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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JAN FEB 2024 VOL.65 NO.01



MUNICIPAL BULWARKS: THE BATTLE FOR CORPORATE ACCOUNTABILITY

Local governments are a transformative force in redressing a wide range of injuries to their communities, achieving significant settlements and changing corporate behavior.

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ETHICS

By: TAMARA L. NILES,
City Attorney, Englewood, Colorado

A Municipal Attorney's Ethical Limitations and Best Practices in Responding to Public Criticism

When conditions of local government take an unexpected turn, the municipal attorney can be front and center of a public controversy. Whether earned or not, the local government attorney—who is often forward facing, a regular presenter at open meetings, and quite possibly one of a public employer's highest-paid employees—can be publicly maligned for policy, decision-making, and rejected (confidential) legal advice. Anecdotally, vitriolic public comment regarding the municipal attorney has become increasingly more common; or at a minimum, more widely-distributed online and in social media.

The American Bar Association acknowledged that:

> [l]awyers regularly are the target of online (and offline) criticism. Clients, opposing parties, and others are increasingly taking to the internet to express their opinions of lawyers they have encountered. Lawyers are left in the quandary of determining whether and how they ethically may respond when the opinions posted are unflattering, and the facts presented are inaccurate or even completely untrue."[1]

Unlike other public employees, however, the attorney is generally prohibited under applicable ethics rules from correcting false statements made in these public allegations.

While "[i]n most instances the best advice is to ignore the criticism,"[2] after careful analysis a municipal attorney may determine that it is in the public's best interest--or their own-- to squarely address it and/or formulate a formal response. This article provides ethics considerations for public criticism responses,[3] recommendations from multiple ethics opinions analyzing this issue, verbatim potential public responses, and practical options for local government attorneys.

A. Attorneys Must Carefully Consider (and Reconsider) Whether to Publicly Respond to Criticism

Political controversy can result in inflammatory (if not defamatory) public, online and social media criticism regarding the municipal attorney. Whether it is proposing a dog regulation (which seems to elicit an especially emotional citizen reaction), case law-required procedural changes that do not align with certain religious beliefs, or discussing legal implications of conversion to a single organized trash hauler, a city attorney's public presentation or response to a council member inquiry can suddenly make the attorney a target of repeated public vocal and written criticism. As any long-term municipal attorney who has sat through many a public comment period can attest,

> [u]nflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website are an inevitable incident of the practice of a public profession…[4]

A careful attorney may choose to take no responsive action to public comment or written/online criticism. As the American Bar Association concluded, "[a]s a best practice, lawyers should consider not responding to a negative post or review…"[5] Similarly, the Michigan Bar Association

> urges lawyers proceed with caution noting that any well intentioned and otherwise permissible response to negative criticism can quickly devolve into an online repartee that could implicate MRPC 1.6. In addition, it should be noted that responding to the criticism itself may draw even more unwanted attention to the original accusations.[6]

While a full-time, in-house city attorney may be unconcerned with Yelp reviews or false social media claims, part-time city attorneys may maintain simultaneous private practices in which potential clients consider public reviews and/or criticism. In this case, despite these concerns, a response to criticism may have a required business purpose.

> Because online reviews are so important to a lawyer's practice, online reputation management is crucial. Therefore, it

may be in the lawyer's best interest to respond to a negative review.[7]

B. Code of Professional Responsibility Limits Content of Attorney Public Responses

Even if public criticism misstates public events or cites legal documents not protected by attorney-client privilege, Model Rule of Professional Conduct 1.6(a) generally prohibits revealing any information—even information within the public domain—regarding client representation unless (a) the client gives consent, or (b) disclosure is impliedly authorized.[8] Information also may be disclosed if it meets one of the exceptions under Rule 1.6(b), such as to secure legal advice regarding ethics rule compliance when faced with the deterioration of a client relationship[9] or to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…"[10]

While a handful of state ethics opinions have held that false online claims by clients or former clients may allow limited confidential disclosures,[11] the vast majority of jurisdictions conclude that the disclosure of confidential information in response to *any* online review is prohibited in the absence of express client authority:[12]

> A negative online review, alone, does not meet the requirements for permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response… relating to a client's representation… would exceed any disclosure permitted under the Rule."[13]

Moreover, "[v]irtually any response to online criticism is going to implicate either client confidences or secrets that are protected… [14]

The most common fact scenario for an in-house municipal attorney, however, occurs when someone that has never been a client—such as a citizen—posts a negative review or lodges public criticism. In that case, attorneys choosing to respond may do so by truthfully stating the person is not a client or former client, given that the ethical duties of confidentiality don't apply in the absence of an attorney-client relationship.[15] The Michigan Bar Association even provides a proposed response when "[r]andom persons who were not part of the case post reviews of the attorney or firm" as follows:

> [Law firm name] provides our clients with effective, zealous representation [considering inserting mission here] and our duty to our clients is our utmost priority. As you were not involved directly in any matters handled by this firm, please contact our office directly so that we may discuss your concerns.[16]

C. ABA/Ethics Opinions Provide Potential Responsive Actions to Public Criticism

In lieu of providing a substantive response to public criticism, several authorities suggest that attorneys consider:

- Seeking removal of the information from an online platform;[17]
- Ignoring it;
- Issuing an invitation to contact the lawyer privately to resolve the matter; or
- Responding directly to the person who posted the criticism.[18]

In addition, the ABA and many a state bar association have issued sample verbatim, Rule-compliant public statements to respond to criticism, such as:

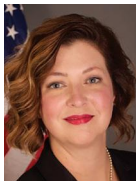
> "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."[19]
>
> "As an attorney, I am constrained by the Rules Regulating The [insert state] Bar from responding in detail, but I will simply state that it is my belief that the [comments/post] present neither a fair nor accurate picture of what occurred and I believe that the [comments/post] [is/are] false."[20]
>
> "My professional and ethical responsibilities do not allow me to reveal confidential client information in response to public criticism."[21]
>
> "[Law firm name] provides our clients with effective, zealous representation. Our duty to our clients is our utmost priority. If you have concerns regarding your case, please contact the attorney who represented you."[22]

Even if utilizing one of the above responses, it should be reiterated that "[p]osting any response to negative online criticism is risky."[23] Despite this, the Oregon Bar Association suggests an additional response "by directing the reader to positive reviews by other clients… and the attorney may also make generic, truthful statements about the lawyer's practice."[24]

D. Additional Options to Consider for False or Unfounded Public Criticism

While the above-cited authorities analyze fact-scenarios applicable to the general legal practitioner most commonly facing criticism by clients or former clients, municipal attorneys most commonly face criticism by non-clients, such as members of the public or other concerned citizen groups. While not cited in ethics opinions, municipal attorneys have additional available tools to respond to and/or correct public criticism and false information regarding

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their public client and representation.

1. Utilize PIO/Communications for Formal Client Response.
While a local government attorney cannot disclose information considered confidential under Rule 1.6, the same information may not be subject to the same limitations when known and disseminated by other employees—in fact, it may be the very role of other employees to disseminate client information that an attorney otherwise cannot. Therefore, while a municipal attorney must be mindful to protect attorney-client privileged or confidential information, they may consider referring the matter to the client's Public Information Officer or communications department, to determine whether an official city response is appropriate to correct the spread of misinformation or unfounded personal attacks against an employee.

2. Communicate Directly with Client Constituents to Correct False Statements.
If an unfounded claim appears to gain steam or is especially inflammatory, a municipal attorney can (and arguably should) provide a private explanation or response to client constituents, such as the elected governing body. While recommended best practices on communication with client constituents to build and maintain trust exceeds the scope of this article, municipal attorneys could consider regularly-scheduled one-on-ones with elected officials to brief them on issues concerning the city attorney's office (and, among other things, lay the groundwork for upcoming legislation). This provides a natural venue for addressing unfounded criticism, correcting misstatements, and requesting guidance. Further, if municipal attorneys deem it necessary, they may be able to request an executive session under applicable open meetings laws for an attorney-client privileged discussion with the entire body.

3. Request Authorization to Release Draft Statement in Response.
Attorneys are not prohibited from releasing confidential information regarding their representation—instead, they must first obtain client consent. "The lawyer is free to seek informed consent of the client … to respond, particularly where responding might be in the client or former client's best interests."[25] Municipal attorneys should consider drafting a response that is "professional,"[26] "proportionate and restrained,"[27] notifying their client constituents of applicable ethical duties of confidentiality, and requesting authority for the release of the proposed responsive statement containing said confidential information. The municipal attorney should only publicly disseminate the proposed response upon authorization by the client.

4. Consider Legal Action in Response to Defamation.
In severe or pervasive cases of false public allegations, municipal attorneys could consider legal remedies for defamation.[28] Such a proposal should be very carefully evaluated and navigated, likely with client constituent knowledge (if not consent), given the complex intersection of the First Amendment, heightened burden of proof for public figures, and potential negative political backlash against the public employer and elected body.

Conclusion

As seasoned attorneys can attest, public criticism of the local government lawyer attorney is not unusual. But how a municipal attorney responds (or not responds) is the critical component to ensuring compliance with client confidentiality ethical requirements and maintaining one's reputation intact. Therefore, municipal attorneys should carefully ensure rules of professional conduct and best practices are steadfastly followed with integrity and restraint. ML

Notes

1. ABA Comm. on Ethics & Prof'l Resp., Formal Op. 496 at 1 (2021).
2. Ky. Bar Ass'n Formal Ethics Op. E-448 at 1 (2019).
3. Professional conduct rules, and opinions interpreting those rules, may vary state-by-state and country-by-country. Therefore, this article provides general guidance, but is not legal advice. Anyone faced with a similar situation should complete their own analysis and contact their own attorney as allowed by Model Rules of Prof'l Conduct R. 1.6(b)(5) to determine compliance with applicable professional conduct requirements. This article applies American Bar Association model rules and U.S. state bar ethics opinions. International practitioners should consult their applicable ethics rules and guidance.
4. NY State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 at 4 (2014).
5. ABA Op., *supra* note 1, at 1.
6. Mich. Bar Ass'n Formal Op. R-26 at 2 (2022).
7. N.C. Bar Ass'n Formal Op. 2020-1 (2021).
8. ABA Model Rules of Prof'l Conduct R. 1.6(a) (2023)
9. *Id.* at R. 1.6(b)(4). But attorneys should use caution when disclosing such information in an attorney list serv. *See* Ill. Bar Ass'n Prof'l. Conduct Advisory Op. 12-15 at p. 1(2012) ("Use of a lawyer listserv … can be a useful and effective means to educate lawyers and can provide a resource when lawyers engage in research and decision-making. However, when lawyers consult with other lawyers who are not associated with them in the mater, both the consulting lawyer and the consulted lawyer must take care to protect client confidentiality and the attorney-client privilege ...").
10. *Id.* at R. 1.6(b)(5).
11. *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 136 (2019); D.C. Bar Ass'n, Formal Op. 370 (2016); Ariz. Bar Ass'n, Formal Op. 93-02 (1993). *But see* People v. Underhill, 2015 WL

4944102 (Colo. O.P.D.J. Aug. 12, 2015) (18-month suspension for online response including confidential/sensitive client information); People v. Isaac, 470 P.3d 837 (Colo. O.P.D.J. 2016)(six-month suspension for response revealing confidential information).
12. *See, e.g.,* Mo. Bar Informal Op. 2018-08 (2018)("If Attorney chooses to post a response to an online review, the response may acknowledge an attorney's obligation to comply with professional obligations and must reveal no information related to the representation in violation of Rule 4-1.6."); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2014-200 (2014); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014); N.J. Advisory Comm. on Prof'l Ethics Op. 738 (2020); Nassau County Ethics Op. 2016-01 (2106); Penn. Ethics Op. 2014- 200; W.V. Legal Ethics Op. 2015-02. *See* also In re: Conry, OSB 18-104 (Or. Sup Ct. 2022) (reprimanding responding attorney).
13. ABA Op., *supra* note 1, at 1.
14. Mich. Op., *supra* note 6, at 1.
15. Fla. Bar Ass'n Formal Op. 21-1 at 2 (2021); *see also* N.C. Op., *supra* note 7. *But see* Model Rules, *supra* note 3 at 1.18 for prospective clients, which could apply depending upon the circumstances.
16. Mich. Op., *supra* note 6, at 2.
17. *See* Ore. Bar Ass'n Formal Op. 2022-201 at 8 (2022)("Some sites that allow professional service reviews may remove reviews upon receipt of a report that the reviewer was not an actual client or customer.").
18. ABA Op., *supra* note 1, at 7.
19. Pa. Bar Ass'n, Formal Op. 2014-200 at p. 1 (2014).
20. Fla. Op., *supra* note 15, at 2.
21. Ky. Op., supra, at 1.
22. Mich. Op., *supra* note 6, at 2.
23. Ore. Op., *supra* note 17, at 5.
24. Id. at 8.
25. Fla. Op., *supra* note 15, at 2, quoting ABA Op., *supra* note 1.
26. N.C. Op., *supra* note 7 (lawyer may post response that is "professional and restrained").
27. Los Angeles County Ethics Op. 525 at 1 (2012)(in discussing a former client's disparaging comments, a public response cannot disclose confidential information, cannot injure former client's legal position, and is "proportionate and restrained").
28. Ore. Op., *supra* note 17, at 8 ("Oregon RPC 1.6 is not, without more, a bar to the attorney's ability to seek legal redress, such as a claim for defamation."); N.C. Op., *supra* note 7 ("If there is a basis in law and fact for a defamation suit … the Rules of Professional Conduct do not prohibit Lawyer from filing such a suit.").

Employment *cont'd from page 9*

job positions based on race.
By now, most employers have reviewed their anti-discrimination policies as well as DEI programs and avoid relying on race as a factor for employment decisions, especially in hiring job applicants. Governmental decision-makers will need the advice of counsel well-versed in Title VII and state anti-discrimination laws and regulations, with expertise to assist with DEI initiatives while avoiding discriminatory practices for all applicants, and the ability to recommend more compliant policies.

Take Notice Public Employers: Changes in Collective Bargaining and Severance Agreements

While the National Labor Review Act (NLRA) does not apply to federal, state or local governments, states are moving towards the creation of expansive, pro-labor rights for public sector employees. The composition of the NLRB saw no changes in 2023, but it issued three notable decisions with far-reaching consequences. Two NLRB decisions addressed employers' duty to bargain during contract negotiations, *Wendt* and *Tecnocap*.[47] Another, *Mclaren Macomb*,[48] limited employers' ability to create severance agreements with terms that conflict with the NLRA. All three decisions and their implications are examined below.

In *Wendt*, an employer had dismissed several employees after their union had been certified but while negotiations for a collective bargaining agreement were still ongoing. In its arguments, the employer, citing *Raytheon*,[49] argued that these dismissals were justified as consistent with its past practice of conducting layoffs during downturns to its business. The NLRB disagreed, overruling *Raytheon* and deciding that unilateral conduct during a bargaining period was permissible only when the employer has demonstrated a regular and consistent past practice that was not subject to a large measure of discretion. The NLRB found that the dismissals at issue were discretionary and thus unjustified. The NLRB also clarified that an employer may not "defend a unilateral change in terms and condition of employment that would otherwise violate Section 8(a)(5) by citing a past practice of such changes before its employees were represented by a union and thus before the employer had a statutory duty to bargain with the union." [50]

In *Technocap*, the NLRB considered a similar issue to that decided in *Wendt*. The *Technocap* employer unilaterally altered employee schedules while the employees were negotiating a collective bargaining agreement. The employer and the union had previously had a collective bargaining agreement that allowed the employer to unilaterally alter employee schedules. However, the NLRB found that, since the clause that had enabled the employer to modify employee schedules had expired, it could not be used to as a basis for discretionary and irregular unilateral conduct like the alteration of employee schedules. Nor could an employer use the now expired clause to demonstrate adherence to past practice. Between *Wendt* and *Technocap*,

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