Ethics and Government Practice: Navigating the Dangerous Waters of Defending a Governmental Entity

or

How I Learned to Stop Worrying and Love Ethics



International Municipal Lawyers Association
2017 Mid-Year Seminar
Washington, DC

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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, joining 3 incumbent at-large Councilmembers

The Players

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

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

Ground Rules

- **Charter § 4-40(f)(2):**
  - Subject to confirmation by a majority 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.
  - Be the legal adviser of the Mayor, Council, Commissions, and Heads of Departments in relation to their duties.
  - Shall perform such other duties as required by ordinance.
  - Receive such salary as prescribed by Council ordinance.
- **City Code § 1.2.402:** When acting as legal advisor, the City Attorney shall comply with the Colorado Rules of Professional Conduct.

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.

  - *Rule 1.13 - Organization as Client*
  - *Rule 1.6 - Confidentiality of Information*

Says Who?

- Council approved a rezoning ordinance on first reading, and an accompanying MP amendment was approved on motion.
- Rezoning and MP amendments are quasi-judicial matters.
- At second reading, CMX stated that he had spoken and corresponded with staff from a “large nearby federal installation.” He moved to postpone second reading pending resolution of the federal installation’s drainage concerns.
- How to address?
  - *Rule 1.13 - Organization as Client*
  - *Rule 2.1 - Advisor*

Not so Hypothetical: Other Counsel

- The Mayor asked CA for a legal opinion on separation/balance of powers related to a matter pending before Council.
- CA shared the opinion with the Council, but Council didn't like the opinion because the CA "always sides" with the Mayor.
- Council President suggested a Resolution authorizing the Council to retain independent 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."

  - Charter/Code/Statutory Authority
  - *Rule 1.13 - Organization as Client*

Turning Point

- Change is stressful
  - No frame of reference
  - Newly 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
  - Explain the Rules
  - Live by the Rules

Ethics Guidelines Elements

- Establish the basis for the attorney-client relationship
  - Charter/Code/Statutory authority
  - Specify duties/roles/functions – *Preamble: A Lawyer's Responsibility*
  - Make clear distinction between ethical responsibilities when serving in advisor and advocate roles

- Address client identification issues – *Rule 1.13*
  - Attorney for the governmental entity
  - Advise constituent client representatives
  - Individuals within the entity

Ethics Guidelines Elements

- Explain conflicts and how to resolve
  - Conflicts between constituent client representatives - *Scope [18]*
  - Ethical conflicts for the CAO – Rule 1.4
- Discuss communications and confidentiality
  - Attorney-Client Privilege
  - Waiving the privilege
  - Sharing information/communications among the constituent client representatives

Ethics Guidelines Elements

- Other CAO Responsibilities
  - Attorney Assignments
  - Supervising Attorney Responsibilities Rules 5.1, 5.3)
  - Prosecutor Responsibilities (Rules 3.8, 4.1, 4.2)
  - Settlement Authority – *Scope [18]*
  - 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.

Quick Case Study

- Citizen sues City, once in 2010 and once in 2013.
- City wins, twice.
- City is awarded attorneys' fees, twice.
  - First award reduced to judgment lien and recorded; attaches to Citizen's property.
  - City waiting for judge to sign second judgment for recording.
- Citizen under contract to sell property to third party.
- Title company contacts City about first judgment lien and City provides payoff information.

But, Wait, There's More

- Citizen finds out about first judgment lien prior to closing and conveys property to a CM.
- Second judgment lien recorded after CM takes title to Citizen's property, so lien does not attach to (now) CM's property.
- Contract for sale to third party revised, and CM closes transaction with third party.
- At closing:
  - First judgment lien satisfied out of proceeds.
  - Proceeds paid over to CM.
  - Citizen brings check to CM at a Council meeting and CM endorses over to Citizen.

Navigating Ethical Waters

COLORADO SPRINGS
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- What are the facts?
- What is the law?
- Who is the client?
- Where does the duty of loyalty lie?
- Is there a conflict?
- Is there an obligation to report?

Office of the City Attorney

Legal Ethics Guidelines[1]

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 City Attorney's Office ("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[2] of the City.

The Office does not provide legal advice to members of the public.

I. Functions of the City Attorney's Office

A. *Litigation/Administrative Proceedings*: 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."[3] Also, the City Attorney is required to represent the City and its enterprises "in all adversary actions in any State or Federal court or actions before State or Federal administrative agencies in which the City or its enterprises, the City Council, Mayor or any board, commission or authority of the City is a party."[4] In civil matters, "[w]hen directed by the City Council, the City Attorney shall represent any Council Member, the Mayor, staff member or employee in litigation resulting from the conduct in good faith of the alleged duties and functions of that person."[5] In criminal matters, City Council may authorize payment for the cost of defense and/or fine incurred by a City employee if the employee was acting during the course of his or her job duties, was acting in good faith, and the defense serves the interest of the City.[6]

B. *Criminal Prosecution*: The "City Attorney shall institute and prosecute actions in case of violation of any Charter provision or ordinance when so directed by the Council or the Mayor"[7] and "shall keep proper records of all actions in courts of record prosecuted or defended by the City Attorney's Office."[8]

C. *Advisor to Executive Branch*: The City Attorney is "the legal adviser of the Mayor" in relation to the Mayor's duties.[9] The City Attorney must provide legal service and support "to the Mayor in the exercise of the Mayor's executive and administrative duties and

[1] Adopted May 2014, revised February 16, 2017.

[2] The term constituent representatives is used throughout this policy. As used herein, constituent representatives refers to the City's elected officials, enterprises, appointees, and/or employees.

[3] City Charter § 13-80.

[4] City Code § 1.2.405.

[5] City Code § 1.2.405; City Code § 1.4.302.

[6] City Code 1.4.301.

[7] City Code § 1.2.403.

[8] City Code § 1.2.408(A).

[9] City Charter § 13-80.

functions" and "give an opinion upon any legal matter or questions submitted by the Mayor."[10] Furthermore, the City Attorney must prepare or revise ordinances when requested by the Mayor.[11]

D. *Advisor to the Legislative Branch*: The City Attorney is the legal advisor to City Council in relation to its duties, including its duty as Board of Directors for Colorado Springs Utilities.[12] The City Attorney is also responsible for providing "legal service and support to the City Council in the exercise of its legislative duties and functions," and giving legal opinions to City Council or "any of its members."[13] In addition, the City Attorney is required to prepare or revise ordinances when requested by City Council or a Council Member; provided, however, that in accord with Rule 8-3 of the Rules and Procedures of City Council, the Office may decline to provide such service at the request of a Council Member if it would require a material amount of staff time, funds, or be disruptive to the Office.[14]

E. *Advisor to the City's Enterprises, Department Heads, and City Staff*: The City Attorney is obligated to provide legal advice to all City enterprises, department heads, and City staff on "legal questions arising in the conduct of City business."[15]

F. *Advisor to Boards, Commissions, and Committees*: The City Attorney is the legal advisor to boards, commissions, and committees and shall render legal opinions when requested.[16]

G. *Approve and Enforce Contracts:* The City Attorney shall also approve as to form "all contracts, deeds and leases to which the City or its enterprises is a party," and "all surety documents and insurance policies required as a condition of approval of any development application or the issuance of any license or permit by the City."[17] The City Attorney is also required to take action to enforce contracts when the Mayor reports a violation of a contract or agreement.[18]

H. *Settle Claims*: The City Attorney has the authority "to adjust, settle, compromise or submit to mediation any action, accounts, debts, claims, demands, disputes and matters in favor of or against the City or in which the City is concerned as debtor or creditor" for an amount not to exceed $50,000, and, with the approval of the Claims Review Board, for an amount not to exceed $100,000.[19]

I. *Make Reports and Keep Records*: The City Attorney shall make reports regarding City litigation and City legal matters to City Council, the Mayor, City enterprises, and interested City staff.[20] The City Attorney is also required to "keep proper records of all actions in courts of record prosecuted or defended by the City Attorney's Office, the proceedings had and

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[10] City Code § 1.2.402.
[11] City Code § 1.2.403.
[12] City Charter § 13-80.
[13] City Code § 1.2.402.
[14] City Code § 1.2.403.
[15] City Charter § 13-80; City Code § 1.2.402.
[16] City Code § 1.2.402.
[17] City Code § 1.2.404(A).
[18] City Code § 1.2.404(B).
[19] City Code § 1.2.406.
[20] City Code § 1.2.407.

all written legal opinions not subject to any attorney-client privilege," and to maintain "Mayoral administrative regulations."[21]

J. *Appoint Hearing Officers*: The City Attorney also has authority to appoint hearing officers as authorized by the City Code or Utilities' tariffs.[22]

II. Attorney Assignments

The City Charter and Code give the City Attorney authority to "employ assistants."[23] The City Attorney has sole authority to assign attorneys to support the various constituent representatives of the City entity. The City Attorney retains the duty and authority to direct the provision of legal services to the legislative and executive branches of government, committees, boards, commissions, and all City enterprises and departments. In rendering legal services to the various branches, enterprises, and departments of the City, each attorney shall exercise independent professional judgment and discretion while always considering the best interests of the City Attorney's client, the City entity as a whole. In ascertaining the best interests of the City, the Office should respect the policy determinations made by the highest level decision maker for the relevant branch(es) of the City government.

While attorneys in the Office are expected to exercise independent legal judgment, they are encouraged to work collaboratively. However, except as otherwise approved by the City Attorney, no attorney will give legal advice to a constituent representative that the attorney knows or reasonably should know is contrary to the legal position taken by the Office or the City Attorney. If multiple attorneys are assigned to provide legal advice on the same subject matter, the attorneys shall work cooperatively to develop any final legal position.

III. Role as Advisor vs. Advocate

A. *City Attorney as Advisor:* The Office advises various constituent representatives of the City government by assessing the legal consequences of past and proposed courses of action. The Preamble to Colo. RPC states, "[a]s advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." Colo. RPC 2.1 provides further guidance regarding a lawyer's advisor role: "a lawyer shall exercise independent professional judgment and render candid advice." A lawyer may analyze not only the law but may consider "moral, economic, social and political factors that may be relevant to the client's situation" and "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[24]

B. *City Attorney as Advocate:* An attorney in the Office performs in an advocate role when he or she represents the City or one of its units or constituent representatives in an adversary process. This role generally occurs in the context of its prosecutorial function in enforcing City ordinances or in the context of litigation or administrative proceedings in which the City and/or its representatives are a named party. The Colo. RPC Preamble states that an attorney as advocate "zealously asserts the client's position under the rules of the adversary system."[25] Likewise, as advocate, an attorney "has a duty to use legal procedure for the fullest

[21] City Code § 1.2.408.
[22] City Code § 1.2.409.
[23] City Charter § 13-90(a); City Code § 1.2.401.
[24] Colo. RPC 2.1 & 2.1 cmt. 1.
[25] Colo. RPC Preamble cmt. 2.

benefit of the client's cause, but also a duty not to abuse legal procedure."[26] As an advocate, a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[27]

IV. Client of the Office/Conflicts of Interest

All attorneys in the Office have a duty to determine whether the individual attorney or the Office has a conflict of interest when rendering legal services to the City. In determining whether a conflict of interest exists, attorneys shall consider, as appropriate, the Rules of Professional Conduct, case law, administrative regulations or interpretations, City policy, and relevant federal, state, and local law. The City Attorney shall be informed of any potential or actual conflicts of interest.

A. *Identity of Client*: The Rules of Professional Conduct guide the identity of the Office's client. A "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[28] In the context of governmental organizations, "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be difficult."[29] Government attorneys "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients" and the "Rules do not abrogate any such authority."[30]

In the context of a municipal attorney, the attorney generally only has one client, the municipality itself.[31] As such, "since the constituent sub-entities and officials of a city are normally not separate clients of the city attorney, a city attorney's provision of legal advice on the same matter to constituent sub-entities and officials will not necessarily give rise to a conflict of

[26] Colo. RPC 3.1 cmt. 1.
[27] Colo. RPC Rule 3.1.
[28] Colo. RPC 1.13(a).
[29] Colo. RPC 1.13 cmt. 9.
[30] Colo. RPC Scope cmt. 18.
[31] *See* Restatement (Third) of Law Governing Lawyers § 96 cmt. b (2000) ("The so-called 'entity' theory of organizational representation...is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations."); CA Eth. Op. No. 2001-156, 2001 WL 34029610 (Cal. State Bar Comm. Prof. Resp.) (interpreting CA ST RPC Rule 3-310(C) which is similar, although not identical, to Colo. RPC 1.7). The California Bar Ethics Committee concluded that a city attorney with charter responsibility to provide legal advice to both the mayor and council did not have a conflict of interest when advising both branches on the same matter even though they had conflicting opinions. *Id.* There was no conflict of interest because the municipal corporation was the client of the city attorney, not the constituent sub-entities and officials of the city. *Id. See also Salt Lake Cnty. Comm'n v. Salt Lake Co. Atty.*, 1999 UT 73, 985 P.2d 899, 905 ("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.); *In re Grand Jury Subpoena,* 866 F.2d 135, 138 (6th Cir. 1989) ("The fact that the government of Detroit is bifurcated into a legislative and executive branch does not support the district court's conclusion that the two branches are distinct entities."); State Bar of Montana Ethics Committee Opinions 870513 and 940202 (concluding a lawyer representing an entity "has only one client, the entity itself"); 82 Op. Att'y Gen. 15 (Md. 1997) (County Attorney represents the County entity not County citizens); Charles Thompson, *Some Ethical Conundrums for City and County Attorneys*, International Municipal Lawyers Ass'n, www.imla.org.

interest even if the constituent sub-entities and officials take contrary positions on the matter."[32] In other words, when different City representatives request a legal opinion on the same matter, the City Attorney's advice to each party should be substantially the same.

Absent rare circumstances (*see* "Multiple Constituent Representation" discussed in subsection D below), no attorney-client relationship exists between the attorneys in the Office and individual elected officials, appointees, or employees of the City or its enterprises. Although the City as a whole is the City Attorney's client, in general, the Office should endeavor to respect the request for confidentiality of communications from constituent representatives within their defined area of authority as set forth in the Charter, Code, policy, or law and, absent appropriate circumstances, should not share confidential communications between the City's various constituent representatives. However, if a constituent representative expresses an intent or decides to pursue a particular course of action after a member of the Office has given advice that such course of action has negative legal implications to the City, the attorney may share communications between the attorney and the constituent with others with a role in the decision-making process about the legal advice provided to the constituent. Attorneys may also share constituent communications with other and/or higher level constituent representatives when the attorney has a duty to refer the matter to a higher authority as described in this policy.

B. *Duty to Refer to Higher Authority:* Attorneys in the Office must provide their best independent legal advice, and if the constituent representative chooses not to follow such advice, the attorney has no further duty unless the conduct is known to be a violation of law or will subject the City to probable civil liability. If the constituent representative persists in moving forward with conduct known to be a violation of law or which will subject the City to probable civil liability, the attorney must inform a higher level of authority in the respective branch of government up to and including the Mayor with regard to the conduct of executive branch appointees and employees, and City Council with regard to legislative branch appointees. This approach is required by the Rules of Professional Conduct 1.13(b), which states:

> 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 is likely to result in substantial injury to the organization, 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 authority 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.

If appeal to the highest authority identified does not alter the course of action which is a violation of law, or it is the highest authority that is persisting on taking such action, and the attorney reasonably believes substantial injury will result to the City, the attorney may further reveal information relating to the matter.[33] Such disclosure must only be to the extent necessary to resolve the issue and, if possible, steps should be taken to limit access to the information (i.e., requesting protective orders in the judicial context).[34]

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[32] CA Eth. Op. No. 2001-156, 2001 WL 34029610 (Cal. State Bar Comm. Prof. Resp.).
[33] Colo. RPC 1.13(c) cmt. 6; Colo. RPC 1.6(b).
[34] Colo. RPC 1.6 cmt. 14.

C. *Duty to Identify the Client to Constituent Representatives:* Each attorney working on a matter must identify the constituent representative(s) of the City with responsibility for the particular matter on which legal advice or representation is undertaken. Attorneys are required to explain the identity of the organizational client to constituents "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."[35] Attorneys must not represent to constituent representatives that they have an individual attorney-client relationship with an attorney or that their communications with the attorney will never be shared, except in circumstances where multiple representation is authorized.[36] If in the attorney's opinion the City's best interests become adverse to the constituent representative, the attorney may reveal such communications to appropriate City officials within the same branch of government.[37]

D. *Multiple Constituent Representation:* In rare circumstances, the Office may have a separate attorney-client relationship with constituent representatives for actions involving their official duties. This typically occurs when the City is required by Charter, Code, or state law, to represent one or more individual officials, appointees, or employees in litigation or an administrative proceeding for conduct occurring during the course of his or her employment[38] or the City is also a party in the proceeding. [39] As a result, the Office may be required to defend the City and one or more individual City employees simultaneously. This situation is referred to as "multiple constituent representation".

The Rules of Professional Conduct address conflicts of interest in the context of multiple constituent representation. A concurrent conflict occurs when "(1) the representation of one client will be *directly adverse* to another client; or (2) there is a significant risk that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[40] Nevertheless, an attorney may represent multiple clients when a conflict exists if:

(a) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(b) The representation is not prohibited by law;

(c) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(d) Each affected client gives informed consent, confirmed in writing.[41]

A conflict of interest may exist at the outset of representation. If informed consent is required, the attorney shall advise the employee of the relevant and material circumstances of the conflict and explain the reasonably foreseeable ways the employee's interests might be adversely

[35] Colo. RPC 1.13(f).
[36] CA Eth. Op. No. 2001-156, 2001 WL 34029610 (Cal. State Bar Comm. Prof. Resp.).
[37] *Id.*
[38] Charter § 13-80; City Code § 1.2.405; C.R.S. § 24-10-110(1)(a).
[39] The representation of multiple constituents by the Office may occur when, for example, both the City, due to the actions of the police department, and individual police officers, due to their actions occurring within the scope of employment, are named as parties in a lawsuit.
[40] Colo. RPC 1.7(a) (emphasis added).
[41] Colo. RPC 1.7(b).

affected by joint representation.[42] The attorney will provide information regarding "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved in authorizing the representation."[43] After fully advising the employee, the attorney should obtain written consent before proceeding with representation.[44] The written consent should be kept with the case file.

A conflict of interest may also develop during the course of litigation. The attorney should be mindful of any potential conflicts of interest throughout the course of the representation. If a conflict of interest develops during the course of litigation, written informed consent must be obtained for continued representation. An employee may revoke consent at any point. If a conflict arises which cannot be resolved by written informed consent or if consent withheld or given but then later revoked by the client, the attorney may be required to withdraw from the representation of the employee or all parties.[45] When a client revokes consent, "[w]hether revoking consent . . . precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result."[46] The attorney is strongly encouraged to advise the employee in a disclosure letter that the Office will continue to represent the City should a conflict arise.

In the context of multiple constituent representation, communications between the attorney and the constituent clients will be shared amongst the clients to the extent the information impacts any member of the client group.[47] Privileged communications among the members of the joint representation are protected.[48] Waiver of the attorney-client privilege requires the consent of all clients.[49] The privilege is, however, typically waived for claims by one client against another.[50] It may be possible for joint clients to agree at the outset to shield information from one another in the event subsequent adverse litigation ensues.[51]

Attorneys are strongly encouraged to provide a disclosure letter to individual clients. A sample letter is attached as an Appendix to this policy.

E. *Prior Legal Employment*: The Rules of Professional Conduct address individual conflicts of interest of government attorneys arising from any attorney-client relationships of the attorney prior to their government employment. A government attorney may not participate in matters in which he or she substantially participated as an attorney prior to City employment

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[42] *See id.*, cmt. 18.
[43] *Id.*
[44] The written consent may be part of an acknowledgement by the employee of the terms of representation, including any applicable reservation of rights by the City.
[45] *See id.*, cmt. 29 ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.").
[46] *Id.*, cmt. 22.
[47] *See Felix v. Balkin*, 49 F. Supp. 2d 260, 270 (S.D.N.Y. 1999); *see also* Colo. RPC 1.7 cmt 30 ("With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.").
[48] *See* Restatement (Third) of the Law Governing Lawyers § 75(1).
[49] *See id.* at § 75(2).
[50] *See id.*; *see also* Colo. RPC 1.7 cmt 31 ("[I]t must be assumed that if litigation eventuates between clients, the privilege will not protect any such communications, and the clients should be so advised.").
[51] *See id.* at cmt. d.

unless the City gives informed consent.[52] In addition, an attorney in the Office may not "negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially" on behalf of the City.[53]

F. *Individual Conflicts*: If an attorney concludes he or she has an individual conflict of interest due to a personal relationship, former client or business relationship, or for any other reason, the attorney must inform the City Attorney. Appropriate steps will be taken depending on the nature of the individual conflict.

G. *Ethical Screens*: The Rules of Professional Conduct generally prohibit any attorneys in a law firm from representing a client when another attorney in the firm could not engage in the representation due to a conflict of interest.[54] However, as noted above, the Rules also recognize that government attorneys "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients" and the Rules "do not abrogate any such authority."[55] The creation of ethical walls or screens is common in governmental law offices.[56] The Office will use ethical screens in the circumstances set forth below and in any other appropriate circumstance.

1. Impermissible Representation: An attorney of the Office shall not perform duties as a prosecutor during an administrative action or proceeding before any board, commission or hearing officer while also serving as legal advisor on the same matter.

2. Ethical Screen Required: In varying contexts (including but not limited to: business license suspension/revocation hearings, liquor license suspension revocation/hearings, civil service commission hearings, department appeals of actions taken by any board, commission, or hearing officer, and Utilities enforcement of pre-treatment matters against Utilities' facilities) attorneys of the Office may be required to provide legal advice to municipal boards, commissions, or hearing officers ("legal advisor") while another attorney of the Office is charged with prosecuting the matter, advocating on behalf of a party in the proceeding, or assisting department staff in preparing the matter to be presented to the board, commission or hearing officer (collectively, "prosecutor").

An attorney of the Office may serve as prosecutor during an administrative action or proceeding before a board, commission or hearing officer while assigned as the legal advisor to the same board, commission or hearing officer in other matters that are not factually related to the matter the attorney is prosecuting. In such situations/circumstances, the attorney shall exercise special care to ensure that the attorney does not inadvertently provide legal advice to the board, commission or hearing

[52] Colo. RPC 1.11(d).
[53] *Id.*
[54] Colo. RPC 1.10.
[55] Colo. RPC Scope cmt. 18.
[56] *See Woodard v. Brown*, 770 P.2d 1373 (Colo. App. 1989); *Davis v. State Board of Psychologist Examiners*, 791 P.2d 1198 (Colo. App. 1990); *Ranum v. Colorado Real Estate Comm'n*, 713 P.2d 418 (Colo. App. 1985); *Spedding v. Motor Vehicle Dealer Bd.*, 931 P. 2d 480 (Colo. App. 1996); *Syn, a/k/a 13 Pure, Inc. v. City of Colorado Springs*, 10 CV 2149 (El Paso County Dist. Ct. 2010); *People v. Shari*, 204 P.3d 453 (Colo. 2009); City Code §§ 1.2.402, 1.2.403, and 2.1.804.

officer regarding the specific matter that the attorney is prosecuting before the board, commission or hearing officer, and shall disclose on the record in such matters that he or she has not provided and will not provide any legal advice to the board, commission or hearing officer regarding the specific matter.

3. Ethical Screen Procedure: An ethical screen procedure must be followed to ensure that both the legal advisor and the prosecutor provide legal services that do not violate the Rules of Professional Conduct, due process, the City Code, and other legal ethical rules or decisions. An ethical screen is not appropriate if it results in a violation of the Rules of Professional Conduct or other legal ethical rules and decisions.

When an attorney of the Office serves as a prosecutor and another attorney of the Office serves as the legal advisor to a board, commission or hearing officer on the same matter, the following procedures shall apply:

(a) Separate Hard Files.[57] The prosecutor and the legal advisor shall keep separate and distinct hard files. Neither the prosecutor nor the legal advisor shall seek out or have access to the other attorney's hard file. The prosecutor's file folder shall be marked: "FILE FOR PROSECUTOR: ACCESS BY BOARD'S LEGAL ADVISOR PROHIBITED." For any file the legal advisor may create related to the same matter, the file folder shall be marked: "FILE FOR BOARD'S LEGAL ADVISOR: ACCESS BY PROSECUTOR PROHIBITED."

(b) Separate Digital Files. Digital files for the legal advisor and the prosecutor shall be separate and distinct. Neither the prosecutor nor the legal advisor shall access the other attorney's digital file related to the matter in front of the board, commission or hearing officer.

(c) Discussions Prohibited. The legal advisor and the prosecutor shall not discuss any facts, law, strategy, or tactics that may apply to the case unless legal counsel for the licensee or other person who is the subject of the administrative action is also present. This subsection shall not prohibit either the legal advisor or the prosecutor from discussing ministerial and procedural matters with the municipal or enterprise department bringing the action, the City Clerk, board, commission, or hearing officer, such as settings, hearings, filings, and similar matters.

(d) Separate Preparation. The legal advisor and the prosecutor shall conduct all investigation, research, discovery, preparation of exhibits, preparation of witnesses, preparation of pleadings, briefs, and arguments, and all other preparation for the administrative action separately and shall not share any preparatory materials or information. The legal advisor and prosecutor shall strive to separate their functions before the board, commission or hearing officer.

(e) Support Staff. Support staff shall not disclose any information in the legal advisor's file to the prosecutor, or vice versa. When possible, different support staff should perform support services for each attorney.

[57] For purposes of this policy, "hard file" refers to a physical, paper file.

(f) Additional Separation of Functions. Where necessary, the City Attorney may impose additional requirements to separate the functions of the legal advisor and the prosecutor.

(g) Any attorney subject to an ethical screen on a matter shall notify their supervisor of the existence of the ethical screen.

V. Outside Counsel

The Code also gives the City Attorney "authority to employ special counsel to assist or conduct litigation and to assist or provide advice on any legal matters arising in the course of business for the City and its enterprises."[58]

Outside counsel will be retained by the City Attorney: (1) when it is necessary to provide representation of the client entity in specialized matters; (2) when, in the opinion of the City Attorney, there is a conflict of interest as outlined by the Rules of Professional Conduct or applicable law or policy; or (3) when workload issues necessitate outside counsel assistance.

Any litigation between the executive branch and the legislative branch or involving a City enterprise controlled by a different branch of City government will likely result in an impermissible conflict of interest preventing the Office from representing both branches in the litigation.[59] Depending on the circumstances, the City Attorney will engage outside counsel to represent at least one branch of City government. The City Attorney will determine, in his or her discretion, whether outside counsel will be retained for both branches, using this policy and the Rules of Professional Conduct to guide the exercise of that discretion.

No outside counsel will be retained or paid by the City or its enterprises without a retention agreement specifying the scope of services, the hourly rate, and the coordination of work

[58] City Code § 1.2.204(B)(2). The Charter and Code also give City Council authority to, in limited circumstances, "employ other counsel." City Charter 13-90(b). These circumstances are hiring outside counsel: (1) "to take charge of any litigation;" (2) to assist the City Attorney; (3) "to conduct litigation where the City Attorney may be personally or officially disqualified;" or (4) "to investigate the City Attorney." City Charter 13-90(b); City Code § 1.2.204(B)(2).

[59] *See Romley v. Daughton*, 225 Ariz. 521, 241 P.3d 518 (Ct. App. Div. 1 2010) (when county attorney has a conflict of interest rendering him unavailable to represent the county in certain matters, board of supervisors may retain outside counsel to advise in those matters); *Pepe v. City of New Britain*, 203 Conn. 281, 524 A.2d 629 (1987) (council had implied authority to hire independent attorney in litigation between mayor and council)); *Hanna v. Rewkowski*, 81 Misc. 2d 498, 365 N.Y.S.2d 609 (Sup. 1975) (various municipal boards or branches had implied authority to appoint independent counsel where there is a clear conflict of interest that results in litigation between the board and another board or branch which is represented by the corporation counsel); *Krahmer v. McClafferty*, 282 A.2d 631, 633 (Del. 1971) (council could hire outside attorney in lawsuit between the mayor and council because city attorney had conflict of interest after he publicly supported the mayor's position on the matter); *City of Tukwila v. Todd*, 563 P.2d 223 (Wash. Ct. App. 1977) (council had implied authority to hire independent attorney in lawsuit with the executive branch); *but see State v. Volkmer*, 867 P.2d 678 (Wash Ct. App. 1994) (distinguishing *Tukwila* and denying the town council fees for independent counsel on grounds that the underlying substantive issue had not been resolved in the council's favor, and also distinguishing *Krahmer* on grounds that there was no obvious conflict of interest with the city's law department); *South Portland Civ. Serv. Comm'n. v. City of Portland*, 667 A.2d 599, 601 (Me. 1995) (suggesting that implied authority is limited to cases in which the party retaining independent legal counsel has prevailed in the litigation on the underlying issue).

through an assigned attorney. In addition, all bills must be reviewed by the assigned Office attorney and a copy of the bill sent to the Legal Administrator.

VI. Confidentiality

The Rules of Professional Conduct recognize the attorney's obligation of confidentiality to the client, with limited exceptions that permit disclosure of confidential communications. Exceptions to confidentiality include when a representative of an organizational client pursues an unlawful course of action,[60] or upon client waiver after "informed consent."[61] The client, not the attorney, is the holder of the privilege. As such, only the client may waive it.[62]

Confidentiality applies only where the attorney-client communication was made for the purpose of obtaining legal advice and under circumstances giving rise to a reasonable expectation that the statement will be treated as confidential.[63] Determination of whether a confidentiality privilege has arisen and, thus, the identity of the person with authority to waive the privilege, is dependent on the identity of the client. The Office's client is the City organization as a whole. Although the attorneys in the Office generally do not share communications intended by a constituent representative to be confidential with other constituent representatives, there may be circumstances in which the best interests of the City require such disclosure.[64]

In the context of the Office or outside counsel hired to represent the City, the City entity, not its constituent representatives, holds the privilege. However, a waiver of privileged communications can only occur through those constituent representatives with authority over a particular legal matter. It is the policy of the Office that, in general, only the highest level of authority over a legal matter may waive the City's privilege. Therefore, the Mayor has authority to waive the privilege for all matters within the Mayor's administrative and executive authority, and City Council, by the concurring vote of a majority of its members, has authority to waive the privilege for matters within its legislative authority.

The City Attorney should be consulted before any waiver of the City's attorney-client privilege. Disclosure of privileged information can have serious legal and financial consequences for the City. Protection of confidential communications allows the City Attorney to give policy makers candid legal advice about potential legal vulnerabilities of various courses of action. Protecting privileged information also allows the City Attorney zealously to defend the City's interest when a course of action is challenged. Inappropriate disclosure of privileged information could provide evidence to a potential adversary to use against the City in a judicial or administrative proceeding.

VII. Supervisor Responsibility Over Subordinate Attorneys and Support Staff

[60] Colo. RPC 1.6, 1.13 cmt. 6.

[61] Colo. RPC 1.6.

[62] This privilege is also codified in Colorado. C.R.S. § 13-90-107(1)(b) ("An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.").

[63] *Alliance Const. Solutions, Inc. v. Dept. of Corrections*, 54 P.3d 861, 868 (Colo. 2002); *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992).

[64] Colo. RPC 1.13(c); Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000) (Attorneys for an organizational client may protect the interests of the entity by disclosing within it communications gained from constituents who are not themselves clients even if the disclosure would be against the interests of the communicating person, of another constituent whose breach of duty is in issue, or of other constituents.).

Supervisory attorneys must take reasonable steps to ensure subordinate attorneys comply with the Rules of Professional Conduct and that nonlawyers do not engage in conduct contrary to the attorney's obligations under the Rules.[65] A supervisory attorney may be responsible for a nonlawyer's conduct or a subordinate attorney's violation of the Rules if the supervisor directs the violation, is aware of the violation and ratifies the conduct, or has prior knowledge of the potential violation and does not take steps to prevent it.[66]

VIII. Criminal Prosecutor Responsibilities

Actions brought in the City's Municipal Court are filed in the corporate name of the City of Colorado Springs "by and on behalf of the people of the state of Colorado."[67] Therefore, a City Prosecutor acts on behalf of the people of Colorado. City prosecutors are members of the City Attorney's Office and have additional responsibilities under the Rules of Professional Responsibility. A prosecutor:

- Cannot move forward with a charge for which the prosecutor knows there is no probable cause to support;
- Must make reasonable efforts to assure the defendant has been advised of the right to counsel;
- Is required to disclose exculpatory evidence and mitigating information at sentencing;
- Must refrain from subpoenaing an attorney to testify about the attorney's client unless certain circumstances exist;
- Cannot make public comments regarding pending cases and must exercise reasonable care to prevent others involved in the matter from making public comments that increase the likelihood the accused will be publicly condemned; and
- Must take steps after a conviction to rectify a wrongful conviction.[68]

City prosecutors shall comply with these special responsibilities in the exercise of their City representation.

IX. Criminal Prosecutors: Interaction With Defendants and the Public

In furtherance of meeting the prosecutorial goals and functions to seek justice, and to place societal goals ahead of the interests of any individual, including any complainant, witness or other person, it is paramount that prosecutors exercise professional, independent judgment and discretion. Individuals may sometimes disagree or be unhappy with the decisions of the prosecutors, especially decisions regarding whether to charge an accused or to continue prosecution of an accused where the charge cannot be substantiated by admissible evidence. Prosecutors and prosecution staff are expected to be professional and courteous in their dealings with such persons, but should not be expected to tolerate abusive, vexatious, disrespectful, or uncooperative conduct or behavior from anyone.

If a defendant during a proceeding or contact with the prosecutor or staff is rude, aggressive, or uncooperative, then that contact may be terminated. Pre-trial rooms within the Municipal Court are part of the City's courthouse and courtrooms, and this type of conduct is not to be tolerated.

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[65] Colo. RPC 5.1(b); Colo. RPC 5.3(b).
[66] Colo. RPC 5.1(b); Colo. RPC 5.3(b).
[67] C.R.S. § 13-10-111(1) & (2)
[68] Colo. RPC 3.8.

If a defendant starts acting violent or making threats, the Marshals Unit should be contacted to handle the situation. Similarly, abusive, vexatious, disrespectful, or uncooperative conduct on the part of a witness/victim/reporting party will not to be tolerated. Such conduct impedes the ability of the Prosecution Division to act as the independent administrators of justice, to evaluate cases fairly and review evidence, and to handle matters docketed before the Court effectively and efficiently. In these circumstances, prosecutors and staff need not respond to such witness/victim/reporting party other than as may be required by law.

X. Criminal Prosecutors: Plea Negotiations

Prosecutors are under no obligation to enter into plea negotiations or a plea agreement that has the effect of disposing of pending charges in lieu of trial. However, when the effective administration of justice will be served, the prosecutor may engage in plea discussions for the purpose of reaching a plea agreement. If a defendant is represented by counsel, the prosecutor should only engage in plea discussions or enter into a plea agreement through or in the presence of defense counsel. A prosecutor may engage in plea negotiations and enter into plea agreements with defendants not represented by counsel. Plea negotiations are a prosecution function and the Court must not participate in these discussions[69].

[69] *See* C.R.S. §16-7-301, Crim.P. 11, NDAA Prosecution Standards 3rd Edition s2-7.4, 2-7.5, 5-1.1

Petition Committee Prepared Strikeout of Changes Proposed

PREAMBLE

ARTICLE I. NAME, BOUNDARIES, POWERS, RIGHTS, AND LIABILITIES

1-10. Name--Boundaries.

1-20. Powers--Rights--Liabilities.

1-30. Council-~~Manager~~ Mayor Government.

The municipal government provided by this Charter shall be known as the "Council-~~Manager~~ Mayor Government." Pursuant to its provisions and subject only to the limitations imposed by this Charter, all powers of the City shall be vested in an elective Council and Mayor.

ARTICLE II. ELECTIVE OFFICERS

2-10.

(a) Elective Officers--Terms--Limitation of Terms for Mayor and Councilmembers .

(1) Elective Officers--Terms . The elective officers of the City shall be a Mayor and ~~eight~~ nine (98) Councilmembers who shall be elected at the general municipal elections. The Mayor and ~~four~~ five (45) Councilmembers shall be elected at large by the qualified electors of the City and one (1) Councilmember shall be elected from each of the four (4) election districts of the City by the qualified electors of such district as hereafter provided. The Mayor shall be elected by a majority, and not a plurality, of votes cast for the office of Mayor according to a run-off election, the procedures for which shall be established by Council. The terms of the office of Mayor and all Councilmembers whether at large or from districts shall be for a period of four (4) years. (1909; 1969; 1975; 1991)

(2) Limitation of Terms for Mayor .

(3) Limitation of Terms for Councilmembers .

(b) Districts .

(c) Commencement of Office . The term of the Mayor and Councilmembers shall commence at ten o'clock A.M. on the third Tuesday of April following their election, except the term of a Councilmember appointed to fill a vacancy shall commence upon the taking of the oath of office, and further excepted that the term of Mayor may commence on the first Tuesday in June following the general municipal election, if necessary to accommodate a run-off election. T~~, and~~

the term of the Mayor and Councilmembers elected as a result of a recall election shall commence upon the declaration of the election and taking the oath of office. (1909; 1920; 1969; 1975)

(d) Mayor and Councilmember Elections . The Mayor and the four at-large Councilmembers shall be elected for four (4) year terms commencing with the 1979 general municipal election, and the fifth at-large Councilmember shall be elected for a four (4) year term commencing with the 2011 general municipal election. The four (4) district Councilmembers shall be elected for four (4) year terms commencing with the 1977 general municipal election. (1969; 1975)

(e) Mayor and Councilmember Prohibitions . No elected City officer shall be permitted to run for any elective City office, except that held by him or her, unless written notice is given to the City Clerk of their intention to so run at least sixty (60) days prior to the date of the next general municipal election. Such notice shall not be withdrawn after the 61st day preceding the next general municipal election. Once such notice is given and not withdrawn, the office of that elected officer shall be automatically vacated at 9:59 a.m. on the third Tuesday in April following said election. The vacancy thus created shall be filled by election at the general municipal election next following when such notice was given. The term of office shall be for the unexpired term of the elected officer giving the notice. (1977)

2-20. Qualifications.

2-30.

(a)Vacancy . The office of Mayor or Councilmember shall become vacant upon death, resignation, removal from office, or forfeiture of office in any manner authorized by law. The office of Mayor or at-large Councilmember shall become vacant for failing to maintain bona fide residence in the City. The office of district Councilmember shall become vacant for failing to maintain bona fide residence in the district from which elected. (1909; 1975; 1987)

If a vacancy occurs in the office of Mayor, duties and responsibilities of that position shall transfer according to Section 4-20 of this Charter, and ~~,~~ Council shall call an election within ninety (90) days, unless a general municipal election will occur in one hundred eighty (180) days and nominations for the office of Mayor can be timely filed in accord with municipal election law, for the purpose of electing a qualified person to the unexpired term of the office of Mayor. If a general municipal election will occur within one hundred eighty (180) days, ~~Council shall appoint a qualified person within thirty (30) days of the date of vacancy to the at-large or district Council position as formerly occupied by the Vice-Mayor~~the provisions of Section 4-20 shall apply~~.~~ until a successor of the Mayor last elected pursuant to the provisions of Section 2-10 of this Charter is elected and qualified, in accordance with this Charter.

~~When the office of the Mayor shall become vacant, the Vice-Mayor shall become the Mayor and Council shall select one of its members to act as Vice-Mayor. Upon commencement of the office of Mayor after an election, Councilmembers who were acting as Mayor and Vice-Mayor shall resume the offices to which they were elected.~~ (1909; 1961; 1975; 1987)

If a vacancy occurs in the office of a Councilmember more than sixty (60) days prior to the next general municipal election, the Council shall appoint an eligible person to fill such vacancy within thirty (30) days of the date of vacancy until the next general municipal election. Any appointed Councilmember shall be subject to the provisions of recall set forth herein. If a vacancy occurs in the office of a Councilmember within sixty (60) days of a general municipal election, such vacancy shall be filled at the next general municipal election. Any vacancy filled by election shall be for the unexpired term. (1961; 1989)

(b)Forfeiture of Office . The office of Mayor or Councilmember shall be forfeited if:

(1)

(2)

(3)

(4) In the case of Councilmembers only, a Councilmember fails ~~Fail~~ to attend three (3) consecutive regular meetings of the Council without being excused by the Council.

~~2-40. Removal .~~

~~The Vice-Mayor, as such officer, but not as a Councilmember, may be removed from the office of Vice-Mayor by a vote of at least five (5) members of the Council.~~ (1909; 1920; 1975)

ARTICLE III. THE COUNCIL

3-10.

(a)General Powers . All legislative powers of the City shall be vested in the Council, except as otherwise provided by law or this Charter~~, and the Council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the City by law.~~ (1909; 1920; 1977; 1993; 2005).

(b) Executive or Administrative Functions. Except as otherwise set forth herein, whenever an executive or administrative function or duty shall be required to be performed by ordinance, the same shall be performed by the executive branch and not by the legislative branch.

(~~b~~c)Duties . To provide for the future of the City, Council shall maintain a strategic plan which prioritizes goals for the City Council and establishes measurable outcomes. ~~The strategic plan shall include the Comprehensive Plan and a five-year capital improvements plan for municipal needs.~~ The plan process shall consider public input. Council shall provide the plan and goals to the ~~City Manager~~Mayor for consideration in ~~for~~ the development of the municipal administrative budget. (1909; 1920; 1977; 1993; 2005)

(~~ed~~)Accountability . The City Council shall provide for an annual ~~report~~ "Report to the ~~citizens~~ Citizens."~~on progress in meeting the strategic plan. The Mayor shall annually provide a "State of the City" report to the citizens.~~ (2005)

(e) Appointments . The Council shall appoint by the concurring vote of a majority of its members ~~a City Attorney, a City Clerk, a City Treasurer, and~~ a City Auditor, whose duties, compensation, and tenure of office shall be as prescribed by ordinance. ~~The office of City Clerk and City Treasurer may be held by one person.~~ All votes upon appointments to office shall be upon roll call and recorded. (1920; 1977; 2005)

(f) The Council shall review and approve by ordinance personnel policies and procedures for all City employees, including civil service employees, but specifically excluding employees of City Utilities and the City's health system; and all municipal purchasing and contracting rules and regulations, it being determined that, as a matter of policy, City Council shall undertake those tasks through the legislative process.

(g) The Council may review an Mayor's proclamation in times of public danger or emergency, and may terminate such proclamation at any time by a majority vote of the Council.

3-20. ~~Mayor and Vice Mayor~~President of Council.

The President of Council~~Mayor~~ shall be elected by and from the ~~a~~ members of the Council and shall preside at all meetings of the Council ~~and perform such other duties consistent with the office as may be imposed by the Council by ordinance or resolution~~; the President of Council~~Mayor~~ shall have a voice and vote in its proceedings ~~but no veto~~. The President of Council~~Mayor~~ shall be recognized as the ~~official head~~leader of the Council.~~City for the purpose of executing legal instruments, for all ceremonial purposes, and by the Governor or other constituted authority for the purpose of military law. The Mayor may take command of the police and govern the City by proclamation in times of public danger or emergency. A majority of the Council shall determine what constitutes such public danger or emergency, and such proclamation may be terminated at any time by the affirmative vote by a majority of the Council. The Mayor shall have no administrative duties. (1909; 1920; 1975)~~

~~If the Mayor be temporarily absent from the City or otherwise disabled from any cause, the Mayor's duties shall, in the meantime, devolve upon and be performed by the Vice-Mayor.~~ In the absence of ~~both the Mayor and~~ the ~~Vice Mayor~~President of Council, the other members of the Council shall elect one of their number to perform the duties of the ~~Mayor~~President of Council. At its first regular meeting on or after the third Tuesday in April of each odd-numbered year, and biennially thereafter, the Council shall elect one of its members as ~~Vice-Mayor~~President of Council. (1909; 1920; 1975)

The President of Council, as such officer, but not as a Councilmember, may be removed from the office of President of Council by a vote of at least five (5) members of the Council.

3-30. Judge of Qualifications .

The Council shall be the judge of the election and qualification of its own members and of the grounds for the forfeiture of the office of ~~Mayor or~~ Councilmember subject to review by the courts in case of contest. (1909; 1977)

3-40. Restrictions Upon Members of the Council .

~~The Mayor or~~ Councilmembers shall not hold any other City office, position, employment, or be employed by any agency for which their compensation is directly paid by the City. No former ~~Mayor or~~ Councilmember shall be appointed to any office, position, or employment, the compensation of which was increased or fixed by the Council while they were a member thereof, until after the expiration of one (1) year from the date when they ceased to be a member of the Council. (1909; 1977)

3-50. Rules of the Council .

3-60. Sessions of the Council .

3-70. Ordinances and Resolutions.

(a)

(b)

(c)

(d)

(e) Every ordinance finally passed by the Council shall be presented to the Mayor within forty-eight hours thereafter for final adoption. If the Mayor approves such ordinance, he or she shall finally adopt it by signing it within five days after receiving it. If the Mayor disapproves, the ordinance shall be returned to the Council within five days with the Mayor's objections in writing. If then six (6) of the members vote to pass the same over the Mayor's veto, it shall become a finally adopted ordinance, notwithstanding the objections of the Mayor. If the Mayor does not return the ordinance with written objections within the time specified, it shall become finally adopted as if the Mayor had approved it.

(1) In any ordinance appropriating funds, the Mayor may disapprove specific line items without disapproving the entire ordinance. After disapproval of specific line items, the ordinance shall be returned to Council to complete the over-ride process as outlined above as to each line item vetoed.

(2) Notwithstanding the foregoing subsections, the Mayor shall not have power to disapprove by veto the following listed types of ordinances, this limitation applying only to the following specifically identified ordinances: an ordinance accomplishing any quasi-judicial act; an ordinance approving bonds to be issued by any City enterprise; an ordinance pertaining to Article VI, "Utilities," of this Charter; an ordinance submitting a

Charter amendment to a vote of the qualified electors; or an ordinance proposing a Charter convention.

(f) The City Clerk shall, with the Mayor, sign and attest all ordinances and resolutions. (1909; 1977)

3-80. Publication of Ordinances.

Every ordinance shall be published twice in a newspaper or newspapers of general or limited circulation within the City to ensure general coverage in the City with the first publication to be at least ten (10) days before final passage by Council of the ordinance published, and the second publication any time after its final ~~passage~~ adoption according to Section 3-70(e) above. The ordinance shall not take effect until five (5) days after the second publication. However, emergency ordinances passed as provided in this Article shall take effect upon ~~passage~~ final adoption and be so published on the following day, subject always to the provisions of Article XII. When the Council deems it appropriate, publication of the title of any ordinance with a summary written by the City Clerk, together with a statement that the ordinance is available for public inspection and acquisition in the office of the City Clerk, shall be sufficient publication. (1909; 1920; 1977; 1989) (Ed. note: The 1977 amendment brought together in a single section the provisions relating to publication which had previously been found in Sections 13 and 14.)

3-90. Emergency Ordinances.

3-100. Amendment or Repeal.

3-110. Record of Ordinances.

3-120. Proof of Ordinances.

3-130. Charter and Ordinances.

3-140. Printed Monthly Statements.

3-150. Adoption by Reference.

3-160. Independent Audit.

ARTICLE IV. THE ~~CITY MANAGER~~MAYOR

4-10. Creation of the Office of Mayor; General Powers.

There shall be, and hereby is, created the office of Mayor. The Mayor shall be the chief executive and shall enforce all laws and ordinances; the Mayor shall possess, have and exercise, all the executive and administrative powers granted to the City by Article XX of the Constitution

of the State of Colorado, and all executive and administrative powers contained in the Charter of the City, and otherwise existing by operation of law, except as hereinafter delegated to the departments hereinafter created, and except the powers granted to other elective officers by this Charter. The Mayor shall be considered the head of the City government for the purpose of executing legal instruments, for all ceremonial purposes, and by the Governor or other constituted authority for the purpose of military law. The Mayor may take command of the police and govern the City by proclamation in times of public danger or emergency. The Mayor shall from time to time give the Council information on the condition of the City and recommend such measures as he or she may deem expedient. The Mayor shall execute all contracts and see that all contracts and agreements with the City are faithfully kept and fully performed. The head of every department shall report to the Mayor all facts and information known to him or her concerning the violation of any contract or agreement with the City.

4-20. Succession.

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(a) Whenever the Mayor is unable, from any cause, to perform the duties of the office for more than a temporary or short-term absence, the President of the Council shall be the acting Mayor and shall hold such office until a successor of the Mayor last elected pursuant to the provisions of Section 2-10 of this Charter is elected and qualified, in accordance with this Charter, at which time the President of the Council may return to his seat on Council.

(b) If the President of Council refuses or is unable to discharge the duties of the Office of Mayor, the Council shall elect one of its members acting Mayor, who shall hold such office until a successor of the Mayor last elected pursuant to the provisions of Section 2-10 of this Charter is elected and qualified, in accordance with this Charter.

(c) Whenever the President of Council becomes the acting Mayor, Council shall elect a new President of Council to serve during the absence as provided in this Charter.

4-30. Restrictions Upon the Office of Mayor.

The Mayor shall not hold any other paid employment position during his or her term in office. No former Mayor shall be appointed to any City office, position, or employment, until after the expiration of one (1) year from the date when he or she ceased to hold the office of Mayor.

~~(a) Appointment . The City Council by a majority vote of its entire membership shall employ a City Manager who shall be the chief administrative officer of the municipal government under the City Council and shall hold office during its pleasure. The City Manager shall be appointed without regard to any consideration other than fitness and competency. No member of the Council shall be appointed City Manager. By letter filed with the City Clerk, the Manager shall designate, subject to approval of the Council, a qualified City administrative officer to exercise the powers and perform the duties of Manager during any temporary absence or disability. During such absence or disability, the Council may revoke such designation at any time and~~

~~appoint another administrative officer of the City to serve until the Manager shall return or the Manager's disability shall cease. (1920; 1975)~~

~~(b) Removal . The Council may remove the City Manager by resolution, but only upon a majority vote of the entire Council. Upon removal, the Council may, at its discretion, provide termination pay.~~ (1975; 1993)

4-~~4~~0. Specific Powers and Duties of the ~~City Manager~~Mayor.

The ~~City Manager~~Mayor shall be responsible ~~to the Council~~ for ~~the~~ all executive and administrative affairs~~ion~~ of the ~~all~~ City, except those reserved to Council herein, including but not limited to, the following: ~~affairs placed in the City Manager's charge by or under this Charter or the ordinances of the City. The City Manager shall have the following powers and duties:~~ (1920; 1975)

(a) The ~~City Manager~~Mayor shall see that the laws and ordinances of the City are enforced.

(b) Accountability.

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(1) The Mayor shall maintain and submit to the citizens a strategic plan that prioritizes goals for the City and establishes measurable outcomes. The strategic plan shall include the Comprehensive Plan and a five-year capital improvements plan for municipal needs. The plan process shall consider public input. The plan and goals shall be used in the development of the municipal administrative budget. The Mayor shall provide for an annual "State of the City" report to the citizens on progress in meeting the strategic plan.

(2) The Mayor shall prepare and submit to the citizens on or before June 30 of each year, a report on the financial condition of the City that identifies material changes, both positive and adverse. The City shall publish these mid-year and year-end financial reports.

(3) The Mayor shall prepare and submit to the Council a complete report on the finances and administrative activities of the City as of the end of each fiscal year, and the Mayor shall timely make such other reports as the Council may require concerning the operations of City departments, offices, and agencies that are subject to the Mayor's direction and supervision.

(c) ~~Except as otherwise set forth in this Charter, t~~The ~~City Manager~~Mayor shall appoint and suspend or remove any City government employee, which excludes employees of City Utilities and the City's health system. All appointments shall be upon merit and fitness alone. The ~~City Manager~~Mayor may authorize any administrative officer who is subject to the ~~City Manager's~~Mayor's direction and supervision to exercise these powers with respect to subordinates in that officer's department, office, or agency.

(d) The ~~City Manager~~Mayor shall direct and supervise the administration of all departments, divisions, offices, and agencies of the City, except as otherwise provided by this Charter or by law. The ~~City Manager~~Mayor may delegate administrative and ministerial functions to the administrative officers of the City.

~~(e) The of such office to personnel supervised and controlled by the City Manager, but despite such delegation, the responsibility for the proper and effective administration of the City remains always with the City Manager and none other.~~ Mayor will appoint a Chief of Staff to act as an administrative officer of the municipal government under the Mayor's supervision and who shall serve at the pleasure of the Mayor. However, despite such delegation or appointment, the responsibility for the proper and effective administration of the City remains always with the Mayor and none other.

(f) Appointments. Subject to confirmation by the concurring vote of a majority of the members of City Council, the Mayor shall appoint individuals to serve at the pleasure of the Mayor in the following positions. If Council fails to begin the confirmation process for any appointment within thirty (30) days thereof or fails to take final action to approve or deny the appointment within ninety (90) days thereof, the appointment shall be deemed confirmed.

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(1) City Clerk;

(2) City Attorney and Municipal Judges;

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(3) Chief Financial Officer, or the Controller, or, regardless of title, the official acting as the City's financial manager; and the City Treasurer, the offices of which may be held by one person;

(4) Police Chief and Fire Chief;

(5) Regardless of title, the leader of head of the City's departments, divisions, offices, agencies, or enterprises relating to public works, parks, community development and the municipal airport so that the individual ultimately responsible for each such function answers directly to the Mayor;

(6) The director or manager of any City department, division, office, agency, or enterprise if the Mayor's appointment authority is set forth by ordinance, except that the Mayor shall not appoint the chief executive officers of the City Utilities or the City's health system.

(g~~d~~) The ~~City Manager~~Mayor shall see that all terms and conditions imposed in favor of the City or its inhabitants in any contract or franchise are faithfully kept and performed, and upon knowledge of any violation thereof to report the same to the City Attorney, who is hereby required to take such proceedings as may be necessary to enforce the same.

~~(e) The City Manager shall attend all meetings of the Council when requested by it, with the right to take part in its discussions but shall have no vote.~~

(hf) The Mayor shall have the right to attend and be heard at any regular or special open session meeting of the Council, and mayThe City Manager shall recommend to the Council for adoption such measures as the City ManagerMayor may deems necessary or expedient.

(ih) On or before the third first Monday in November October in each year, the City ManagerMayor shall furnish to the Council estimates in writing of the probable expenses to be incurred in the several departments of the City for the ensuing fiscal year, specifying in detail probable expenditures, including a statement of the salaries of all administrative officers and employees, and certify the amount of money to be raised by taxation during the ensuing fiscal year to make payment of interest, sinking fund, and principal of bonded indebtedness and also the estimated amount of revenue from all sources other than tax levy. At the same time or on such later date in each year as shall be fixed by the Council, the Mayor City Manager shall prepare and present to the Council the annual budget for the ensuing fiscal year, which shall include interest and sinking fund on the bonded debt. The budget so prepared shall be in such detail as to the aggregate sum and the items thereof allowed to each department, office, board, or commission as the Mayor City Manager may deem advisable except such as are fixed by law.

(j) The Mayor shall serve as an *ex officio* and non-voting member of the Board of Directors for Utilities. (1920; 1975)

(ki) The Mayor City Manager shall perform such other executive and administrative duties as may be prescribed by the Charter or required of the City Manager by the Councilthe ordinances of the City. (1920; 1975)

ARTICLE V. ADMINISTRATIVE DEPARTMENTS

5-10. Creation of Departments.

By ordinance, the City Council may establish departments, divisions, offices, or agencies in addition to those created by this Charter and may prescribe the functions of all departments, offices, and agencies, except that no function assigned by this Charter to a particular department, office, or agency may be discontinued or, unless this Charter specifically so provides, assigned to any other. The specific positions enumerated in Section 4-40(f)(1)-(4), as well as the leader or head of departments described in Section 4-40(f)(5) shall be appointed by the Mayor, subject to confirmation by Council. Such departments, divisions, offices, or agencies may include but not be limited to police, fire, and health. (1977)

5-20. Direction by the City ManagerMayor.

All departments, divisions, offices, and agencies shall be under the direction and supervision of the City ManagerMayor but shall be may be administered by an administrative officer appointed by and subject to the direction and supervision of the City Managerthe Mayor's Chief of Staff. With the consent ofThe CouncilMayor, the Manager may serve as the head of one or more such

departments, offices, or agencies or may appoint one (1) person as the head of two (2) or more of them. (1977)

ARTICLE VI. UTILITIES

6-10. Utilities Director, Appointment.

6-20. Definitions.

6-30. General Powers.

6-40. Utilities--Accounting--Reserves.

(a) City Council shall serve as the Board of Directors for Utilities, and the Mayor shall serve as an *ex officio* and non-voting member thereof. Utilities shall include the Departments designated by the Manager of Utilities and approved by Council. Each of said departments shall, as far as practicable, be administered as an entity. All revenues of each department shall be placed in the Utilities Gross Income Fund, from which all operating and maintenance expenses shall be deducted. The funds of Utilities shall be kept separate from the funds of all other departments of the City. (1977; 1985; 1991; 1995)

(b)

(c)

(d)

(e)

6-50. Water Rights.

6-60. Emergency Warrants.

6-70. Utility Rates.

6-80. Sale, Conveyance or Leasing of Utilities.

ARTICLE VII. FINANCE

7-10. Fiscal Year.

7-20. Public Monies.

(a) The ~~City Manager~~ Mayor shall have the direct control of the revenues of the City except as otherwise provided by this Charter or by ordinances. (1909; 1977)

(b)

7-30. Budget.

(c)The budget shall include all stipends and other expenses of City Council and the salary of the Mayor and the budget shall declare the amount of money necessary to fund the budget. Subject to any pre-existing bond covenants, the City Council's budget shall be apportioned among the City's general fund, its Utilities funds and its ~~hospital~~ health system fund as a reflection of City Council's direct responsibilities for all municipal and Utilities matters as well as City Council's general supervision and control of ~~hospital~~ health system matters based upon such reasonable allocation methodology as City Council may determine. (2005)

7-40. Levy.

7-50. Appropriations.

7-60. No Liability Without Appropriation.

Neither the Council, nor the Mayor, nor any administrative officer or employee of the City shall have authority to make any contract involving the expenditure of public money, or impose upon the City any liability to pay money, unless and until a definite amount of money shall have been appropriated for the liquidation of all pecuniary liability of the City under such contract or in consequence thereof to mature during the period covered by the appropriation. Such contract shall be *ab initio* null and void as to the City for any other or further liability, provided, first, that nothing herein contained shall prevent the Council from providing for payment of any expense, the necessity of which is caused by any casualty, accident, or unforeseen contingency arising after the passage of the annual appropriation ordinance; and, second, that the provisions of this section shall not apply to or limit the authority conferred in relation to bonded indebtedness, nor for monies to be collected by special assessments for local improvements. (1909; 1977) (Ed. note: Formerly section 44.)

7-70. Collection of Taxes.

7-80. Limitation on City Indebtedness.

7-90. The Taxpayer's Bill of Rights.

7-100. Limitation on District Indebtedness.

(a)

(b)

(c) The City Council and ~~City Manager~~Mayor shall make available to the public all essential data and information regarding the financial condition and status of any and all districts established pursuant to Title 31, C.R.S. (1993)

ARTICLE VIII. MUNICIPAL COURT

ARTICLE IX. BOARD AND COMMISSIONS

ARTICLE X. FRANCHISES AND LICENSES

ARTICLE XI. ELECTIONS

ARTICLE XII. RECALL, INITIATIVE, AND REFERENDUM

ARTICLE XIII. OFFICERS, EMPLOYEES, AND SALARIES

13-10. Officers, Employees.

~~The Mayor and~~ Councilmembers shall be the legislative officers of the City. The Mayor shall be the chief executive and chief administrative officer of the City. The ~~The City Manager,~~ City Attorney, City Clerk, City Treasurer, City Auditor, Chief of Staff, and all department heads ~~appointed by the City Manager~~shall be the administrative officers of the City. All other persons employed by the City shall be City employees. (1909; 1979)

13-20. ~~Stipend for~~ Compensation for Elected Officials.

(a) The Mayor shall be paid an annual salary adjusted by ordinance every four years to coincide with the start of a new mayoral term and shall reflect any change, up or down, over that four-year period in the most local consumer price index for all urban consumers (CPI-U) published by the U.S. Department of Labor, Bureau of Labor Statistics, beginning with an annual salary of $96,000.00 for the first Mayor serving under the Council-Mayor Government in April 2011. In addition, the City of Colorado Springs shall provide employee benefits to the Mayor in the same manner as provided to other full-time City employees.

(b) ~~Councilmembers.~~

All Councilmembers shall receive an annual stipend of $6,250 payable pursuant to ordinance. The City of Colorado Springs shall not provide City paid benefits to Councilmembers other than those mandated by federal or state statute. (1995)

13-30. Oaths.

Every legislative, executive, and administrative officer of the City and all other employees required by law shall, before they enter upon the duties of their office, take, subscribe, and file with the Clerk an oath or affirmation to support the Constitution of the United States, the Constitution of the State of Colorado, and the Charter of The City of Colorado Springs, and to faithfully perform the duties of the office upon which they shall be about to enter. (1909; 1979:1995)

13-40. Bonds.

13-50. Personal Financial Interest.

Any City officer, employee, or appointee who has a substantial financial interest, direct or indirect or by reason of ownership of stock in any corporation, in any contract with the City or in the sale of any land, material, supplies, or services to the City or to a contractor supplying the City shall make known that interest and shall refrain from voting upon or otherwise participating in their capacity as a City officer or employee in the making of such sale or in the making or performance of such contract. Any City officer or employee who willfully conceals such a substantial financial interest or willfully violates the requirements of this section shall be guilty of malfeasance in office or position and shall forfeit said office or position. Violation of this section with the express or implied knowledge of the person or corporation contracting with or making a sale to the City shall render the contract or sale voidable by the ~~City Manager~~Mayor or the City Council. (1909; 1977; 1979)

13-60. Prohibitions.

13-70. Removal of Striking Employees.

It shall be unlawful for any employee of the City of Colorado Springs to participate in or engage in a strike or any action to withhold service from the City. In the event of such strike or action, any employee who participates or engages therein shall be disciplined. Such discipline shall be discharge; however, for any such employee who has acted in violation of this section as a result of coercion or threat of serious harm, such discipline shall be suspension without pay. Such disciplinary action may be appealed only under such rules as the ~~City Manager~~Mayor shall establish. Neither Council nor any administrative officer of the City shall grant amnesty to any employee in violation of this section. (1979; 1980)

13-80. City Attorney, Duties.

13-90. City Attorney Assistants.

(a) The City Attorney~~, with the consent of the Council,~~ may employ assistants~~,~~ who shall receive such salary as the Council by ordinance shall prescribe. (1979)

(b)

ARTICLE XIV. CIVIL SERVICE

ARTICLE XV. GENERAL PROVISIONS

15-10. ~~Present Form of Government to Continue~~Transition to Council-Mayor Form of Government.

The form of government existing in the City at the time of adoption of this revised Charter shall continue unaltered, and, except as inconsistent with this revised Charter, all officers and other persons in the service of the City at the time this revised Charter takes effect shall continue to

serve as such and to receive compensation therefor as now provided by law and to have and exercise the powers, authority, and jurisdiction theretofore possessed by them respectively.

(a) Upon approval of this revised Charter by voters in 2010, the City's form of government shall begin to transition from a Council-Manager form of government to the Council-Mayor form of government so that the Mayor elected at the City's regular election of April 2011, or any run-off election necessary thereafter, shall assume the duties set forth herein. In addition, the fifth at-large councilmember, created by Section 2-10-(a)(1) herein, shall be elected at the City's regular election of April 2011.

(b) The Mayor in office at the time of approval of this revised Charter by voters in 2010 shall remain in office under the Council-Manager Government until the Mayor elected at the City's regular election of April 2011, or any run-off election necessary thereafter, is sworn in under the Council-Mayor Government.

(c) Upon approval of this revised Charter by voters in 2010, the Council shall complete within ninety (90) days its review and approval by ordinance of the personnel policies and procedures and its review and approval by ordinance of the purchasing and contracting rules and regulations, as mandated by Section 3-10(f) herein.(1909; 1979)

15-20. Compilation of Charter.

15-30. Present Ordinances Continue in Force.

All laws, ordinances, resolutions, by-laws, orders, rules, or regulations in force in the City at the time this Charter takes effect, and not inconsistent with the provisions of this Charter, shall continue in full force and effect, until the Council otherwise by ordinance, resolution, or motion provides. All references to the City Manager in laws, ordinances, resolutions, by-laws, orders, rules, or regulations in force in the City shall, following the City's regular election of April 2011, be read to refer to the Mayor unless otherwise specified herein. (1909; 1979)

15-40. Continuing Bonds.

15-50. Submission of Charter Amendments.

15-60. Reservation of Power.

15-70. Conflict Between Measures--Which Adopted.

15-80. Public Records.

15-80. Public Records.

15-100. Saving Clause.

15-110. Northfield Watershed--Recreational Use.

15-120. North Slope Watershed--Recreational Use.