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

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]

A. *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]

B. *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 functions" and "give an opinion upon any legal matter or questions submitted by the

[1] Adopted May 2014, revised October 2020.

[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.

Mayor."[10] Furthermore, the City Attorney must prepare or revise ordinances when requested by the Mayor.[11]

C. *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]

D. *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]

E. *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]

F. *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]

G. *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]

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

[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.
[21] City Code § 1.2.408.

I. *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 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

[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.
[26] Colo. RPC 3.1 cmt. 1.

argument for an extension, modification or reversal of existing law."[27]

With regard to the exclusion of private property within the City limits from a Title 32 fire district pursuant to C.R.S. § 32-1-502 *et seq.*, the Office understands that the City will be a party to the exclusion litigation regardless of whether the fire district board, the affected property owners, or the City files the petition for exclusion in the district court. For general policy reasons, the City has historically not unilaterally filed exclusion petitions because (1) exclusion from a fire district directly benefits the affected property owners and does not directly benefit the City as a whole, and (2) the City's standard annexation agreement provisions typically require the property owner to ensure exclusion from any overlapping fire district. However, there may arise circumstances in which the City Council requests the Office to initiate exclusion proceedings in the district court for private property in an overlap area. Specifically, the City Council may request the City Attorney to initiate exclusion proceedings in the district court if all of the following conditions exist:

- The private property owners in a defined City/fire district overlap area are not the original annexor or developer of the property; and
- The defined City/fire district overlap area comprises less than fifty percent (50%) of the entire fire district; and
- The private property owners have formally requested or petitioned the fire district board for exclusion; and
- The fire district board has consented or agreed to the proposed exclusion but the fire district board does not petition the district court for exclusion within a one hundred eighty (180) day period from the date of the meeting at which the fire district board consented or agreed to the proposed exclusion.

The City Attorney's Office shall ensure a Joint Plan and Agreement has been negotiated and approved by the City Council and the fire district board prior to initiating exclusion proceedings in the district court. The City Attorney's client for purposes of the exclusion proceedings shall be the City of Colorado Springs and the City Attorney shall have no attorney-client relationship with either the fire district board or the private property owners. The City Attorney shall otherwise endeavor to comply with Title 32, C.R.S., and these Ethics Guidelines in its representation of the City in the exclusion proceeding.

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

[27] Colo. RPC Rule 3.1.
[28] Colo. RPC 1.13(a).

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 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

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[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.

[32] CA Eth. Op. No. 2001-156, 2001 WL 34029610 (Cal. State Bar Comm. Prof. Resp.).

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]

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

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[33] Colo. RPC 1.13(c) cmt. 6; Colo. RPC 1.6(b).

[34] Colo. RPC 1.6 cmt. 14.

[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.

"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:

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. The representation is not prohibited by law;
3. 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
4. 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 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.

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[40] Colo. RPC 1.7(a) (emphasis added).

[41] Colo. RPC 1.7(b).

[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.

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 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.

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[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.

[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.

I. 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.

II. 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 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.

III. 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,

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

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.

(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.

[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).

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 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

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[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).

[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).

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

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;

[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.).

[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)

- 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.

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]

[68] Colo. RPC 3.8.

[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