

THE ROLE OF THE CITY ATTORNEY WHEN CONFLICTS ARISE

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You've had a busy week, managing your business, taking care of family matters, and you've only glanced at your agenda packet at lunch. When Agenda Item 3(a), "Street Vacation," is brought to the floor, you suddenly realize that the right-of-way vacation that is being proposed might make it more difficult for your brother-in-law to sell a piece of property he owns. What do you do? You might obtain the floor, turn to the City Attorney and ask "Do I have a conflict?" Is this, in fact, the proper thing to do?

The question of giving ethics advice typically generates a lot of debate when it comes up as a topic among City Attorneys. Some city attorneys refuse to discuss ethics questions with public officials; others will discuss such matters, but with the caveat "I'm not your attorney on this matter." A sampling of city attorney opinions on this issue is:

"[T]he client is always the City and the Council member must know that from the beginning. It's a lot like the City Attorney's role in dealing with advice to staff and department heads. If a staff member told you about a crime, you would be under obligation to the City to deal with that fact from the City's perspective. There should be no difference if you were approached by a Councilor with a similar revelation . . . 'Who's the client?' is always the first and last question to answer ."

"While the client is the City, I think we can provide information to Councilors, just like we provide it to any other City staff who asks a legal question that affects the City. And this can affect the City because improper actions can potentially invalidate decisions. However, in almost every case, the question comes to us indirectly, through the City Manager or other city staff person.

I classify the questions into two basic categories. The ones in which there is a clear correct answer (one way or the other) and the other ones in which there is room for doubt or differing points of view. If in my view there is a clearly correct answer, I let them know what I think. If there is any doubt at all, I let them know the arguments on both sides, advise what the conservative approach is, and let them make the decision. I don't recall one instance in which a council member has not taken the conservative approach (declare the conflict and step down if it is actual).

I also let them know that they cannot rely on my advice and that they can contact GSPC directly. If it is controversial, I let them know that if they don't have something from GSPC in writing, they need to be very careful.

I hope I haven't just admitted to anything unethical."

"My interpretation has always been that it is in the best interest of the client - the public entity - for the public body lawyer to answer those questions up to the point of the filing of a formal complaint against the public official, at which point the City . . . had the policy that they would provide separate counsel. It is in the public entity's interests to ensure that its officials have the legal advice they need to avoid getting into trouble in the first place, because it avoids the attendant cost, distraction, and public relations disaster of a formal ethics investigation. It also protects against the governing body or staff making potentially voidable decisions. Having the City Attorney give such advice (as opposed to hiring outside counsel) benefits the public body because it ensures a consistent approach to the statute. (Especially important given this particular statute.) Use of outside counsel for such advice may also make an official reluctant to seek that advice (particularly if the public body is not paying), or result in a situation where the City Attorney disagrees with that advice and is compelled to advise his or her public body differently."

The reason that the question of giving ethics advice generates debate is that giving such advice implicates a different set of ethical rules that are binding on the attorney - The Oregon Code of Professional Responsibility. These rules establish the standards of conduct for attorneys in Oregon, and a violation of these rules can be the basis for discipline imposed by the Oregon State Bar.

The fundamental issue for the City Attorney sitting at that meeting where you ask the question is identifying who, exactly, is the client. For purposes of the Code of Professional Responsibility, a client is the person or entity to whom the lawyer owes the duty to appear in court, to provide legal advice, to provide defense in legal proceedings, and to act in any matter of legal business. Ordinarily, a client is a person who enters into a contract for legal services with an attorney, commonly called a retainer agreement.

Identifying the client is critical, since all of the duties imposed on the attorney under the Code of Professional Responsibility -- attorney client privilege, duty to avoid conflicts of interest, etc. -- arise by virtue of this relationship. Unfortunately for the attorney representing governmental, entities, whether he or she is a private attorney hired by a governmental entity to

provide legal advice or in-house counsel, the Code of Professional Responsibility contains few provisions which directly address the peculiarities of representing a governmental entity.

As the responses earlier in this essay indicate, it is common wisdom that the "municipal corporation" -- not individual elected officials -- is the client. Although there are no cases which answer the question, the Oregon courts would most likely take the position that an attorney who represents a city represents the "corporate entity." See The Oregon Ethical Lawyer, §6.7 "Government as Clients" (OSB 1991). The nature of the representation of a corporate entity has been characterized by the American Bar Association as follows:

"A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." ABA Model Code of Professional Responsibility, Rule 1.13 "Organization as a Client" (2003)¹.

Representation of the municipal corporate entity does not mean that the attorney, as a matter of law, represents individual elected officials or public employees. In certain instances, representation of the corporate entity may include aspects of the attorney/client relationship which appear, to include representation of individual elected officials or public employees. As an example, the ABA Model Code of Professional Responsibility takes the position that when a "constituent" of an organizational client communicates with the organization's attorney in the constituent's organizational capacity," that communication is protected by attorney/client privilege. This representation is limited, however, to those aspects of the individual elected official and public employees which are in an "organizational capacity." Compare Formal Opinion No. 998-152, (Oregon State Bar, 2000) (officers and officials of state agency who are equivalent to corporate officers, directors and managers may not be contacted by opposing counsel on a matter that the attorney knows such persons to be represented on, unless prior consent of the lawyer for the agency is obtained, or is authorized by law to do so).

When is an act undertaken in an "organizational capacity?" There is no clear answer to this question, and little guidance in case law. The question is critical for your city attorney, since the wrong answer could create an attorney/client relationship, and result in a various ethical conflicts for the attorney under the Oregon Code of Professional Responsibility. See DR-4-104, Preservation of Confidences and Secrets of a Client; DR 5-105, Conflicts of Interest: Former and Current Clients; DR 7-102, Representing a Client Within the Bounds of the Law. Although the question may arise by virtue of the fact you are a public official, the answer may depend on the context with which the question arises -- i.e., voting as opposed to use of a publically-owned vehicle.

¹ The Oregon State Bar House of Delegates approved Model Rule 1.13 as part of a proposed revision of the Oregon Code of Professional Responsibility at its September, 2003 meeting. This revision must be approved by the Oregon Supreme Court before it takes effect.

The strongest case for the propriety of a city attorney giving ethics advice are those cases where the question is whether an elected official can vote due to a conflict of interest, since voting is by its very nature "the performance of an official duty." See Chavez v. City of Tampa, 560 So.2d 1214(1990)². It is also less likely that responding to a question from an elected official regarding voting would create an attorney/client relationship, since there should be no reasonable expectation that any information provided to the city attorney would be confidential under ORS 244.120(2), since both actual and potential conflicts require the public announcement of the nature of the conflict. The weakest case for ethics advice might involve use of a public resource occurring outside the public arena -- e.g., if you are an elected official, in some place other than a public meeting; if a public employee, away from the workplace. The answer will be very fact-specific.

It should be noted that if Oregon adopts ABA Model Rule 1.13, a city attorney may have additional duties of disclosure where the ethical behavior of a public official is at issue:

"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 which 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."

If this type of situation arises, then the interests of the city attorney and the individual public official will be in conflict. At this point, under ABA Model Rule 1.13, there will be a duty to clarify this fact, and to advise the constituent that there is an actual or potential conflict of interest between the organization's and the constituent's interest, that the attorney cannot represent the constituent, and that the constituent may wish to retain his or her own attorney. In addition, the attorney has a duty to inform the constituent that any discussions may not be privileged.

² "[A] city has the duty to protect its interests even when those interests are invaded in the form of an attack on a public officer. The conditions that must be satisfied for a public official to be compensated for legal defense expenditures are that the lawsuit arise from (1) the performance of the officer's *official duties* and (2) while serving a *public purpose* . . . '[Public purpose' equates with 'public interest' and excludes any taint of 'private interest' . . . If there is some private personal gain involved at issue, the official may not vote on it." Chavez v. City of Tampa, 560 So.2d 1218.

Even if a city attorney gives advice to a public official on an ethics matter, that official may, of course, still be subject to an ethics complaint before the Government Standards and Practices Commission. There is always the possibility that the Government Standards and Practices Commission may disagree with the attorney's conclusion.³ Relying on your city attorney's advice is not a defense to an ethics complaint, unless that complaint is a violation of ORS 192.660, the provisions of Oregon's public meetings law authorizing an executive session. For these reasons, a public official's primary source for ethics advice should *always* be the Commission. The Commission was created both to enforce Oregon's ethics laws and to provide guidance to public officials on ethics issues:

"The terms of ORS 244.280 reflect an intention to provide public officials who were subject to the Code of Ethics with a means of determining what action it required of them and what conduct was a violation of its provisions. Subsection (1), providing for opinions on 'the requirements of this chapter,' provides the mechanisms by which public officials may be advised as to what affirmative acts the Code of Ethics requires them to undertake. . .[S]ubsection (2) provides the means by which an official may be advised as to whether actions which he or she was contemplating would be an ethical violation. Thus, for example, an official who wanted to know whether certain conduct constituted use of his office for personal gain would seek an opinion under subsection (2). "Fadeley v. Oregon Government Ethics Commission, 20 Or App 795 (1977).

If a public official obtains a written advisory opinion from the Commission, the public official has a defense if an ethics complaint is subsequently filed:

"A public official or business with which a public official is associated shall not be liable under [ORS Chapter 244] for any action or transaction carried out in accordance with an advisory interpretation issued under subsection (2)" ORS 244.280(3).

If you have an ethics complaint filed against you, your city has no statutory duty to provide a defense. In City of Tualatin v. City-County Insurance Services Trust, 321 Or 164 (1995), the Oregon Supreme Court held that "ORS chapter 244 is designed 'to deter violations of the legislative policy of safeguarding the public trust inherent in holding a public office,'" and "the ethics law was created to benefit the public, not create a civil claim for or against an individual." Consequently, a violation of ORS Chapter 244 was not a "tort" under the Oregon Tort Claims Act, ORS 30.260-30.300, since ORS Chapter 244 did not "create a civil right of action for damages or any other protective remedy for an individual." As such, a city has no statutory duty to "defend its officers, employees, or agents against an ethics complaint," even if

³ Many public officials and attorneys representing local governments have criticized ORS Chapter 244, complaining that the statute does not give clear guidance to public officials.

the public official acted on advice of the city attorney⁴

Although there is no statutory duty, there may be a common law duty to provide a defense, if the public official has sought and obtained the advice of the city attorney. See Chavez v. City of Tampa, 560 So.2d at 218. Since the public official acts in reliance on the advice of the city attorney, he or she should not be penalized as a result of such reliance. See McQuillin on Municipal Corporations, §12.137 "Reimbursing or indemnifying officer" (2001)(if a public official incurs loss in the good faith discharge of official duty imposed or authorized by law, municipal corporation has authority to appropriate funds to reimburse official, unless expressly forbidden by law).

Finally, in working with your legal counsel, do the following:

- Find out what your city attorney's philosophy is regarding giving advice on ethics issues. Respect that position, since reasonable attorneys can differ on whether it is proper under the Oregon Code of Professional Responsibility to give ethics advice to individual public officials.
- If your attorney takes the position that he or she represents the city, and cannot give ethics advice to individual public officials, then get in the habit of anticipating ethics questions by reviewing materials ahead of time and contacting the Oregon Government Standards and Practices Commission if you have any questions.
- If your city attorney will discuss ethics issues with you, make an appointment to meet with him or her at the earliest possible time.
- Practice full disclosure at every point in the process. If there is any fact which you do not want to disclose, then there is a good chance you have a serious ethics issue, and should be prepared to take appropriate action.
- If your question arises during the course of a meeting, ask for a short recess so that you can discuss the matter with the city attorney. This will allow the city attorney time to get a copy of ORS Chapter 244, and to analyze the issue with a bit more deliberation.
- If your city attorney tells you there's a conflict of interest, and you disagree, then

⁴ In reaction to City of Tualatin, some cities adopted policies to provide defense to public officials charged with violations of ORS Chapter 244. See, e.g., "City of Lincoln City Policy on Defense of Charges of Violation of Government Standards and Practices Law."

you should be prepared to again practice full disclosure and have the reason why you disagree with the city attorney placed on record.

- Finally, always be conservative, and when in doubt declare a conflict or seek a formal, written opinion from the Oregon Government Standards and Practices Commission.

Holding public office is a public trust, and engaging in any activity in your capacity as a public official which call your commitment to preserve that trust in question can only damage the public's respect for the city you represent.

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