CHARTER REVIEW COMMISSION
Municipal Building Multi-Purpose Room
201 West Gray
Norman, Oklahoma

Monday, October 14, 2019
5:30 p.m.

1. Call to Order and Roll Call

2. Consideration of approval of the Charter Review Commission meeting minutes of September 9, 2019.

3. Continued discussion and possible action of Article II, Section 1, of the City Charter to consider increasing the monthly stipend provided for the Mayor and Councilmembers.

4. Continued discussion and possible action of Article VII, Section 2, to consider whether the City Attorney should be appointed and subject to removal by the City Council.
5. Discussion of whether or not there should be consequences for violations of the City's Ethics Ordinance.

6. Miscellaneous Discussion.

7. Adjournment.

It is the policy of the City of Norman that no person or groups of persons shall on the grounds of race, color, sex, religion, national origin, place of birth, age, familial status, disability, retaliation, or genetic information, be excluded from participation in, be denied the benefits of, or otherwise subjected to discrimination in employment activities or in all programs, services, or activities administered by the City, its recipients, sub-recipients, and contractors. In the event of any comments, complaints, modifications, accommodations, alternative formats, and auxiliary aids and services regarding accessibility or inclusion, please contact the ADA Technician at 405-366-5424, Relay Service: 711. To better serve you, five (5) business days' advance notice is preferred.

ITEM 2

MINUTES

CHARTER REVIEW COMMISSION MINUTES

September 9, 2019

The Charter Review Commission met at 5:30 p.m. in the Municipal Building Multi-Purpose Room on the 9th day of September 2019, and notice and agenda of the meeting were posted in the Municipal Building at 201 West Gray and the Norman Public Library at 225 North Webster 48 hours prior to the beginning of the meeting.

CALL TO ORDER AND ROLL CALL.

PRESENT:	Ms. Aisha Ali [arrived at 6:02 p.m.] Mr. Doug Cubberley, Vice-Chairman Mr. Jim Eller Mr. Jim Griffith Mr. Tom Hackelman Mr. Kenneth McBride Mr. Kevin Pipes Mr. Richard Stawicki Mr. Bob Thompson, Chairman Mr. Bryan Vinyard
ABSENT:	Mr. Trey Bates Ms. Carol Dillingham Mr. Greg Jungman Ms. Victoria McBride Ms. Shon Williamson-Jennings
STAFF PRESENT:	Ms. Kathryn Walker, Interim City Attorney Ms. Brenda Hall, City Clerk

Item 2, being:

CONSIDERATION OF APPROVAL OF THE CHARTER REVIEW COMMISSION MEETING MINUTES OF JULY 8, 2019, AND AUGUST 12, 2019.

Member McBride moved that the minutes be approved and the filing thereof be directed, which motion was duly seconded by Member Stawicki;

Items submitted for the record

1. Charter Revision Committee minutes of July 8, 2019
2. Charter Revision Committee minutes of August 12, 2019

and the question being upon approval of the minutes and upon the subsequent directive, a vote was taken with the following result:

Item 2, continued:

YEAS:	Members Cubberley Eller, Griffith, Hackelman, McBride, Pipes, Stawicki, Vinyard and Chairman Thompson
NAYES:	None

The Chairman declared the motion carried and the minutes approved; and the filing thereof was directed.

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Item 3, being:

CONTINUED DISCUSSION AND POSSIBLE ACTION OF ARTICLE II, SECTION 1, OF THE CITY CHARTER TO CONSIDER INCREASING THE MONTHLY STIPEND PROVIDED FOR THE MAYOR AND COUNCILMEMBERS.

Interim City Attorney Kathryn Walker provided draft language for the Committee's consideration based on feedback received at the previous meeting. The language provided a range of stipend for Mayor of $8,100-$11,700 annually and a range of $5,400-$7,800 for Councilmembers.

Chairman Thompson allowed Mr. Paul Arcoli to present some information to the committee related to this topic since he was not able to so the previous meeting. Mr. Arcoli said the fixed stipend currently in place makes it difficult for hourly wage individuals to participate in City Council activities. He said the stipend should be increased and suggested the stipend recognize to a degree, the level of tenure for each Councilmember.

Committee members discussed several options; e.g., using minimum wage as a basis for pay with some type of trigger for increases, tie increases to CPI, establishing a Compensation Committee to review and make recommendations to Council for increases. Vice-Chairman Cubberley did not support automatic increases and suggested establishing a committee. Member McBride supported the creation of a Committee and tying increases to something that is not arbitrary like CPI.

Chairman Thompson said the consensus is to create the base number and create a Compensation Committee to review every three years to be effective the following term. He asked Staff to prepare draft language for the Committee's consideration at the next meeting. Ms. Walker said she would need to review using the word stipend vs. salary so that it would not create a problem of making Council City employees.

Items submitted for the record

1. Article II, Section 1 – Stipend increase for Mayor and Councilmembers including draft language for amendments

Item 4, being:

CONTINUED DISCUSSION AND POSSIBLE ACTION OF ARTICLE II, SECTION 2 OF THE CITY CHARTER TO CONSIDER WHETHER THE TERM OF OFFICE FOR COUNCILMEMBERS AND MAYOR SHOULD EXPIRE ON THE LAST TUESDAY OF THE MONTH IN WHICH A RUNOFF ELECTION IS HELD OR SCHEDULED TO BE HELD.

Ms. Walker highlighted draft language for the Committee's consideration which would change the date for Councilmember Elects to be sworn in. The language proposed would tie the effective date of the office to the Cleveland County Election Board's certification of the election results. Concern was expressed by the Committee regarding the variability of term length using this approach and Staff was asked to work on language to bring back at next meeting.

Items submitted for the record

1. Article II, Section 2– Mayor and Councilmember's Term Expiration with draft language

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Item 5, being:

CONTINUED DISCUSSION AND POSSIBLE ACTION OF ARTICLE II, SECTION 10, OF THE CITY CHARTER THAT WOULD REQUIRE A CANDIDATE FOR CITY COUNCIL TO RESIDE IN THE WARD IN WHICH HE OR SHE SEEKS ELECTION FOR A MINIMUM OF SIX MONTHS PRIOR TO FILING FOR SAID OFFICE.

Ms. Walker said the draft language requires that a Councilmember candidate reside in ward in which they seek election for six months prior to the date of the Municipal election. It also included language to address changes in ward boundaries due to reapportionment of wards within six months of the election date. That language states if a candidate's ward designation has changed in the six months prior to the election due to reapportionment, the six month residency requirement would be waived.

Members unanimously approved the language as written.

Items submitted for the record

1. Article II, Section 10 – Requiring a Person to Reside in a Ward for a Minimum of Six Months in order to be an Eligible Candidate for a Councilmember Position with draft language

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Item 6, being:

CONTINUED DISCUSSION AND POSSIBLE ACTION OF ARTICLE II, SECTION 22, OF THE CITY CHARTER TO CONSIDER ALLOWING THE OUTGOING COUNCILMEMBER CREATING THE VACANCY TO APPOINT HIS OR HER SUCCESSOR, UNLESS SUCH VACANCY HAS BEEN CREATED DUE TO REMOVAL FROM OFFICE AS A RESULT OF PROCEEDINGS BY A COURT OF COMPETENT JURISDICTION. [ALTERNATE LANGUAGE APPROVED]

Ms. Walker said at the previous meeting the Committee discussed alternate language to replace vacancies other than allowing the outgoing Councilmember creating the vacancy to appoint his or her successor. She said the Committee asked Staff to draft language that would require the use of a committee within the ward similar to the process used that past few times a vacancy occurred. She said the language requires a committee made up of five residents within the ward to make a recommendation for City Council's consideration.

Members unanimously approved the language as written.

Items submitted for the record
1. Article II, Section 22 – Filling Vacant Council Positions with draft language

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Item 7, being:

DISCUSSION REGARDING THE CONSIDERATION TO ADD LANGUAGE TO THE CHARTER RELATED TO THE APPOINTMENT AND REMOVAL OF A CITY AUDITOR THAT WOULD BE A FULL TIME EMPLOYEE OF THE CITY OF NORMAN AND APPOINTED AND SUBJECT TO REMOVAL BY THE CITY COUNCIL.

Ms. Walker said there is no specific proposed language at this time. Currently, Norman does not have a City Auditor. The change as proposed would create the position of City Auditor. The City Auditor would be a full time employee of the City of Norman who would be subject to appointment and removal by City Council. She said if it's the Committee's desire to create a City Auditor position that would serve as an "at will" employee, language would need to be added to the Charter to clarify such status. She highlighted other cities in the metro and surrounding areas. Oklahoma City was the only city that has an auditor position and that position is appointed by City Council. Stillwater has an Audit Committee that is appointed by City Council.

Committee members discussed pros and cons of this proposal. Vice-Chairman Cubberley said City Council has the ability to hire an auditor for any specific purpose and felt this position would just be adding another level of bureaucracy, which is not needed for a city the size of Norman. Member Stawicki suggested the City Controller be a Council employee. Member Eller like the notion of an internal auditor not for finances, but for practices.

After further discussion, it was unanimously approved not to create the position. No change to the Charter will move forward to City Council.

Item 8, being:

DISCUSSION OF ARTICLE VII, SECTION 2, TO CONSIDER WHETHER THE CITY ATTORNEY SHOULD BE APPOINTED AND SUBJECT TO REMOVAL BY THE CITY COUNCIL.

Ms. Walker said just like the previous item, there is no specific proposed language at this time. Currently, the City Attorney is appointed by the City Manager, subject to confirmation by the City Council. Only the City Manager can terminate the City Attorney and it must be for cause. Under this proposal, the City Attorney would become a full time employee of the City of Norman who would be subject to appointment and removal by City Council. She said if it's the Committee's desire to specify that the City Attorney would serve as an "at will" employee, language would need to be added to the Charter to clarify such status. She highlighted other cities in the metro and surrounding areas. The City Attorney in Stillwater, Oklahoma City, Edmond, and Lawton are appointed by the City Council.

Member McBride felt the City Attorney should report to the City Council. He said question becomes "who's the client – the City Council or the City Manager". He felt the attorney client relationship should be between the City Attorney and the City Council. Member Stawicki suggested the client be identified in the Charter.

Vice-Chairman Cubberley was concerned about politicizing the position. He felt the current language in Article III, Section 6, was sufficient to address these type of concerns. Chairman Thompson felt the previous City Attorney politicized himself and provided examples to the Committee. Vice-Chairman Cubberley agreed there is potential for bad advice or misconduct, but does not think this is the answer. Some felt there has been a long history of the City Attorney not being responsive and loyal to the Council.

The consensus what for staff to draft two alternatives for consideration at the next meeting - that the City Attorney is an at will employee hired and fired by the Council, and language that would maintain the City Attorney's current status as an employee of the City Manager but clarify that the Council is the client.

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Item 9, being:

Miscellaneous Discussion.

Next meeting we will discuss consequences for violations of the Ethics Ordinance.

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Item 10, being:

ADJOURNMENT.

Chairman Thompson declared the meeting adjourned at 7:15 p.m.

ITEM 3

ARTICLE II, SECTION 1
Increasing Council stipend

CHARTER REVIEW COMMISSION
October 14, 2019

Article II, Section 1 – Stipend increase for Mayor and Councilmembers.

Background:

The 2005 CRC unanimously recommended a compensation increase for the Mayor and Council members. The City Council did not elect to include the compensation increase in a municipal vote. In 2015, Article II Sec. 1's verbiage changed from "compensation" to "stipend" per the CRC's recommendation. However, the 2015 CRC did not consider changing the actual stipend amount.

The most recent proposed stipend increase appeared in the Resolution No. R-1819-66 drafted in December 2018. No specific increase amount was requested.

A chart comparing Norman's stipend amount with other cities' stipend amounts/salaries was presented to the CRC during its August 12, 2019 meeting. The Committee discussed the range of stipend amounts in other cities and there was consensus to move forward with a modest increase in a format that would simplify the payment process (instead of tracking the number of meetings attended to establish the stipend amount). The Committee asked that language be drafted to recommend a stipend between $450 - $650 per month ($5,400 - $7,800 per year) for Councilmembers and $675 - $975 per month ($8,100 - $11,700 per year) for the Mayor.

At its meeting in September, the Committee reviewed the drafted language and discussed other ways to gauge the appropriate compensation so that it would not require a Charter change every time the stipend was changed. Some suggested tying future increases to a set marker – employee wage increases, consumer price index, etc. but others expressed concerns about putting forward a structure that would guarantee a regular stipend increase without regard to overall budgetary concerns. Ultimately, the Commission appeared to reach a consensus and asked that language be drafted that requiring a Compensation Commission to be appointed and make recommendations for stipend increases every three years.

After looking at the implications of using either the term "stipend" or "salary" and whether the amount of each may impact status of the elected official as an "employee" of the City, it appears stipend is an appropriate term for these purposes regardless of the amount. A stipend is generally defined as a fixed sum of money paid periodically for services or to defray expenses. Whether it is called a stipend, wage or salary is immaterial for Internal Revenue Service purposes. Elected officials are explicitly excluded from the definition of employee in the context of the Employment Security Act. 40 O.S. s. 1-210, Federal Fair Labor Standards, 29 U.S.C.A. s.203, and the Family Medical Leave Act, 29 CFR s.825.102.

Proposed Change:

Section 1. - Elected Officers: Powers and duties; stipend.

* * * *

The Mayor shall receive an annual stipend of [$8,100 - $11,700] for his or her service per annum, payable monthly beginning with the mayoral term that begins in 2022. Each of the Councilmembers shall receive an annual stipend of [$5,400 -$7,800] per annum, payable monthly, beginning with the terms that begin in 2022. The Mayor, with the consent of Council, shall appoint a five member Compensation Commission to determine and set the appropriate monthly stipend for the Mayor and each of the Councilmembers ~~shall receive~~ based on the consumer price index, the City's overall budget, and other relevant factors every three years thereafter. Said Compensation Commission shall be appointed every three years and any monthly stipend increases approved by the Commission shall not become effective until the following Council or Mayoral (as applicable) term.~~, a stipend for their services, fifty dollars per month, plus ten dollars for each regular or special meeting attended, provided, however, that no Councilmember shall receive more than one hundred dollars total stipend for any given calendar month.~~

ITEM 4

ARTICLE VII, SECTION 2

City Attorney

CHARTER REVIEW COMMISSION
October 14, 2019

Article VII, Section 2 – Appointment and Removal of City Attorney by City Council

Background:

Appointment and removal of the City Attorney by the City Council is a novel issue for the CRC. Currently, the City Manager appoints and removes the City Attorney. The proposed change first appeared in the Resolution No. R-1819-66 drafted in December 2018.

Currently, the City Manager is the only employee of Council. The Charter sets forth the Manager's position as an at-will employee of the Council and sets forth how a City Manager may be removed or suspended. It also outlines the general and special duties and powers of the City Manager.

The Charter empowers the City Manager to "appoint and remove all directors or heads of departments and all subordinate officers and employees in such departments. Further, such appointments and removals shall be made upon the basis of merit and fitness alone, including training and experience in the work to be performed…" Article III, Section (b). Similarly, the City's Personnel Manual sets forth the causes for termination in Section 305.9. Such causes include, but are not limited to:

(a) Failure to report for work, regularly and promptly, except for causes beyond control of the employee;
(b) Failure to meet prescribed standards of work, morality and ethics to an extent that makes an employee unsuitable;
(c) Failure to comply with City rules and regulations;
(d) Failure to make a reasonable effort to perform emergency service in any position when requested to do so;
(e) Insubordination (a willful or intentional failure to obey a lawful and reasonable request of a supervisor or an action which constitutes lack of respect or harassment directed toward a supervisor);
(f) Abuse of, or actions toward or around other employees or the public, either on or off the job, which tend to disrupt the good order and efficiency of the operation of any City department, impair the morale of its employees or impair the respect of the public for the department;
(g) Horseplay, scuffling, and other acts that could have an adverse influence on the safety or well-being of other employees;
(h) Theft, destruction or misuse of City property;
(i) Unauthorized absences, abuse of leave privilege or a three (3) day absence without leave (AWOL)
(j) Acceptance of a gift, fee, money or other valuable consideration given with the intent of influencing the employee in the performance of their official duty;

(k) Improper use of authority or official position for personal profit or advantage;
(l) Use of alcoholic beverages or intoxication while on duty;
(m) Use, possession, sale, solicitation or transfer of drugs; or
(n) Controlling interest, directly or indirectly, in any contract or job for the work or for material, or supplies, or the profits thereof, or any purchase made for or sales made by, to or with the City.

Recent City Managers in Norman have had an employment contract that specifies his or her status as an at-will employee and contains severance provisions that apply if the City Manager is fired, but not for cause. The current City Manager's contract is attached for your review.

A chart comparing the status of City Attorneys/Municipal Counselors and the approval and removal process of such persons was provided to the CRC at its September 9, 2019 meeting. Discussion centered around the need for the Council to be able to select its Attorney versus the need to protect the Council's legal advice from politics. Ultimately, the CRC asked that two options be prepared for discussion at the October meeting – one option to add language to the Charter that would make the City Attorney an at-will employee of City Council, similar to the City Manager, and a second option that would make the City Attorney an at-will employee of the City Manager and clarify that the City Council is the client.

Proposed Change:

Option 1 (modeled after City Manager, Art. III, Section 1):

~~The City Attorney shall be appointed by Manager~~; ~~such appointment shall be subject to the approval of a majority of the City Council. The City Attorney may be removed by the City Manager.~~ Council shall by an affirmative vote of five (5) members appoint a City Attorney, who shall serve at the pleasure of the City Council as an at-will employee. He or she shall be chosen by the Council solely upon the basis of his or her qualifications, without regard to age, race, color, religion, ancestry, national origin, sex or place of birth, and need not, when appointed, be a resident of the City or State. No member of the Council shall, during the time for which he is elected, be chosen City Attorney, nor for two years after he ceases to be a member. In case of absence or disability of the City Attorney, the Council may designate some qualified person to perform the duties of the office during such absence or disability. The City Attorney may be removed or suspended at any time, upon an affirmative vote of five (5) members of the Council. Should at least four (4) Councilmembers desire that a majority of Council discuss removal or suspension of the City Attorney, then a notice of such a request shall be filed with the City Clerk, who shall then place an item for Executive Session for that purpose on the Agenda of the next regularly scheduled Council meeting or at a special meeting of the Council called for that purpose. In the event Council should desire to suspend or remove the City Attorney following the Executive Session, an additional item shall be included on the same Agenda of the meeting in which the Executive Session is to be held to consider immediate suspension or removal of the City Attorney. If the Council suspends or removes the City Attorney from office, the Council may provide for the temporary performance of the City Attorney's duties. The action of the Council in suspending or removing the City Attorney shall be final, it being the intention of this Charter to vest all authority and fix all responsibility for such suspension or removal in the Council.

Option 2:

The City Attorney shall be appointed by the City Manager; such appointment shall be subject to the approval of a majority of the City Council. The City Attorney ~~may be removed by the City Manager.~~ shall serve at the pleasure of the City Manager as an at-will employee and shall represent the City acting through its duly authorized constituents as provided by the Oklahoma Rules of Professional Conduct for Attorneys.

Oklahoma Statutes Citationized

Title 5. Attorneys and the State Bar

Chapter 1 - Attorneys and Counselors

Appendix 3-A - Oklahoma Rules of Professional Conduct

Article Client-Lawyer Relationship

Section Rule 1.13 - Organization as Client

Cite as: O.S. §, __ __

Oklahoma Rules of Professional Conduct
Chapter 1, App. 3-A
Client-Lawyer Relationship

Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interests of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if:

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however that when the lawyer knows that the organization is likely to be substantially injured by the action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter or advise that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information

only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances 1.2 (d) may also be applicable, in which event, withdrawal from the representation under 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for the public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal office or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Amended by order of the Supreme Court, 2007 OK 22; effective January 1, 2008. (superseded document available)

The Professional and Ethical Obligations of Municipal Attorneys

BY: JOHN C. GILLESPIE, *Parker McCay P.A., Mount Laurel, New Jersey*

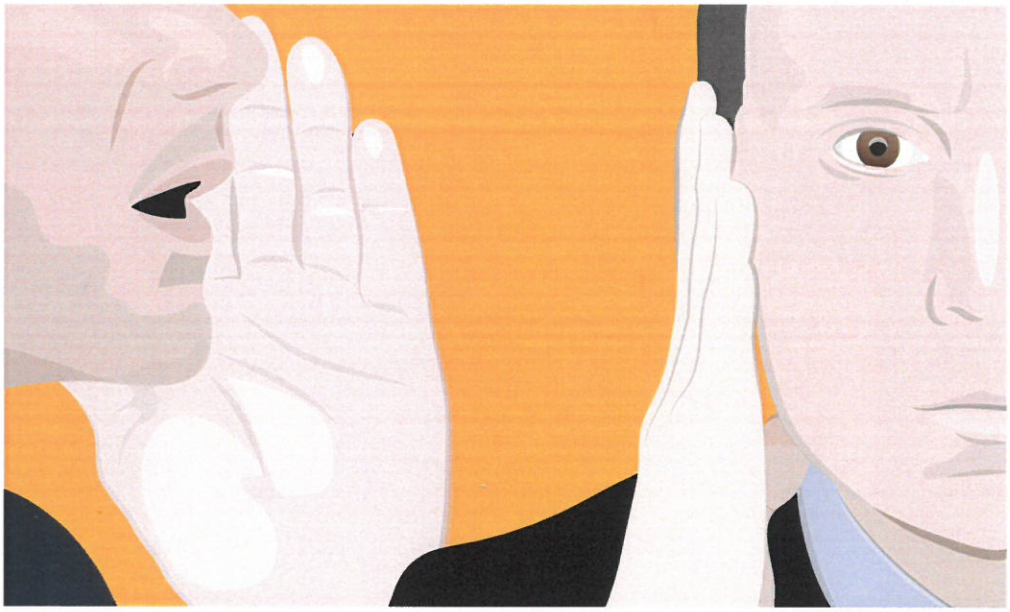

ILLUSTRATION: TRUJILLO DESIGN

Introduction

Not every issue that municipal lawyers confront will require an extensive analysis of ethical principles, but it is critical that we understand those duties and rigorously discharge them. This article is intended to review certain of those responsibilities. It cites New Jersey precedents and the New Jersey Rules of Professional Conduct, which closely follow the ABA Model Rules and should therefore be useful for most readers.

I. Municipal Attorneys – Who is our client?

How often are municipal attorneys asked by individual members of a governing body to provide them with advice on certain matters relating to the performance of their duties (or even matters falling outside the scope of their duties), and they say to us, "Now this is privileged, right?" The answer, of course, is that conversations with individual elected officials do not always fall within the attorney-client privilege. Because underlying that question is the assumption that each member of the governing body is also individually our client. That is, in fact, not the case. N.J.S.A. 40A:9-139 provides:

> In every municipality the governing body, by ordinance, shall provide for the appointment of a municipal attorney who may be designated as the corporation counsel or municipal attorney...

By statute, then, the attorney for the municipality is just that: the attorney for the municipality. He or she is not, by virtue of that status, also separately the attorney for each individual member of the governing body. A municipality is a municipal corporate body politic. N.J.S.A. 40:43-1. The governing body of a municipality is "the board or body having control over the subject matter in connection with which the term is used, and having the power and authority to legislate thereon..." N.J.S.A. 40:42-2. The distinction between representation of the governing body, and "being the attorney for the members of same." is important. It relates not only to defining the scope and duties of the statutory position of municipal attorney, but implicates other issues such as the application of the attorney-client privilege; disclosure obligations; recusal from certain matters, and the like.

The New Jersey Advisory Committee on Professional Ethics issued Opinion No. 655 on December 9, 1991. It wrote:

> It is well recognized that in carrying out his official duties, a municipal attorney represents the collective governing body and not the individual members. This is based upon R.P.C. 1.13(a) which states that a lawyer representing any organization represents the collective organization as distinct from directors, officers, employees, members and the like.

New Jersey R.P.C. 1.13(a) actually says:

> A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other

> constituents. For purposes of R.P.C. 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entities, but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that 'significant involvement' requires involvement greater, and other than, the supplying of factual information or data respecting the matter...

Under this Rule, the municipal attorney's duties are to the organization, and not to its individual "directors, officers, employees, members, shareholders or other constituents." The Model Rules do not include the language describing the "control group." Instead, the Model Rules simply encourage lawyers to make clear to an organization's directors, employees, members, shareholders, or other constituents, that when the organization's interests may be adverse to that individual, the lawyer's duty is to the client organization only.

Nevertheless, in the course of representing a public entity, as with any other corporation, the corporate attorney is often asked to give advice to individual governing body members, the manager/administrator, assessor, clerk, department heads, and staff. To the extent that they relate to the activities of the governing body, this advice would appear to be equally privileged, as those corporate officers would certainly fall within the entity's "control group." New Jersey R.P.C. 1.13(a); see also M.R.P.C. 4.2, 4.3; *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), (where the United States Supreme Court recognized that middle level and lower level employees often have the relevant information needed by corporate counsel if (s)he is to adequately advise the client with respect to potential difficulties); and, New Jersey Evidence Rule 504(3)[11] (and N.J.S.A. 2A:84A-20), which provides:

> As used in this Rule a 'client' means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyers representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity...A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

Therefore, communications by such employees to corporate counsel are covered by the privilege. In contrast, Model Rule 1.13 does not include the language describing the "control group." Instead, the Model Rules leave the difficult issue of privilege for each state to decide, while encouraging lawyers to make clear to an organization's directors, employees, members, shareholders, or other constituents, that the organization itself, and not that individual, is the client. That, of course, is necessary and appropriate, because the client remains the municipal corporation. (This is not to say, however, that a municipal attorney cannot represent individual members of the governing body in matters not relating to municipal business. The municipal attorney can, for example, represent individual governing body members with regard to personal Wills and Estate issues, corporate matters in which the member of the governing body is a shareholder or member of a limited liability company, etc. Obviously, in such cases, the representation/relationship must be disclosed to the other members of the governing body; and it is suggested that the member who is represented by the municipal attorney, should not vote on the Municipal Attorney's appointment or re-appointment, payment of her/his bills, etc.)

The distinction between the municipal attorney's obligations to represent the municipal corporation, as opposed to individual members of the governing body, is underscored where issues arise that suggest some form of impropriety or misconduct by an individual member of the governing body.

The distinction between the municipal attorney's obligations to represent the municipal corporation, as opposed to individual members of the governing body, is underscored where issues arise that suggest some form of impropriety or misconduct by an individual member of the governing body. In *Bell Atlantic Corp. v. Bulger*, 2 F.3d 1304 (3d Cir. 1993), the court was confronted with an allegation of a conflict-of-interest of a law firm representing Bell Atlantic Corp., and certain individual defendants. The Circuit looked to the commentary under the Model Rules of Professional Conduct, R. 1.13(a), upon which New Jersey's R.P.C. 1.13 is based. The court wrote:

> We look to the Model Rules of Professional Conduct to furnish the appropriate ethical standard (cit. om.) Under R. 1.13(a), a lawyer's obligation runs to the entity. The commentary to R. 1.13 provides:
>
> > The question can arise whether counsel for the organization may defend [a derivative]

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> action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those instances, R. 1.7 governs who should represent the directors and the organization.
>
> We believe serious charges of wrongdoing have not been levelled against the individual defendants... There are no allegations of self-dealing, stealing, fraud, intentional misconduct, conflicts of interest, or usurpation of corporate opportunities by defendant directors...
>
> We have no hesitation in holding that - - except in patently frivolous cases - - allegations of directors' fraud, intentional misconduct or self-dealing require separate counsel. We recognize that corporate law has traditionally distinguished between breach of the duty of care and breach of the duty of loyalty, the latter being more great...[12]

In this regard, in the municipal context, Opinion 526 of the New Jersey Advisory Committee on Professional Ethic [113 N.J.L.J. 383 (April 5, 1984)] is instructive. The question posed in Opinion 526 arose where "an insurer filed suit against the municipality joining certain officials of that public body in a claim that the defendants made willful misrepresentations and committed fraud in seeking indemnity in excess of its lawsuit entitlement under contract." The Committee concluded that:

> The duty of the municipal attorney includes the need to exercise his professional judgment on behalf of his public body free from and independent of any interest or bias he may have for or against municipal officials with whom he or she is in continual day-to-day contact on the regular affairs of that municipality. If the professional contact with the co-defendant official is substantial and continuing, special counsel should be engaged to defend the municipality.

When that elected official asks you, "Now this is privileged, right?" the answer needs to be "Well, it depends"; but also caution that person: "Since I represent the public body as a corporation, what you tell me may be privileged as to the corporation, but it's not privileged in that I may have an obligation to tell the other members of the governing body what you are about to tell me. So think about that before you begin this confession!"

II. Privileged versus Public Communications

It is settled that the attorney-client privilege applies to public entities as well as private corporations.[13] In the public sector, however, not every written communication will be protected from disclosure by the privilege.

New Jersey statutory law defines "government record" or "record" to mean:

> Any paper, written or printed book, document, drawing, map...or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commissioner, agency or authority of the state or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commissioner, agency, or authority of the state or of any political subdivision thereof, including subordinate boards thereof...
>
> The terms shall not include inter-agency or intra-agency advisory, consultative or deliberative material.[14]

There is specifically exempted under the statute, however, "any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege. . . ."[15]

In New Jersey, as in many states, municipal attorneys are "government officers."[16] Since our public entity clients, and their elected and appointed officials, "receive" our communications, the communications are public records. The question, of course, is whether the attorney-client privilege exempts them from disclosure.

In determining whether a communication falls within the privilege, courts generally engage in a balancing test. Courts recognize that the attorney-client privilege is "limited to communications made to the attorney in his professional capacity."[17] In a New Jersey case, a plaintiff, who sued her employer under the State Law Against Discrimination, sought the results of an investigation into her pre-litigation claims, which investigation involved in-house counsel for the New Jersey Turnpike Authority. The Turnpike Authority asserted the attorney-client privilege and refused to release the report. The court wrote:

> Defendant maintains that the attorney-client privilege protects the entire investigatory process because attorneys employed by defendant participated in the investigation. We disagree with that blanket contention... While an organizational corporation like Defendant can be a 'client' for purposes of the privilege, NJRE 504(3), a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essential non-legal duties. An attorney who is not performing legal services or providing legal advice in some form does

not qualify as a 'lawyer' for purpose of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable. That result obtains even where litigation may eventually arise from the subject of the attorney's activities.
The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegations of sexual harassment. If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was to simply enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.[8]

Accordingly, if the nature of the lawyer's activities are not specifically related to the practice of law but involve some other assignment which, while presumably relying upon the attorney's general skill set, is not necessarily construed as "giving legal advice," any communications arising from same may not be protected by the privilege; and absent some other exception, could be subject to discovery and/or dissemination.

How are general communications from the municipal attorney to the municipal client treated, vis-a-vis, legal opinions? Often, we mark them "Personal & Confidential: Attorney-Client Privilege," because they do indeed constitute pure legal advice. However, it is often to the governing body's benefit to make that advice known to the public. Keeping in mind that the privilege is always waivable by the client, the governing body, as a whole (and not through any one of its individual members acting unilaterally), can vote to make the opinion/advice public.

[I]f the nature of the lawyer's activities are not specifically related to the practice of law but involve some other assignment which, while presumably relying upon the attorney's general skill set, is not necessarily construed as "giving legal advice," any communications arising from same may not be protected by the privilege; and absent some other exception, could be subject to discovery and/or dissemination.

Closed Session Minutes. The New Jersey Open Public Meetings Act[9] has two sections that come into play in this discussion of "public v. private" communications in the field of local government law. N.J.S.A. 10:4-12 requires all meetings of public bodies to be open to the public at all times. However, it provides a number of exceptions including the following:

> 10:4-12(b). A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (7) any pending or anticipated litigation or contract negotiation other than in subsection b.4 herein in which the public body is or may become a party.
>
> Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

N.J.S.A. 10:4-14 requires that:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12(b)(7)].

Accordingly, the question arises as to when and under what circumstances, can minutes of closed sessions, where the attorney-client privilege was invoked as the reason for going into closed session, be released. First, as indicated in § 10:4-12(b)(7), the matter falling within the attorney-client privilege can be discussed in closed session "to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." Thus, in the simple situation where we are often asked to give an opinion in public, and there is no particular confidentiality, privacy interest, or other reason not to give it publicly, we generally do so. However, there is often advice that we want to give to the governing body that we do not want to share with the general public. The courts have recognized this need:

> Although New Jersey has a notably strong public policy in favor of open government as evidenced by the Open Public Meetings Act, N.J.S.A. 10:4-6 to —21, and the Right to Know Law, N.J.S.A. 47:1A-1 to -4, the public's right of inspection is not unlimited....Thus, the Legislature recognized that matters falling within the privilege should be free from public review notwithstanding that a government entity is a client and despite the strong public policy favoring maximum access to government deliberations.[10]

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With regard to closed session minutes, the court in the Turnpike Authority decision referenced above stated:

> If a communication is covered by the privilege, then the public body may legitimately meet with its attorney in closed session. The minutes, part or all of which may constitute work product, then may be appropriately suppressed or redacted.[11]

The question then becomes: at what point do the minutes become subject to disclosure at a later date, after the matter is concluded? And, how long are you allowed to keep closed session minutes "closed"? The *Press v. Ocean County Joint Insurance Fund* court addressed these as well:

> The Court should also consider whether the requested documents pertain to pending or closed cases as the need for confidentiality is greater in pending matters. (Citing to Keddie v. Rutgers, 148 N.J. 36, 54 (1954). Nevertheless, 'even in closed cases...attorney work product and documents containing legal strategies may be entitled to protection from disclosure.' Id. The attorney-client privilege 'recognizes' that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system... Moreover, there is a manifest potential for chilling the free flow of communications between attorney and client, if strategy, advice and evaluation are to be disclosed even upon the conclusion of cases. The possibility that settlements will be inhibited is clear. Feared disclosure of such privileged communications, even after the case is completed, could severely restrict a public entity's willingness to resolve litigation by settlement. That prospect contravenes the strong judicial policy favoring consensual resolution. The public interest in rapid and cost-efficient disposition of claims against government bodies, as well as the fundamental fairness of adjusting claimant's rights fairly and promptly, argues for the protection of that portion of the process that is most critical in accomplishing those goals.[12]

Similarly, this analysis should be applied not just to the settlement of lawsuits, but to negotiations regarding, for example: contracts with unions, so that the strategies, which likely will be the same in three years after the current contract expires, are not disclosed to the union; negotiations leading to an agreement to acquire real estate (you never want the seller of the property to know that you were really willing to pay more!); and similar matters that require full candor. Therefore, non-disclosure of the advice by an attorney to his/her clients, and of the client's questions and implementation of those strategies, is advisable.

III. Whistleblowing: The Duty to Report?

M.R.P.C. 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may13 reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime of fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) to comply with other law or a court order; or
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

N.J.S.A. 2A:84A-20(1) and Evidence Rule 504 both provide:

> Subject to Rule 530 and as except as otherwise provided by paragraph

> 2 of this Rule, communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has privilege (a) to refuse to disclose any such communication and (b) to prevent his lawyer from disclosing it...

Finally, M.R.P.C. 1.4 provides:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The question presented is, what do you do when a member of the governing body, or, for example, the Township Manager or Administrator, or Municipal Clerk confides in you as the municipal attorney, that he or she has done something which may well be contrary to the interests of the municipality, and/or create an adverse relationship between that person and the Township? This, again, invites the recognition that the client of a municipal attorney is the municipality, and that while the individual officials may enjoy some claim of nondisclosure through the attorney-client privilege, none of them are "the client." A municipal attorney's obligation remains to the client: the municipality. Accordingly, if an individual member of the governing body, or a member of its "control group" brings such information to the municipal attorney, it appears clear that the municipal attorney has the obligation to keep his client informed to the "extent reasonably necessary to permit the client to make informed decisions regarding the representation." M.R.P.C. 1.4(b).

Caselaw also offers guidance:

> This appeal concerns the conflict between two fundamental obligations of lawyers: the duty of confidentiality, Rules of Professional Conduct (R.P.C. 1.6(a), and the duty to inform clients of material facts, R.P.C. 1.4(b)...Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation. Thus, R.P.C. 1.6(a) states that 'a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized and ordered to carry out the representations.' Generally, 'the principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication.' (*citation omitted).* "A lawyer's obligation to communicate to one client all information needed to make an informed decision qualifies the firm's duty to maintain the confidentiality of a co-client's information. R.P.C. 1.4(b), which reflects a lawyer's duty to keep clients informed, requires that 'a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.' See, also Gautam v. DeLuca, 215 N.J. Super. 338, 397 (App. Div. 1987) (stating that an attorney has continuing duty to 'inform his client promptly of any information important to him'); Passanate v. Yormark, 138 N.J. Super. 233, 238 (App. Div. 1975) (attorney's duty 'includes the obligation of informing his client promptly of any known information important to him')...[14]

Accordingly, the municipal attorney is under an obligation to report to the governing body, matters brought to his or her attention, which would be important for the governing body to know in the furtherance of its duties on behalf of the municipal corporation. Presumably, if the information brought to the municipal attorney relates to some proposed act of a criminal or fraudulent nature, then the attorney would be allowed under M.R.P.C. 1.6(b), and obligated under the New Jersey Rules, to disclose that information to "the appropriate authorities."

IV. Representing Clients After Public Service

In New Jersey, most municipal attorneys maintain separate, private law practices, and generally do not devote full time to their position as municipal attorney. Obvious exceptions, of course, are found in the Cities of Newark, Jersey City, Trenton, Atlantic City, Camden and other major municipalities. While all municipal attorneys are considered "local government officers" (because N.J.S.A. 40A:9-139 creates the required position of "municipal attorney," and because Attorney General Opinion 91-0092, says so), most are appointed under New Jersey's Local Public Contracts Law, N.J.S.A. 40A:11-5, through the award of a "professional service" agreement. Under either scenario, however, one's tenure as a municipal attorney is not always long in duration. Given the nature of the position as a political appointment, "things often change." As a consequence "former municipal attorneys" are often sought by private clients to represent their interests "in front of," or against, the attorney's former client/employer. The question, of course, is whether an attorney who previously, and perhaps even "recently" served as a municipal attorney, can represent private clients in matters adverse to that public entity's interests; and, if so, under what circumstances may (s)he do so.

Under many state statutes, employees of state departments are required to wait a period of time, often one year, before taking employment that requires them to appear before, submit applications to,

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or act on behalf of clients on front of, the department in which they were previously employed.

No such specific statutory proscription applies to New Jersey's municipal attorneys. There is, however, helpful guidance available.

M.R.P.C. 1.9(a) provides that: "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing."

On the other hand, the New Jersey rules state that: "[a] public entity cannot consent to representation otherwise prohibited by this Rule." R.P.C. 1.9(d). The Model Rules do not have a corresponding exception.

M.R.P.C. 1.11, entitled "Successive Government and Private Employment", provides, in pertinent part:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
>
> (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
>
> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
>
> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
>
> (1) is subject to Rules 1.7 and 1.9; and
> (2) shall not:
> (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
> (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
>
> (e) As used in this Rule, the term "matter" includes:
>
> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

M.R.P.C. 1.11(d) is simply the reverse of the above sections, and relates to an attorney now serving in the public sector, who was previously in private practice.

An application to disqualify an attorney under M.R.P.C. 1.9, or its state equivalent, requires a Court "to balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel."[15] However, in finding that balance, Courts must consider that "a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement."[16]

The burden of proof is upon[17] the former client seeking to disqualify the attorney from representing the new client. As the New Jersey Supreme Court held in *City of Atlantic City v. Trupos*, 201 N.J. 447 (2009), if that burden of production, or of going forward is met, the burden then shifts to the attorney sought to be disqualified to demonstrate that the matter or matters in which he represented the former client were not the same or substantially related to the controversy in which the disqualification motion is brought. "That said, the burden of

persuasion on all elements under R.P.C, 1.9(a) remains with the moving party, as it `bears the burden of proving that disqualification is justified."[18]

In *Trupos*, the Court fairly well ignored R.P.C. 1.11, focusing instead, on that clause of 1.11(a) which provides: ". . . and subject to R.P.C. 1.9. . . ." The *Trupos* court recognized its 2004 elimination of "the appearance of impropriety" standard in evaluating claims of attorney conflicts, and focused on the specific R.P.C.'s. It phrased the question before it as follows:

> In the shifting of allegiances that arises when lawyers `change sides' in their representation of new clients, the confidences of prior clients must be preserved. The propriety of a lawyer representing a current client adverse to the interests of a former client generates attention - between fealty to a former client and zealousness in favor of a current client - - that this court must address.[19]

In *Trupos*, the former city attorney had been retained to represent a number of taxpayers in tax appeals against the City of Atlantic City. The City urged that the attorney was privy to its confidential strategies regarding the defense and settlement of tax appeals, and therefore should not be permitted to represent the taxpayers against the City of Atlantic City, a mere year after leaving the City's employ. It sought to disqualify him from representing those taxpayers.

The court analyzed the matter under R.P.C. 1.9:

> The presence of two of the three necessary predicates to the application of R.P.C. 1.9(a)'s disqualification bar [which are] not in dispute: the law firm formerly represented plaintiff, and the interest of the law firm's clients in the 2009 tax appeals are materially adverse to plaintiff's interests in those appeals. Therefore, the only substantive open question remaining in this appeal is whether the 2006 — 2007 tax appeals - - where the law firm represented plaintiff - - and the 2009 tax appeals - - where the law firm sought to represent taxpayers adverse to the plaintiff - - are 'the same or substantially related matters.'

That inquiry must start from the now well established principle that whether the matters are the 'same or substantially related' must be based in fact, as we have rejected the appearance of impropriety as a factor to be considered in determining whether a prohibited conflict-of-interest exists under R.P.C.1.9.[20]

The New Jersey Supreme Court ultimately concluded that there were no confidential communications that the City had shared with the law firm that could or might be used against the City in the law firm's prosecution of tax appeals on behalf of the taxpayers; that there was no proof that the facts of the prior representation were relevant or material to the subsequent tax appeals three years later; and that, therefore, while there might be a "purely superficial similarity" involved in all of these tax appeals, they were not "the same or substantially related matters."

Trupos is great reading for municipal attorneys who are seeking to return to private practice, and specifically, who are asked to undertake matters adverse to their former public entity clients. As can be seen from *Trupos*, the determination is fact sensitive, and not subject to any general proscription.

CONCLUSION

The foregoing is a subset of the many ethical complexities facing local government lawyers. While a complete analysis of the subject would be a significant undertaking, it is hoped that the issues discussed here provide greater clarity and promote the professional excellence to which we aspire.

NOTES

1. F.R.E. 501 states: ". . . in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." A note clarifies that the rule is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). 2. Bell Atlantic Corp. v. Bulger, 3 F.2d at 1316, 1317.
3. See e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 621 (D.D.C. 1979); Detroit Screwmatic Co. v. United States, 49 F.R.D. 77 (S.D.N.Y. 1970); United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1963).
4. N.J.S.A. 47:1A-1.
5. *Id.*
6. *See* New Jersey Attorney General Op. 91-2009, "Municipal Attorneys as 'Local Government Officers' Pursuant to the Local Government Ethics Law," Sept. 20, 1991.
7. In re: Teleglobe Communications Corp., 493 F.3d 345, 359 (3d Cir. 2007); Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).
8. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-551 (1997).
9. Each state has an analogue to the NJ Open Public Meetings Act. Of course, there is variation in the specific requirements of each state's sunshine law. The following website contains summaries and links to each state's open meeting statute: https://ballotpedia.org/State_open_meetings_laws.
10. Press v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 490-91 (Law Div. 2001).
11. *Payton, supra* note 8, at 558.
12. *Press, supra* note 10, at 391-392.
13. The New Jersey Rules of Professional Conduct, like many states, differs from the M.P.C. requiring disclosure by using the word *shall* in this rule.
14. A v. B 158, N.J. 51, 14-15 (1999).
15. Dewey v. R.J. Reynolds Tobacco Co, 109 N.J. 201, 218 (1988); Silver Chrysler, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975); Hughes v. Paine, Webber, Jackson & Curtis Inc., 565 F. Supp. 663, 667 (N.D. Ill. 1983).
16. .*Dewey supra* note 15, at 218.
17. *Id.* at 221-222
18. City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2009) (*citing to* N.J. Division of Youth and Family Services v. V.J., 386 N.J. Super. 71, 75 (Ch. Div. 2004)).
19. *Id.* at 450-451.
20. *Id.*

ITEM 5

ETHICS VIOLATIONS

CHARTER REVIEW COMMISSION
October 14, 2019

Article __, Section _ – Consequences for Violations of the Ethics Ordinance

Background:

On April 12, 2009, the City Council adopted the City of Norman Ethics Policy for City Council, Boards, Commissions and Committees of the City of Norman by Resolution. This policy continues to be used to guide decisions related to ethical dilemmas on Norman Boards, Commissions and Committees. In 2011, the Council adopted Ordinance O-1112-5, which formerly codified much of the Ethics Policy as applicable to City Councilmembers in Section 2-103 of the Code. Among other things, the Ethics Ordinance requires that Councilmembers refrain from participating in discussion and votes on items in which they have a pecuniary interest (expectation of a financial benefit, detriment or employment consequence) or actual conflict (items in which the official holds a direct benefit, detriment or employment consequence) related to the action or decision. Additionally, Councilmembers must disclose potential conflicts prior to participating in the discussion and vote on an item where he or she might have an indirect benefit, detriment or employment consequence that could call into question his or her objectivity or independence. The City Attorney's role as set forth in the Ethics Ordinance is to answer questions and provide opinions related to possible ethics violations. There is no penalty outlined in the ordinance for violations. The resolution establishing the CRC asked that the CRC consider adding language to the Charter that would establish consequences for violations of Section 2-103 of the Code. A copy of the ordinance is attached for your review.

A chart comparing Norman's ethics ordinance with approaches in other cities is attached for the CRC's review. The cities cited on the chart are all cities in Oklahoma that are of similar size, population, and proximity to metropolitan areas.

Proposed Change:

There is no specific proposed language at this time.

PENALTIES FOR ETHICS VIOLATIONS IN OTHER CITIES

City	Ethics Section	Penalty for Ethics Section Violation	Penalty for Bribery / Passing or Accepting Favors	Conflict of Interest
Norman (Current)	Sec. 2-103 of City Code	None	Violations handled according to state law (See Section 2-103 of Charter)	Violations handled according to state law (See Section 2-103 of Charter)
Stillwater	N/A	N/A	Potential grounds for recall of elected official (See Section 8-2 of City Code)	Potential grounds for recall of elected official (See Section 8-2 of City Code)
Oklahoma City	Art. IV of Charter	Violations handled according to state law Art. IV Sec. 11	Violations are grounds for removal / handled according to state law (See Art. IV Sec. 10& 12)	Contract or purchase order is void Violation of ethical standards (Art. V Div. 1 Sec. 2-255)
Edmond	N/A	N/A	Potential grounds for removal from office See Art. IX Section 34 of Charter	Potential grounds for removal from office See Art. IX Section 34 of Charter
Midwest City	Sec. 2-17 of City Code	Violations shall be a misdemeanor punishable upon conviction by a $500 fine. Any person convicted of a violation shall immediately be removed from office and shall forever be disqualified from filing for or holding a city elective office.	"	"
Tulsa	Title 12 Chapter 6 of Charter	Intentional violation is grounds for disciplinary action up to and including dismissal or removal from office	"	"
Lawton	N/A	N/A	Grounds for removal from office (Article XV Section 64 of City Code)	Forfeit of office upon conviction (Section C-8-14 of Charter)

Sec. 2-103. - Council ethics.

(a) Members of the Council shall refrain from:

(1) Making use of special knowledge or information obtained from their position before that knowledge or information is made available to the general public;

(2) Making decisions in which a Councilmember has a pecuniary interest or actual conflict as defined herein;

(3) Using their influence as Councilmembers in attempts to secure contracts, zoning, or other favorable municipal action for a person or entity with whom a Councilmember has a pecuniary interest or actual conflict as defined herein;

(4) Actions benefiting special interest groups at the expense of the City;

(5) Appointments of persons with whom a Councilmember has a pecuniary interest or actual conflict, as defined herein, to appointive boards and commissions;

(6) Willful violations of Section 2-103;

(7) Conflict of interest.

a. In order to assure independence and impartiality on behalf of the common good, no elected City Official shall use his official position to influence government decisions in which he has a pecuniary interest or in which he has an organizational responsibility that may give the appearance of a conflict of interest.

b. Violations of the conflict of interest provisions set forth herein shall be handled in a manner consistent with the City Charter and applicable state law.

c. Violations of the conflict of interest provisions set forth herein shall be handled in a manner consistent with the City Charter and applicable state law.

(b) Members of the Council shall:

(1) Conduct themselves so as to bring credit upon the City, setting an example of good, ethical conduct for all citizens of the community;

(2) Comply with all lawful actions, directives and orders of duly constituted municipal officers as such may be issued in the normal and lawful discharge of their duties; and

(3) Insuring within their power, the equal and impartial enforcement of all laws, without respect to race, creed, color, sex, or the economic or social position of individual citizens.

(c) Definitions.

(1) *Actual conflict:* A set of circumstances wherein an elected City Official would be required to take an action or make a decision regarding a cause, proceeding, application or any other matter where he or she holds a direct benefit, detriment, or employment consequence.

(2) *Benefit, detriment, or employment consequence:* A benefit, detriment, or employment consequence to:

a. The public official;

b. A member of his or her immediate family; or

c. A business or organization in which the official has a pecuniary interest or actual conflict as defined herein.

(3) *Confidential information:* Privileged statements or communications, whether expressed or implied, oral or written, between an elected City Official, City of Norman employees, and the City Attorney; work product of the City Attorney's office; and City of Norman records, documents, and other information not subject to public disclosure and dissemination by law.

(4) *De minimis:* A pecuniary benefit that does not exceed the value of one hundred dollars ($100.00) incidental to personal, professional, or business contacts and involving no substantial risk or undermining official impartiality.

(5) *Elected City Official:* The Mayor and any member of City Council.

(6) *Gift:* The transfer of anything of economic value, regardless of the form, without adequate and lawful consideration. The term "gift" does not include the solicitation, acceptance, receipt or regulation of political campaign contributions regulated in accordance with the laws of the State of Oklahoma.

(7) *Pecuniary interest:* The expectation of a financial benefit, detriment or employment consequence. This also includes any pecuniary interest of a member of the official's immediate family. A person has a pecuniary interest in an organization in which that person has a five (5) percent ownership interest or greater or valued over twenty thousand dollars ($20,000.00). A person has a pecuniary interest in a decision if a financial interest of that person will vary with the outcome of the decision. This includes officials with real property interests abutting a subject property.

(8) *Potential conflict:* A set of circumstances wherein an elected City Official would be required to take an action or make a decision regarding a cause, proceeding, application or any other matter where he or she may have an indirect benefit, detriment, or employment consequence; this type of situation calls into question the official's objectivity or independence, but the effect of this type of conflict is not certain.

(d) Conflict of interest.

(1) *Pecuniary interest or actual conflict.* An elected City Official shall not participate in any official action if he or she has a pecuniary interest or an actual conflict. Prior to the beginning of discussion on the issue, the elected City Official shall disclose his or her pecuniary interest or actual conflict. Then, the elected City Official shall not participate in either the vote or the discussion relating to the issue. City of Norman Code Section 2-108 requires that any Councilmember barred from voting must leave his or her Council chair and shall not participate during the debate of such item.

(2) *Potential conflict.* If the elected City Official has a potential conflict, that elected City Official may engage in both the vote and discussion, but the potential conflict must be disclosed prior to participation.

(3) *Exceptions.*

a. If the elected City Official's financial interests are included within a whole class of citizens, such as property taxpayers, an exception is made to allow the official to vote. This only applies in case of votes or decisions in which the elected City Official has a personal interest or pecuniary interest no greater than that of other persons generally affected by the decision, such as adopting a bylaw or setting a tax rate.

b. If an elected City Official discloses an actual conflict on the record, that elected City Official shall disqualify himself or herself from participating in any decision or vote relating thereto, unless following such a disclosure, a majority of the remaining members of Council, determine by official action at a public meeting, that such conflict of interest is de minimis.

(4) *Discovery of conflict.* The existence of an ethical issue often does not arise until a meeting is underway. Rather than risk an inadvertent violation, the safest course of action is simply to declare that a conflict of interest may exist that prevents an elected City Official from participating. As soon as an elected City Official realizes that a conflict of interest exists on a given matter, he or she must disclose the conflicting of interest on the record for the minutes.

(e) Duty to report. Elected City Officials have a duty to report in accordance with state law. Moreover, elected City Officials should never attempt to use their authority or influence for the purposes of intimidating, threatening, coercing, commanding, or influencing any person with the intent of interfering with that person's duty to disclose such improper activity. If an elected City Official

believes that another elected City Official or citizen may have violated this policy, he or she may consult with the City Attorney's office.

(f) Gifts. Gifts must be refused or returned with a friendly but firm message that elected City Officials are not allowed to receive gifts.

(1) Oklahoma Statute Title 21, § 382 makes it a crime for any municipal officer or any employee of a political subdivision to corruptly accept or request a gift or gratuity, or a promise to make a gift, or a promise to do an act beneficial to such officer. If this happens, the officer or employee shall forfeit his office, be forever disqualified to hold any public office, trust, or appointment under the laws of the State of Oklahoma, and be guilty of a felony punishable by imprisonment not exceeding ten (10) years or by a fine not exceeding five thousand dollars ($5,000.00) and imprisonment for not more than one (1) year.

(2) In addition, Article XVII, Section 5 of the Charter of the City of Norman, makes it unlawful for any officer of the City of Norman to directly or indirectly give, or promise to give, any person any office, position, employment, or anything of value for the purpose of influencing or obtaining support, political or otherwise, aid, or influence of any person. Engaging in any of these activities is grounds for removal from office.

(3) A de minimis personal gift, lunch, or entertainment under one hundred dollars ($100.00) is permissible if given without the intent to influence. The ethical principle is that officials obtain no personal gain from performance of their duties except official compensation and the satisfaction of a job well done.

(g) Use or disclosure of confidential information. Elected City Officials are prohibited from disclosing or offering to disclose confidential information to any party not entitled to receive such information nor shall he or she use such information for his or her personal gain or benefit. City of Norman Code Section 2-103 prevents Councilmembers from making use of special knowledge or information obtained from their position before that knowledge or information is made available to the public.

(h) Role of the City Attorney.

(1) Questions about the City of Norman Council Ethics contained herein, a conflict of interest, or other ethical problems related to the business of the City of Norman, should be presented to the Norman City Attorney's office. If time permits, requests should be in writing to the City Attorney directly. The City Attorney may consult with outside legal counsel to adequately and timely research specific requests for legal advice on particular issues. Reliance on opinions of a private attorney or attorneys for matters related to the business of the City of Norman may not preserve immunity protections afforded City Councilmembers by state law.

(2) For ethical or otherwise personal issues not related to the business of the City of Norman, any elected City Official may, at any time, seek the counsel, at their expense, of a private attorney or attorneys in regard to those personal legal or ethical issues that may arise.

(Ord. No. 0-7475-35; Ord. No. 0-1112-05, § 1; Ord. No. 0-1718-54, § 1)

COMPLETED

CHARTER REVIEW COMMISSION
October 14, 2019

Article II, Section 2 – Mayor and Councilmember's Term Expiration.

Background:

Prior to 2003, the terms of the Mayor and Councilmembers expired "at the time fixed for the last regular meeting of the Council in April". In 2003, voters approved the current language that sets the expiration of mayoral and councilmember terms on the first Tuesday of July.

A chart comparing Norman's current term expiration date with other cities' term expiration date was provided to the CRC at its August 12, 2019 meeting. The Committee discussed the potential for a lengthy period of time between election and officially seating the newly elected member and expressed a desire to reduce this time. The Committee liked the approach used in Stillwater, where seating newly elected officials is tied to the certification of the election results.

During the September meeting, the CRC reviewed proposed language and expressed concerns about the term of office not being exactly two years as set forth in the existing Charter language. The language below has been modified to reflect a two-year cycle for Councilmember elections and a three-year cycle for Mayoral elections.

Proposed Change:

Section 2. - Term of office.

~~The term of Councilmembers shall be for a period of two years.~~ Elections for Councilmembers shall occur every two years, with the odd-numbered ward elections occurring in odd years and the even-numbered ward elections occurring in even years. The terms of Councilmembers chosen to represent Council wards two (2), four (4), six (6), and eight (8) shall ~~expire~~ begin during even-numbered years at six-thirty in the evening (6:30pm) on the first Tuesday following certification of the election results by the election board secretary. ~~on the first Tuesday of July~~ o~~f the next even numbered year after their election.~~

The term of Councilmembers chosen to represent Council wards one (1), three (3), five (5), and seven (7) shall begin during odd-numbered years at six-thirty in the evening (6:30pm) on the first Tuesday following certification of the election results by the election board secretary. ~~expire on the first Tuesday of July of the next odd numbered year after their election.~~

Each elected officer shall continue to hold and to perform the duties of his office until his successor is elected and qualified, unless he is removed or forfeits his office under other provisions of this Charter.

~~The term of office of the Mayor elected at regular elections,~~ Elections for Mayor shall ~~be~~ occur every three (3) years. The term of the Mayor shall ~~expire~~ begin at six-thirty in the evening (6:30pm) on the first Tuesday ~~of July~~ following certification of the election results by the election board secretary and each three (3) years thereafter.

* * * * * *

CHARTER REVIEW COMMISSION
October 14, 2019

Article II, Section 2 – Requiring a Person to Reside in a Ward for a Minimum of Six Months in order to be an Eligible Candidate for a Councilmember Position.

Background:

Currently, in Article II Section 2, the Norman Charter requires that a councilmember candidate reside in Norman for six months prior to filing for office. There is not a specific ward residency requirement in the Charter at this time. A ward residency requirement for councilmember candidates has not been considered by past CRCs. The proposed change first appeared in the Resolution No. R-1819-66 drafted in December of 2018.

A chart comparing Norman's current ward residency requirement with other cities' policies was provided to the CRC for review at its August 12, 2019 meeting. The Committee discussed whether requiring a candidate to live in the ward for six months was too long, but most members expressed support for the requirement, citing the ability to know the ward better the longer one has lived in the ward. Concern was expressed, however, that in the case of reapportionment, someone could have lived in a neighborhood for more than six months, but be ineligible to serve merely because the Ward boundaries changed. In Article XX, Section 5 of the Charter, it states that in the case of reapportionment, "the new wards and boundaries will supersede the previous wards and boundaries for the next primary and general election, and for all other purposes on the day on which the terms of the Councilmembers elected that year begin."

Some committee members also asked whether it was possible to define residency and/or domicile. Although it is difficult to find a definition of residency in a similar context, Oklahoma courts have recognized that the term "resident" is not an ambiguous term, that is, its meaning is clear to a layperson. *Shelter Mutual Insurance Company v. American Hallmark Insurance Company of Texas*, 330 P.3d 1229 (Okla. Civ. App. 2014). Black's Law Dictionary defines "residence" as living or dwelling in a certain place permanently or for a considerable length of time. By it's plain reading, language requiring residency in the ward for 6 months would mean living or dwelling in a location within the ward for 6 months. Conversely, Black's Law Dictionary defines "domicile" as the place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

At its September 9, 2019 meeting, the CRC voted unanimously to recommend the proposed language set forth below.

Proposed Change:

Section 2. - Term of office.

The term of Councilmembers shall be for a period of two years The terms of Councilmembers chosen to represent Council wards two (2), four (4), six (6), and eight (8) shall expire on the first Tuesday of July of the next even numbered year after their election.

The term of Councilmembers chosen to represent Council wards one (1), three (3), five (5), and seven (7) shall expire on the first Tuesday of July of the next odd numbered year after their election.

Each elected officer shall continue to hold and to perform the duties of his office until his successor is elected and qualified, unless he is removed or forfeits his office under other provisions of this Charter.

The term of office of the Mayor elected at regular elections, shall be three (3) years. The term of the Mayor shall expire on the first Tuesday of July and each three (3) years thereafter.

For purposes of filing and election to the positions of City Council, only persons who have been duly registered to vote in accordance with state law within the City of Norman and reside within the ward for which they seek election for the six months prior to the date of the municipal election ~~and reside in the ward from which they seek election, on the date of their filing~~, shall be eligible to seek election to the City Council. If a candidate's ward designation has changed in the six months prior to the election due to reapportionment, then the requirement of six months durational residency shall be waived, although the candidate is still required to live in the newly established boundaries of the ward for which he or she seeks office.

For the purpose of filing and election to the position of Mayor, only persons who have been duly registered to vote in accordance with state law within the City of Norman for the six months prior to the date of the municipal election, shall be eligible to seek election as Mayor.

CHARTER REVIEW COMMISSION
October 14, 2019

Article II, Section 22 – Filling Vacant Council Positions.

Background:

Whether to allow an outgoing councilmember to appoint their successor or to hold a special election to fill the empty position is a novel issue for the CRC.

The proposed change allowing an outgoing councilmember to appoint their own replacement came in the form of an amendment to the Resolution proposed by Councilmember Castleberry on April 18, 2019. The Resolution was subsequently amended by Councilmember Petrone to include a proposed change that would mandate a special election in the case of a vacant councilmember position.

A chart comparing Norman's current policy for filling vacant positions with other cities' policies was provided to the CRC for review at its August 12, 2019 meeting. The CRC discussed both proposals and expressed a desire to follow a consistent process, recognizing that the current Charter language provides Council an option to call a Special Election or follow a committee process. Ultimately, the Committee recommended that language be drafted to codify the Committee process used recently to fill vacancies in Ward 6 and Ward 4.

The CRC voted unanimously at its September 9, 2019 meeting to recommend the proposed language below.

Proposed Change:

Section 22. – Vacancies in office.

* * * * *

Any vacancy occurring on the City Council shall be filled by a majority vote of the remaining members of the City Council after appointment and recommendation of one candidate from a Selection Committee made up of five residents of the ward for which the vacancy has or will occur, for a period extending until the next regular municipal election, at which time an election, conducted as provided by this Charter and applicable State law, shall be held to fill any balance of the unexpired term; provided, however, if the City Council does not fill the vacancy by appointment within sixty (60) days after the same occurs, it shall be mandatory on the part of the City Council to call and schedule a special election to fill the vacancy for the unexpired term, which election shall be held for the election of a City Councilmember, only, and said election shall be conducted in the same manner as a regular municipal election.

CHARTER REVIEW COMMISSION
October 14, 2019

Article ___, Section ___ – Creation of the Position of City Auditor Subject to Appointment and Removal by City Council

Background:

The Creation of the position of City Auditor is a novel issue for the CRC. The proposed change first appeared in the Resolution No. R-1819-66 drafted in December 2018.

Currently, the City Manager is the only employee of Council. The Charter sets forth the Manager's position as an at-will employee of the Council and sets forth how a City Manager may be removed or suspended. It also outlines the general and special duties and powers of the City Manager.

The Charter empowers the City Manager to "appoint and remove all directors or heads of departments and all subordinate officers and employees in such departments. Further, such appointments and removals shall be made upon the basis of merit and fitness alone, including training and experience in the work to be performed…" Article III, Section (b). Similarly, the City's Personnel Manual sets forth the causes for termination in Section 305.9. Such causes include, but are not limited to:

(a) Failure to report for work, regularly and promptly, except for causes beyond control of the employee;
(b) Failure to meet prescribed standards of work, morality and ethics to an extent that makes an employee unsuitable;
(c) Failure to comply with City rules and regulations;
(d) Failure to make a reasonable effort to perform emergency service in any position when requested to do so;
(e) Insubordination (a willful or intentional failure to obey a lawful and reasonable request of a supervisor or an action which constitutes lack of respect or harassment directed toward a supervisor);
(f) Abuse of, or actions toward or around other employees or the public, either on or off the job, which tend to disrupt the good order and efficiency of the operation of any City department, impair the morale of its employees or impair the respect of the public for the department;
(g) Horseplay, scuffling, and other acts that could have an adverse influence on the safety or well-being of other employees;
(h) Theft, destruction or misuse of City property;
(i) Unauthorized absences, abuse of leave privilege or a three (3) day absence without leave (AWOL)
(j) Acceptance of a gift, fee, money or other valuable consideration given with the intent of influencing the employee in the performance of their official duty;

(k) Improper use of authority or official position for personal profit or advantage;
(l) Use of alcoholic beverages or intoxication while on duty;
(m) Use, possession, sale, solicitation or transfer of drugs; or
(n) Controlling interest, directly or indirectly, in any contract or job for the work or for material, or supplies, or the profits thereof, or any purchase made for or sales made by, to or with the City.

Recent City Managers in Norman have had an employment contract that specifies his or her status as an at-will employee and contains severance provisions that apply if the City Manager is fired, but not for cause. The current City Manager's contract is attached for your review.

A chart comparing the existence of city auditors and the approval and removal process of those city auditors was attached for the CRC's review at its September 2019 meeting. Commission members discussed the position and did not feel it was necessary for the City to create a position in the Charter for City Auditor due to the sufficiency of existing regular outside audits.

Proposed Change:

No changes recommended by the Charter Review Commission.