

Advice for a New City Attorney

By: Marcus W. Norris*

This article offers general advice for a new city attorney or assistant city attorney on coping with some common hurdles encountered in a municipal law practice. Of course, the reader should always comply with your office procedures and practices manual or superior's orders, if different from these reflections.

1. You are the Government. Everything you learned in law school about the Constitution now applies to and constrains your actions and the advice you offer to city departments. Are you involved in disciplining a city employee for social media comments, deleting citizen comments from the city's Face Book page, or regulating citizen speech in a public hearing? These all implicate the First Amendment. Simultaneous civil and criminal investigations of an employee? Beware of the 5th Amendment and *Garrity* rights. Know the current precedents in your federal circuit.

2. Communication & Information is Key. People may come to you with hidden agendas; they will lie, confuse the chronology, and state opinion as fact. You must listen, withhold judgment, and ask questions. Don't become the inadvertent advocate for the first "side" that gets to your office! **(A)** When a vendor, developer, or citizen complains about a city department, say that you are sorry to hear they encountered a problem. Do not commit to or validate their assertion. Say that you will look into it or refer to a manager, as appropriate. When a city employee complains, use the same procedure or refer him/her to H.R. **(B)** Ask the complainant if he has talked with higher-ups on the other side. It is surprising how often this does not occur. When you arrange for such to happen, you will often see misunderstandings clarified or a compromise emerge. **(C)** When a *non-managerial* employee asks about the meaning or application of a policy or law, you must ask, "what does your chain-of-command say about this?" Otherwise, you may find yourself being a pawn in the internal argument of a city department. Not a good position for you. Refer that employee back to the department to either put the query in a memo or to file a grievance. **(D)** When a department head contacts you about a personnel issue, be sure to include H.R. in the discussion, lest contradictory positions or advice emerge within the organization. If you facilitate communication as described here, you will become known as a problem solver.

3. Beware of Citizen Demands to Use Power. Many citizens overestimate the power of local government and, want you to use that power against their enemy, neighbor, fellow church member, etc. Their beef is not necessarily the city's beef. If you take the bait and intercede as they request, it may get the city sued.

4. Know Your Client. Your client is the municipal government entity. It expresses itself through the *collective* voice of the elected governing body, appointed executives, and in some instances department heads, but *none* of those *individuals* (or other city employees) are your client. Your loyalty is to the good of the organization. Therefore, you should not blindly promise confidentiality when anyone opens a conversation asking for such. He/she may share something that impacts the organization and you will have a duty to disclose it to others. Consult your superiors in the legal department or, if you are in a solo office, call another city attorney. Study the [Disciplinary Rules of Professional Conduct](#), especially the rules regarding confidentiality, organization-as-client, and governmental attorneys. You will become known as an attorney of discretion and high ethical integrity.

5. Follow the No Secrets/No Surprises Rule. Promptly (that is, on the same business day) tell your superior (the city attorney or city manager) when: **(A)** a council member, manager, or news media contact you. It may be important that he/she knows that particular person is interested in a matter; **(B)** you have heard of a potentially serious or sensational matter regarding the client, so that your superiors are not blind-sided by that matter; or, **(C)** you have made a mistake. Your superiors have the better position and broader experience to do damage control, to protect the client, to figure out the root cause (— it may not be all your fault) and, to protect you from consequences by early intervention. You will become known as an honest person and a team player.

6. Keep the Roles Straight. (A) Council determines policy and gives leadership direction. City management and staff make it happen. Your special role is to be their legal advisor. Describe alternatives in a fair, evenhanded, dispassionate manner. Be prepared for the possibility that the client may weigh the issues differently or even make a poor choice from among alternatives. Clients have the right and the freedom to be wrong. When that happens, you do not have the luxury of telling your friends or announcing to the media that, “I told them so” or, that you had informed them of other options. **(B)** Maintain your situational awareness: *always think political but always act apolitical*. This is a corollary to Number 3, above. Sometimes it will be another official who wants you to issue an opinion that serves that official’s agenda. Make sure that each opinion serves first your client and only as honest coincidence it may assist anyone else’s agenda. Avoid answering political or campaign finance questions from elected officials. Refer them to their own campaign treasurer, the Secretary of State, the Ethics Commission, or even the City Secretary. You are not a political consultant. But if the city secretary or city manager asks, then you may respond or refer them to your superiors for advice concerning an election law issue.

7. Go. Leave your office and go see the broken equipment, controversial zoning site, or the drainage ditch at issue between the city engineer and a developer. Alternatives and solutions will more easily come to mind when you do research, after having seen, touched, or heard the problem. When in the field, it may be helpful in some situations to recall this Rule of thumb for locating the edge of public right-of-way or utility easement: utility poles are generally set 1-6” inside the outer edge. This seventh tip may also call for you to get dressed in the middle of the night and go to a scene, as when a pursuit ends in a fatal crash or a protracted SWAT call). You will become known as an attorney who wants to understand problems, is available, and doesn’t mind getting her hands or shoes dirty. Get a hard hat, reflective vest, eye protection, etc. as appropriate.

8. Run the Bases in Correct Order. When asked to solve a problem, many government lawyers get into the sad habit of always starting with the policy manual or law book (--and that is exactly the right approach *only* when construing the meaning of a law or regulation is called for.) But when the issue is one of public policy or when there is no readily discernible answer in the law book, then that lawyer is left with the lame knee jerk answer of, “no, it can’t be done.” The remedy to such unimaginative bureaucratic thinking is to run the bases in correct order. First Base: do #2 & #7, above. Second Base: determine where the legal, equitable, just, or moral values are in the situation. Third Base: now go to the law books to find a legal doctrine, rule, definition, or exception that provides a basis to achieve that legal, equitable, or just solution. You will become known as a practical lawyer who “really knows the law” — because you find a legal basis for accomplishing good outcomes. Caveat: There is a right time to just say “no” to your client: you don’t know the law, the facts are developing, the best outcome may be blurred, and due to extreme urgency there is no time to run the bases. Example: the 3 a.m. call from a police supervisor confronting an evolving live situation. That could be a time to consider saying, “no, don’t do that.” Why? *In most instances, it is more difficult for the government to be sued for doing nothing than it is when the government acts.* Use this tool sparingly. The officer may grumble but he knows it is a close call or difficult question, otherwise he would not be calling you. He will get over it and you will have protected your client as best you could under poor circumstances. Employees will not always agree with your answers, but will respect you for making the tough decision and then stating it clearly.

9. Strength in Numbers. A truly unique problem is actually a rarity. It may be new to you, but someone somewhere has likely encountered the municipal problem confronting you. Unlike competitive private law firms, city attorneys are a collegial group. Pick up the phone or email someone. If they are out-of-state, then differences in state law may affect the precise shape of a remedy in your state, but you can gain ideas from others. Become an active member of the Texas City Attorneys Association, [International](#)

[Municipal Lawyers Association](#), and the [IMLA ListServes](#) (hosted by MuniCode). You will become known as a savvy city attorney who is aware of trends and solutions from across the state and nation. Your client will benefit from your professional networking.

10. It's Good to be King. If you represent a home rule city, never underestimate the broad authority and constitutional basis of that home rule status. The city is empowered to write ordinances as necessary to remedy a host of issues, so long as the ordinance does not violate the constitution or general laws of the state. When writing an ordinance, pause to anticipate and avoid unintended consequences of your words, organization, or sentence structure in that legislation. General law cities must be authorized by state law to enact a particular ordinance. With the plethora of laws now on the books, it is easier than ever to establish that authority. Don't overlook the broad grant of authority in Local Gov't Code, §51.012 for Type-A cities. Note the potential for extending that authority to Type B or C cities *via* the "borrowing" provisions in §51.035 and 51.052.

11. Choose the White (or Less Black) Hat. On occasion, the city will be at risk of suit from both "sides" on an issue, or may face differing causes of action depending upon how the city decides a matter. In that case, choose your best hat: which alleged sin would the city rather defend in public? **Examples: (A)** A sex offender threatens to sue if not hired as a pool lifeguard, despite the presence of children at the pool. **(B)** Pursuant to a disaster declaration, an area is quarantined. A rancher argues that he and his employees must be allowed in to care for several world-class horses worth a few million dollars. **(C)** A question of the city's legal authority arises. Choice X seems to better protect certain third party legal rights but may jeopardize more lives or property, while Y has a weaker basis in the law but is more likely to protect lives and property. Consider erring on the course that best protects human life or property under the known facts.

In the first place, the city may never get sued under any of these scenarios, despite the high potential for it. (Remember: those horses are personal property and highly insured against loss.) Second, the city has immunity, affirmative defenses, and damage caps that apply to many instances. Third, even if a judge rules that the city violated the law in its decision, then it can typically be remedied with money damages. You will become known as a lawyer who has right priorities and the courage of your convictions when the stakes are high.

12. Enjoy. You are in a position to improve your city, both internal to the city hall organization and externally to address community problems. Unlike much of private practice, not every decision or outcome you craft is driven by financial interests. You are privileged to wrestle with constitutional issues, matters of public policy, and questions of good governance. Enjoy the adventure!

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