THE LOCAL GOVERNMENT ATTORNEY IN VIRGINIA

2009 Edition

CONTRIBUTORS

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CHAPTER 1

INTRODUCTION

In 2004 Les Lilley, the City Attorney of Virginia Beach empanelled a committee composed of Sharon Pandak, Rhysa South, Roger Wiley and later Steve Micas and Liz Whiting to formally describe what a local government attorney is or should be. More precisely, the Committee was charged with the series of tasks set out in Jan Proctor's March 4, 2008 letter (see Appendix A). At the April 2007 Hampton Roads LGA conference, the Committee members presented some preliminary thoughts on this topic.

A commonly-held concern among local government attorneys is that many people both inside and outside local government do not know what we do and that this lack of understanding tends to diminish our effectiveness. One might argue as well that even the Virginia State Bar lacks a true understanding of our job, an organization which historically has been dominated by members of private law firms. As one example, many State Bar members have never understood, nor is it in their interest to understand, the shifting notion of the "client" for the local government attorney.

The difficulty in understanding the role of the local government attorney is complicated by the varying perspectives of the groups that we serve:

1. The Public "… views the public attorney as representing their needs because the public attorneys are paid by tax dollars;"	2. Government Bureaucracy "... views the attorney as an internal advocate or external litigator; sometimes someone to be avoided;"
3. Private Bar "... in their interest not to recognize the unique nature of representing a local government;"	4. Council/Board "... views the local government attorney as protecting their individual legal (and often political!) interests above all others."

These differing perspectives and the existence of differing statutory responsibilities for the local government attorney can lead to:

1. Unnecessary conflict between the CEO and the attorney as to their relative roles;

2. Misunderstandings about whom or even what a client is;

3. Tension as to the extent to which the attorney should be part of a "management team" or even the extent to which an attorney should be told anything within the organization other than "I just got served with a lawsuit, get me out of it;"

4. A belief that attorneys just "get in the way;"

5. Clandestine attempts by the CEO to "punish" department heads who talk to the attorney without permission.

In reflecting back on many long meetings and contentious litigation and in talking to committee members, we have identified at least 13 separate roles (only a few

of which are contemplated in any job description). Those roles are (Any reader can, no doubt, think of others):

1. Civil litigator
2. Transaction Attorney
3. Appellate Attorney
4. Counselor/Confidential Advisor
5. Prosecutor
6. Ethical Leader/Model of Professionalism
7. Mediator/Arbitrator
8. Mentor/Teacher
9. Manager/Supervisor
10. Negotiator
11. Parliamentarian
12. Clarifier/Simplifier
13. Risk Taker/Risk Manager

In addition to dealing with constantly shifting proper “roles,” the many people in the localities that we serve also have differing views as to the public attorney’s role in their organization. Politicians' and managers' concepts of what represents "successful" (such as being "agreeable") may have nothing to do with how we judge our own relative success or failure. I remember one long-since departed Deputy County Administrator who refused to ever refer to us as the County Attorney's Office but rather called us the "Legal Department" in his lame attempt to diminish our importance so that we would become metaphorically the equivalent of the right of way department or the purchasing department. Contrast, however, the model for Tidewater localities where within the city code or charter the City Attorney is thought to be elevated by describing in considerable detail the composition and responsibilities of the "Law Department" managed by the City Attorney. We can all recall struggles with administrators and even some elected officials, who want to keep lawyers "from the table" under the naïve notion that, without legal advice, they are safe in acting illegally or in inadvertently increasing risk of

liability or damages (as if their lawyers won't have to clean up the mess later). But our professional obligation is always to provide the best legal advice; so to insure that public officials are fully informed, we struggle to be "at the table." We are frequently, then, metaphorically "inviting ourselves to the party."

Nevertheless, the purpose of this publication is to examine the legal and practical aspects that define the professional life of a local government attorney in the hope that we can enhance the delivery of legal resources to our localities so each jurisdiction may better serve the public.

CHAPTER 2

WHAT'S IN A NAME?

"Statutory and Charter Descriptions in Virginia of the Responsibilities of the Civil Attorney"

The formal job description for county, city and town attorneys in Virginia is set out within various statutes of the Code of Virginia[1]; among provisions in town, city and county charters and in local ordinances. Frequently, the job description will be articulated by reference to a combination of all of the above sources.[2] There are typically two approaches to describing the responsibilities of the local government attorney in local ordinances: the "short form" approach which says something akin to "... the city attorney shall be a lawyer licensed in Virginia and the duties of the city attorney shall be as prescribed by council"[3] or the "long form," which attempts to set out in detail every legal responsibility of the local government attorney.[4] See also, Virginia

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[1] All statutory section references throughout will be to the Code of Virginia, 1950, as amended unless otherwise indicated.

[2] Contrast the relative simplicity of the articulation of the duties of the prosecutor in Virginia, an office recognized by Article VII, § 4 of the Virginia Constitution as a local officer who is elected by voters and whose job description is set out in § 15.2-1626, et. seq.

[3] See, e.g., Town of Abingdon Charter § 4.5 and Town Code § 2-128, and generally local charter and code provisions of Town of Cape Charles, County of Chesterfield, Town of Culpeper, Town of Dumfries, City of Emporia, Town of Farmville, City of Franklin, City of Fredericksburg, Gloucester County, City of Hampton, City of Harrisonburg, City of Hopewell, Town of Lawrenceville, Town of Leesburg, City of Manassas, City of Manassas Park, Town of Mount Jackson, Town of New Market, City of Petersburg, Town of Pulaski, Town of Purcellville, City of Radford, Roanoke County, Town of Rocky Mount, City of Salem, City of Suffolk, Town of Tappahannock, Town of Vinton, Town of Warrenton, City of Waynesboro, Town of West Point, Town of Woodstock and Town of Wytheville.

[4] See, e.g., City of Norfolk Charter § 11, 46, 53, City Code §§ 2-150 through 2-156 and generally local charter and code provisions of City of Alexandria, Town of Blacksburg, City of Bristol, City of Charlottesville, City of Chesapeake, City of Danville, City of

County Supervisors' Manual, 7th Ed. at pp. 54-56 and 119 for a layman's description of the attorney's job duties. Tidewater jurisdictions tend to define the city attorney as the head of a broadly defined "Law Department." § 15.2-1520 sets out the general authority of a political subdivision to hire a county, city or town attorney for the purpose of defending and representing the locality and its employees in civil actions. A generic job description for the local government attorney is set out in § 15.2-1542.[5] Any County Attorney may also prosecute criminally fire and building code violations and such other local ordinances as are agreed upon with the Commonwealths Attorney. (See attached Agreement to Prosecute Certain Crimes; Appendix B) § 15.2-1542B. City and Town Attorneys are given broader authority to prosecute all local misdemeanors. § 15.2-1542D. Quaintly, the County Attorney is authorized to remove obscene books in the jurisdiction by prosecuting under § 18.2-384.

Other particular duties of the local government attorney are set out in many random provisions of the Code of Virginia including the requirement to certify

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Fairfax, County of Fairfax, City of Falls Church, Town of Herndon, Town of Luray, City of Newport News, City of Pouquoson, City of Portsmouth, City of Richmond, City of Roanoke and City of Virginia Beach.

[5] The county or city codes of the following localities do not reference the County or City Attorney, preferring to rely on the description of responsibilities in the Code of Virginia: Accomack County; Altavista; Amherst County; Bedford County; Berryville; Blackstone; Bland County; Brunswick County; Colonial Beach; Culpeper County; Cumberland County; Damascus; Dinwiddie County; Fauquier County; Floyd County; Franklin County; Glade Spring; Goochland County; Greene County; Greensville County; Halifax County; Hanover County; Haymarket; Henrico County; Henry County; Isle of Wight County; King and Queen County; King George County; King William County; Lancaster County; Louisa County; Montgomery County; Nelson County; New Kent County; Norton; Orange County; Powhatan County; Prince Edward County; Prince George County; Prince William County; South Boston; Southampton County; Spotsylvania County; Washington County; Westmoreland County; Williamsburg; Wise County.

grievance procedures as in compliance with State law § 15.2-1507; to represent the local Social Services Department § 15.2-1519; § 63.2-317, § 63.2-1949; to draft referendum questions "in plain English" § 15.2-1702 and § 24.2-687; to represent a local housing authority § 36-14; to ask for Attorney General opinions § 2.2-505 and § 2.2-3121; to receive notices of claims against an entity within six months of the occurrence § 15.2-209; to accept service of process on the local government attorney § 8.01-300; to facilitate boundary adjustments § 15.2-3104 and annexation § 15.2-3234; to defend tax disputes § 58.1-3709; to perform legal review of contracts § 15.2-1237; to approve deed forms § 15.2-1803; to consider claims against a county § 15.2-1245; enforce city and town (and Henrico and Arlington) weight limits on roads § 46.2-1138.1 and § 46.2-1138.2, facilitate correction of erroneous assessments § 58.1-3959, § 58.1-3981 and prosecute anti-trust violations § 59.1-9.15. The invaluable Handbook of Virginia Local Government Attorney Law, 5th Ed., first published by the LGA in 1982 remains the only comprehensive compendium of the substantive law important to Virginia local government attorneys.

Most local government attorneys are appointed by the governing body and serve at the pleasure of the governing body.[6] A few local government attorneys are appointed by the chief executive officer such as in Henrico County and in the City of Charlottesville where the City Manager appoints the city attorney with the "advice and consent" of city council. No city, county or town attorney is elected. However, in the absence of an appointed civil attorney, the Commonwealth's Attorney represents the

[6]Compare, however, the City of Petersburg providing a four-year term by charter, § 3-6; City of Harrisonburg a two-year term by charter, § 51; and City of Roanoke a two-year term by charter, § 26.

local governing body. § 15.2-1542. A few localities operate under a written employment agreement with the local government attorney.[7] A residency requirement is rarely imposed, however, see City of Richmond Charter § 2-1112 requiring that the City Attorney, among other officials, live in the city. Localities will frequently solicit applications for the local government attorney with wildly expansive job descriptions and overly optimistic expectations of personal skills. See e.g. Prince William County and Gloucester County 2008 job solicitations for their County Attorney. (Appendix D) The Board of Supervisors of Gloucester County, six months previously, had unceremoniously dumped the County Attorney within minutes into the first meeting of a four-year Board term and still had the chutzpah to invoke motivational quotes from none other than Bill Gates and Napoleon Bonaparte in its solicitation for a new County Attorney.[8] Thankfully, the Code of Virginia does provide some protection against the imposition of a penalty in the calculation of Virginia Retirement benefits to local government attorneys if the attorney is terminated and is at least 50 years of age with 20 years of VRS service. § 51.1-155.2.

[7] In 2008, Accomack County, City of Fredericksburg, City of Harrisonburg, City of Suffolk, Culpepper County, Goochland County, New Kent County, Spotsylvania County, Warren County, Wise County and York County used employment agreements for their local government attorney. (As one example of an employment agreement, see Appendix C).

[8] Four members of the Gloucester County Board of Supervisors were indicted by a grand jury for misuse of their office related to the firings of county officials, seizing of county computers and violations of the Freedom of Information Act. A citizens group also submitted a petition to the Circuit Court seeking the removal from office of the four supervisors for malfeasance. The indictment was dismissed with prejudice and the removal petition was also dismissed as defective. The Circuit Court ordered the County to pay attorneys fees and awarded sanctions against 40 people who signed the petition for a total of $80,000 in sanctions against the citizens. The trial court will consider a motion to reconsider the sanctions in April, 2009.

CHAPTER 3

YOUR RELATIONSHIP WITH THE GOVERNING BODY AND CHIEF EXECUTIVE

The quest for a simple, clear-cut definition of the role of the local government attorney is, upon reflection, unattainable. For that reason, this report chooses to identify many roles that we fill, are asked to fill or are forced to fill. Each of these roles is, in some mysterious indefinable way, imbedded in the bedrock notion of the attorney-client relationship. Don't ask too aggressively what that attorney-client relationship means to the public attorney; it is not subject to absolute certainty and clarity. But, even if the attorney-client notion remains elusive for us, whatever it turns out to be: that relationship is standing behind every one of these roles. Although we remain careful not to usurp the client's policy-making authority, in reality, much of what we do has some effect on policy. The law is so intertwined with governmental activity that being a local government lawyer inevitably affects policy. We are constantly in the middle of the intersections where the "collisions" among the three branches of government occur.

1. Civil Litigator

Although "pure" civil litigation, where a legal dispute between two parties is ultimately decided by a judge or jury, continues to decline in both state and federal courts, maintaining a strong facility with the technical and human skills necessary to try a case is still a foundation of success for a local government attorney, even in non-litigation contexts. Knowing how to vigorously litigate, how to protect your clients during depositions, and how to manage discovery are all essential skills to being a successful local government attorney. Protecting your position during discovery depositions is a particularly pertinent skill because the relative lack of rules, lack of self-

discipline and lack of an umpire, mimics what we often face at meetings of the governing body. Even when a high percentage of filed cases are ultimately settled, your client's position can only be maximized by utilizing strong litigation skills up to the moment of settlement.

Litigation skills hone the attorney's personal courage and, most effectively, elevate the attorney's status or credibility within the work force. Being a strong litigator is the fastest way to developing "street cred" within both legal and bureaucratic forums where the client will need an effective advocate. Litigation skills demand a level of flexibility and nimbleness that are valuable skills in any context. The high level of stress in litigation forces us to have a keen understanding of the human condition and how we are prone to act under extreme pressure. Moreover, litigation is the testing ground where we can accomplish perhaps the most difficult task we have: transferring courage to a frequently conciliatory bureaucracy who, in the face of conflict, often looks for the nearest exit. Virginia civil procedure remains highly "plaintiff's friendly" and the defensive motions so effective in federal court do not work to jettison "garbage" cases in Virginia trial courts. The jury still has its say more often that not in Virginia. Litigation alternatives such as mediation and arbitration also utilize the same skills exercised by attorneys during litigation.

2. Transaction Attorney

The transaction attorney role requires us to draft and review important legal documents including contracts and ordinances. It is essential that transactions be "closed" in a timely fashion, that all parties understand the current terms and future risks of the transaction. Certainty and clarity must be imbedded in complex transactions so

that future government employees, politicians and attorneys will not be saddled with the costs of ambiguity. We are generally not in the position of weighing in on whether any proposed "deal" is just a "bad idea" or wildly one-sided. We do have a duty, however, to reduce contingent risk for our client and to stop blatant and excessive risk shifting so that any contract or transaction is fairly balanced. An example of performing this duty is the customized set of changes drafted by a team of LGA lawyers to reverse the one-sidedness of the AIA owner/architect and owner/contractor contracts when the standard form of those documents amounts to a grant of immunity or absolution to the very people government is paying to perform expert skills. Frequently, as well, contracts to purchase software will provide that any dispute must be resolved in the courts of, say, New Jersey and always contain a significant limitation on liability when the software crashes. Incurring debt by the locality through the sale of bonds, certain lease purchase transactions or other esoteric borrowing schemes such as in redevelopment projects, service districts or community development authorities requires the retention of specialized bond counsel.

3. Appellate Attorney

Many attorneys would love to just be appellate attorneys. Who wants to deal with the messiness inherent in dealing with witnesses, experts, fickle decision makers and other "primitives"? Why not deal exclusively with other highly educated people, who think like us, were educated like us, who predominate the same intelligences, and where the rules of engagement are actually known and put in writing? The appellate practice skills of clear writing and a quick wit most closely resemble the skills practiced in law school and, therefore, are most comfortable for us. But appellate practice alone

lacks the personal grit of achieving a viable solution while fighting through the fog of human self interest. Appellate practice can have an isolation about it; we like to say that if you think you have done your job by just coming up with the "right" legal answer, then be a law clerk your whole career. Being a local government attorney doesn't stop at the water's edge of being legally correct. We must wade into the deep end, and cobble together a solution that is the closest to the theoretically perfect "right" answer in an imperfect and constantly moving world. And we must perform this task in such a way that other people will “buy into” the correct legal conclusion. Nevertheless, the ability to advocate in writing and orally in an appellate setting, when fully developed, can become every bit as important to us in the daily human battles we face in front of people who aren't wearing a black robe.

4. Counselor/Confidential Advisor

The counselor/confidential advisor role encompasses the traditional role of attorneys to (i) advise their client of the law; (ii) interpret the law and its implications in specific fact scenarios; (iii) serve as a “translator” in helping the client to understand the law by simplifying the purpose, intent and implication of laws; and (iv) serve as an umpire in the interpretation of policies by resolving internal disputes or answering the ever present “games” styled as “questions” surrounding bureaucratic processes or parliamentary procedure. The role of legal counselor also includes the task of providing formal (written) or informal (oral) advice.

The local government attorney’s advice on specific legal matters that clients and attorneys would normally expect to remain confidential may not always be honored by individual Board/Council members. After advising the governing body of the risks of

losing a lawsuit and any financial exposure or having argued in favor of a certain settlement goal, some of us have seen elected officials go to the media (anonymously) and announce that the attorney said, "We have less than a __% (always less than 50%) chance of winning" or “we expect to settle for $____.” This risk of open discussion by a person within the client group is truly shocking to any attorney in the private sector who is being paid large sums to represent a corporate client. No client in the private sector is going to jeopardize his legal “investment” by disclosing confidential advice. The clarity of the profit motive inherent in capitalism is non-existent in the public sector resulting in an undisciplined and sometimes individualized view of what the legal end result should look like.

Rule 2.1 of the Virginia Rules of Professional Conduct specifically addresses the role of an attorney as an advisor. The rule states that “[in] representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” Moreover, “[in] rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” The last sentence of the Rule is particularly applicable to public attorneys.

5. Prosecutor

Many of us act as prosecutors of local ordinances such as zoning and building codes because the elected prosecutor is not particularly interested in what he probably considers to be "nickel and dime" offenses. These violations are frequently, however, of considerable importance to the administration and elected officials because they represent important quality of life issues in your jurisdiction. The local government

attorney should and does spend more time and energy prosecuting these cases than you would expect a Commonwealth's Attorney to do. Misdemeanor prosecutions frequently involve one prosecution in District Court and then another prosecution, on appeal de novo, in Circuit Court. We must be cognizant of the special ethical rules governing prosecutors and need to be careful not to misuse the criminal process or to blend attempts to achieve civil and criminal results in the same dispute. Acting as a prosecutor, however, can also be fraught with risks of politicians improperly trying to influence the course of a prosecution. Any such attempts are clearly unethical and must be vigorously resisted.

6. Ethical Leader/Model of Professionalism

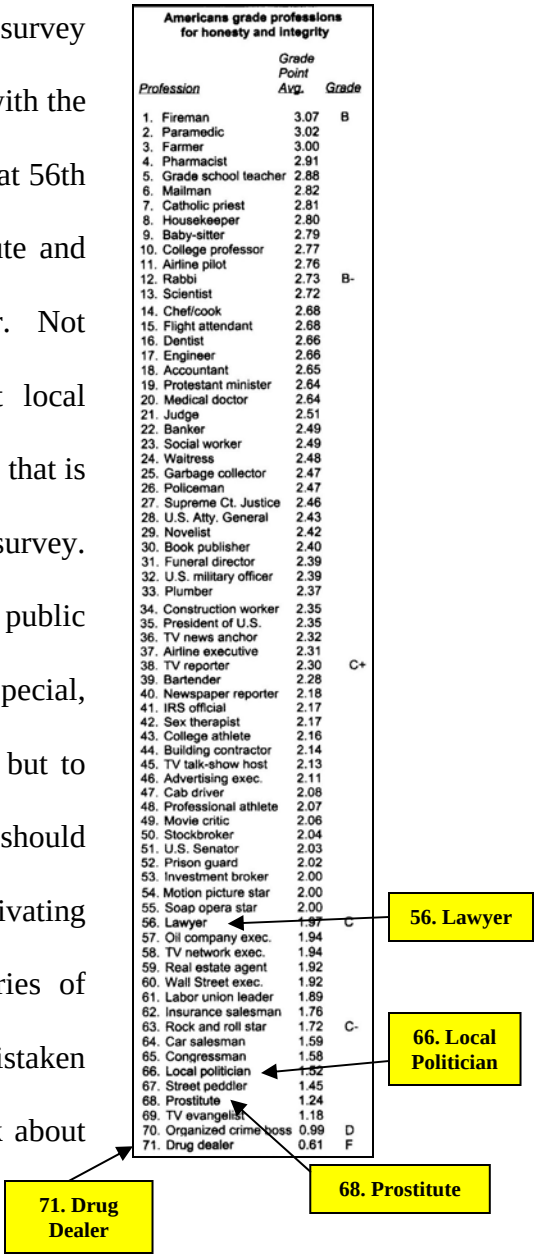
The traditional concept of legal ethics revolves around a series of behavioral limitations that are applied after painful analysis to changing sets of facts.[9] How you answer those dilemmas will determine whether you are “ethical.” Most ethical calls require "drawing a line in the sand" in the shifting desert of human activity. But the legal profession’s hyper-focus on ethics as lists of proscriptions apparently hasn't sunk in with the general public as any kind of virtue.

For whatever reasons, people jokingly refer to lawyers as the people we pay to lie for us better than we can lie for ourselves. Maybe we are seen in this way because

[9] Fall 1998: "Ethical Precepts and Issues for Local Government Attorneys," adapted from an outline of Rhysa South, James M. McCauley; Fall 2001, LGA Conference, "The Legal Ethics of City/County Attorneys Prosecuting Misdemeanors," by Harry M. Hirsch; Fall 2002: "Ethical Considerations in Public Sector Law and Practice by the American Bar Association--Government and Public Sector Lawyers Division"; Southwest 2002: "Managing Ethical Issues and Practical Problems in Local Government Representation" by Gregory Haley; Fall 2003: "Ethics Hypotheticals," by Thomas E. Spahn; Fall 2005: "Establishing the Best Local Government Law Office: Dispelling the Myths and Setting the Stage for the Highest Standards of Practice," by Sharon Pandak; 2007; all available on-line at www.lga.org.

lawyers are viewed as the only profession that is ethically obligated to deceive others -- not the most uplifting thought.

Several years ago a national magazine did an attitude survey to determine which jobs are considered to be the most honest with the most integrity. Lawyers, unfortunately, are way down the list at 56th and local politicians are 66th, just two steps above a prostitute and five steps above the lowest ranked "profession," drug dealer. Not only are we lawyers, but we are lawyers who represent local politicians. How bad can it get? As a positive, anything we do that is even remotely ethical will elevate our status based on this survey. This low ranking is both a reward and a challenge. But as public attorneys, the state bar and citizens recognize that we have a special, heightened ethical responsibility to serve not only our client but to seek justice in whatever form it may take.[10]Ultimately, ethics should not be a list of esoteric proscriptions, but is really a motivating opportunity to perform at a higher level. It is not a series of restraints. Many people, without saying it, are under the mistaken belief that values or ethics are soft or academic—nice to talk about but suicidal in the real world.



But in any lawsuit we are going to be more effective when we use the power of ethics and the forgotten beauty of telling the truth. Over the years, the courts, which

[10] See, e.g. Chapter 4, pp. 29 and 30 and "Local Government Lawyers: Expanding Ethical Responsibilities?" Journal of Local Government Law, Vol. XIX, No. 2, Winter 2009.

tolerate a large amount of lying even under oath, know that the local government attorney does not shave the truth. And we get better results from judges because of the trustworthiness of our public office.

We all depend on our long-term reputation and "one-on-one" human relations to succeed in our jobs. Try and think of something more important. Ethics are a powerful tool to cement long-term relationships. A solid reputation helps us achieve short-term results because of the concept of trust. Figuring out what is the "right" ethical choice is actually pretty simple in the broadest sense. The bigger challenge is in understanding the pressures and temptations not to do what is right and how to cope with these internal and external realities.

As a law student (or later in CLEs), we remember that fearful expectation that we would be called upon to decide what was the defensible course of action in some ethical dilemma and would give the "wrong" answer, thereby forever being branded as "unethical." Later in our careers, being more confident, we can see ethics not as a series of limits but as opportunities to be better than our adversaries to the advantage of our clients. The public attorney is rightfully held to a "double-standard" on ethics by every trial judge. Conduct or behavior that is tolerated by judges when coming from the private bar is intolerable if engaged in by the local government attorney. But that double standard is a powerful tool, because our arguments before judges are typically clothed with a presumption of truthfulness and our draft court orders are normally viewed as evenhanded, not attempts to overreach from the court's decision or to place a judge at risk of being overturned on appeal.

Those of us working in the public sector know that we and our clients live in a fish bowl of public scrutiny and that all of our actions will be seen and reviewed by the public. And that knowledge, entirely absent from the private sector, encourages a greater awareness and sensitivity to ethics than exists in the hard edges of corporate America.

7. Mediator/Arbitrator

See generally Civil Litigator and Negotiator but subtract some of the "edginess" or "aggression." Some of the more cynical among us might suggest that the widely accepted goal of a "win-win" resolution is technically impossible to achieve. "Win-win," typically seen as the upside to mediation, can become nothing more than an exercise in convincing the other side to be happy when they accepted less than they should have.

8. Mentor/Teacher

Being a mentor or teacher is simply acting in an old fashioned way as a role model to others. We perform this role when we participate in LGA presentations, Virginia State Bar CLEs, Bar Committees, pro bono activities, give speeches in the community and teach State Bar professionalism courses. We should strive to assist younger professionals, not only those who work directly with us, but young adversaries as well. The LGA provides an important place for younger attorneys to present substantive topics to our assembled group of lawyers in a way that accelerates their professional advancement and furthers the older members' duty to mentor the less experienced. We should seek out opportunities to display a value system that furthers

our credibility and that continues the knowledge base of the prior generation of local government attorneys.

9. Manager/Supervisor

The local government attorney is also a "department head" responsible for the management of a local government attorney's office. Depending on the size of the office, these duties can be extensive and, in addition to managing the legal business of the locality, involves the economics and budgeting of legal services, managing professional and clerical staff, physical facility management, and the responsibility to provide efficient delivery of legal services. This role also requires that we develop skills to motivate employees, determine client satisfaction, maintain office records, evaluate employees, and craft performance measures; topics more fully discussed in Chapter 7. This role can also involve managing outside counsel retained for specific legal tasks. For many of us this can be the least developed of our roles, perhaps because it can be the most unpleasant. There can be a natural reluctance to generate human conflict in this area when so much of our life revolves around conflict in other larger arenas.

10. Negotiator

The role of negotiator is closely related to the job of transaction lawyer. This role has grown in recent years to mimic the job of the commercial or corporate lawyer because of the rapid expansion of public/private partnerships. The normal government administrator is inclined to solve problems as quickly as possible. This means he or she is highly risk averse and impatient, both traits, if left unchecked, will inevitably doom the success of any negotiation. Because of these predictable bureaucratic tendencies, it is incumbent on the local government attorney to be a "crack" negotiator because the

local government employees who are most affected by any contract negotiation cannot be expected to shoulder the necessary risk, conflict, and hard-nosed patience that are obligatory for succeeding in tough negotiations.

Many administrators believe that every negotiation should be conducted by the department who will be most affected by the contract being negotiated. That belief is misguided. The only choice for a negotiator should be a person who truly has the special skills to negotiate. The substantive area being negotiated is largely just an area for a "quick study" by a negotiator. As an analogy, a good salesman can sell anything from vacuum cleaners to time shares. The product is less important or, more likely, completely unimportant than is a person's negotiating skills. In other societies this negotiating (haggling!) skill is honed in the street markets and bazaars of the local town.

This negotiating role of the public attorney can arise in diverse areas such as negotiating a new health care plan, a topic where the HR department believes it "owns" the issue. Since the HR Department is typically even more risk averse than otherdepartments, this toxic mix of bad instincts can lead to bad results if HR tries to negotiate the deal. We also are asked to negotiate consent orders involving utilities operations or negotiate disputes with state regulatory bodies. We negotiate with national vendors of emergency communications systems and negotiate personal property lease financings with national vendors.

On occasion because of their impatience and conflict avoidance, administrators will "cut a deal" before the attorney finds out about it and the attorney is told, in effect, to just approve the contract "as to form" and make no further comments. Not only must the attorney then confront a vendor who has already "declared victory" on a deal but this

situation demands its own delicate negotiation when the toughest negotiation becomes negotiating with the bureaucracy itself.

11. Parliamentarian

An important, but largely undervalued responsibility of many local government attorneys is to act as parliamentarian at meetings or as the parliamentary advisor to the presiding officer--either the mayor or chairman. Since human conflict and substantive policy disputes consistently play out through the gloss of some kind of procedural pretext, it is essential that the local government attorney be the "guardian" of parliamentary regularity. Every local government attorney should have a working knowledge of Robert's Rules of Order, but often a somewhat looser or more flexible parliamentary process works better over time and recognizes the fast and unpredictable dynamics of local government meetings. The most rigid or technical application of Robert's Rules seems to hearken back to an almost Victorian pace and a concept of public civility largely absent in the 21st century.[11] More importantly, elected officials are prone to use parliamentary procedure as part of the normal political "games" and, therefore, attempts to comply perfectly with every aspect of Roberts Rules are doomed to failure. Each year at the organizational meeting the governing body is authorized to adopt its own Rules of Procedure which should set out rules governing the conduct of meetings and should identify who is responsible for making parliamentary "calls" at

[11] For an examination of how local government attorneys can effectively use parliamentary procedures to preserve calmness, decorum and regularity, see Journal of Local Government Law, Vol. XVIII, No. 4, Spring, 2008, "Parliamentary Procedure: Bring Order to the Chaos and Confusion of a Public Meeting," by Walter C. Erwin; and Spring 1999, LGA Conference, "What Every Leader and Member Needs to Know About Parliamentary Procedure," by Jon Ericson.

public meetings.[12] Rules of Procedure provide a comforting structure so that the risk of unruly meetings can be moderated by an overlay of formality and process. See Appendix E for an example of Rules of Procedure. The role of parliamentarian is closely related to our job of insuring compliance with the Virginia Freedom of Information Act requiring open meetings and public access to documents. Va. Code § 2.2-3700 et. seq.

We also are the "first responder" on questions of conflict of interest and filling out disclosure forms. Va. Code §§ 2.2-3100 et. seq. Our opinions are admissible in the event of a subsequent conflict of interest prosecution, but the Commonwealth's Attorney's opinion, if abided by, is an absolute bar to prosecution. Va. Code § 2.2-3121.

12. Clarifier/Simplifier

Being the clarifier or simplifier of complicated legal/human dramas is probably the most rarified of the necessary skills in being a local government attorney. Nothing stands more directly at the confluence of every intelligence and every instinct than our ability to clarify. Your listener must be able to "see" what is really happening from his or her perspective because he may have no idea what is actually happening. He only knows there is a problem which is creating anxiety. Because the people our localities must deal with may dissemble, misinform, or hide their true motives, our clients can let unclear information undermine their confidence so that they are reluctant to make tough decisions. When we clarify and simplify we magically reduce the fear of the unknown

[12] Consistent with the 1st Amendment, Rules of Procedure can encourage civility by including a prohibition on personal attacks at public meetings. Steinburg v. Chesterfield County Planning Commission, 527 F.3d 377 (4th Cir. 2008).

and create confidence. This clarification skill in earlier times would be referred to as wisdom.

13. Risk Taker/Risk Manager

The risk taker role is imbedded within our roles as litigator and as a negotiator. But other legal functions include some measure of taking risk to lessen future risk. Also, if your locality is self-insured for personal injury, workers compensation, and property damage, you will have responsibilities in setting up the structure of the claims adjustment process and in guiding financial decisions for the risk management fund. But we must also be comfortable in taking personal risks, of being isolated, of being "disliked," of being vilified when our obligation to seek justice is not welcomed with "open arms." We can never let our opinions or decisions be controlled by the "shifting winds" of the normal short-term desire to please the person standing in front of us. In the corporate context, corporate counsel is sometimes accused of being too beholden to every regulatory risk so that the advice to any client is always “You can’t do it.” We should never take “risk for the sake of risk” but all action entails risk and the client deserves representation that allows it to “get the job done.” Frequently, a manager will come into the office and ask: “I need to fire this employee but what are the chances of losing in front of the grievance panel?” We always reframe the question and ask, “What is the right decision for your department?” Once the manager has made that decision, we then determine the best ways to insure that the proper decision is upheld.

CHAPTER 4

"WHO IS THE CLIENT?"

Sorting Out the Interests of Individual Officials, the Locality and Its Citizens

As we go about our duties as local government attorneys, we need to be mindful of the identity of our clients. As many of us have discovered, that seemingly simple task can sometimes prove to be very difficult.

The Virginia State Bar's Rules of Professional Conduct ("RPC") provide the basic "legal" answer to the inquiry. RPC 1.13(a) says that "a lawyer employed or retained by an organization represents the organization, through its duly authorized constituents." But who speaks for the organization?

In most local government organizations the identity of those "duly authorized constituents" varies depending on the case or subject under consideration. At different times the "constituent" authorized to act on behalf of the organization may be its chief administrative officer, an independent elected official, a subordinate department or agency, a quasi-independent board or commission, or an individual employee.

For almost all Virginia counties, cities and towns (the City of Richmond with its elected chief executive being a possible exception), however, it is clear that the ultimate decision-making authority on most issues is the elected local governing body – the board of supervisors or municipal council. In the strict legal sense that governing body – not the individual members of it, but the body acting collectively – becomes the local government attorney's "client of last resort in most cases."

Nevertheless, public attorneys deal daily with individual public officials and employees of the local governments who look to us for advice, and consider us to be, in

some measure, "their" attorneys. Often the decisions these people make – and the advice and representation they need – are about matters in which the local governing body has little or no involvement. In some cases, the chief administrator and even the department head will likewise have little knowledge or understanding of the individual's actions or decisions in a particular case.

As a practical matter in these situations, there may be no one other than the local government attorney in a position to notice that the individual officer or employee is about to make a decision or take an action that will be detrimental to the interests of the locality. What do we do when we believe that an individual we are advising has done or is about to do something actually or potentially damaging to the organization that is our actual legally-defined client?

If the individual has indicated the intent to take some action that would be a crime, the answer is relatively simple. The Rules of Professional Conduct recognize the possibility that any attorney's client may reveal an intention to commit a crime or a fraud on a tribunal. In such situations, there is an affirmative obligation on the attorney to attempt to dissuade the client, and to tell the client that, if he does not abandon his intent, the attorney has an ethical obligation to reveal that intent to the proper authorities along with such other information as may be necessary to prevent the crime. RPC Rule 1.6. If the client persists, the attorney must follow through with that threat.

Fortunately, situations in which an official's intended action would be an actual crime are relatively rare. More often we will confront situations when the

individual public official's conduct, actual or proposed, is simply ill-advised and potentially detrimental to the local government organization.

Perhaps what the official proposes to do significantly exceeds the authority given to him by applicable statutes or adopted policies of the organization. Perhaps his decision is arbitrary and capricious, or violates some civil duty and will present a high risk of a lawsuit against the organization and resulting liability. Perhaps what he intends to do, while not unlawful, will be viewed by the media and public as inefficient, wasteful of public funds, or just plain stupid, and therefore embarrassing and detrimental to the locality. Since the client is the organization, we have an obligation to do more than just sit back and watch this guy go over the cliff dragging the organization with him. What are the options?

First, it is important to tell the individual that (1) you are not his personal counsel, (2) your ethical duty is to the organization, (3) you are not obligated to treat what he tells you as confidential, (4) you may even have an ethical obligation to disclose that information to others to protect the organization, and (5) if he doesn't want to take your advice, he should seek his own counsel.

Under RPC 1:13(b), when the individual's actions or intended actions are a violation of his legal obligations to the organization, or a violation of law that may be imputed to the organization, and are likely to cause substantial injury to the organization, the public attorney has an ethical duty to do what is reasonable to protect the organization. In such cases where the consequences of the individual's action may be quite serious, it will usually be prudent to state the foregoing explanation of your responsibilities to the individual in writing. Even when what he does or wants to do is

merely stupid, the attorney's ethical obligation to protect the interests of the organization from adverse consequences would not seem to permit the attorney simply to ignore the problem.

Once the attorney's status and obligations are clear, what should be done to turn the situation around? The following measures are consistent with those suggested "among others" by RPC 1.13(b).

The first and most obvious option is to convince this errant representative of your client that he needs to change course. If he doesn't hear you the first time, try again. And again.

If that isn't working, encourage and assist him to seek a second opinion. Don't be so protective of your own turf, or so locked into your own position that you hesitate to do this. Be strong enough to volunteer this peer review of your advice. Many, if not most, issues are debatable, and both of you can benefit from a well-informed second look.

Of course, the first place to seek another opinion is among the other lawyers in your own office or firm. The hardest thing about a solo practice would be the difficulty of getting validation of your own opinions and advice.

Fortunately, for those who are in that situation, the LGA listserve provides a free and convenient way to do that. Of course our LGA network is also a great way to do "quickie research" at no cost, but is most valuable when we put our own views out and ask others to critique them. Even for those in large offices, the listserve may be an easier and better source than your own co-workers for opinions and information on

specialized topics. The person you are trying to convince may also view the opinion of an attorney from another jurisdiction as being more objective.

Occasionally, seeking a more formal outside opinion may be needed, either because of the topic or because the "client of the moment" is especially difficult to convince. The Attorney General of Virginia is one option, particularly when the person you are trying to convince is a constitutional officer, or the deputy of one. But you should expect that the AG will generally take the most restrictive view of local powers and authority, so don't ask for an opinion unless you are prepared to live with an adverse result.

In really important situations, or especially when uncertain of the correct answer, paying for the second opinion may be the better option. Reliable as LGA colleagues may be in many cases, there may sometimes be validity in the observation that free advice is worth what you pay for it. Also, because of the extra cost, the mere suggestion of paying for the outside help may make a department head or chief administrator more willing to take your advice.

If the second opinion still doesn't dissuade your recalcitrant client representative, the next step is to kick the matter up to the next level of authority in your organization. While this may sometimes be necessary, it should be done as a last resort for some reasons that are pretty obvious.

First, doing this may damage your ongoing relationship with the individual you are trying to persuade. If he thinks you are going to "rat him out" to his superiors every time he disagrees with your advice, his response will probably be to stop seeking that advice. Going over the chief administrator to the governing body is especially

damaging to your ongoing relationship and should be avoided unless absolutely necessary.

Second, pushing the matter up the chain of authority often doesn't work. For one thing, the folks higher up will soon begin to question why you are asking them to referee so often. Also, you have your best shot at convincing the guy at the lower level; as you go higher, your chances may diminish. The entry-level zoning inspector is more likely to accept your advice without question than the planning director. The city manager is probably more likely to argue with you than a department head will be. If you and the manager don't agree, the governing body may be extremely reluctant to choose sides between its two principal advisors.

If you must follow this route of seeking a decision from higher authority, once again, you need to explain to the person you are seeking to bypass, in as polite a manner as you can muster, why he is not your ultimate client, why you may have an obligation to share information about the issue and his intentions with the higher authority, and why you believe the interests of the organization require you to go over his head.

As previously noted, RPC 1:13 specifically authorizes the attorney for an organization to seek resolution by a higher authority, and a Comment to that Rule suggests that the normal obligation to keep client confidences may, in the governmental context, be superseded by the need to prevent the commission of wrongful governmental acts. *Id,* Comment [6]. The same Comment also notes that:

> in a matter involving the conduct of government officials, the government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. *Id.*

What happens when you tell the governing body that an action or decision, either occurring at a lower level or initiated by the governing body itself, will be substantially detrimental to the organization, and they ignore or refuse to accept legal advice? Let's assume the matter is a serious one – something that, even if not criminal, would be viewed by most people as a failure by the governing body to carry out its responsibilities or a gross abuse of its powers – unlawful in the civil, if not the criminal, sense.

Once you have pointed out this problem, have you fulfilled your obligation, or do you have some further obligation to an even higher level client – a public duty to the citizens of your community? Don't they, whose taxes pay for your services, clearly have an overriding interest in maintaining a just, fair and honest government?

In a somewhat oblique way, the Rules of Professional Conduct make it clear that you do, but the way the State Bar tells you to perform that duty is not a happy one. RPC 1:13 says that if, despite your efforts, the highest authority in your organization persists in a course that is unlawful and is likely to cause substantial injury to the organization, your option is to resign, or at least to decline to represent the body on that matter.[13]

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[13] Although the Comment to RPC 1:13 supports the disclosure of potentially damaging matters to higher authorities within the organization, it stops short of suggesting that an attorney whose advice is ignored or disputed by the highest internal authority can then disclose then matter to a higher authority outside the organization. RPC 1:6 gives express authorization for the attorney to ignore the confidentiality obligation and do this only when necessary to prevent an actual crime. RPC does not expressly ease the confidentiality requirement when the damaging action or decision is only civilly unlawful, or even when the attorney learns the crime has already occurred. The Comment to RPC 1.6, does suggest that other provisions of law could authorize or even obligate the attorney to reveal information about the client, but says that there should be a presumption that other statutes do not supersede Rule 1.6. In 2006 the General Assembly for the first time adopted a "whistleblower protection" statute applicable to local government employees. That law, Va. Code Ann. § 15.2-1512.4, states:

OUCH! Most of us have dependents and mortgages; all of us need to eat! Does it really have to come to that? Well, we can all hope it WON'T, but if I am being honest, I will admit that I've always known that it COULD. Maybe it was the Watergate era that made me realize it, watching all those White House lawyers who let their careers go down in flames because they remained blindly loyal to a flawed President.

If you accept the premise that you are in this line of work to serve the public, and if you care anything at all about your own integrity, I believe you must always live with the possibility that things could get so bad that you have to find the exit. More recently we have learned that this is not unique either to lawyers or to the public sector. Remember those accountants working for Enron? Some of them didn't resign soon enough either.

Maybe this is not so terrible. There are other jobs out there, usually even some pretty good ones with other local governments. Accepting the idea that your "public

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> Nothing in this chapter shall be construed to prohibit or otherwise restrict the right of any local employee to express opinions to state or local elected officials on matters of public concern, nor shall a local employee be subject to acts of retaliation because the employee has expressed such opinions.
>
> For the purposes of this section, "matters of public concern" means those matters of interest to the community as a whole, whether for social, political, or other reasons, and shall include discussions that disclose any (i) evidence of corruption, impropriety, or other malfeasance on the part of government officials; (ii) violations of law; or (iii) incidence of fraud, abuse, or gross mismanagement.

This statute may offer some employment protection to a local government attorney who reports unlawful actions of the governing body to either the Commonwealth's Attorney for the locality or the Attorney General of Virginia, but it is not clear that it would supersede Rule 1.6 and permit the local government attorney to reveal confidential information in that manner

duty" might someday obligate you to look for another job may actually have a salutary effect on the advice you give your present employer.

Apart from issues about attorney-client confidentiality, the concept that government attorneys have a transcending “public duty” has some tacit support in case law. As much as 80 years ago, the Supreme Court of the United States observed that:

> a government lawyer is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation ... is not that it shall win a case, but that justice shall be done." *Berger* v. *U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

That statement was later chiseled in stone on the wall of the Department of Justice.

Although the *Berger* opinion was referring to a government prosecutor, the same principle should apply to government attorneys in civil practice. The American Bar Association's Model Code of Professional Responsibility says that a government lawyer in a civil action or administrative proceeding has "the responsibility to seek justice" and "should refrain from instituting or continuing litigation that is obviously unfair." *Id.*, EC 7-14.

Citing both that provision and *Berger* to criticize counsel for a federal regulatory agency who had stubbornly refused to dismiss a suit against a regulated business, even though a later general order of the agency had obviously made the case moot, Judge Abner Mikva, the plain-spoken chief judge of the U.S. Court of Appeals for the D.C. Circuit noted that "a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." *Freeport McAloran Oil & Gas Co., et al.* v. *FERC*, 962 F.2d 45, 48, 295 U.S. App. D.C. 236, 238 (1992).

As local government attorneys we can't escape this "public duty" that transcends our duty to our official client. We have the obligation not only to advocate vigorously the positions taken by our local governments or their agencies, but also to seek to be fair and just. This obligation should inform and guide all our interactions with citizens, individual or corporate. Yes, like it or not, we have just as much obligation to be just and fair in dealing with slick-talking real estate developers as we do with the little old lady who has experienced a sewage back-up in her basement.

In the heat of combat, whether the battlefield is a courtroom, a board of supervisors' meeting, a committee of the General Assembly, or merely a telephone conversation with an angry citizen, it is very easy to start believing that your client's position is the only "right" position, *simply because your client is the government.* In fact, it is precisely because we *are* usually the "good guys" that we are more vulnerable than our private sector counterparts to this particular variety of *hubris.*

Fighting this tendency isn't easy. It requires honest self-criticism and a conscious effort to take a detached, objective view of the positions and policies you are advocating. You have to make yourself stop, however briefly, perhaps while you are shaving or fixing your hair in the morning, and ask yourself this sort of question:

- *Is this business owner I am fighting over his property assessment really a sleazy tax dodger, or are we just possibly overreaching a bit on his assessment?*

- *Is it really in the best interests of this child to terminate parental rights, or is his caseworker trying to hold his mother to an unrealistic bureaucratic standard?*

- *Is my opponent's settlement offer really completely inadequate, or am I just longing to pound him into submission?*

- *Are the legislators and lobbyists who are pushing for the*

adoption of this bill just trying to punish local governments, or do they have some valid points in their argument?

We should not try rigidly to substitute our personal judgment for that of the public officials you are representing or that you should capitulate to unreasonable citizen demands. Both the citizens and your local government organization, which after all exists to serve those citizens, will be better off if you don't let your enthusiasm for advocacy completely overwhelm your sense of justice and fair play.

A few lines written by an 18th century English poet seem to offer a good antidote to public official *hubris.* It may help to think when advising and representing local governments.

> "In every government, though terrors reign, though tyrant kings or tyrant laws restrain, how small, of all that human hearts endure, that part which laws or kings can cause or cure!" -- Oliver Goldsmith, *The Deserted Village*

CHAPTER 5

LEGAL ETHICS FOR LOCAL GOVERNMENT ATTORNEYS

"The Impact of Legal Ethics in Defining the Role of the Local Government Attorney"

This chapter discusses some ethical challenges unique to local government as discussed in a recent Legal Ethics Opinion (LEO) and concludes with a compendium of Ethics Rules and LEO that can be used as a reference for local government attorneys and their clients.

The Virginia Rules of Professional Conduct ("Rules") set forth a lawyer's responsibility to a client and establish boundaries governing our conduct as we carry out our varied roles as advisor, advocate, negotiator, mediator, intermediary and evaluator. Legal ethics courses in law school and more recently the mandatory professionalism course provide a good overview of the two sets of legal ethics obligations for lawyers under the Rules. First, a lawyer's duties to the courts and the rule of law, such as the lawyer's duty not to mislead the courts. Second, a lawyer's relationship to his or her clients, such as the lawyer's duty to represent clients competently, to keep clients' secrets confidential and not to represent clients with conflicting interests.

Clearly, the duties to the courts, to the rule of law and of competent representation apply equally to public and private practitioners. However, the Virginia State Bar's ethics framework for analyzing the Rules that apply to client confidentiality and representation of adverse interests is all based on a duty to a client. These Rules are tough to apply when the attorney's client is a locality. This is so because a locality cannot act except through its duly elected governing body or through statutorily empowered officials who in turn charge various departments and individuals with

implementation of their policies. Consequently, the local government attorney in representing his or her client locality must give legal advice to the many individuals who are charged with providing services in accord with the locality's policies.

Local government attorneys must ferret out which of these individuals are entitled to assert a privilege in communications or to object to representation of adverse interests. Fortunately, recently issued LEO 1836 gives much needed guidance to local government attorneys and their constituent clients in answering these ethical conundrums. (A full copy of LEO 1836 is available at http://www.vacle.org/opinions/1836.htm.) This opinion analyzes various fact scenarios concerning multiple representations and concludes that:

1. A City Attorney does not have any ethical duty to maintain as confidential, information obtained from one constituent while concurrently providing legal services to another constituent. While the attorney-client privilege applies to communication shared in an official or employee's organizational capacity, that privilege belongs to the city, not to any one individual.

2. The City Attorney may have an ethical duty to disclose information learned in the course of providing legal services to a constituent within the organization, if it relates to the City Attorney's representation of his client—the City. Where severe injury to the city is likely to result, it is ethical for the attorney to disclose confidential information to others within the organization.

3. In the absence of direction from the organization, whether or not the City Attorney should disclose in advance to the Administration a proposed resolution or ordinance he was asked to draft must be guided by the Attorney's judgment in

accordance with the best interests of his client, the City.

4. Administration's disagreement with Council's proposed action or a desire to be advised on the legal ramifications of not complying with the proposed action is not sufficient to constitute an unethical conflict of interest.

5. No impermissible conflict exists simply because one or more constituents disagree with the City Attorney's legal opinions or conclusions. A City Attorney acting in the role of advisor must give candid advice even when the individuals may not want to hear that advice.

6. Absent specific guidance from the organization, the City Attorney may not "screen" designated subordinate attorneys assigned to represent constituents because this would hinder the attorneys' duty to keep the city reasonably informed of matters.

The clear message from LEO 1836 is that the local government attorney's ultimate allegiance will be to the governmental entity as a whole, not its individual members. While the entity is the client, in most instances, the city's interests will be the same as the individual constituents. We offer the compendium of Ethics Rules and the LEOs attached as Appendix J to aid in understanding the rules and restrictions which apply to our every legal representation. Local government attorneys are encouraged to contact the LGA's Ethics Committee for assistance when answers to ethical dilemmas are not clearly addressed by the Rules.

CHAPTER 6

PRO BONO OPPORTUNITIES FOR THE LOCAL GOVERNMENT ATTORNEY

Pro Bono service by the local government attorney can be challenging. Those willing to serve need the approval of their employer, which at times is hard to come by due to local ordinances, charters, and personnel regulations and policies that may limit their practice to their governmental employment. They typically don't carry malpractice insurance. Their "resources," whether they are pens, paper, file folders, or photo copy machines, are often government-owned resources. Extreme care must be taken not to have their *pro bono* work conflict with the interests of their localities.

In many instances the more prudent course is to provide non-representational assistance, such as educating others about the legal system. I offer the following example of a non-representational program that would fit the needs of virtually any local government attorney.

For over 20 years, the Page County Bar Association, one of the smallest bar associations in the Commonwealth due to the fact that the Page County population is only around 22,000, has heeded former Chief Justice Harry Carrico's 1984 challenge to lawyers to forever become "adjunct professors of law." In his challenge, the Chief Justice envisioned lawyers educating young people in the public schools about the law and preparing them for jury service as adults.

The format is as follows: (1) In-class presentations by attorney-presenters to individual classes upon teacher requests for presentations on designated topics, aimed to conform to the statewide Standards of Learning; (2) In-service seminars to Page County

school personnel upon administration request on various topics, such as confidentiality, physical contact between teachers and pupils, and civil liability in the school setting; (3) Maintenance and expansion of a law-related education audio-visual and book library for use by attorney-presenters and teachers in the presentation of law-related education topics in the public schools; and (4) Organization and chaperoning of field trips to witness oral arguments in the United States Supreme Court and the Virginia Supreme Court or the Virginia Court of Appeals for selected high school juniors and seniors.

One of the keepers of the flame of this marvelous endeavor is George W. Shanks, the Page County Attorney and a past Chair of the Virginia State Bar's Conference of Local Bar Associations. The following musing by George explains why he and his colleagues in Page County find this Project so rewarding: "I fear I have been too successful at extolling the virtues of trips to see The Supremes. In the beginning of our now 20+ year educational odyssey, I could contact the US Marshal's office and, as often as not, get a seating on the first day of the Term. Now, a request for a seating for a group of 40 is honored with a promise for consideration in 4 years. Not exactly a benefit to our target population of honors juniors and seniors. Still, in a nation of 300 million souls, the opportunity to share this experience with a handful of Page County youngsters is like being Santa Claus and making check marks on a Life List."

Representational *pro bono* work may involve simply giving advice or going to court. I can speak from some experience as to the rewards and difficulties inherent in both kinds of representational service.

The Fairfax Bar Association runs an effective *pro bono* program that is designed to supplement the work of Legal Services of Northern Virginia by assisting people who

have incomes that are, in many instances, slightly higher than those served by LSNV, but who are still too poor to hire lawyers. The Fairfax Bar calls its service the "Neighborhood Outreach Program" and provides it at several County–run homeless shelters and neighborhood resource centers. One of those centers is the Franconia Family Resource Center, which is located in the basement of a large, subsidized apartment complex on Commerce Street in Springfield. The center provides the connection that the residents, who are virtually all Latino, have to County services and the pro bono program. The residents, for the most part, are the working poor, and most of them work in the building trades, in lawn maintenance service, and as domestics, and they often hold down multiple jobs.

For several years, I have been volunteering at the center every quarter. Sometimes I can help a client on the spot. With the assistance of a bilingual County Department of Family Services employee who staffs the center during the day and graciously schedules the clients and stays on to translate through the two-hour *pro bono* session offered one or two evenings a month, I can sometimes help clients during the session or do some research and get back to them later. (During one visit, I was able to explain to a young man the import of a subpoena he had received to attend a hearing in J&DR Court in Manassas and to try to assuage his concern about testifying against a known youth gang member. The next day I was able to contact the Prince William County Police Department's victim-witness coordinator, who then got in touch with him further to allay his fears.) But more often than not, I am relegated to diagnosing the legal problem, writing it up, and forwarding it to the Fairfax Bar's full-time *pro bono* coordinator for her referral to another volunteer, who will handle the matter from there.

That's where the frustration comes in. As a local government attorney, I have reluctantly concluded that it's really difficult to undertake "representation" of a *pro bono* client. The client may be confused regarding your role, and why not? When I give my County business card to a client with a promise that I will get back to her with an answer, and I hand the card to her at a County-run center, it's likely that she thinks that this is another government service, my concerted efforts to explain my true role to her not withstanding. How would I then go about contacting her employer to seek the money she says he owes her without raising the inference that the County Attorney's Office was after him? And if I had to go to court in Fairfax, what judge, let alone court personnel, and the tax-paying public, would not be confused as to what I was doing there on behalf of this woman? It's because of my frustration over realizing that representational service, at least in my estimation, is almost impossible, that I became intrigued a number of years ago when LSNV offered a two-hour CLE on "uncontested divorces," with the "cost" being a promise that the participant would handle three uncontested divorce cases in the future. The announcement of the program promised a how-to-guide to handling uncontested divorces in the three courts served by LSNV: Fairfax, Arlington, and Alexandria, which I would later learn is referred to among "matrimonial lawyers" as Las Vegas on the Potomac. More important, it brought me the promise of being able to have a client to whom I could make abundantly clear that I was not assisting her on behalf of the County and being able actually to go into a court, other than Fairfax's, where the judges, court personnel, and public (even if anyone knew who I was), might more easily understand my role in representing a "civilian" client.

The "uncontested divorce" CLE offered by Legal Services of Northern Virginia, was everything I could have wanted and more. Not only did the CLE review the current law, it explained the procedural differences among the circuit courts in Fairfax, Arlington, and Alexandria, where LSNV provides its services. The CLE also provided a CD-ROM with fill-in forms for every stage of the process in each of the jurisdictions in a variety of circumstances—everything from a cooperative defendant to a jailed defendant. Piece of cake, right? Wrong, for at least two reasons.

First, I forgot that knowing the law is not practicing the law. As I bumbled along contending with the various steps in the process that would have been second nature to a lawyer experienced in divorce law, it occurred to me that I had not handled a divorce of any kind since I left private practice in 1979. In the best of circumstances, because of the perfectionist in me (and I am certain in all of my colleagues in LGA), I soon realized that it would take a lot longer than I would have expected in things both large and small, down to double-checking the number of copies of the Complaint I would have to file with the clerk. Second, I forgot a lesson I had learned as far back as 1969, when, as a second-year law student, I was doing intake at the Charlottesville legal aid society: it is sometimes more difficult to work with poor clients.

I learned from the CLE that the Alexandria Circuit Court was the most "relaxed" in its procedures, and I knew and considered as friends all three of its Circuit Court judges. Alexandria was definitely the place for me. Now all I needed was a client. Soon after the CLE, LSNV sent me a file on my first client. I immediately contacted her to set up a meeting at the LSNV office in Alexandria, which was fairly close to her home and reachable by public transit. At the appointed time I arrived and waited…and

waited…and waited for over half an hour, only to find out later that she had arrived one hour after the scheduled appointment and had arrived drunk. To LSNV's credit, staff told her that LSNV would not be able to assist her. Shortly thereafter another file arrived, and this client met with me as scheduled and emphasized that she was anxious, as in a big hurry, to get divorced. Since I barely knew where the courthouse was located, I cautioned her that, even though uncontested, (with me) the divorce could take some time. She promised that she could get her husband to sign an acceptance of service of process and waiver of further service of process and notice before a notary public, as required by law. I mailed her the necessary forms and pleadings with strict instructions that she was to have her husband sign the papers before a notary public. While it *appears* that she obtained her husband's signature, she had *her* signature notarized but not her husband's. When I brought this to her attention, she told me that she would do it correctly, and I sent her a new set. Several weeks went by, and I heard nothing from her. When I finally was able to contact her, she told me that she had been in a coma for an unspecified period (first time I ever heard that one) and, furthermore, that her husband was now unwilling to cooperate. Back to the drawing board. I eventually obtained service by posting at an apartment where the husband was supposed to be boarding. After the required time to respond had come and gone, I called chambers to schedule an *ore tenus* hearing, at the conclusion of which, if successful, my client could go home with a signed decree. LSNV advises *pro bono* attorneys to advise the courts of their status, and doing so certainly resulted in express service in the Alexandria Circuit Court. On the fateful day, my client and her witness arrived exactly at the time I had requested them to be there, which, just to be safe, was one-half hour

before court was to convene. I found our case on a "short" docket, but mercifully either the judge or her clerk had placed us second, so I could see how the questioning was supposed to be done. It worked. Relying on a script that used all leading questions to establish the allegations in the Complaint, we were through in ten minutes, with the judge allowing me to "walk" the file, containing the signed final decree, down to the clerk's office where certified copies were made. With hearty handshakes, my client and her witness were out the door five minutes later, divorce decree in hand. In all, it took almost a year (including the break for the coma) for my simple, uncontested divorce to reach conclusion. Even though I had spent way too much time on something that a competent divorce lawyer could have done incredibly more efficiently, I got what my client wanted, and I left the courthouse feeling as exhilarated as I had ever felt at any time during my legal career. I will definitely do another one, but first I am going to take a little time off to recover.

CHAPTER 7

EFFECTIVE OFFICE MANAGEMENT:
Crafting Performance Measures, Determining Client Satisfaction, Maintaining Office Records and Evaluating Employees

One of the gifts of being a public attorney is to be free from the tyranny of having to document "billable hours." Nor can our individual constituent clients fire us easily as attorneys can be released in the private sector. Our department heads are, more or less, stuck with us whether they like us or not.

Since we don't bill hours and can't be "fired" by individual clients, how should we measure effective performance or quality work? It's no longer enough to say, "I know a good attorney when I see one" or "That attorney seems to work very hard." City managers in 2008 want to see statistics that show productivity and efficiency. One way to start "nibbling away" at the edges of these management issues is to periodically send out a customer satisfaction survey. Make sure that you choose a list of clients who are not also adversaries who may use the opportunity to rate your services as an opportunity to berate you for vigorously defending your locality. (See letter attached to Appendix F). Before doing that, be sure to negotiate a set of agreed upon priorities with the manager (Appendix G) so that clients understand that what is always their first priority, themselves, is not always the organization's first legal priority. In an increasingly fast moving electronic world, document retention and having a system of document retrieval is also critical to any office's success. One system that has a long history of utility (and has filled up an entire warehouse with document boxes) is a topically indexed "key number" type system where all files are indexed and can then be retrieved by referencing topic numbers or file name. (Appendix H). Other systems may be superior,

but new attorneys remain most comforted by an efficient document retrieval system coupled with the LGA Handbook so that they do not have to "reinvent the wheel." Document retrieval system, in some instances, will protect the locality from spurious "spoliation" claims. Truly useful evaluation systems are not easily created or agreed upon by either the rater or ratee. The balance between generalized goals for each attorney and precise landmarks of achievement is hard to define. Most rating systems leave both the rater and ratee somewhat unsatisfied. (Appendix I)