International Municipal Lawyers Association

2021 Mid-Year Seminar

Ethical Issues for Municipal Lawyers in Evolving Organizations

April 20, 2021

Lisa Glover

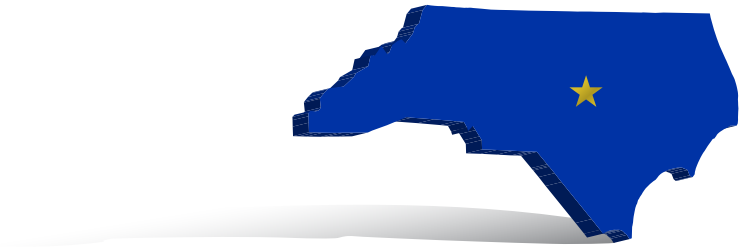
Interim Town Attorney

Cary, North Carolina

©2021 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2021 Mid-Year Seminar, held April 23-26, 2021 in Washington, DC. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

Ethical Issues for Municipal Lawyers in Evolving Organizations

BY: LISA GLOVER
Senior Assistant Town Attorney, Cary, North Carolina



The Town of Cary, North Carolina grew from 8000 residents in 1970[1] to over 160,000 residents in 2019.[2] It's known as one of the safest cities in the United States; was rated by Money Magazine as one of the "Best Small Cities in America;" and maintains the highest bond ratings from Moody's, Fitch, and Standard & Poor's.[3] Growth and development over the years have led to increased property tax revenues, allowing Cary to cover the expenses of delivering additional services and maintaining existing infrastructure.[4] However, less than 16% of the land in Cary's planning jurisdiction remains available for new development; the population is aging; and the cost of providing services and maintaining aging infrastructure is expected to increase, eventually surpassing increases in revenue with current tax rates.[5]

Cary, which has a city manager form of government,[6] hired Sean R. Steagall as its Town Manager in August 2016. Steagall recognized that this accelerating pace of change and the new fiscal reality would require a change in the way Cary operated, and a change in mindset of Cary staff. Staff at all levels of the organization, including the legal department, have been introduced to and encouraged to implement tenets of "Adaptive Leadership" as outlined in books by Ronald Heifetz and Marty Linsky of Harvard University's Kennedy School of Government,[7] and to experiment with new and innovative ways to provide services to citizens, including use of new technology.

Other cities are experimenting in different ways with organizational, process change, or technological change. Employees in San Jose are using "Scrum,"[8] which has been described as an "agile project management framework" that is "most frequently used by software development teams."[9] Boston has had an "innovation team" since 2010, and many other cities, including Memphis and Durham, also have them.[10] Many localities are striving to become "smart cities," which one publication has defined as a city that uses "sensors and technology to connect components across a city to derive data and improve the lives of citizens and visitors."[11] Even if your city is not using any of these buzzwords, your city manager has probably talked about "breaking down silos to help people collaborate across boundaries," and is finding it just as difficult to do as it is in the private sector.[12, 13]

While your local government may not be undergoing the level or type of change that's happening in Cary, odds are modes of operation are changing in your organization in some way to meet the challenges of reduced revenue sources, aging infrastructure, disruptive technology innovations (electric scooters, autonomous vehicles), alterations in local weather patterns (too much

City attorneys are required to be generalists who can provide advice on topics from animal control law to zoning. In today's world, where drones are everywhere and autonomous vehicles may soon proliferate, we must do the "necessary study" so we can "provide adequate representation in a wholly novel field."

rain, not enough rain, increased frequency of storm events), the needs of a younger workforce, increasing divisiveness in local politics, or some combination of all of these.

It doesn't take much searching to find articles touting "The Agility That Governments Need for the Digital Age"[14] and "Retooling our Organizational Culture."[15]

As noted by one professor at the Harvard Business School, "organizations everywhere are struggling to keep up with the accelerating pace of change – let alone get ahead of it."[16]

If your organization is adopting the latest and greatest technology, or working to become more adaptive, flexible, collaborative, or entrepreneurial in spirit, you will likely be asked to do the same. What ethical challenges does this present for a municipal lawyer? This article uses the framework of the American Bar Association's Model Rules of Professional Conduct (hereinafter, "Rules") to start the discussion.[17]

Preamble: A Lawyer's Responsibilities

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[18]

In a traditional local government setting, the City Attorney may be looked at as simply the person who tells the Manager or the City Council whether a given course of action is legal (the advisor), and who defends the city in court when the city is sued (the advocate). Lawyers have long been negotiators and evaluators as well, but these skills may be overlooked and underutilized in a siloed organization. Contracts may be negotiated solely by technical staff, who bring the lawyers in only to memorialize a deal. And there may be no one "getting off the dance floor and going to the balcony" to gain "perspective on the bigger picture" of how actions affect the City as whole. [19] The Preamble to the Rules makes clear that lawyers may perform all these roles, and in fact, should be expected to perform all these roles. The Rules thus support and encourage a larger role for attorneys in evolving organizations.

Rule 1.1: Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[20]

The very first Rule requires lawyers to provide competent representation to their clients. This may well be the biggest challenge in an evolving organization, or just in any organization today, given the pace of change in society and technology. City attorneys are required to be generalists who can provide advice on topics from animal control law to zoning. In today's world, where drones are everywhere and autonomous vehicles may soon proliferate, we must do the "necessary study" so we can "provide adequate representation in a wholly novel field."[21] One commentator has suggested that we "focus on learning skills that the [organization] needs both in the near term and as you look out five years into the future" in order to satisfy the requirement for competence.[22] And of course, we must continue to associate or consult with outside counsel[23] to provide guidance on legal topics that we do not feel competent to handle or that we know we will not have time to properly

Continued on page 14



Lisa C. Glover is the Senior Assistant Town Attorney for Cary, North Carolina. She advises Cary on all aspects of municipal law, with an emphasis on land use law. Previously, she served as an Assistant Attorney General for the North Carolina Department of Justice, representing the North Carolina Department of Transportation in environmental law matters. She began her legal career as a clerk at the North Carolina Court of Appeals. Ms. Glover earned her B.S. degree in Biology from the University of North Carolina at Chapel Hill, and Juris Doctorate and Masters of Environmental Management degrees from Duke University. She was certified as an IMLA Fellow in 2019.

handle, such as complex personnel matters, protracted litigation, or intellectual property law.

Legal subject-matter competence is not enough, however. Comment [8] to Rule 1.1 specifically admonishes lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[24] Just as in the rest of society, lawyers run the gamut from technology-obsessed to technology-adverse. But unlike the rest of society, we have an ethical duty of competence when representing our clients that extends to technology.[25]

We tend to hear about this most often in the context of e-discovery, and mistakes made by lawyers resulting in release of confidential information,[26] but our duty of technological competence embraces much more than e-discovery. Is your organization transitioning to Microsoft OneDrive, Box, or other "cloud" document storage services?[27] Are city employees using Slack, Google Apps for Business, or other messaging and collaboration tools?[28] Do you understand how they work? Can you competently advise your clients on the public records implications: retaining records properly, segregating confidential or protected records, thoroughly searching for records in response to requests, disposing of records when their retention period ends? Perhaps more importantly, are you taking proper steps to preserve client confidentiality (Rule 1.6) and safekeeping of client property (Rule 1.15) with your own files? Ethics opinions in your state may address steps you need to take when using the cloud or "software as a service."[29]

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

A close corollary of competence is diligence. We must not only understand technology and new developments in the law, we must follow through with that knowledge. One commentator has suggested that "diligence" may require lawyers to not only "have a basic understanding or familiarity with social media," but also to use it "to screen a client or opponent's social media posts to gather relevant information."[30] This raises an interesting question – should you "follow" the Mayor, council members, the manager, or other employees on social media? Do you have a duty to do so? In certain situations, the answer may be yes. Both the New Hampshire and the North Carolina State Bars have recognized that a lawyer must "be competent to obtain [social media] information directly or through an agent, and to know how to make effective use of that information in litigation."[31]

The aspect of diligence that keeps me up at night, however, is that captured in comment 2 to Rule 1.3: "A lawyer's workload must be controlled so that each matter can be handled competently."[32] In an evolving organization, new ideas and experimentation are encouraged.[33] One of the benefits of this approach is said to be that if a new idea "misses the mark, you do not feel compelled to defend it" because you know you are trying things out to "see what happens, and make changes accordingly."[34] Unfortunately, if a new idea misses the mark, the City Attorney may be called on to defend it! When new ideas are introduced, we have a duty to vet them and provide competent advice.

I'm sure all lawyers have concerns with workload, but in private practice I would posit there is (generally) more flexibility to associate with other counsel, hire new associates, or otherwise spread work around or decline new matters. City attorneys must be mindful of limited outside counsel budgets that are typically adjusted only once per year, hiring freezes, and the pressure to "do more with less" that all governments face. And we can't "decline" to represent our client – our only client – without quitting our job.

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The guiding ethical precept for local government attorneys is that your client is the organization – not the mayor, not any individual council member, and not the city manager. Municipal attorneys typically interact with the governing board, city manager, and department heads. In a new, collaborative environment, where silos are breaking down, lower level staff may be approaching you more often with new ideas for programs or approaches to existing work. It's therefore more important than ever to make sure everyone you work with understands that your first duty is to the organization as a whole.

The wider the circle of people you interact with, the greater the chance that someone will want to tell you something "in confidence" – perhaps they are even concerned with the direction the organization is taking, or want to commiserate with you over some perceived shared grievance. One of the tenets of adaptive leadership and evolving organizations is that there will be change, and that affected employees experience a sense of loss with

> Just as in the rest of society, lawyers run the gamut from technology-obsessed to technology-adverse. But unlike the rest of society, we have an ethical duty of competence when representing our clients that extends to technology.

this change.[35] They may view you as a trusted person they can air concerns to, or they may think what they say to you is protected by attorney-client privilege.

Rule 1.13 requires that we "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[36] We know we must warn employees that we do not represent them when we are conducting internal investigations into misconduct; but what about those more mundane, water cooler situations? Can we ever participate in employee discussions about the state of the organization, or the changes it may be undergoing? Does this answer differ if you are "The City Attorney" or an assistant attorney? Does it differ if the discussion is amongst management staff only or includes lower level employees? Management staff, and lower level employees that you interact with frequently, should be reminded about the limits of attorney-client privilege and public records laws. In North Carolina, for example, written communications from the attorney are protected only if (1) made to the governing board; (2) within the scope of the attorney-client relationship; (3) concerning a "claim against or on behalf of" the city or judicial or administrative actions; and are only protected for three years from date of receipt by the board.[37] Emails, Slack messages, or other forms of electronic messaging to the attorney from staff, or from the attorney to staff, are not protected from disclosure.

The most conservative approach, then, would be to stay disengaged, but that leaves you at risk of being judged aloof and not a "team player." It also may not serve the organization – your client – well. Being able to take the pulse of the organization as it deals with change is crucial. Experimenting with new and different ways to do business may result in required legal processes being overlooked. Disaffected employees may turn into litigious ex-employees. You must be aware enough to know if an employee "is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization."[38] If that occurs, you must escalate the matter to the city manager or the city council, as appropriate.[39]

Rule 2.1: Advisor

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

When an organization is undergoing cultural change, there is pressure on all employees to get on board with the new culture. If your council has just hired a new manager, they may expect everyone – including the city attorney – to back her new approach to leading the organization. Attorneys should support the culture and management of their organization, so long as there is no conflict with the lawyer's ethical responsibilities.[40] However, the lawyer must be prepared to give "unpalatable" advice in the face of "unpleasant facts and alternatives that a client may be disinclined to confront,"[41] and must be prepared to give advice, even when not asked, if the "client proposes a course of action that is likely to result in substantial adverse legal consequences."[42]

While a lawyer has no duty to give advice the client has not asked for, comment 5 to Rule 2.1 notes that "a lawyer may initiate advice to a client when doing so appears to be in the client's interest." In a truly adaptive organization, the leadership will actually welcome this candid advice. "In a highly adaptive organization, no issue is too sensitive to be raised . . . and no questions are off-limits. . . . It is not only all right to challenge [management]; it is expected" at all levels of the organization.[43] Even dissenters and skeptics – which lawyers are often accused of being – are recognized as having "the uncanny capacity for asking the really tough key question" that may lead to the unearthing of "a wide range of perspectives that would otherwise be unspoken."[44] Leaders in evolving, adaptive organizations should welcome the critical eye their attorney brings to the table. We should still be sensitive to how we deliver advice, however.

Continued on page 24

Building Consensus *cont'd from page 23*

the local band in your community gazebo. In the past when speaking on this topic I tell the very sincere story of how I picked the community in which I live to be the place at which I "settled down." In the end, it is a story of how I fell in love with my community. I close with a challenge to you in the form of a question: what are you doing that will make someone fall in love with your community today?

You might be wondering about the community about which I spoke at the beginning of this article. I am happy to report that they are doing very well and achieving their goals on a regular basis. Since our discussion nearly five years ago they have annexed land to bring the bypassed highway back within city limits, they obtained voter approval for a fire protection sales tax to offset costs that were previously being covered out of the general fund, they hold regular live music events, they have adopted their first ever zoning code, a new restaurant has opened in town, and the local convenience store and gas station has decided to relocate and expand. Their financial reserves are growing again and things are really looking up!

Conclusion

Municipal attorneys are in a unique position to understand the legal implications of their city's diverse activities. They can and should use this knowledge in assisting city officials to avoid potential liabilities and enable their communities to flourish.

Notes

1. Adapted from Mindtools.com, *Golden Rules of Goal Setting- Five Rules to Set Yourself Up for Success*, (http://www.mindtools.com/pages/article/newHTE_90.htm; last visited June 27. 2019).
2. *Id.*
3. *See* McQuillin, Eugene, 15 McQuillin Mun. Corp. § 41:2 (3d ed.).
4. *See* Mo. Const. art. VI, § 26(b).
5. *See, e.g.*, Cal. Const. art. XIII C, § 2(requiring local government general taxes to be put to majority vote, while special taxes require 2/3 majority voter approval); Mo. Const. X, § 22(a) (requiring majority vote of qualified voters before creating a new tax, or increasing the current levy).
6. *See, e.g.,* Kan. Stat. Ann. § 79-2925c (placing a tax lid on city or county property taxes in excess of the five rolling year CPI, unless approved by a majority of qualified voters).
7. Note that transfer of funds is not always permitted. *See* McQuillin, Eugene, 15 McQuillin Mun. Corp. § 39:63 (3d ed.); *but see* Town of Thornton v. Winterhoff, 406 Ill. 113, 92 N.E. 2d 163 (1950) (holding that borrowing from one fund into another is not by itself illegal, provided that funds are returned in time to be available when a demand for such funds is made).
8. *Id.*
9. 42 U.S.C. §§ 2000cc- 200cc-5 (2000).
10. *See, e.g.*, River of Life Kingdom Ministries v. Village of Hazelcrest, 611 F.3d 367, 372 (7th Cir. 2010).
11. Authority for municipal investment of idle funds varies, and if available is often restricted by constitutional or statutory provisions. *See, e.g.,* McQuillin, Eugene, 15 McQuillin Mun. Corp. § 39:19 (3d ed.).
12. Annexation authority and procedures vary widely from state to state. *See, e.g.,* McQuillin, Eugene, 2 McQuillin Mun. Corp. § 7:15 (3d ed.).
13. *See, e.g.,* Tunica County v. Town of Tunica, 227 So. 3d 1007 (Miss. 2017).
14. Including an inventory of surplus land available for religious uses to assist applicants with researching available locations before they invest in land acquisition or design activities may also be beneficial in mitigating risk for RLUIPA claims. *See,* Seeman, Evan J. and Peloso, John, *Avoiding and Defending Against RLUIPA Claims*, Resource ID w-002-9215 (Thompson Reuters 2017).
15. Peter Kageyama, For The Love Of Cities (2011). **M.**

Ethical Issues *cont'd from page 15*

Comment 1 to Rule 2.1 guides us to "sustain the client's morale" and message the advice "in as acceptable a form as honesty permits."[45]

Attorneys should not limit their counsel to "[p]urely technical legal advice," "especially where practical considerations, such as cost or effects on other people, are predominant."[46] However, attorneys should be sure to explain when their caution or hesitancy about a new idea is based on legal concerns or other considerations. If you think a decision is a bad policy decision, but is otherwise legal, you may share your concerns, but should ensure it is clear that you are not challenging the legality of a decision and will accept it.[47]

Conclusion

Working in an evolving, adaptive organization is exciting and challenging. I have seen first-hand how empowering employees to experiment and tackle emerging issues can yield positive outcomes for the organization and its employees. I am also fortunate to work for an organization that values all voices, including those that may advise caution. Helping your local government use the tools it needs to succeed in the 21st Century, while at the same time abiding by your ethical duty to the organization, can be very rewarding if you can find the right balance.

Notes

1. Town of Cary, *The Cary 2040 Community Plan* 2 (Jan. 24, 2017).
2. *About Cary*, Town of Cary, https://www.townofcary.org/recreation-enjoyment/about-cary (last visited Feb. 7, 2020).
3. *Cary Superlatives*, Town of Cary, https://www.townofcary.org/recreation-enjoyment/about-cary/cary-superlatives (last visited Feb. 7, 2020).
4. Town of Cary, *supra* note 1, at 8.
5. *Id*. at 6, 8.
6. Some of the challenges discussed here may not be applicable to attorneys who operate under other forms of government; however, many of the challenges are faced by the legal profession as a whole.
7. *See*, Ronald Heifetz & Marty Linsky, *Leadership on the Line* (2017); Ronald Heifetz, Alexander Grashow, & Marty Linsky, *The Practice of Adaptive Leadership* (2009).
8. Hana Schank & Sara Hudson, *Getting the Work Done: What Government Innovation Really Looks Like*, New America, 21 (Oct. 2018), https://www.newamerica.org/public-interest-technology/reports/problem-solving-government/.
9. *Scrum*, Atlassian, https://www.atlassian.com/agile/scrum (last visited Feb. 7, 2020).
10. Schank & Hudson, supra note 8, at 25, 26.
11. Teena Maddox, *Smart Cities: A Cheat Sheet*, Techrepublic, July 16, 2018 https://www.techrepublic.com/article/smart-cities-the-smart-persons-guide/.
12. Tiziana Casciaro, Amy C. Edmondson, & Sujin Jang, *Cross-Silo Leadership*, Harvard Business Review, May-June 2019 issue, https://hbr.org/2019/05/cross-silo-leadership.
13. Scott D. Pattison, *Eliminating Silos in Government*, Governing (Apr. 5, 2006), https://www.governing.com/columns/mgmt-insights/Eliminating-Silos-in-Government.html.
14. Russ Linden, *The Agility that Governments Needs for a Disruptive Age*, Governing (June 7, 2017), https://www.governing.com/columns/smart-mgmt/col-agility-governments-need-disruptive-age.html.
15. Dan Singer, Retooling Our Organizational Culture, ICMA (Oct. 3, 2017), https://icma.org/blog-posts/retooling-our-organizational-culture.
16. John P. Kotter, *Accelerate* 1 (2014).
17. Please consult your local state bar's ethics rules for guidance specific to your state.
18. Preamble cmt. [2].
19. Heifetz & Linsky, *supra* note 6, at 51, 53.
20. Rule 1.1.
21. Rule 1.1 cmt. [2].
22. Sterling Miller, *Ten Things: Common Ethics Issues for In-House Counsel*, Ten Things You Need to Know as In-House Counsel (Aug. 18, 2015), https://sterlingmiller2014.wordpress.com/2015/08/18/ten-things-common-ethics-issues-for-in-house-counsel/.
23. Rule 1.1 cmt. [1].
24. Rule 1.1 cmt. [8] (emphasis added).
25. *Id*.
26. Debra Cassens Weiss, *Lawyer's E-Discovery Error Led to Release of Confidential Info on Thousands of Wells Fargo Clients*, ABA Law Journal (Jul. 27, 2017), http://www.abajournal.com/news/article/lawyers_e_discovery_error_led_to_release_of_confidential_wells_fargo_client.
27. Michael Muchmore & Jill Duffy, *The Best Cloud Storage and File Sharing Services for 2020*, PC Magazine (June 14, 2019), https://www.pcmag.com/picks/the-best-cloud-storage-and-file-sharing-services.
28. Pritam Tamang & Prodyut Borah, *5 Best Slack Alternatives for Collaboration Software*, Capterra (Aug. 4, 2019), https://blog.capterra.com/the-top-13-slack-alternatives/.
29. *See, e.g.,* N.C. State Bar, 2011 Formal Ethics Opinion 6 ("Subscribing to Software As a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property").
30. Judge Herbert B. Dixon, Jr., *Yes, Judges Should Know About Recurring Ethical Issues Involving the Use of Social Media by Lawyer*, The Judges' Journal, Vol. 57 No. 2 Spring 2018, at 37, 38.
31 N.C. State Bar, 2014 Formal Ethics Opinion 5 ("Advising a Civil Litigation Client About Social Media") (citing N. H. Bar Ass'n Op. 2012-13/05).
32. Well, that and procrastination (Rule 2.1 cmt. [3])!
33. *See* Heifetz & Linsky, *supra* note 6, at 36-37.
34. *Id*. at 36.
35. *See id*. at 92-95.
36. Rule 1.13(f).
37. N.C. Gen. Stat. § 132-1.1 (2017).
38. Rule 1.13(b).
39. *See id*.
40. *See* Rule 1.3 cmt [1] ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.")
41. Rule 2.1 and cmt. [1].
42. Rule 2.1 cmt. [5].
43. Heifetz, Grashow, & Linsky, *supra* note 6, at 102.
44. *Id*. at 145-146.
45. *Id*.
46. Rule 2.1 cmt. [2].
47. *See* Rule 1.2(a) ("a lawyer shall abide by a client's decisions"). ML