions is envisioned by the mayor-council form of government. *Id.* (emphasis added). The Court held the bifurcation of functions is:

> *not intend to abridge the normal powers of investigation incident to the legislative branch. Accordingly, the courts should intervene only where the Council exceeds its legislative purpose in subpoenaing municipal officials. The Mayor intimates that the Council's investigation here was motivated, in part, by political factors. However, as long as a municipal committee's investigation has legitimate public ends, it is immaterial that political motivations are also present. The subpoena would, of course, be invalid if the Council issued it in bad faith or without a proper legislative purpose. Nor could the subpoena transgress the Mayor's constitutionally-protected interest.*

Id.

While *Matter of Shain* involved the City Council suing the Mayor, the reverse may occur when an executive believes the legislative body has overstepped its authority. In *Hanna v. Common Council of City of Utica*, 46

A.D.2d 503 (N.Y. 1975), the City Council formed a committee to investigate certain personnel actions taken by the Mayor involving the city police department and also the release of certain prisoners. *Id*. at 504. The Mayor, acting through the City Attorney, sued the City Council to declare void the Council's action in creating the investigative committee and to vacate subpoenas issued against the Mayor. *Id*. The Mayor claimed the committee was illegal because it was created by resolution and not by ordinance. *Id.* at 505.

The Court held that the Council, as a legislative body, was authorized, "by inquiry, to ascertain facts which affect public welfare and the affairs of government. Such power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function." *Id.* at 506. "By its very nature such power is not subject to action or veto by the Mayor. It is one of the functions of the legislative branch of the government as opposed to the functions of the executive and judicial branches." *Id.* The Council therefore could proceed by resolution or ordinance in this matter and was empowered to issue subpoenas. *Id.*

As conflicts ensue between the council and the executive, it is not unusual for loyalty of a city or county attorney to be questioned – sometimes for good reason. For example in *City of Tukwila v. Todd*, 563 P.2d 223 (Wash. App. 1977), the City Attorney was accused in a budgetary dispute of favoring the executive over the council. The suit arose when the Mayor increased the salaries of certain city employees above levels set in the annual budget. *Id*. at 224. The Mayor argued the local ordinance prohibiting the action was implicitly repealed when the enabling State statute was repealed.

All seven members of the City Council sought to enjoin the Mayor and City Clerk from taking the action, arguing the ordinance, despite the repeal of the underlying statute, remained in effect. *Id*. at 24-226. Furthermore, the Council hired a private attorney to represent the Council in the law suit because "the council members believed the city attorney was biased in favor of the administrative branch…and was unable to render impartial legal advice to the council." *Id.* at 225.

The Court sided with the Council in both matters. First, it pointed out that while the enabling state statute was repealed, a substantially similar state statute replaced it. The Court was satisfied the difference between the two statutes was negligible and that "the legislative intent was to amend and not repeal" the original state statute. *Id*. at 226. Second, the Court agreed with the trial court that the City Council "had substantial reasons to seek independent legal counsel." *Id*. The trial court found "substantial evidence" supported the belief that a conflict existed between the Council and the Mayor, and "the city attorney represented the mayor whenever there was a difference of opinion." *Id*. at 227. The Court held that "even though the regular city attorney is responsible, by law, for attending to

all the legal affairs," the council was justified in retaining private legal counsel under the circumstances presented in the case. *Id.*[13]

Conclusion

Tukwila and cases of its ilk provide a cautionary tale for the government attorney who provides advice in a bifurcated form of government – use of the advocacy model has limited utility. Zealous advocacy of the client's interests is possible only when the client's "duly authorized constituents" have formed a working consensus about the subject under discussion. In a council-manager or council-executive form of government, consensus is never a foregone conclusion. The corporate personality has been deliberately segmented into mutually reinforcing but separate camps, leading inevitably, if not continually, to the fragmentation of consensus.

An adroit attorney working in these environments will attempt to avoid being placed in a position where he or she is viewed as overtly or enthusiastically supportive of one party's position over another. This is especially true in a legislative environment, which almost by definition is an environment in which consensus is absent. In environments where consensus is elusive or fleeting, clothing oneself in the role of an advocate, or being viewed as an advocate, is likely to diminish an attorney's professional legitimacy.

Professional legitimacy is best preserved in a legislative environment, regardless of the form of government served, when the attorney adopts a neutral model of behavior. In this model, the attorney is unwilling to support any position except one that comports with the attorney's "best" reading of the law. This behavior may not entirely protect an attorney from charges of bias or incompetence, given that the advice of a legislative attorney is given in a highly charged political arena. It may not even escape criticism that the advice rendered is highly subjective, which of course it is since the advice provided will be based on one attorney's understanding of the law. Yet, the institutional arrangement of the client and the attorney's role in the institution make criticism unavoidable.

[13] On the other hand, when no conflict of interest exists, the council may not be empowered to obtain its own attorney. See *State v. Volkmer*, 867 P.2d 678 (Wash. App. 1994).