



MONTANA MUNICIPAL INTERLOCAL AUTHORITY
PO Box 6669
Helena MT 59604-6669

RISK MANAGEMENT BULLETIN

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RE: Role of the City / Town Attorney

Herding Cats in a World of Pygmy Goats and Potbellied Pigs

Rich Hickel, City Attorney, Kalispell

As a young lawyer practicing law in Eastern Montana, I would commiserate with my more experienced colleagues in the profession about a new and pressing issue which had arisen in a divorce which I was then handling. One day, I might relay a story about trying to convince a client that the toaster she and her soon-to-be former spouse had received as a wedding gift from her Aunt Marge nine years ago was not really worth calling me at home at 2:00 a.m. on a weekend. On another day, I might tell them about a call I had received from the state brand inspector informing me that my client had just double-branded this year's calf crop over which he and his soon-to-be ex-spouse were engaged in a bitter custody battle.

These stories serve to illustrate that among the advantages of working in the private practice of law, are the opportunity to, (1) select your client, and (2) select the type of cases you will handle or the areas of practice in which you choose to engage. Those of us who have decided to forego the financial rewards which are available in the private sector and instead have dedicated ourselves to serving the public, do so knowing that we will no longer enjoy the luxury of selecting our clients nor will we always be able to choose our area of practice. As a city attorney, you will receive a call with a liability question regarding a sewer backup, which just flooded several residents' basements with raw sewage. You explain to the Public Works Director that you will get to it as soon as you have completed your memo on an employee termination which is about to occur. And in an hour, you have a bench trial in city court on a misdemeanor no insurance ticket involving a prominent local business person who was pulled over in his Corvette. At trial, you take the time to educate the defendant as you present your case to the judge. You explain that forgetting to renew is not really a valid defense to a no insurance citation in Montana. If you present your case well, at the conclusion of the case you may find that the judge can be a very persuasive ally in this educational effort.

While these are all in a day's work for a city attorney, these are not the kinds of matters that keep you awake at night or which require you to come in on weekends and holidays to do your legal research. It is easy to be a city attorney when the matter concerns an issue that is black and white.



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For example, I recall a furious debate which erupted at City Hall more than a decade ago. A homeowner was being threatened with prosecution for harboring two pygmy goats at their residence. Their council representative was approached and was asked to carve out an exemption for the pygmy goats from the city's animal ordinance, which prohibited the keeping of "cattle, horses, mules, sheep, goats, buffalo, swine, or other predatory or game animal" within city limits.

In that case, the city attorney's role was to simply advise the council on the issue of whether state law would permit such an exemption and then to draft the appropriate language which would accomplish this goal. When city council met to consider the matter, not only did the pygmy goat lobby appear at the council meeting to speak in favor of the change, but so too did the lobby for potbellied pigs. Following an impressive presentation before the council by the proponents for the amendments, the council then hotly debated the issue. They ultimately agreed with the proponents that not only should pygmy goats be allowed in the city, but potbellied pigs too, should be exempt from the city's livestock ordinance. In the interest of political compromise, the number allowed was set at no more than two potbellied pigs or pygmy goats per city household. In addition, these critters had to be kept "as household pets," as opposed to keeping them for sustenance. After the council passed that amendment, it then became the role of the city attorney to explain to an inquisitive public why miniature horses had not been similarly exempted. You field the call and explain, "I'm sorry, ma'am. The miniature horse lobby failed to mount an effective campaign before the council." If it was your desire to be particularly helpful, you might then direct the caller to contact his or her council representative to request they consider further amendment to the ordinance.

In all seriousness, where the difficulty and art of being a city attorney comes into play is in those situations where you need to advise and sometimes "nudge" your council toward the better alternative, or at the very least, the more defensible alternative. This will arise in those cases which land on your desk where the law is unclear and is subject to equally plausible and valid legal interpretations by both sides to the controversy. It is not uncommon for a state statute to authorize a city council to exercise discretionary authority over a decision, but the final council decision itself may be political. It is in these cases that you will find that the ability to herd cats is invaluable.

Let us use development impact fees as an example. One council person can present a completely valid interpretation of the state law which governs an impact fee proposal he or she supports. Another council member who opposes that proposal can offer a completely valid interpretation which is 180 degrees opposite of that interpretation. The council may (and hopefully, will) turn to the city attorney for guidance. As you research the matter, you may be shocked to find that a council member contacts you personally in an effort to convince you that his or her interpretation of the law is the correct one and is the course you must recommend. It is doubly difficult when you realize that the council person who is attempting to convince you holds a vote on your annual office budget (for those who are full-time city attorneys) or who holds a vote on whether or not to renew your contract with the town next year, for those of you who contract to provide your town with legal services.



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In these cases it is important for the city attorney to understand who they represent. In other words, ask yourself, "Who is my client?" Under Rule 1.13(a) of the Montana Rules of Professional Conduct, the short, but not-so-simple answer is that it is the organization, or in this case, the city, which is your client. It is because the city acts through its duly elected or appointed representatives and employees that the waters become muddied. In one context, the client could be directed by the city council or by an advisory board, such as the planning board. In another context, it might be a department head that holds the discretionary authority to act on an administrative matter within the course and scope of his or her authority. While explaining to a council member that he or she is not the client can be uncomfortable, it is easier to pull off if you explain your role as city attorney as clearly as possible.

For example, there may be situations in which the city's interest will become, or may be likely to become, adverse to a council member. In those circumstances, the city attorney has a responsibility to advise the member of the conflict or potential conflict, and explain that he or she cannot represent the person in that matter and that the person may want to consider obtaining independent representation.

Once you understand that it is the city which is the client, it is the city attorney's ultimate responsibility to represent your client with competence. Rule 1.1 of the Montana Rules of Professional Conduct defines competent representation as possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In an increasingly litigious society and an ever more demanding public, meeting this responsibility means remaining abreast with changes in the laws governing municipalities. The city attorney will be called upon to render advice to ensure the council's actions fall within the bounds of the law. In this role, it is the city attorney's responsibility to advise the decision-makers on the procedural and substantive legal issues which are presented, the possible legal ramifications of the proposed courses of action, and to advise on matters which directly affect the conduct of city business. For example, the city attorney will be responsible for ensuring that the council has properly followed all public meetings and participation laws and that they have been informed of the conflict of interest laws prior to voting.

Particularly with highly-politicized decisions, after the vote there may be the tendency to identify winners and losers. The city attorney may find that he or she is the one who determines the outcome. When confronted with these difficult and occasionally emotional, political decisions the city attorney must have the courage to make a decision which might prove unpopular. This will involve more than simply saying "no" when appropriate. While you should strive to do so in private whenever possible, it will often be necessary to do so in a public meeting. In this case, it is the city attorney's role to serve his or her advisory role with diplomacy and with respect. Keep in mind that whatever is said publicly may touch on a sensitive nerve with one or more members of the council, a co-worker, or perhaps with a member of the public. But even more important, a poor choice of words could result in undermining the city's legal position should litigation ensue.

All things considered, the job of a city attorney can be quite interesting and personally rewarding. You serve in an advisory role, an educational role, an advocacy role, and in a general administrative support role.



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You routinely deal with a wide variety of legal issues to which you might not be exposed if you were employed in a specialized field in a large law firm or in a corporate legal department. You still receive the occasional call at home at 2:00 a.m. But this time, it will typically be one of your police officers on the other end of the line asking a question about a search and seizure issue or whether there is sufficient evidence to charge a suspect. On the civil side of the law, you have the ability to shape public policy to a degree that will prove beneficial to your city and to your neighbors. More importantly, you can serve a vital role in city governance by aiding its leaders with the task of complying with the law and adhering to the ethical standards required by the state and by your own ordinances.