Model Rule 1.13 and the Municipal Organization as the Client

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[1] We would like to express our gratitude to our mentor, colleague, and friend Bill Geary, retired City Attorney for the City of Kansas City, Missouri; IMLA Fellow; and James H. Epps III Award winner. This work is derivative of Bill's efforts during his career to further municipal lawyers' understanding of their ethical and professional responsibilities.

WHO'S THE CLIENT?

One observer noted that:

> [g]overnment lawyers must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures. But as they do so, they include themselves among the ranks of many of the noblest public servants this nation has ever known.[2]

But as any person who has worked as an in-house city attorney[3] knows, many elected officials and government employees have a different view. When the issues are personal, when the issues are critical to a program's implementation or even success, it is often time to "get a real lawyer." No advice is better than the advice of a consultant or better yet a lawyer friend of an elected official (although the names are never given and the "research" is never shared). Lawyers may have themselves to blame.

> Having said all that, there is often some kernel of truth at the core of a stereotype. The image of lawyers as backward-looking, ass-covering, wordsmithing, risk-averse, non-value generating, fine-distinction-drawing deal killers, who spend most of their time trying to separate the pepper from the fly poop, and the rest of the time saying "no you can't do that" to their clients, probably has some empirical basis.[4]

Of course, the truthiness[5] or falseness of this stereotype sometimes depends upon who is making the observation. More directly – is it a client? But who's the client?

City attorneys practice in an environment regulated by many sources of law including legislation, administrative regulations, common law and judicial regulation, rules of procedure and evidence, local laws and procedures, and rules governing their own professional conduct and ethical standards. They "…must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures."[6] "Dealing with such issues is particularly challenging when the ethics rules leave lawyers in limbo by not prescribing a clear course of conduct."[7] On any given day, a city attorney may be asked to represent and advise an entity or multiple entities, their officers and employees on a variety of issues; draft legislation; exercise discretion to file suit, decide settlements, seek or appeal judgments on behalf of the city; and always remain cognizant of legal requirements and the public interest the entity is organized to serve.

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[2] Randy Lee, Symposium: *Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, 9 Widener J. Pub. L. 199 (2000).
[3] For the sake of brevity, "city attorney" includes the assistants serving in law departments.
[4] Jeff Lipshaw, *More on Lawyers as Leaders*, Legal Profession Blog (Jan. 10, 2007) available at http://lawprofessors. typepad.com/legal_profession/2007/01/lipshaw_on_hein.html.
[5] See Stephen Colbert, The Colbert Report (October 17, 2005) available at https://www.cc.com/video/63ite2/the-colbert-report-the-word-truthiness.
[6] Randy Lee, Symposium: *Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, Widener J. Pub. L. 199, 200 (2000).
[7] Susan Saab Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education*, 69 Wash. U. J.L. & Pol'y 17, 21 (2022).

The foundational question of "WHO'S THE CLIENT" is something every city attorney must answer. A city attorney should look to the source of its representational authority, ethical rules and court opinions for guidance on how to resolve client identification issues and conflicts of interest.[8] Unfortunately, these often fall short of providing an answer.

Identification of the Client

A lawyer cannot preserve confidences, avoid conflicts or protect interests without first knowing who the client is. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[9] A critical determination for the municipal lawyer is who is a duly authorized constituent? There are many possibilities: Mayor, City Council, City Manager, Appointed Officials, Boards and Commissions, Department Directors, Municipal Corporation.

"An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents."[10] Comment 9 to Model Rule 1.13 notes that precisely defining the identity of the client and prescribing the resulting obligations may be more difficult in the government context and is a matter beyond the scope of the Model Rules.[11]

"No universal definition of the client of a governmental lawyer is possible."[12] The Restatement (Third) of Law Governing Lawyers acknowledges that a government lawyer ultimately represents the public (or the public interest). Such a definition is less than helpful. The Restatement proposes as the "preferable approach" to regard the respective governmental agency as the client—the lawyers subject to the direction of those officers authorized to act in the matter involved in the representation.[13] But even when the city attorney can identify the duly authorized constituent, the duty remains to the organization.[14]

Duty to the Organization

What is the duty to the organization? Every attorney owes a duty to the client which includes the general requirements of competence, diligence, timeliness, communication and the like. Generally, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[15]

In some circumstances, however, a city attorney's duty to the organization may require a lawyer to respond to specific acts or omissions by an organization's constituent related to the representation. "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

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[8] Adam Edris, *Issues of Client Identification for Municipal Attorneys: An Agency and Public Interest Approach*, 24 Geo. J. Legal Ethics 517 (2011).
[9] 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13.
[10] *Id.* at Comment 1.
[11] *Id.* at Comment 9.
[12] Restatement (Third) of the Law Governing Lawyers § 97 (2000).
[13] *Id.*
[14] 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 annotations.
[15] *Id.* at Comment 3.

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, then 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."[16]

Knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.[17] "… [A] lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations."[18] In an attempt to clarify this responsibility, annotations indicate that "a city attorney must also seek an appropriate balance between maintaining confidentiality and assuring a potential wrongful act by any constituent is prevented or rectified, since the organization is conducting public business."[19]

As a city attorney, you might routinely encounter this obligation in a variety of circumstances. Common examples include a constituent who refuses to do or avoid doing something unlawful, recklessly disregards the potential for risk and liability, refusal to make needed decisions, and making decisions that are beyond the authority of the constituent.

City Attorney Advice	**Constituent Response**
That's illegal.	It's done that way.
Your division is going to violate the law.	It's his call.
If your department does this the city is on the hook for big dollars.	You'll have to defend us.
To the boss: Make 'em stop!	You're talking to me about this because…?

In these instances, it is important for the city attorney to consider whether the advice is legal advice related to the representation (as opposed to business advice or personal advice). A city attorney also has to consider who can make the decision about the underlying matter. Is it the constituent, the supervisor, another department, official, employee?

> SCENARIO: Who directs settlement of a claim? A department director might say "I pay your salary. I pay the claims. I'll tell you when to settle and when not to settle." Not so quick. What department budget picks up the tab for an attorney is not determinative of who makes the decision. What is the lawyer's role? The question is, what does the client (organization) want from the lawyer, not what does the representative of the client want from the lawyer.

To answer the question, who directs settlement of a claim, a structural analysis is necessary. How is the law department established? What are its duties? What type of decisions does the law

[16] *Id.* at § 1.13(b).
[17] *Id.* at Comment 3; 1.0 Terminology, Ann. Mod. Rules Prof. Cond. § 1.
[18] 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Comment 4.
[19] 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Annotations.

delegate to the City Attorney? What's the relationship of the law department to other departments? The question: Who's the client, can't be answered with an easy analysis. It depend upon the circumstances.[20]

Again, Model Rule 1.13 gives us guidance. It is applicable to representing governmental organizations, and in comment notes that the attorney-client relationship in the government context has the added consideration of preventing or rectifying wrongful official conduct.

So back to the issue using Kansas City, Missouri as the setting: "I pay your salary. I pay the claims. I'll tell you when to settle and when not to settle." What does a structural analysis tell us? The City's Code of Ordinance provides that the city attorney may settle claims in favor of or against the city up to $25,000.00 without further approval. The risk management committee can approve settlement up to $50,000.00. Claim payments in excess of $50,000.00 are subject to approval by the city council upon the recommendation of the risk management committee and the city attorney.[21] That means an ordinance must be passed, and the city's legislative body must authorize the settlement. Nowhere is the department director given the right to dictate the settlement of cases –even those cases arising from the director's department.

Surely this is a mistake. No. The City Council has given department directors the authority to enter into non-construction contracts up to $400,000 and construction contracts up to $1,000,000.[22] It retains the authority, however, to make decisions on all but the most minor claims. The structure of Kansas City government defines the client. It's not the director.

Kansas City is a charter city. The answer may be less clear for a non-charter city. Missouri statutes provide that "[i]t shall be the duty of the city attorney to prosecute and defend all actions originating or pending in any court in this state to which the city is a part, or in which the interests of the city are involved, and shall, generally, perform all legal services required in behalf of the city."[23] The statue does not specifically address settlement authority.

> SCENARIO: Was the attorney-client privilege invoked by plaintiff's counsel during depositions of two defendants and two non-defendant employees? An employee files suit against an organization ("Organization"). While discovery was proceeding, events transpired which caused the Organization to consider whether to terminate the plaintiff's employment. The organization's attorney was brought into the discussion to give related legal advice. Two non-party witness employees who investigated the "events" were part of the discussion with the attorney. During later depositions, the non-party witnesses were instructed not to answer questions if the only basis for the answers is to recall a conversation about the events in the presence of the attorney. The court found that "[w]hen the client is an organization, such as a corporation or, as in this case, a township, questions arise as to which employees of the organization are considered "clients" for purposes of the privilege. The answer to that question is that it depends upon the circumstances." Noting that attorneys must ascertain legally relevant facts in order to give sound and

[20] *See Dzierbicki v. Township of Oscoda*, 2009 WL 1491116, (E.D. Mich. May 26, 2009).
[21] §2-302, Code of Ordinances, Kansas City, Mo.
[22] §3-41, Code of Ordinances, Kansas City, Mo. These figures are current at the time of this writing in August 2022.
[23] Mo. Ann. Stat. § 98.330.

> informed advice to the client, and that the privilege exists to protect both decision makers who can act on the advice and those who can provide relevant facts. The court found that since the non-defendants were involved in the discussion with the attorney for the purpose of helping the attorney ascertain relevant facts, the attorney-client privilege extended to their conversation. The privilege, however, extends only to the communications and not to the underlying facts which a witness may still have to disclose in any other context.

Application in Reality

Discussed above in the context of client identification, Comment 9 to Model Rule 1.13 goes on to provide a sobering warning of the importance of client identification in the government sphere:

> "Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."[24]

EXAMPLE: *In re Schuessler,* 578 S.W.3d 762 (Mo. 2019).[25]

- The attorney *knew* of a criminal act and potential civil rights violation.
- The attorney *knew* the suspect was falsely charged to cover up the assault.
- The attorney failed to report the misconduct and protect the client.

Katherine Dierdorf became licensed to practice law in Missouri in 2011. In February 2014, Ms. Dierdorf accepted a position as an assistant circuit attorney in the office of the circuit attorney of the city of St. Louis (OCA). Ms. Dierdorf was assigned to the misdemeanor division. Ms. Dierdorf was good friends with Ambry Schuessler and Bliss Worrell, who were all also assistant circuit attorneys in the misdemeanor division.

On Tuesday, July 22, 2014, Ms. Dierdorf and Ms. Worrell, went to a St. Louis Cardinals baseball game. While there, Ms. Worrell received a telephone call from a detective (and friend) with the St. Louis police department—Det. Tom Carroll. Two important facts:

1. Det. Carroll's daughter's vehicle had been broken into and her credit card stolen.
2. A suspect was apprehended with the daughter's credit card.

On Wednesday, Ms. Dierdorf was in her office when Ms. Worrell entered the office and stated, "Tom beat up that guy" who stole his daughter's credit card. Ms. Worrell left Ms. Dierdorf's office soon thereafter. Ms. Dierdorf did not report to her supervisors Det. Carroll's assault of the suspect immediately following Ms. Worrell's disclosure of it. That afternoon, Ms. Worrell went to the warrant office and issued charges against the suspect Det. Carroll assaulted, including a felony.

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[24] 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Comment 9.

[25] This is a case that has a nightmare list of ethical disasters, resulting in an FBI probe and jail time for some of the characters. For Model Rule 1.13 purposes, we focus on Ms. Katherine Dierdorf, but this case could serve as a case study in what not to do under multiple rules of professional conduct.

On Thursday, Ms. Dierdorf was, again, in her office when Ms. Worrell entered the office and told them she had issued the case against the suspect Det. Carroll beat up for stealing his daughter's credit card. They also discussed some details of the assault. Ms. Dierdorf then went to Ms. Schuessler's office where she stated the suspect was falsely charged with fleeing custody to explain why the suspect was injured.

Ms. Schuessler: "We could get in trouble just for knowing this."

Ms. Dierdorf: "How would they find out. I'm not going to say anything."

As these things go, everyone found out, including St. Louis Police Internal Affairs and the FBI. Det. Carroll and Ms. Worrell were subsequently indicted on federal criminal charges and plead guilty. Ms. Worrell was disbarred. Ms. Dierdorf testified at the grand jury proceedings and then had to face her own disciplinary proceeding—it did not go well. The court saw it the following way:

> Ms. Dierdorf – a lawyer for OCA – knew another assistant circuit attorney – Ms. Worrell – had violated the law by filing false charges against a suspect to cover up a police officer's brutal assault of the suspect. The failure to report such conduct was a violation of Ms. Dierdorf's legal obligation to the circuit attorney's organization and could have resulted in a civil rights violation or lawsuit against OCA. Accordingly, it was reasonably necessary in the best interest of OCA that Ms. Dierdorf report Ms. Worrell's conduct…. The record, therefore, reflects, by a preponderance of the evidence, that Ms. Dierdorf violated Rule 4-1.13 when she failed to report Ms. Worrell's misconduct.[26]

Troubled by Ms. Dierdorf's repeated dishonesty and finding that government attorneys are held to a higher standard given the nature of their work to protect the public, it was not a surprise when the court disciplined her with an indefinite suspension with no leave to file for 3 years.

EXAMPLE: *Crandon v. State*, 897 P.2d 92 (Kan. 1995), cert. denied sub nom. *Crandon v. Dunnick*, 516 U.S. 1113 (1996).

- Potential wrongdoing within a government agency.
- Role of lawyer as part of the team.
- Role of lawyer is to advise, not to prosecute, the government client and its representatives.

Joyce Crandon served as general counsel of the Kansas Office of the State Bank Commissioner. In that capacity she was informed by someone believed to be credible that the Deputy Commissioner was engaging in improper banking behavior. Ms. Crandon was told that the Deputy Commissioner had done business with at least two banks chartered by the State of Kansas. Ms. Crandon faced a conundrum. Did she confront the Deputy Commissioner, inform the Commissioner, or did she report the possible violations to the Federal Deposit Insurance Corporation?

[26] *In re Schuessler*, 578 S.W.3d 762, 771-772 (Mo. 2019).

Ms. Crandon told the FDIC. The FDIC told the Commissioner. There were no violations involving the Deputy Commissioner. Ms. Crandon was fired.

Ms. Crandon's First Amendment, pre-*Garcetti*,[27] gave her no claim to damages claimed as a result of her termination. As an attorney, Ms. Crandon had an obligation to her client, the Office of the State Bank Commissioner. By taking her investigation outside her office she failed in her obligations.

The Kansas Supreme Court succinctly observed: "The attorney's duty is to advise and counsel, not prosecute her client." The attorneys working for government have a different relationship than other employees. Because of that difference an attorney's conduct is measured by a different standard.[28] It is not so much that the standard is "higher" but that it is different.

EXAMPLE: *In re Harding*, 223 P.3d 303 (Kan. 2010). Background:

- Small town politics
- Bar complaints and aftermath
- Personal destruction

WaKeeney, Kansas is the county seat of Trego County, located midpoint between Kansas City and Denver in western Kansas along Interstate 70. The entire county has about 2,800 people; over 60% of the residents of Trego County live in WaKeeney. For people in WaKeeney, politics is a contact sport.

David Harding was WaKeeney City Attorney in 2006, having served in that position since 1978. He was also the Trego County Attorney. Since 1978 Mr. Harding had been a member of KPERS, the Kansas Public Employees Retirement System, even though he was a part-time employee of WaKeeney.

Mr. Harding was paid a monthly retainer that covered basic work for the City. He billed the City hourly for additional work. In 2006 he asked the City Council to run his monthly bills through the City's payroll to treat him as a City employee – and increase his KPERS contributions – and thus increase his retirement benefits. The Council's response may not have been what Mr. Harding expected.

Councilwoman Neish responded by suggesting Mr. Harding shouldn't be a member of KPERS in the first place. No decision was made on the request by Mr. Harding, but Ms. Neish volunteered to call KPERS.

[27] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ["We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."].
[28] *Crandon v. State*, 897 P.2d 92 (Kan. 1995), *cert. denied sub nom. Crandon v. Dunnick*, 516 U.S. 1113 (1996).

The people at KPERS explained that a person had to have 1,000 hours of service per year to qualify for benefits for that year. KPERS then disqualified Mr. Harding for six years, 21.5% of his time as WaKeeney City Attorney.

Mr. Harding began hearing things. Possibly Councilwoman Neish and the Mayor and the Police Chief were up to no good. With a suspicion of criminal acts afoot Mr. Harding talked to the Ellis County Attorney. Ellis County is directly east of Trego County. Mr. Harding had to talk to someone; he was the Trego County Attorney, too.

The Ellis County Attorney gave this advice: "Call the Disciplinary Administrator." Good advice. The Kansas Disciplinary Administrator's Office told Mr. Harding he needed to talk to the people at the City about the situations. This, of course, is the lesson of Joyce Crandon. Mr. Harding set up a meeting.

He then accused them of unlawful behavior and threatened investigations. The Disciplinary Administrator's advice was correct, to the point. Mr. Harding's implementation of the advice was horrible. The meeting didn't go well.

As Trego County Attorney Mr. Harding asked Ellis County Attorney Tom Drees to serve as special prosecutor to investigate three allegations of wrongdoing:

- Did Mayor Deutscher and Councilwoman Neish commit a crime by using their city cell phones for private calls and running over on their minutes?
- Did Police Chief Eberle commit a crime by buying rock from the City at the City's price, $60 - total?
- Did Mayor Deutscher commit a crime by buying a meal for utility crews, including his son, during storm repairs?

On the assumption that the best defense is a good offense, Mayor Deutscher filed a complaint with the Disciplinary Administrator over Mr. Harding's behavior. Councilwoman Neish then filed a complaint. As did Chief Eberle. The City Council then fired Mr. Harding. He chose not to run for re-election as Trego County Attorney.

In addition to the breach of confidentiality – the information given to the special prosecutor included City records obtained by Mr. Harding as its City Attorney – the failure to recognize who was his client caused the Kansas Supreme Court to reject the Disciplinary Administrator's recommendation of a public censure, which was also recommended by the committee, in favor of a 90-day suspension. The Supreme Court wrote:

> We are concerned about the harm done, the respondent's disclosure of confidential information, and the damage caused to the reputations of some of the city officials. We may not ignore respondent's angry and selfish response. A minority of the court would impose a greater discipline.[29]

[29] *In re Harding*, 223 P.3d 303 (Kan. 2010). After almost 3 years the special prosecutor decided to not bring charges based on the failure to get rollover minutes on the City's plan; based on the spreading of gravel on the alley between the WaKeeney Methodist Church and the Chief of Police's house, or based on charges that the City paid for a meal

GREAT. SO…WHO'S THE CLIENT?

Ms. Dierdorff, Ms. Crandon and Mr. Harding all failed to consider the question: Who is my client? There are many possibilities, but even those possibilities have problems.

The People

If you work in public service, surely the public must be high on the list of potential clients. But which public do you serve? Is it racial? Of course not. Is it based on politics? Of course not. Is it those who make campaign contributions? Or those who engage in community volunteerism? Of course not. "The people" is simply too vague to be of any assistance.

Unless you're elected. Then it can be even more complicated. Although not common nationally, some city attorneys are elected. They seem to express a freedom not necessarily appropriate for appointed officials. Who's the client? Is it someone who chooses you and who can fire you? Elected officials are turned out of office by the people. But it is still necessary to engage in a structural analysis of the office and the government.

We can clearly see this process in California, where elected city attorneys are common, and where politics and the law get muddled. The Los Angeles City Charter makes this clear statement:

> The civil client of the City Attorney is the municipal corporation, the City of Los Angeles. The City Attorney shall defend the City in litigation, as well as its officers and employees as provided by ordinance. The City Attorney may initiate civil litigation on behalf of the City or the People of the State of California, and shall initiate civil litigation on behalf of the City when requested to do so by the authority having control over the litigation as set forth below. The City Attorney shall manage all litigation of the City, subject to client direction in accordance with this section, and subject to the City Attorney's duty to act in the best interests of the City and to conform to professional and ethical obligations. In the course of litigation, client decisions, including a decision to initiate litigation, shall be made by the Mayor, the Council, or boards of commissioners in accordance with this section.[30]

Likewise, the San Diego City Charter provides:

> The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney.[31]

But that didn't keep City Attorney Mike Aguirre from investigating and suing – more than once – the City of San Diego during his only term in office. He promptly dismissed the City as his client and held out the "people" as his client. Paraphrasing a political foe discussing the situation; it is a

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for utility crews working to repair utility service to WaKeeney after a winter storm. The day after Mr. Harding's suspension took effect KPERS reinstated his previously disqualified six years.

[30] § 272, City Charter of Los Angeles, California (1999).

[31] §40, City Charter of San Diego, California (1931).

fundamental principle that an attorney may investigate and pursue an entity or represent an entity, but not both. Though elected officials represent the people, this does not impart them with any special powers to act outside the law. The elected city attorney, claiming to represent the people, initiated major investigations of *his own client* in direct contravention of the law.[32]

Mayor and Council

Elected officials might be a client. This raises a multitude of problems. Foremost is the basic issue: Which one? Is it the Mayor? Is it the sponsor of legislation? Is it the committee chair? Is it the one who supports the Law Department's budget the strongest? Is it the group that has the most votes?

The latter question helps us identify how the client makes decisions, but it doesn't help us identify the client. A little math may show the problem.

In Kansas City, Missouri there are 13 members of the City Council, which includes the Mayor. To adopt most ordinances seven votes are required. How many groups of seven Council members can you make out of 13 members of the City Council? The answer: 1,716 different theoretical combinations of elected officials. That doesn't work.

Department Directors / Agency Heads

Most local elected officials are part-time public servants. Daily contact with the city attorney is not always ensured. The people doing the work of the city implementing the policies put into place by the elected officials – the department directors, division heads, section leaders, and crew chiefs may be more frequent consumers of law department services. But they may have inconsistent goals:

- I want to get all the grass in all the parks cut before the week of July 4.
- I want to have money in the budget left so I can cut the grass in most of the parks before Labor Day, too.

There is more to the client than just giving directions. Department directors are, generally, representatives of the client. They are not the client.

The Public Interest

We earlier saw former San Diego City Attorney Mike Aguirre take the approach that he, and apparently he alone, would determine what was best for the people of San Diego and would act on those beliefs. The fact that the City Attorney stood for election did not give the position greater policy making powers than the Mayor or City Council. The election was a means of selecting the client's attorney.

The Municipal Corporation

The textbook answer, of course, defining the client of a local government lawyer is the government – the municipal corporation. How do you take direction from a corporation? The answer may be, trough the majority.[33] This is most often expressed through ordinances or resolutions.

[32] Dan Coffey, *City attorney is unfit for office*, San Diego Union-Tribune (Apr. 24, 2005).

[33] There are always exceptions. For example, the U.S. Senate apparently can only act, short of challenging the very foundation of our republic, through a 3/5 super-majority. However, that type of issue is not great for local

The Mayor and City Council, the City Manager or City Administrator or Mayor's Chief of Staff in some cities all may be from time to time constituents of the client. The structural analysis of the City's governing laws will provide a means to identify the decision maker. A most succinct description of the "client problem" was described recently this way:

> The client problem is that a city attorney works for all of the city's elected officials but represents none of them.[34]

WHY DOES IT MATTER?

The ramifications of not identifying the client can be devastating to a city, its elected officials, appointed bureaucrats and employees. A handful of situations will disclose the problem.

What information is confidential? If there is an attorney – client privilege between the city attorney and the city, the representative of the client must be identified. There can't be an attorney – client privilege without a client! Also, only the client can waive the privilege; it does not belong to the attorney. Open records laws, such as the Missouri Sunshine Law or the Kansas Open Records Act, may provide exceptions to disclosure of government document based on attorney-cllient privilege and the attorney work product doctrine.[35] For the work product doctrine to apply the litigation must be against your client. All of these issues of confidentiality necessitate the question (and answer): Who's the client?

Conflicts of interest must be navigated, but cannot be done successfully until the client and the client's interests are identified. Likewise, who has control of litigation is critical. Consider this scenario:

> The Mayor and City are sued. The City Council wants to settle. The Mayor does not want to settle. The City Attorney is representing the City. The City Council authorized the Mayor to obtain a private attorney, to be paid for by the City. The City Council doesn't want to spend any more money on the defense of the Mayor. The Mayor wants to keep fighting.[36]

It has been suggested that since "Who's the boss?" is a different question from "Who's the client?" that the determination can follow, again, a structural analysis of the government and the issue being confronted.[37] The practical ramifications are navigated every day. Who wants to explain to an elected official that yes, she is your boss, but no, she is not your client. But knowing the client determines the entire character of the City Attorney's work.

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governments. People expect their local governments to actually accomplish things and they must be able to make decisions and move on to the next problem.

[34] Brigham Smith, *Who's the Boss: Deciding Who Your Client Is When You're A City Attorney*, 11 T.M. Cooley J. Prac. & Clinical L. 1, 2 (2009).

[35] Chapter 610, RSMo.; K.S.A. §45-215, *et seq*.

[36] All characters appearing in this example are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.

[37] Brigham Smith, *Who's the Boss: Deciding Who Your Client Is When You're a City Attorney*, 11 T.M. Cooley J. Prac. & Clinical L. 1, 16 (2009).