

## MEMORANDUM

**To:** Wynetta P. Massey, Esq., City Attorney

**From:** Richard A. Westfall, Partner, Hale Westfall LLP

**Date:** June 20, 2014

**Re:** Office of the City Attorney Legal Ethics Guidelines

### **I. Introduction and Background**

I was retained by your office to assist you in dealing with issues related to potential conflicts involving your office and representation of various branches of City government, including and especially the Mayor's office and the City Council.

My background includes serving as Solicitor General under Attorney General Gale Norton. In that capacity, I assisted in drafting a comprehensive manual for the office guiding the Attorney General dealing with a wide array of representational issues including the issues for which I was retained by you. That manual is titled "Legal Representation, Memorandum and Guidelines."

Recently, you provided me a draft of a similar set of guidelines titled Office of the City Attorney Legal Ethics Guidelines ("Guidelines"). You asked me to offer my opinion on the Guidelines, including compliance and consistency with the Colorado Rules of Professional Conduct, the Guidelines' completeness, and other issues related to their suitability to guide the lawyers working under the supervision of the City Attorney and the City Attorney herself.

In sum, I believe the Guidelines are thorough, complete, consistent with the Colorado Rules of Professional Conduct, and address the difficult issues facing the office, particularly conflicts of interest, in a thoughtful and careful manner. The reasons for my conclusions follow.

### **II. Descriptions of Functions of the Office**

The City Charter and the City Code offer extensive guidance on the City Attorney's powers and duties – in contrast to the governing laws dealing with government lawyers representing many other governmental entities. The Guidelines set out the essential features of both the City Charter and the City Code in one guiding document.

Based upon my review, the Guidelines capture all of the essential duties of the City Attorney as defined in the Charter and the Code in both her advisory capacity and her role as an advocate for the City.

### **III. Representation of All Branches of Government for the City and Related Conflicts Concerns**

My discussion of the Rules of Professional Conduct and the Guidelines' compliance with them is contained in the next section. Here, I address the issues facing the City Attorney generally dealing with representing the City as the client.

As set forth in the Guidelines' discussion of the City Attorney's functions, the City Charter and the City Code unquestionably provide that the City Attorney is charged with representing the City as a whole as the client. This is consistent with the general body of law related to representation of governmental entities. The governmental entity itself is usually the client, not the constituent agencies and officials. *See generally* Restatement (Third) of The Law Governing Lawyers § 97 (Representing a Governmental Client), § 96 (Representing an Organization as Client).

The City Attorney's role in representing the entire City can be contrasted with the role of the Colorado Attorney General. For example, the City Charter expressly provides that the City Attorney is the legal advisor to the City Council – the City's legislative branch. City Charter § 13-80. By contrast, the Attorney General generally represents only the executive branch of Colorado government and is expressly not empowered to represent the legislative branch: "The attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch." C.R.S. § 24-31-101(1)(a). The City Attorney is expressly responsible for representing the City as a whole, including its constituent institutions and agencies.

One of the most difficult issues facing the City Attorney in representing the City as a whole as the client is dealing with issues related to inevitable disagreements among particular constituents of the City. While the constituents may perceive a conflict of interest, there actually is none, as established by the Guidelines.

Proof of this can be found in judicial approval of ethical walls between constituents of a governmental entity. (The Guidelines refer to ethical screens. I will use a term I've used in the past to discuss this situation.) Colorado Courts have long allowed lawyers within the same governmental office to represent constituent agencies or departments in situations that would clearly be prohibited under traditional conflict rules. In *Woodard v. Brown*, 770 P.2d 1373 (Colo. App. 1989), cited in the Guidelines, the Colorado Court of Appeals noted the traditional practice of the Colorado Attorney General's office in representing different constituents of state government:

In order to maintain the integrity of administrative disciplinary proceedings, the attorney general has established an internal system designed to separate the regulatory law section from conflicts counsel. This system permits the

assignment of counsel from the regulatory law section to represent the Board [of Medical Examiners] and the inquiry panel in its investigative and prosecutorial functions, and the use of separate conflicts counsel to act as legal advisor to the hearings panel in its decision-making capacity. We have approved this method of avoiding an impropriety or the appearance thereof and maintaining the integrity of the administrative process.

*Id.* at 1376. *See also People v. Shari*, 204 P.3d 453, 459 (Colo. 2009) (recent recognition of concept by Colorado Supreme Court).

The Guidelines appropriately establish policy for dealing with ethical walls in their traditional sense (e.g., separating roles of advising decision-making agency from advising staff prosecuting an individual before that agency). Recognition of ethical walls, however, also is a manifestation of the appropriateness of having one governmental lawyer (e.g., the City Attorney or the Attorney General) represent a governmental entity as a whole, even when constituent agencies and institutions may have antagonistic views on particular policies or issues.

I concur with the California Ethics Opinion cited in the Guidelines in defining, generally, the client for purposes of governmental entity representation. The California State Bar Standing Committee on Professional Responsibility and Conduct, in 2001, was asked to resolve a dispute caused by the mayor of a California municipality refusing to accept advice given to both him and the city council, and “accus[ing] the City Attorney of a conflict of interest in advising both the council and the mayor in the same matter.” CA Eth. Op. 200-156, 2001 WL 34029610 \*2 (Cal.St.Bar.Comm.Prof.Resp.) (“California Ethics Opinion”). The California Ethics Opinion established at the outset that the City as a whole was the client, not the mayor or the city council. Citing California ethical rules and earlier case law, the opinion notes that this was

authority for two propositions: (1) that an attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials; and (2) that a constituent sub-entity or official may become an independent client of the entity’s attorney only if the constituent sub-entity or official possesses the authority to act independently of the main entity and if the entity’s attorney is asked to represent the sub-entity or official in its independent capacity.

*Id.* at \*3. Similar to the situation here, the California Ethics Opinion found no conflict because the city attorney there was required to provide advice to all constituents in representing the city as a whole:

The charter of the City of Prosperity requires the city attorney to provide advice on legal questions to the mayor and the city council. It therefore contemplates no conflict in these roles. The charter is a legislative enactment which reflects a policy determination that a single city attorney is responsible for all legal matters involving the city and that the city is a single municipal corporation with responsibility for its operations divided among various officers, *none of whom is given the power to act independently of the city*. As a result, neither the mayor

nor the city council, independent of the city itself, established an attorney-client relationship with the city attorney by seeking legal advice on proposed ordinances, because neither had the potential to become the city attorney's client against the other. The city attorney does not represent the city council or the mayor; in advising the council and the mayor, the city attorney represents the municipal corporation as an indivisible unit. There is no attorney-client relationship formed with the component parts, because the component parts cannot function as independent entities under the City of Prosperity's charter.

*Id.* at \*6 (emphasis added). Under the Colorado Springs City Charter, the Code and the Rules of Professional Conduct, discussed in the next section, the City Attorney here performs the same function, which the Guidelines capture.

It is my understanding that two issues have arisen involving the determination that the City Attorney's client is generally the City as a whole and not the constituent institutions. The first one involves a view based upon the City Charter and the City Code. The Code is explicit that "[i]n accord with Charter section 13-80, the City Attorney is the legal advisor to the City of Colorado Springs." City Code § 1.2.402. The assertion is that Section 13-80 of the Charter makes the City Attorney the attorney for the constituent institutions rather than the City as a whole when the City Attorney acts in an advisory (as opposed to advocacy) capacity, and that the Code language just quoted is inconsistent with the Charter. Section 13-80 reads as follows:

**13-80.City Attorney, Duties.** 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. The City Attorney shall be the legal advisor of the Mayor, City Council, Commissions, and Heads of Departments *in relation to their duties*, and shall perform such other duties, not inconsistent herewith, as may be required of the City Attorney by ordinance. The City Attorney shall receive such salary as the Council by ordinance shall prescribe.

(Emphasis added.) I do not believe the Code in any way conflicts with the Charter in this regard for the following reasons:

First, the plain language of Section 13-80 expressly makes the City Attorney's advisory role to the listed constituent institutions limited in scope in relation to their duties as part of the City. Qualifying the advisory function (in contrast to language that expressly made the City Attorney the "advisor to the Mayor" or "the City Council") makes it clear that the City Attorney's attorney-client relation to the constituent institutions arises from their duties performed for the City – the ultimate client.

Second, the argument that the Charter language makes the City Attorney the attorney for the constituent institutions as opposed to the City as whole is wholly inconsistent with the well-established law related to the role of government lawyers generally. As noted in more detail below dealing with the Rules of Professional Conduct, the role of a government lawyer under the Rules is a subset of the general rule relating to representation of an organization as a client. The

Restatement (Third) of The Law Governing Lawyers § 97 (Representing a Governmental Client) is clear on this point:

A lawyer representing a governmental client must proceed in the representation as stated in § 96 [Representing Organization as a Client], except that the lawyer: (1) possesses such rights and responsibilities as may be defined by law to make decisions on behalf of the governmental client that are within the authority of a client under §§ 22 and 21(2); (2) except as otherwise provided by law, must proceed as stated in §§ 96(2) and 96(3) with respect to an act of a constituent of the governmental client that violates a legal obligation that will cause substantial public or private injury or that reasonably can be foreseen to be imputable to and thus likely result in substantial injury to the client . . . .

This restatement of the law as to the role of a government lawyer generally is entirely consistent with the Guidelines and the City Code. To interpret the Charter as requiring the City Attorney to treat each constituent institution as “the client” would be wholly inconsistent with the Restatement and the vast body of law supporting it.

Third, as discussed below regarding the Rules of Professional Conduct, and consistent with the Restatement, Rule 1.13 defines the ethical duties of an attorney for a government entity explicitly in the context where the organization is the client. Comment 9 is clear on this point: “The duty defined in this Rule applies to governmental organizations.”

Fourth, the authority provided by the California Ethics Opinion is persuasive. The concluding section of the Opinion quoted above specifically noted that the constituent elements of the city at issue there did not have the power to act independently of the city. California Ethics Opinion at \*6 (“a single city attorney is responsible for all legal matters involving the city and that the city is a single municipal corporation with responsibility for its operations divided among various officers, none of whom is given the power to act independently of the city”). Similarly, Section 13-80 of the Charter limits the City Attorney’s advisory role related to the constituent institutions to their performance of their duties to the City of Colorado Springs. It also should be noted that as set forth in the beginning of the California Ethics Opinion, the charter of the city at issue there: “gives the city attorney the power to represent the city in litigation, subject to council direction, and to advise the council, other city bodies, and city officials (including the mayor) on legal questions.” This is the same scheme outlined in Charter § 13-80.

In sum, regarding the first issue related to a potential conflict between the Code and the Charter regarding the role of the City Attorney, I see no such conflict.

The second issue deals with the concern that the City Attorney may be unduly responsive to the Mayor vis-à-vis other constituent institutions because of the Mayor’s ability to hire and fire the City Attorney. I do not believe this is a legitimate concern for at least two reasons. First, the Rules of Professional Conduct mandate that the City Attorney will discharge her ethical obligations to all constituent institutions as part of her representation of the City as a whole as described more below. As noted in the Guidelines, Rule 5.4(c) expressly mandates that the City

Attorney must exercise professional judgment in serving a client regardless of how she is employed:

A lawyer shall not permit a person who recommends, *employs, or pays* the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

As part of my public policy practice, I routinely represent individuals in significant public policy litigation while being paid by others (often trade associations, for example). I retain my duty to zealously represent the interests of my clients (a phrase from the predecessor rules to the current Rules of Professional Conduct) under Rule 5.4(c) and generally under the Rules.

Second, the Code and the Charter expressly obligate the City Attorney to advise all constituent institutions, including the Mayor and the Council. The joint representation of the Mayor and the other constituent institutions is mandated by law. It cannot be assumed that she will not discharge her legal duties simply because of possible fear of employment action by the Mayor.

There is one provision that gives the City Council the ability to hire outside counsel as described in the Guidelines. *See* at 10 and n.62 (citing City Charter § 13-90(b)). Concerning separate representation for constituent entities, the Guidelines appropriately limit those situations to ones generally involving litigation between the entities. I have reviewed the cases cited in footnote 63, and they provide guidance for the City Attorney to make an informed decision on whether separate representation is called for in a given situation.

In sum, the Guidelines define the proper role of the City Attorney in representing the City as a whole, and properly address dealing with issues related to constituents.

#### **IV. The Guidelines Comport With the Colorado Rules of Professional Conduct**

The Colorado Rules of Professional Conduct specifically discuss the role of government lawyers. While all of the rules apply to all lawyers, particular to the Guidelines there are two particular rules of note and one comment. The rules are Rule 1.13 (which addresses the situation where an organization is the client) and Rule 1.7 (which addresses conflicts of interest).

Government lawyer representation of a governmental entity is a species of representation of an organization as the client. As noted in the Guidelines, all of the parts of Rule 1.13 apply. That rule contains a number of provisions designed to insure that lawyers faithfully discharge their responsibilities to the organization as a whole rather than the constituents, and the Guidelines capture those provisions.

The interplay between Rule 1.13 and Rule 1.7 is where government lawyer representation differs from a private lawyer representing a corporation. The key parts of the rules discussing the role of government lawyers are found in Comment 18 (under the Scope section of the Preamble and Scope that begin the Rules) and Comment 9 of Rule 1.13. Comment 18, Scope,

describes the general differences between government lawyers and private lawyers representing an organizational client. Concerning conflicts, Comment 18 notes:

[L]awyers under the supervision of these officers [e.g., the Attorney General or in this case this City Attorney] *may* be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

Comment 18, Scope, Colorado Rules of Professional Conduct (emphasis added). This Comment also notes that government lawyers, such as the Attorney General or the City Attorney, may have the authority to direct legal matters, including entering into settlements, “that ordinarily reposes in the client in private client-lawyer relationships.”

Turning to Comment 9 of Rule 1.13, the Comment confirms that government lawyers are governed principally by Rule 1.13, but there are differences between government lawyers and private lawyers:

The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers *may be more difficult* in the government context *and is a matter beyond the scope of these rules*. See Scope [18]. Although in some circumstances the client *may* be a specific agency, it *may* also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government *may* be the client for purposes of this Rule. 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. In addition, duties of lawyers employed by the government or lawyers in military service *may* be defined by statute and regulation. This Rule does not limit that authority. See Scope.

Comment 9, Rule 1.13 Colorado Rules of Professional Conduct (emphasis added). I quote the entire Comment and emphasize the multiple uses of “may” (and emphasize the use of “may” in the Scope Comment) to show that the Rules of Professional Conduct do not provide clear guidelines themselves for how the City Attorney, and the lawyers under her, address the myriad of issues related to conflicts, representation of the City vis-à-vis constituents, confidentiality of communications with constituents, etc. The Rules and cases interpreting them are an important source for the City Attorney to consider in addressing a specific situation, but, in the end, the City Attorney must comply with the Charter and the Code which the Rules expressly acknowledge.

For this reason, I believe it is important for the City Attorney to formulate the Guidelines and use them to establish policies and procedures for representation of the City. The Guidelines that are in fact drafted track the essential features of the Rules of Professional Conduct as they relate to representation of the City, but also track the City Attorney's responsibilities and duties under the Charter and the Code.

**V. The Guidelines Contain a Series of Useful Policies Facilitating Day-to-Day Representation of the City**

Before closing, I would like to briefly comment on one other general feature of the Guidelines that I believe is very useful for managing the lawyers under the authority of the City Attorney. There are a number of practical policies that will be useful for day-to-day administration of the office.

For example, the Guidelines establish policies for dealing with confidentiality. Given the City Attorney's duties to the City as a whole, it is important to establish policies related to maintenance of confidentiality in that context, which the Guidelines do. The ethical-wall and multiple-constituent policies are detailed and easy to follow. The Guidelines admonition to all lawyers regarding their general duty to the City is also an important facet of the Guidelines, that is: "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." Guidelines at 3.

I would happy to answer any questions you may have concerning any aspect of this memorandum.