

## **The City Attorney: A Reference Manual** **By TML Legal Staff**

Congratulations, city official. You've just obtained the services of a real-life city attorney! You've heard of this person before—a shadowy presence skulking around city hall with a big briefcase in tow, pestering the city secretary about an inadequate agenda posting, hectoring the city manager about city contracts, seemingly capable of speaking only a few stock phrases: “It depends,” and “No, you can't do that,” and “Gee, I wish you'd shown that to me before.”

Well, now you actually work with one! This guide will tell you everything you need to know about this new relationship. You'll learn how to interact with the city attorney and what you can expect in return. City attorneys aren't so frightening, once you get to know them. Treat the city attorney well, and you're in for many years of governmental satisfaction.

### **Identify the Model**

First things first, though. It's important to identify which model of city attorney you're working with. They come in four basic designs. If you don't see a sticker on the back of the model, you can try asking.

**The In-House City Attorney:** This model is ideal for larger cities that can afford to pay all the upkeep on their city attorney. This attorney has only one client (the city) and will soon develop a specialty in the particular needs of its employer city. In-house city attorneys may need to farm out particular legal work—such as specialized litigation—to other attorneys, and they will want to oversee the work of such attorneys.

**The Specialist Law Firm City Attorney:** There are entire law firms that do nothing but provide city attorney services to Texas cities. In most cases, a city using such a firm will appoint one of the firm's attorneys as the designated attorney for the city, though the person is not an actual employee of the city. If the officially appointed city attorney is tied up on other matters, any of the other attorneys at the firm can fill in on a moment's notice. Such firms offer great value to small and medium-sized cities: a wealth of municipal law experience combined with the flexibility of not having the attorney on the permanent payroll.

**The Local General Practitioner City Attorney:** Many smaller cities appoint a local general private practitioner as the city attorney. Like attorneys from specialist law firms, this attorney isn't an official employee of the city, but is the appointed city attorney. Such lawyers may come from a variety of backgrounds, and they don't necessarily specialize in local government law. Far from being a disadvantage, however, this broad experience is often quite useful because such attorneys frequently possess familiarity with local courtroom procedures, and that can serve the small city well. A smaller city should not shy away from hiring a local general practitioner as its city attorney—this attorney's experience, judgment, and reputation with the local bench and bar frequently make up for any perceived lack of specific municipal law experience.

**The Outside Counsel Attorney:** Cities will often hire outside counsel to handle specific legal tasks, without officially appointing such attorneys as the official city attorney. The best practice

for dealing with such attorneys is usually to allow the designated city attorney to be the primary liaison between city officials and the outside counsel. The designated city attorney knows which information is important to communicate with outside counsel, and it's frequently necessary for this person to coordinate issues related to authority, attorney-client privilege, and conflicts of interest. Sometimes the very smallest of cities won't have a designated city attorney and will only occasionally hire outside counsel to perform specific legal tasks. This is okay, too.

### **Determine Who the Client Is**

If you're the city official who hired the new city attorney, you might assume that the city attorney works for you. You'd be wrong! The city attorney has curious loyalties—this person doesn't represent the mayor, the manager, or even the city council. According to the *Texas Disciplinary Rules of Professional Conduct*, the city attorney has one client and one client only in nearly all cases—the city as a whole. While a city attorney may report to and accept certain directions from city officials, it is the attorney's duty to act in the best interests of the city as a whole.

How does this work in practice? If you ask your city attorney for advice on your campaign finance or other personal legal issues, the attorney will probably not be able to help. Your legal issues in this case are different and unrelated to the interests of the city as a whole.

More seriously, if a city attorney learns that a particular city official has committed misconduct, the attorney may very well have a duty to report that misconduct to the authorities. The reason for this is that individual misconduct can harm the interest of the lawyer's client, the city as a whole. Moreover, when it comes to potential misconduct by city officers, the rules provide that “a government lawyer may have authority to question conduct more extensively than that of a lawyer for a private organization in similar circumstances.”

### **Decide Who Gives Instructions to the City Attorney**

While the city itself is the client, that doesn't mean the city attorney isn't subject to taking direction from certain city officials. According to the rules, the city attorney accepts directions from the city's “authorized constituents.” Who are these people? It can vary, depending on the type of city and how authority has been delegated within the city. In some cities, the council acting as a body determines policy, and thus has primary authority to direct the actions of the city attorney. In other cities, the authority has been delegated to a manager or administrator or, perhaps, the mayor.

In some cities, exactly who directs the actions of the city attorney isn't clearly spelled out. Don't worry—your city attorney will figure it out in short order by looking at the state statutes, the charter (if there is one), and other city policy.

Some cities pass resolutions or policies stating that only certain officials may speak to the city attorney, implying or stating that other city officials are prohibited from communicating with the city attorney. Such policies are often motivated by an understandable desire to prevent individual officials—a lone city councilmember, for example—from piling up expensive billable hours in use of the attorney's time. While these policies may have relevance in the employment or council relations arena, they may not in fact be binding on the attorney from the perspective of legal

ethics. Remember, the city attorney must act in the best interests of the city as a whole. This duty exists regardless of who has authority to officially speak for the city. For example, if the city attorney determines that proper representation of the city requires interviewing a department head regarding that employee's knowledge of certain facts, the attorney may need to do so.

Cities concerned about the scope of their city attorney's representation and the impact it has on the attorney's billable hours should discuss these issues carefully up front and set reasonable expectations about the relationship.

### **What and When Can I Expect to Hear from My City Attorney?**

Contrary to urban legend, city attorneys do more than grunt and groan obscure Latin phrases. Often they'll share information they know about pending city litigation or other confidential information. The big question, though, is this: will they tell this information to you?

Certain confidential information gathered by the attorney is held on behalf of the city. As a constituent of the city, a particular city official may or may not be entitled to request such confidential information from the city attorney. To complicate matters, the person to whom a city attorney can communicate certain information can differ from the person who may give instructions to the attorney, as discussed above. So, be sure to realize that if you ask your city attorney a question and the response is, "I can't disclose that to you now, but I'll have a report at the next council meeting," it may be a necessary effort to preserve confidential information until the appropriate time.

### **What I Tell My City Attorney Is Confidential, Right?**

Not necessarily! It's true that all attorneys are bound by attorney-client privilege. What city officials sometimes overlook, however, is the fact that the attorney owes the privilege only to his client, the city. The city attorney may not have a privilege as to individual city officials or employees. In fact, the attorney might have an obligation to affirmatively disclose what he or she has been told by certain officials, depending on the nature of the conversation.

How might this play out in real life? If a city official tells the city attorney about a certain financial transaction the official has entered on behalf of the city, and the city attorney knows the transaction to be illegal, it may very well be the duty of the city attorney to reveal that communication to the city council and then to the proper authorities in an effort to protect the city from legal jeopardy.

Many things that city officials, acting in good faith, tell their city attorney are covered by attorney-client privilege, of course, because the interests of cities and their officials are usually closely aligned. But not always!

### **But My City Attorney Will Represent Me if I'm Sued, Right?**

Probably not. If a city official is sued individually, it's often the case that the city is being sued as well. In such a case, the legal interests of the city official and the city may diverge. If so, it's unethical for the attorney to represent two clients with divergent interests. You'll probably need to get your own attorney, though that doesn't necessarily preclude the city from paying for your legal fees if the alleged conduct is part of your official duties.

### **Should We Bring Our City Attorney to Council Meetings?**

City attorneys are patient creatures and will typically survive an entire city council meeting none the worse for wear (especially if well fed). That does not mean it's the best practice to bring them to the meeting. Whether a city attorney is present, or even participates, in the meetings of a city council is a practice that varies by the size, finances, and geography of a city, and can also depend on the complexity or controversial nature of a particular meeting agenda.

In-house city attorneys usually attend city council meetings, since their salaried services are already paid for. The same may not be true for part-time or contract city attorneys, however. Some cities negotiate contracts under which certain work performed by the city attorney is done on an hourly billing basis but guarantee the presence of the attorney at once- or twice-monthly meetings in exchange for a set fee.

Legislation passed in 2001 permits a city council with a city attorney who is not on the municipal payroll to consult with that attorney by telephone, video, or Internet during a public meeting or during a proper executive session. According to the statute, the voice of the attorney must be audible to the public during the public portion of the meeting. This option is useful for small cities that wish to have the advice of the attorney during meetings but can't afford the fees associated with the attorney's travel. (Just be aware that the disembodied voice of a city attorney piped in over a loud speaker can frighten small children.)

### **Okay, but Should We Bring the Attorney into Executive Session?**

Bringing your city attorney into executive session is tricky. In some cases, the city attorney *must* be present in an executive session: namely, executive sessions in which the purpose is to consult with the attorney about litigation or a matter involving attorney-client privilege. In such cases, the confidentiality of what the attorney has to discuss with council, such as strategy in a particular litigation, necessitates that the attorney be present or on the phone as permitted. (See section immediately above.)

In other instances, the council, acting in good faith, can determine whom it deems necessary to bring into executive session. If the council adjourns into executive session to discuss the sale of a particular piece of real estate (where an open discussion would jeopardize the city's bargaining position), a council might choose to invite its attorney to assist in discussing the intricacies of the transaction.

There is an executive session scenario involving the city attorney that the council should be careful to avoid, though. Sometimes a city is tempted to adjourn into executive session to discuss a controversial or sensitive matter for which there is no independent legal authority to hold the executive session. To get around this, the council will take the city attorney in tow and label the executive session "consultation with the city attorney." This should not be done.

For example, say the city is negotiating a contentious contract for the purchase of a piece of equipment. The city council would like to conduct the discussions in executive session, out of the hearing of the public and press. Can it do so by consulting with the attorney? No. For one thing, there isn't pending or reasonably anticipated litigation going on—mere controversy or

sensitivity doesn't amount to anticipated litigation. So the city will have to look for other independent authority—but there isn't any. Discussion of real estate might qualify, but not equipment.

The bottom line? Be careful not to use your new city attorney as a “crutch” to conduct otherwise improper executive sessions. Illegal executive sessions might result in jail time (for you, not the city attorney).

### **So What Good Are City Attorneys, Anyway?**

In light of all the above, you might be asking yourself whether having a city attorney is worth it. Fear not, for it certainly is! A city attorney's job in life is to look out for the best interests of the city. When lawsuits and countersuits are flying back and forth like missiles, your city attorney will stay up late at night figuring out how to best protect the town. About no other person can that be said—the judge, the prosecutor, the police—you name it. In other words, you hire a city attorney to “watch your back,” legally speaking. City attorneys will help you sleep better at night, even if you can't understand what they're saying half the time.