Legal Research in a Panic and Writing a Tight Opinion

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We come together today to reflect on our role as city attorneys[1], and to define that role not based on expectations limited by stereotype or by the minimum expectations of others; rather, we seek a more open-ended definition that allows for its boundaries to expand to the full scope of our own personal and professional experience and adaptive creativity.

Some of you in this room may be newly appointed city attorneys, while others may be old hands in the profession. Our program today serves no less as a refresher to the old hand than as an introduction to the newly appointed. It would be a mistake to think you will walk away from today's program with a detailed definition of success in the form of a prescription of what you must do and what you must never do. In a sense, we are here to redefine ourselves in our role as city attorney. The thing to remember is not to redefine ourselves by limited expectations.

As you read these words, remember always that over the years you have acquired a set of successful problem attack strategies that have stood you in good stead in dealing with emergencies in your life inside and outside the practice of law, whether that be as a student, as a lawyer, as a parent, as a patient, or as an actor anywhere else on life's broad stage. You must not abandon what has worked for you in the past and in other contexts. Rather, you should adapt what has worked in the past to the tasks you face ahead as a municipal attorney. You will develop your own unique style that is destined to be as different from mine as yours will be from those who follow you, unless you allow limited expectations – either your own or others' – to prevent you from doing so.

In these materials I will try – but will intentionally fail – to restrict my comments to the subject matters suggested by the title: legal research in a panic and writing a tight opinion. Yet, these are but two of the countless crises that you will inevitably encounter in your public law practice. So, I will take some liberty in going beyond our narrow title topics.

A Few General Points

[1] I shall adopt the convention of speaking only of cities, but mean my comments to apply, mutatis mutandis, to towns, districts, counties, government agencies, and other public officials.

1 - Analogize - Your experience and skill as a lawyer are only parts – and not even the most significant parts – of your human experience and accomplishments. Analogize freely to your style of problem solving outside of the limited field of law, and adapt what has worked for you in other areas of your life to what can work for you as you face the city council or other multiple member bodies of your municipal client. Parallels to problem analysis and solution lie all around us, needing only a bit of attention and creativity to adapt them to municipal law encounters. Let life itself be a metaphor for your success in public law practice. The ancient Greeks had a flare for the concise: *Γνῶθι ςεαυτον – Know yourself.*

2 - Be Yourself - If you know your own style, are comfortable with yourself, and stay generally well informed about the subject matter that brings you in contact with the governmental body, you should be able to sail through encounters made difficult by real or perceived exigencies that require you to act quickly. It is almost always a mistake to adopt uncritically the personal or professional style of another; it is never, however, a mistake to adapt some of another's successful strategies to your own unique needs and circumstances.

3 - Attitude - Remember also that lightness, a display of appropriate good cheer about having to deal with problems, can be contagious. While you have the responsibility of organizing your own thoughts in unplanned council appearances, you also have the opportunity to adjust the thoughts and feelings of your audience and their attitudes toward the problem, and – more important – to you and your legal response. Another attitude that positively influences how you come across in your public encounters is confidence. If you act confidently, communicating by your words and body language that you are comfortable with what you are telling the council, your confident attitude will go a long way in forming the council's attitude toward you and to your message. Capitalize on this. Predispose your council to see you positively, and you have set the stage for them to hear what you have to say. In other words, visualize yourself succeeding; symbiotically, others will see you as the success you see yourself to be.

4 - Externalize - To the extent possible, let your attention be on the problem before you rather than on how you might appear or sound to those present at your performance. Have you ever tried to watch yourself walk on a rail without tripping or falling off? Your chances of walking on the rail without falling off are much better if you focus on the horizon and not on your feet. Being equipped with a wide and flexible set of reaction strategies in a council meeting can keep you correspondingly centered.

5 - Organization - If your appointment to be the city solicitor or corporation counsel includes becoming the administrative head of an existing law department, resist the impulse to reorganize the office – at least right away. Take the time necessary to understand fully how the office currently functions, to ascertain who among the professional and support staff will provide that indispensable continuity that will be key to your future administrative success. Having established yourself early as someone who listens before making judgments and decisions, later administrative decisions will more likely win confidence and acceptance from those affected thereby.

6 - Clear Requests - Let your administrative style be one that includes making clear requests. This means: (i) that you identify yourself and your listener in the full context of the situation at hand; (ii) that you state the required completion time and fulfillment conditions so that there is no ambiguity about what will satisfy your request; (iii) that you make sure that you and your listener share a complete understanding of the problem or matter at hand; and (iv)

that you give the listener, wherever appropriate, the option of declining the request. In his recent book *The Language Instinct*, Steven Pinker provides an eye-opening account of how we human beings develop and use our ability to exchange information and knowledge through the medium of language. For there to be a complete correspondence between the thought or idea in my head and in yours – and assuming that we did not totally share the experience that led to my having the idea or thought to begin with – my task is to translate the thought into the material content of the written or spoken words of a common language. Your corresponding task is to re-translate those words, to re-constitute from them the thought or idea that I want you to have. Correspondence between my idea and your conceptualization of my idea would be complete only if my choice and concatenation of words perfectly captured my original thought, if you listen to me as I speak, and if you give my words and their precise expression exactly the same meaning that I intended them to have. You can instinctively see that this is impossible, and the best we can hope to achieve is a close approximation. The concluding insights might be: (1) become as skillful in the use of language as a communication tool as you can; (2) be understanding when those to whom we communicate verbally fail to grasp our point exactly; and (3) exploit every other, non-verbal means of communicating available to us.

7. Active Listening - This point is essentially the flip side of the preceding one. It has been estimated that people – yes, even our clients – are more comfortable talking than listening. Even when they are not talking, they are often preparing to talk back rather than listening to us. When, for example, a council member talks, listen; and let the member know you are listening by your attitude, your physical posture, your eyes, by exploratory or clarifying questions, or by any other means you can devise. Occasionally you will be pleasantly surprised when effective active listening results in the member answering the very question the member posed to you!! Better still, if you pick up on this dynamic, you get credit for coming up with the answer! Here are some tips for active listening[2]:

- Not talking, not thinking of what you will say next.
- Maintaining eye contact and a facial expression of interest which cannot be feigned, leaning forward, body language.
- Encouraging the speaker to continue till the entire message is communicated.
- Paraphrasing occasionally what has been said.
- Resisting the temptation to "tell your own story," keeping the attention on the speaker, permitting silences for thinking to occur.
- Responding to the speaker's request for feedback without negating the speaker's experience.

8 - Clear Expectations - In addition to making clear requests, decline, when you know you must, requests made of you by your municipal client or your own staff that you know you cannot fulfill. While it important to say "no" when by saying "yes" we would create stress and make mistakes or both, it is better to cultivate relationships in which saying "no" is less

[2] Excerpted from "Active Listening," with permission from Eastern Point Consulting Group, Newton, Massachusetts.

necessary. Such relationships are formed by guiding the client to form reasonable, clear expectations of what we can be expected to deliver "on the spot."

9 - Know the Systems that Serve You - Airline pilots in modern commercial airliners have the luxury of almost letting the aircraft fly them and passengers from take-off to touch-down. However, most pilots and airlines realize the critical importance of maintaining a pilot's high skill level in manual control of the airplane. If an automatic system fails, its failure must be quickly identified and transition to manual control must be swift and accurate. Too much dependence on systems can result in complacency and an erosion of basic skills. The metaphor to our life in public law practice is clear: never loose your touch with the basic skills of legal research and knowledge management. Never delegate to subordinates tasks without staying on top of how those tasks are accomplished. (But, don't make the opposite mistake of not delegating, in the false belief that only if you do it will it be done right!) Never so isolate yourself from the day-to-day functions of your office or its human and equipment resources that you cannot "fly the airplane manually" on Saturday or at nighttime when your staff is not around to help you. What could be worse than knowing that a critical piece of information or research is on file in your office somewhere, but in the short time before you have to appear before the council you are without the means to work your filing system?

I

As the title of this paper intimates, a local government attorney will inevitably be called upon to display legal skills and legal knowledge on the spot. Clearly this unfortunate circumstance is the lot of every lawyer in every area of practice and is not unique to municipal lawyers. I think it is safe to say, however, that we who have multiple member governmental bodies as clients are far more likely to find ourselves in that spot than lawyers in most other practice areas. Where this cannot be avoided, you will naturally want to give good advice to your municipal client and not merely avoid giving bad advice. But sometimes you simply have neither the law nor the facts at hand to fashion an immediate and adequate substantive response.

So, where do you start in your search for the tools you need to cope? In one respect you have already done that by attending this program and by being active in an association whose members have "been there, done that." IMLA and the association of municipal attorneys in your jurisdiction represent a rich source of practical wisdom in handling municipal law problems. Joining and being active in such associations should be a cornerstone of your public law practice.

The reality is that you do not have to go into every meeting having correctly anticipated the issues that will come up or having researched in advance the legal basis for every possible answer to every probable question. There are tools that will equip you to parry the thrust of the unanticipated question with lawyerly aplomb and to bring the lawyer's perspective confidently to governmental debate. You cannot be expected to have all the answers at your fingertips; but you absolutely must have the tools to avoid the panic that would surely set in if you thought you always had to deliver definitive legal opinions on the spot.

It is almost a "given" that from time to time we will be called upon to give legal advice with

respect to a matter that deserves substantial legal research but where the circumstances in which we are asked do not provide us with sufficient time to devote to our response. This is where "panic" is likely to make its unwelcome appearance. Panic can be said to be the inappropriate – and always unnecessary – reaction to being put on the spot and feeling unprepared to give a quick legal opinion. But, panic is always an invited guest. We allow panic to fill the vacuum created by our failure to have anticipated being put on the spot and by a general lack of prepared reaction strategies. Panic is only rarely, and unnecessarily, the result of our failure to have ready substantive answers to the question posed. Panic is actually a chaotic state-of-mind typically associated with our fear of being unable to respond in a substantively appropriate manner accompanied by paralyzing self-consciousness at being caught unprepared.

It is one of the purposes of this paper to touch on several strategies that might help you to block panic at the front door, strategies that touch both on things to be avoided and things to fall back on when we are put on the spot. Some may work some of the time, and some may trigger an insight or two that will become an integral and instinctive component of your personal and written interactions with governmental bodies. Most of the really effective strategies are not those I can offer you here, but ones that you know have worked for you in your personal and profession lives to this point.

In order to deliver a truly "tight" opinion, you would naturally always wish to have had the foresight of having anticipated the question in time to have prepared your threshold response. Alternatively, you would naturally enjoy having the luxury of a period of reflection before having to provide your response. When neither of the foregoing is available to you, panic is always ready, willing, and able to fill the void.

However much we try to anticipate the legal issues that are likely to hit us in meetings with governmental bodies, we will always be faced with circumstances where the meeting is sudden. There is no time to reflect on the likely legal issues or where the issues that arise are totally unforeseeable. You are faced unexpectedly with a request for your legal opinion.

Let's imagine that you are the newly appointed city attorney, and that the mayor has asked you, as the city attorney, to attend an emergency meeting of the city council or that you are required to attend all council meetings ex officio. Here are a few points to ponder well in advance of any such meeting.

(1) *Forewarned is forearmed* - If the city council has not fashioned an agenda for the meeting, you would do well to ask the mayor or council secretary what matters the council plans to or might take up at the meeting. Knowing in advance the general subjects or purposes of the meeting, or the agenda for regular meetings, will at least give you an opportunity to reflect on possible legal questions that might arise and an opportunity to consider in advance how you might be called upon to contribute to the council's deliberations. Time permitting, you might wish to review any files related to those subjects which you have available or to check into any media attention that has been drawn to those subjects. There may be one or more local public officials whose input will equip you with a broader perspective on the issues likely to arise. The closer you are to isolating the probable legal aspects of deliberations you are asked to be available for, the less room you allow for panic to set in.

(2) *Establish reasonable expectations* - Make every prior effort to have established for the council reasonable expectations of what kind of legal advice and opinions can be expected of you on unannounced matters. Help council members understand the need and desirability for their attorney to access legal resources before giving them legal opinions or advice. Remember, your high ground is the law, theirs is politics. Respect the boundaries.

(3) *Don't rush to reply* - Don't be too quick to reply. Take time to reflect on the question asked. At meetings, if at all possible, sit off to the side so that you can take an extra moment or two in moving closer to the microphone or the table where you will speak. Use that brief opportunity to reflect as time in which to organize your thoughts on how best to respond to the question. Remember that in situations where a real or perceived crisis is in progress, it is important first to manage the crisis before offering a resolution. Apart from having an audience that might not be listening to your remarks, a premature substantive reply to a crisis-driven question might inadvertently fuel the crisis or factionalize the council rather than resolve the problem.

(4) *Never guess* - Never guess or offer a substantive response that you are not confident is legally sound. The impulse to demonstrate our knowledge of the law is powerful. Still, the embarrassment of having to say that you do not know the answer is surely preferable to the embarrassment of later having to reverse yourself after checking the facts and the law. Sometimes the best course of action is a candid admission that you do not have a ready answer to the question and need time to do further research. I'm reminded of the old adage – (Question: can an adage ever be new?) – that it's better to be silent and thought stupid than to speak and remove all doubt.

(5) *Restate / re-frame the question* - Restating or re-framing the question will give you an opportunity to reflect on the meaning of the question and an opportunity for an intuitive response to the question to gestate and form in your mind. It will also give the requester a chance to correct any misunderstanding you might have about what is being asked. It can be embarrassing to come up with the definitive answer to a question that was not asked, leaving the question asked unanswered.

(6) *Is it really an emergency?* - Confirm with the requester that the question is one that must be answered at the meeting. Ask the council to reflect on the immediacy of the matter and whether it would be more appropriate to defer action until a more thorough response can be formulated. Unless you are confident that you can offer a sound legal view on the issue, you might wish to suggest that you be given an opportunity to look into the matter and to provide a more in-depth response at a future meeting or in writing. Help the council members identify those matters that need to be addressed now and those that can be deferred to a later time. If they go along with you in this, respect any agreed-upon deadline for response so that the council members know they can count on you to answer their questions in the time frame agreed upon. Some lawyers find it effective to offer a tentative response, concurring perhaps with an assessment of the municipal client, but going on to say that you would like the opportunity to check your legal resources to confirm your tentative opinion on the matter. But the key point here is to "look at the big picture" and not be boxed into narrow boundaries embedded in the question presented to you.

(7) *What's the real issue?* - Try to discern the real issue, and whether the question asked corresponds to the real problem of concern to the requester. It might well be that the

underlying issue of concern to the council is not reflected in the question asked but rather is something else more fundamental. Perhaps it is a matter know a good deal about and with regard to which you are more comfortable offering a tentative opinion in general terms. Isolating the real underlying issues from the question asked gives you more control of the discussion and a better chance to speak authoritatively.

(8) *Vocalize* - If you absolutely must provide legal guidance to the council now and on the spot, try vocalizing your reasoning process. Let them follow you as you articulate the various aspects of the issue presented to you for analysis – letting them in, so to speak, on your own personal problem attack strategies. You should be careful to say that your discursive approach to their questions should not be considered at this time your legal opinion, but that you are trying to stake out for them and for yourself the parameters of the problem for possible further research, analysis, and discussion. Articulate verbally how the question presented fits into the larger scheme of things. The larger the scheme of things, the firmer the ground on which you might be able to speak authoritatively. You might even have equipped yourself with several stand-by observations generically relevant to the matter at hand. And if given the opportunity to return later with your response, do not leave the meeting without a clear understanding with the council when your response will be given. Meet that deadline.

(9) *Focus* - Focus on one or more central elements of the issues implicated in the questions asked, formulating general legal propositions that relate thereto. You can usually state one or more overarching general propositions of law that bear on the kind of question presented, leaving open the possibility of expanding upon these propositions more concretely after further legal analysis.

(10) *Act with confidence* - Act with confidence and leave with the council the tacit message that you have taken control of the legal aspects of the matter under discussion and that you speak with the full authority of your office as city attorney.

II

Let's assume that you have convinced the council that it would be wiser for it to defer deliberations until you have had an opportunity to undertake further research into the matter. Clearly, the council wants to act quickly and your legal research must be expedited. How best to proceed? Let me offer the following.

(1) *Many hands* - Clearly you are in a situation where many hands make light work. Identify others who can contribute to your immediate need for legal research and get as much help to bear on the issue as you can: law clerks, paralegals, and associates.

(2) *"All hands on deck!"* - Immediately schedule a brainstorming session with your legal staff, having first presented them with a concise statement of the legal issues you are grappling with. Remember that your legal staff were not at the meeting but you were, so provide them with an adequate factual basis for their review and comments. Tap into the expertise of others who might offer you an immediate perspective on the question at hand. Brainstorming is not only a source of information but also affords different slants and frames of reference for the problem and often points to new lines of inquiry. Consider inviting to the

brainstorming session non-lawyers who have skills, knowledge, or experience appropriate to the problem at hand.

(3) *History of the problem* - Inquire into the origins of the problem at hand. That is, how did the problem develop to the point where an opinion of counsel is now asked for? Every once in a while you'll find the key to your response in the prior history of the problem.

(4) *Historical perspectives* - As a new city attorney you will want to have access to your predecessor and your predecessor's work product. It's always best when you have had, and continue to have, good working relations with prior counsel. A telephone call to discuss any issue that may have been the subject of the council's prior attentions can be enormously helpful. In larger offices, quickly identify those durable souls who possess the institutional memory of the law department, and make them important members of you team they deserve to be.

(5) *Historical records* - The files of the former city attorney should be accessible to you. Check to see whether the issues you are dealing with have arisen in the past. Read the correspondence and opinions of your predecessor. You will not want to blunder into a legal opinion that is in direct conflict with one given to the council previously, at least without elaborating on how your present opinion reconciles with, or differs – and why – from, prior opinions. If prior counsel had given council members advice of generically the same sort, you can build upon that advice in the context of the next issue at hand. To the extent that prior counsel's records reveal the details of any supporting research, your further research will be jump-started.

(6) *The context of the problem* - Consider the total factual as well as legal context in which the question has arisen. Remember also that no advice given by counsel to council is given in a vacuum. It will be important to know what the council members know and what they have been told and by whom. It also helps to know roughly what positions, if any, council members have taken in the past on similar questions, as this will help to focus your opinion on the aspects of the matter that are of most concern or importance to them. No problem presented to you is ever going to be an <u>entirely legal</u> problem. There are always going to be considerations other than the law that bear on what the council really needs to know. Others, non-lawyers, will likely be offering guidance of a quite different sort to the council. Consider how your legal advice will blend with other guidance the council seeks and gets. Do not forget obvious sources of information that could have a significant bearing on your assignment. For example, you might check the local library for back copies of local newspapers in which the subject of the council's concern had previously been the subject of media attention.

(7) *Divide and conquer* - Break the subject of the question into its constituent parts, and attempt to respond first to those parts with which you are most familiar. Start with what you know and are confident about, and back into what you do not know and may have to research further. Leave the council with your clear articulation of the issues that need further analysis and reasonable expectations about when you can respond.

(8) *Archive to retrieve* - Begin the practice of archiving closed files and electronic documents and data in a manner that will permit later easy access and retrieval. Inevitably, you will want to refresh your recollection of, and be consistent with, what you have said or written in

the past. So, before retiring a file, take care to prune it of duplicates and unnecessary file content. Organize the to-be-closed file in accordance with the logic of the case or chronologically, label it appropriately, and, wherever possible, create an index or data-base record of the matter. Remember, you will probably not have a lot of time later to pour through your closed records looking for what you need. Organizing and labeling the file at the point of file closure will no less important to you than the crumbs dropped by Hansel and Gretel to find their way out of the forest. Nothing is more frustrating than knowing that you had once researched a question and had given what you recall to have been good advice, but now are unable to locate that information quickly when you are required to expedite a request for a legal opinion "on the spot." Good computer skills and appropriate use of computer software are essential. Make it a goal to learn and to use the high-tech tools now available to us, but be discriminating in their use. For example, while Power Point or other "presentation software" can be most effective in some settings, it often comes with the high price of losing the eye-contact that is so essential to effective communications. If you end up having to struggle with the equipment, you lose your audience, and it is often difficult to regain your momentum and your image of competence.

(9) *Network* - Contact other members of whatever municipal law network you are active in, whether IMLA, municipal attorneys association of the state or province, league counsel's office, or municipal law section of the state and local bar associations. Check to see if there is something in the association's municipal law data-bank that bears on the question before you. Contact the municipal law division (if any) in the Attorney General's Office for the state or province or the office of the general counsel of other government agencies. Consider contacting a nearby law school, where both faculty and law students are often the source of relevant expertise and research skills. Often law librarians are acquainted with research materials that are off the beaten path, such as law journals or monographs related to the general subject involved in the question.

(10) *Back to basics* - Fortunately, the new municipal lawyer will most probably have had some experience in public or private practice of law to fall back on, and substantially all lawyering skills and experience are readily transferable to the municipal law arena. Ultimately, time permitting, the traditional legal resources are available, including relevant jurisdictional statutes and case law, practice treatises, municipal form books, Westlaw, Lexis, and a wide variety of Internet legal resources. Of course, as the title of this paper suggests, you will not have the time to do all the things you might like to do before coming out with your legal opinion in response to the council's request. But the more points you touch, the more confident you will be when you present your views to the council.

(11) *Don't overlook the obvious* - Read the statutes. More often than not you will be pleasantly surprised to find that there is a simple answer to a complex problem that jumps right out of the clear language of the applicable statute, ordinance, or regulation. Look up dictionary definitions for terms used in discussions about the problem. Check the indices for standard texts such as McQuillan and your jurisdiction's standard practice volumes. Review your rules of statutory construction. Read earlier versions of relevant statutes to discern the legislative history and intent. Whenever possible, go to the source. Sometimes we look too far afield for an answer that is at the tip of our nose.

(12) *Be clear* - Remember that you are giving your legal opinion to folks who, in all likelihood, are not lawyers. You want to be clearly understood. If the council later finds

itself in legal difficulties, you do not want the members to say that it was because your legal advice was not clear and deeply embedded in legalese. You do not need to be criticized for using those awful lawyerisms that even we lawyers have come to hate. Do not use them with the council; rather, write to be understood.

(13) *Be approachable* - Do not let your verbal or written advice be intimidating, lest the council members fear letting you know that they do not understand. Solicit feedback from the council, giving the members ample opportunity to discuss your advice and its meaning. Nothing ensures good understanding between counsel and council as well as good personal relationships and an environment in which council members are comfortable enough with the city attorney to ask even "stupid questions." Another reason to have a free exchange with the council members is that they might just do as you say without knowing why and, when trouble later comes, it will be said that you did not explain the matter clearly to them. A word of caution, however, do not lose sight of the fact that your client is the city, and your professional relationship does not run to its council members singly. Still, a member will sometimes approach you with expectations that the encounter will provide support for the member's side of a council debate. Make it clear to the council at the very beginning of the relationship that your duty runs to the body, and not its constituent members. That having been said, there is nothing wrong with initiating the approach and making yourself accessible. Staying in the pipeline of internal communications will give you a leg up in coping with the problems and questions that come your way.

(14) *Answer the question* - To avoid ambiguity, always state the question you are answering. After answering the question, summarize what you have said in response. Often the council will grasp onto only one or two things from your opinion, so make them few and concise, and repeat them in your concluding comments. Some have found it useful to prepare in advance of a meeting with the council a list of Questions and Answers not unlike routine preparation for a meeting with the press. This provides an opportunity to establish the total context of the problem by anticipating the questions which your client may wish it had asked. Your legal guidance will now have something to which it is directly responsive. This greatly helps to focus the attentions of the client of the aspects of the problem that matter.

You can be sure that cost is a matter of great importance to the client, even though you may not have been explicitly asked to comment on cost. It might be well to embed in your answer to their direct question some information that will let them know that you are aware of cost considerations and have tailored your guidance with cost being taken into account. Sometimes they will be grateful for not having had to ask.

(15) *Tell them what they <u>can</u> do* - If you have to tell council members that they <u>cannot</u> do what they would like to do, tell them also what they <u>can</u> do, and how, to the extent legally possible, they might be able to accomplish what they seek to accomplish. Lay out options for the council members from which they might better be able to determine whether and how they can proceed in light of your legal opinion. There are times when the issue is not whether a proposed course of action is legal or illegal. The issue, rather, is whether and to what extent a proposed course of action carries with it identifiable legal risks. In such a case the council may seriously have to consider taking a calculated risk with the benefit of your advice to achieve what is seen as an important community objective even at the cost of expending political capital. So, be sure to make clear distinctions between what is legally forbidden and what carries the mere possibility of legal challenge. It is the council's function, not yours, to

decide upon the ultimate administrative action regarding which your legal views have been solicited and given. Consider who, if anyone, is likely to challenge a legally questionable action. If no one is likely to do so, the action becomes less risky.

One possible approach to telling them what they can do is to fashion – for their use and yours – a one page decision tree, or flow chart, laying out the alternative paths that your municipal client should consider. This approach best starts off with a bullet list setting summarizing the "present situation," followed by Path A, Path B, . . . Path X, each such path leading to yet further sub-paths. To each path and sub-path is attached a box laying out its costs and benefits. Use of a decision tree when addressing the council helps focus their attentions on the general flow of your legal guidance and can be a major enhancement to their understanding of a complex matter. Attached (Exhibit A) is a sample decision tree used by one of my associates to lay out alternatives for the client's consideration on whether to continue defensive litigation or to settle in a case dealing with treatment of a patient in a facility owned and operated by the defendant client.

(16) *Dry run* - Run your proposed response by someone knowledgeable in the field. Try explaining your position to a non-lawyer. If a written opinion, ask a non-lawyer to read it. Sometimes as lawyers we tend to presume that others know more of the law than they actually do. Our legal opinion should include enough of the factual and legal premises upon which it rests to serve as a foundation for those receiving our opinion to understand it in context. This also makes our opinion more useful for future reference and application to other factual circumstances.

(17) *Written in stone* - Remember that your opinion is, or may soon be, a public record, and that your opinion is advice that may be considered but not followed by your municipal client. In such circumstances, when trouble later comes, those opposing council action will be delighted to have your written opinion advising the council not to take the challenged action and your reasons for advising against that action. Circumspection in delivering to the council advice that may not be followed suggests that other less formal means of communicating your views to the council should be considered. You should take care, however, to avoid any violation of your jurisdiction's open meeting or public records laws. Remember also that public meetings with your governmental client are recorded on video or audio, and the foregoing points should serve as cautions to what you say publicly as well as what you write.

(18) *Effective Time Management* - When time is short and your need for it is great, it is time to remember to give yourself – without interruptions – time to return, research, reflect, and report. A relevant aphorism for which I take no credit of authorship tells of the airline pilot who told his passengers "we've made very good time, but we're uncertain of our actual position." Managing time well requires that you first know where you are going and what you are going to do with the time you have. Avoid indecision about how best to spend your time. Procrastination, time's well-known thief, is very often best kept at bay by simply starting to work on the problem. After you start, weed out the unimportant or unattainable goals, and avoid doing more than is necessary to get the job done in the time available. Zero-in on the essentials by drawing clear lines between what is necessary and what is excessive. Distinguish between the few main issues and the many issues of lesser importance, and devote your time to the few. The so-called Pareto Principle states that 20% of your goals possess 80% of their aggregate value, and that doing the right thing is every bit as important as doing things right. Finally, avoid interruptions when working on a deadline, making a

disciplined determination in advance that you are not to be disturbed for the time you have set aside to work on just those tasks you have established as objective-related priorities.

(19) *Cultivate a deserved reputation for ethical conduct* - Over the course of your career as an attorney, municipal or otherwise, your words will earn the respect and confidence of your private or public clients if you have left in your wake a history of ethical conduct and if you have manifested in your words to, and actions before, your clients that you live by what you subscribe to. Even when you must tell the council members things they do not want to hear, they will think twice before taking actions that you have advised against if they have come to know you as a person of integrity. Knowing the rules of ethics is always required but never enough. They are the threads that, when woven together with your aspirations for professional excellence, will become the very fabric of your public and private life. That will ultimately lead to a high level of credibility and will earn you the benefit of any doubt when confronting the unforeseen at meetings with your governmental client.

III

Let's assume that the situation requires that you provide a written opinion. The structure, as well as the substance, of your opinion is critically important since excellent research and wise counsel can be so buried within the body of the opinion that they are missed by the reader. There is no one way to structure an opinion, and it would be well to adopt a consistent plan of attack that suits your style. Having a standard attack strategy for organizing your opinion will itself facilitate your thought process and make the job of writing it easier.

Consider adopting or adapting the brief-writing format prevailing in your jurisdiction. Even though you are not writing to a judge or to lawyers, the core architecture of a brief that has historically served as a model for isolating the information and persuasion points to be made in court may yet serve broader needs. Adapted, that same architecture – or any other standard document format you find more useful – might serve you well in fashioning a good written opinion. By having that structure available to you as an opinion template on your word processor, your work is partially accomplished and greatly facilitated.

When you sit to write something that is intended to be both informative and persuasive, where you are striving not only to inform your client well but also to advocate for one or more legal outcomes, no less care should be given to the organization of what you write than its substantive content. Organization matters. Poorly organized material, of whatever quality, will simply not be read, while well organized material will stand a much better chance of being read and understood.

Consider one traditional organization for the brief: Caption, Statement of Case, Statement of Issues, Summary of Argument, Argument Headings, Argument, Conclusion. The structure of a brief blends well with the expectations of the reader, focuses the reader's mind on subjects of the writer's choice, and serves as an easy-to-follow roadmap that you have fashioned for the reader's journey toward well-informed decision making.

You can adopt or adapt the structure of a brief to the task of writing an effective legal opinion, or you can design a personal standard structure for your legal opinions based upon another paradigm of your own choice. But whatever structure you settle on, you will be off

to a jump start by embedding that structure in a word processing template that eliminates the distraction of writing boilerplate and stimulates your creativity by means of the same roadmap you have chosen for your reader.

The caption serves to identify both you and those for whom the opinion is written containing appropriate other contextual information that sets the stage for what follows. It should identify the purpose of the opinion in the terms by which your opinion was requested.

The statement of the case is where you might set forth the essential history of the matter your opinion addresses. For impact and nexus to your conclusion, this section should be carefully culled to include only enough of the history to provide the skeleton upon which the other elements of your opinion are dependent. Employ a unifying thread to what you write here, typically chronological order. Distinguish between the essential factual history of the matter and the procedural or administrative history which you might wish to address separately.

The statement of the issues is where you might restate the question initially posed to you for your legal opinion, perhaps paraphrased to blend with your planned response. Consider whether that question might best be broken down into its constituent elements, each one of which deserves to be treated as a distinct issue to be addressed in your opinion. Consider also whether the question presented – and therefore the issues you wish to address – is but one part of a larger issue that you must posit for reply. As with briefs, it is better to be specific here rather than generic, referring to the facts surrounding the request for your opinion.

The summary of the argument, the argument headings, and the argument itself are where, in briefs, you would construct your most persuasive and legally compelling presentation. In the context of a legal opinion, this might be where you might address each of the issues identified in the statement of issues, including (i) relevant legal information, (ii) your legal opinion on that issue, and (iii) your guidance or advice on what the governmental client can, cannot, should, or should not do in light thereof. In this section you should consider the use of headings which are complete sentences for each of the issues or sub-issues. Your progressive treatment of each of the issues should be framed positively rather than negatively and should include your comments addressing issues raised by other parties on the subject of your requested opinion.

The conclusion should be brief, responding as nearly as possible to the underlying question(s) posed in the request for your opinion.

I urge you not to adopt the foregoing as your method of choice without first considering whether there is another format more congruent with your own personal style that achieves the same ends. But once selected, make it a template, and use it consistently.

Remember also that outcome options can be varied and many. Your conclusion may have to be crafted with an assortment of alternatives each with appropriate legal support and each with its associated legal and political risks. Remember that you are the advisor, and that advice can be taken or left.

IV

A potpourri of tips in writing opinions

(1) In appearance, your opinion should be inviting to the eye by consistent management of margins, spacing, fonts, and "white space" to draw the reader's eye . . . and mind! Substantively, be consistent in your use of style and diligent about grammar and punctuation. Adopt a tense for all your verbs and stick to your choice. Shorten your references to long names on first occurrence, and be consistent in your subsequent abbreviated references. For example, your first reference to the "Alcoholic Beverages Control Commission" should be followed parenthetically by ("ABCC"), without unnecessary words like "hereinafter" or "hereinafter referred to" which are entirely superfluous. This sets the stage for using "ABCC" instead of the full name of the agency. When referencing parties, prefer real name references ("Smith") to categorical references such as "applicant," which will distract the reader from your message as the reader tries to remember or figure out who the "applicant" is. Avoid long quotations, preferring – where appropriate – to incorporate short quotations into the sentence structure of your opinion. Avoid contractions ("can't"). Avoid passive voice verbs (which distracts the reader who will be asking "by whom" the action was taken). In short, periodically refresh your familiarity with your favorite style manual, such as "The Elements of Style." In short, you should want to do everything in your power to avoid anything that will distract your reader from the points that you are trying to make.

(2) Less is more - Prefer short to long wherever possible.

Get to the point - Get right to the point in each component of your opinion, regularly using topic sentences.

Be specific - Be specific and avoid vague or ambiguous language.

Be civil - Avoid disparaging comments even when they might be entirely warranted.

Remember the reader's frame of reference - Remember the unique characteristics of the official or government body you are writing to, and reassess the readability of your words from the perspectives of the reader, using or avoiding specialized language conventions as the situation dictates.

Unifying thread - Let each element of your opinion have a single unifying thread, and stick to a single issue or sub-issue for each element.

Do not restate the obvious - Don't waste words on the obvious, unless a gentle reminder is really warranted.

Use plain words - Use plain words, avoiding cliches and sarcasm. Avoid "impressive words" that you think will display your erudition and could have the effect of making the reader think your out to impress rather than inform or counsel.

Vary sentence length - Mix up sentence lengths to make your text interesting.

Conclude with your beginning - Restate your beginning point at the end.

(3) Compare the substantive content of the above two paragraphs, and decide for yourself

whether organization and white space renders the substantive content of paragraph (2) more immediate and discernable than paragraph (1). The worthwhile tips deeply embedded in (1) would much more effectively have been showcased in the format exemplified in (2). The implication is clear: the setting of the diamond will bring a greater price.

V

But, back to the beginning. We are here to deal with how to do "Legal Research in a Panic." In many ways, doing research and giving a "tight opinion" is much like swimming. If you didn't drown when you fell overboard, you're likely to remember the strokes that got you back to shore or to the boat. Panic was surely not the stroke of choice. Practice the strokes that worked.

Good legal guidance is, in the final analysis, no less process than product. You should always be able to maintain a high comfort level with your ability to process legal questions even when you do not know the answers when asked.

If you leave the program today with the feeling that nothing that I have said in the foregoing is what you did not already know, then in a real sense I have achieved my main goal. In the final analysis, this paper was meant <u>not</u> to be a window opening onto unfamiliar landscape but rather a mirror reflecting your own familiar attributes and strengths. Draw upon them with whatever insights have been triggered by our presentations today.

When we were sworn in as lawyers, we were issued a license to learn, not a certification that we knew what we would need to know to succeed in actual practice. The learning process is in a sense coterminous with the license itself. That's why were are all here today. As municipal attorneys we were appointed to positions of trust because others felt we possessed the repertoire of skills to do the job well. The position we have been called upon to fill has not been so fully defined by those who have preceded us as city attorney or as appointing authority that we cannot add our own unique contribution to that definition.

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Last year, the accomplishments of the two Voyager spacecraft were recently reported in the press as evidence that these remarkable machines, when launched, had been wrongly defined by limited expectations. They have long since delivered everything for which they had been designed, and then some. They now appear to have moved beyond our solar system, having measured and photographed all its planets and moons, and are now moving on to deliver windfall information about interstellar space for many more years than their creators thought possible. In short, we have had to redefine the spacecraft in accordance with our revised expectations based on actual performance, replacing our earlier definition based on design criteria, yet by needlessly limited expectations.

Whether this Institute has served to facilitate your commencement of a local government law practice or as a pause to reflect on a long career in local government law, the Institute faculty hope you walk away accepting the invitation to redefine yourself, not by limited expectations but rather a discernment and reawakening of our innate talents and strengths.

This article represents the opinions and legal conclusions of its author or as otherwise attributed, and not necessarily those of the Office of the Massachusetts Attorney General. It was presented at IMLA's Institute for Local Government Lawyers held in Denver, October 2002, and Minneapolis, October 2003.