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WHO'S THE BOSS? DECIDING WHO THE CLIENT IS WHEN YOU'RE A CITY ATTORNEY

I. INTRODUCTION

My first days on the job as the City Attorney happened to be in the middle of a bitter budget battle between the Mayor and the City Council. Shortly after I arrived, the Mayor's Finance Director approached me and gestured to one of my arms. He said to me (only half jokingly), "I'm afraid at the end of the day, both of your arms are going to be pretty long; I just hope this one's longer than the other."

His point, of course, was that as the City Attorney I was stuck between the City Council pulling on me from one end and the Mayor from the other. So, within my first few days on the job, I had to ask myself an important question. Who exactly is my client, and how do I represent my client?

Actually, in theory, the answer to this question is easy: a City Attorney's client is, of course, the City. In practice, the answer is hard. Typically, a City Attorney is responsible to both the Mayor and the City Council. In Lansing, as elsewhere, the Mayor and City Council do not always agree, and indeed, many times the City Council Members do not always agree amongst themselves. With this many bosses, what's a poor City Attorney to do?

Although a City Attorney is responsible to both the Mayor and City Council, at the end of the day, the client is neither the Mayor nor the City Council: the client is the City itself. But, how do I define the City's interest, which I am ethically bound to represent, when I am getting diametrically opposed instructions from my various bosses? How do I decide a budget debate when my arms are getting longer with each passing day?

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This article shares some insights into common problems that City Attorneys face and potential solutions to those problems. Specifically, this article identifies five problems and proposes solutions to resolve each of them. The problems identified consist of the following: (1) the client problem; (2) the ethics problem; (3) the confidentiality problem; (4) the privilege problem; and (5) the dueling-courts problem. I will then distill these solutions into a flowchart for deciding "Who's the Boss?"

In the conclusion, I note that while these problems make a City Attorney's job challenging and while the solutions make it easier neither the problems nor the solutions are unique to the City Attorney's job. These five problems, and their corresponding solutions, apply to all attorneys who serve as in-house counsel. Having served both in the private sector and the public sector, I can conclude with confidence that the only thing tougher than local politics, after all, is office politics.

II. PROBLEMS AND SOLUTIONS

A. The Client Problem

Briefly put, the client problem is that a City Attorney works for all of the City's elected officials but represents none of them. The problem is compounded when the elected officials are at odds with each other, as is often the case in politics. While it would be easy to simply divide elected officials between the Administration and the Council this is too clever by half. As often as not, conflict within the City Council can be as contentious as conflict between the Administration and City Council.

The problem is further compounded by the bottom line: the Mayor can fire the City Attorney at will, and the City Council can cut the City Attorney's salary to \$1,000.00. When I took this job as the City Attorney, one of the first things I did was review the City Charter Commission Wrap-Up. The Wrap-Up highlighted the changes that occurred when Lansing went from a Strong City Council to a Strong Mayor form of government in 1978.

The Wrap-Up put the Client Problem nicely, and had then-City Attorney, Stephen Sawyer, answer difficult questions about his own job security with remarkable candor:

Mr. Hull:

What happens with an attorney [sic]. Because he is now responsible to both the Council and the Mayor.

Mr. Sawyer:

The Attorney, in my reading, can still be fired by the Mayor. There is no requirement that the Council will participate in that decision. I suppose my own protection, if you people should decide that the Mayor is way off base and he would do something like that, which of course I hope he doesn't, would be as with every other city department, you have, I believe it is, 30 days period of time if you can muster six votes that agree with you, you can over-ride the firing or suspension decision.

Mr. Hull:

Let's put it the other way around. Suppose the Council says, 'this Attorney is a certified turkey and we are firing him.' The Mayor says, 'I don't agree.'

Mr. Sawyer:

Then the City Attorney doesn't get fired.

Mr. McKesson: The Mayor wins that one.

Mr. Baker: What if you put together six votes?

Mr. Sawyer: Under this initiative, it is vested solely in the Mayor. Even if you had a unanimous vote of Council it could not affect the firing of any city department head.

Mayor Graves: Same thing in the present Charter. The Mayor has to initiate to the Council the firing of an individual of a department.

Mr. Sawyer: That's correct. Your power isn't decreased . . .

Mr. Baker: Realistically though, if you have a City Attorney up here that has five or six Council members railing at him every night, he would probably disappear anyway. It is going to be very hard for him to practice law in the City if he is getting bombarded.

Mr. Donnellan: There are very few City Attorneys who would be willing to serve for a thousand dollars a year. I just point that out.

Mr. Adado: You ultimately come back to the budget. Is that what you are saying?

Mr. Walsh: I'm not sure you have made a friend.

Mr. Sawyer: I'm not sure I like the center of this discussion.

[The room was filled with laughter from all present.]

Mr. Baker: We just wanted to set a tone for the rest of the meeting.

[Jokes and chiding of the City Attorney followed with the Council members and Commissioners joining in the kidding.]¹

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The Wrap-Up underscored the peril of a City Attorney's position: "Jokes and chiding of the City Attorney,"² with at-will employment on one end and a \$1000 salary on the other. So, how do you solve the client problem?

The only solution is trust. At the end of the day, the only currency a City Attorney (or any general counsel for that matter) has is trust. With it, a City Attorney can handle the client problem and, although individual elected officials may not like the City Attorney's decision, they will respect it. Without it, a

City Attorney can handle nothing, except perhaps updating the City Attorney's resume.

And, the only way to obtain the currency of trust is to earn it. This involves doing the right thing, decision by decision, even when doing the right thing implicates the trigger of at-will employment or a salary cut. Taken together, only a series of decisions like this will truly protect a City Attorney's salary (or job) from being cut for any particular decision. However, as with many solutions I present in this article, this can prove easier said than done.

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B. The Ethics Problem

The ethics problem stems from the client problem. That is, irrespective of political considerations, what ethical considerations constrain a City Attorney? Here, there are two questions: (1) what do the Rules of Ethics say about who the client is, and (2) what do the Rules of Ethics say about a single client comprised of several bosses. These questions, and their answers, apply not just to City Attorneys, but to all in-house counsel. These questions are discussed in detail below.

1. What do the Rules of Ethics say about who the Client is?

The operative Michigan Rule of Professional Conduct (MRPC) that determines who the Client is for a City Attorney is MRPC 1.13(a). The rule discusses an attorney's duty of loyalty and states, "A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents."³

On its face, MRPC 1.13(a) makes clear that a City Attorney's client is the City, and a general in-house corporate counsel's client is the corporation. The comment to the rule specifically addresses the rule's applicability to governmental agencies:

The duty defined in this rule applies to governmental organizations. However, 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 because public business is involved With these qualifications, the lawyer's substantive duty to the client and reasonable courses of action are essentially the same as when the client is a private organization.⁴

Thus, the duty of loyalty under the MRPC is clear both for City Attorneys and general counsel, and this is good as far as it goes, but it *6 does not go very far in actually determining the duty of loyalty on a day-to-day basis. For this, we need to look at another rule.

2. What do the Rules of Ethics say about a single Client Comprised of Several Bosses?

The really interesting question under the MRPC is how the duty of loyalty changes based on which member of the organization is asking for legal advice. In these situations, the operative rule that deals with

conflicts of interest is MRPC 1.7(b). The rule states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless . . . the lawyer reasonably believes the representation will not be adversely affected; and . . . the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.⁵

A number of State Bar Ethics Opinions clarify how MRPC 1.7(b) is implicated. However, two opinions, in particular, are helpful. State Bar of Michigan Ethics RI-259 holds that “[a] city attorney may meet individually with a member of the city council, the chief of police or the city manager regarding the consequences of the city manager’s arrest, but may not deliver legal services to them individually unless the proper conflict screening is performed and confidences and secrets.”⁶ The opinion rests on MRPC 1.7(b), finding that “[s]ince at least some of the available options will negatively affect the city manager, MRPC 1.7(b) has been triggered, i.e., the city attorney’s representation of the city manager would be materially limited by the city attorney’s duties to city council.”⁷

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Lending more instruction is State Bar of Michigan Ethics RI-254. This addresses instances when a City Attorney must follow the edicts of City Council and when he need not. In the fact pattern, the majority of City Council asks the City Attorney to draft an ordinance banning in-line skating on city sidewalks, and the dissenting City Council member asks for an opinion on the legality of such an ordinance. Focusing on MRPC 1.7, the opinion concludes:

Pursuant to MRPC 1.13(e), the city attorney may comply with the request of the dissenting member only if permitted by MRPC 1.7. It appears that the dissenting member was seeking an opinion that such an ordinance would not be constitutional or enforceable in court. Such a request would accomplish the needs of the individual council member, but not the directive of the majority of the city council. The city attorney cannot comply with this request to provide legal services to the city council member. To serve the needs or request of an individual city council member which are in conflict with the majority views of the city council would subject this lawyer to a conflict of interest in violation of MRPC 1.7(b).⁸

Thus, under the MRPC, the City Attorney must determine whether a majority of City Council is seeking legal advice or only a minority. If so, the advice is proper; however, if the minority seeks it, it is not legal advice. But what happens when the City Council and the Mayor seek advice from the City Attorney over a disputed issue? Where is the duty of loyalty when your bosses disagree? Who then is the client?

This is not a problem unique to local politics. For example, not long ago, a similar debate erupted over whether former Attorney General Alberto Gonzales had a duty of loyalty to President George W. Bush or a separate duty of loyalty to the United States independent of his appointment by the President. The debate ultimately concluded that the duty of loyalty rested independently with the United States and

included considerable political fallout along the way such as *8 Gonzales's resignation as Attorney General. On a grander scale, this debate is no different than the one that occurs on a daily basis within municipalities all across the country.

In my experience, and in the experience of my predecessors, the only touchstone that works for determining a duty of loyalty amidst a conflict between the Mayor and the Council is separation of powers. If an issue is executive in nature, then the Mayor trumps and the City Attorney's duty of loyalty to the client resides with the Mayor. If it is legislative in nature, then the Council trumps, and the City Attorney's duty of loyalty to the client resides with the Council.

The problem, of course, is determining when a function is executive versus legislative, which quite often is no small task. Where a city's charter or ordinances specifically define a function, the task is easy. But what about mixed bags like licensing, which on its face appears to be executive in nature, but in application requires legislative approval? Although I suggest a bright line for determining a City Attorney's duty of loyalty, actually applying the bright line can be difficult.

The best tricks in determining whether a function is executive or legislative are familiar to anyone who has been trained in the basics of administrative law. The closer a function gets to setting policy, the more likely it is to be legislative. The closer a function gets to administering an existing policy, the more likely it is to be executive. In many cases, the first, last, and best option is a formalistic rather than functionalistic approach. That is, rather than categorize each question based on the function of the power exercised, as often is not, the charter or ordinances spell out the exercised power as a matter of form. If something requires City Council approval in the charter or ordinances, then the matter of form is legislative. If not, it is executive. In the end, of course, form often follows function, and the distinctions that might have been drawn on a case-by-case basis have already been drawn for all cases in the text of the charter and ordinances themselves.

With this tool at the City Attorney's disposal, the job is easier, but it is by no means easy. Even where a duty of loyalty is firmly established, a duty of confidentiality remains perhaps not as an ethical matter but certainly as a political one. If trust is the City Attorney's only currency, how is trust kept when the job does not allow it?

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C. The Confidentiality Problem

As I suggest, the confidentiality problem springs from the ethics problem. Recall that the comment to MPRC 1.13(a) states: "[h]owever, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified because public business is involved."⁹

The comment highlights a problem all City Attorneys face. How do you keep a confidence when you work for several different bosses, any of whom may be at odds, and all of whom may seek your confidence? I believe there are two basic approaches to solving this problem: limited situational confidence and unlimited openness in all situations.

1. Limited Situational Confidence

What I call limited situational confidence really means that, to the extent possible and permitted by law, a City Attorney will attempt not to divulge matters the Mayor or individual Council Members discuss with an expectation of confidence. Obviously, this does not-and cannot-include matters where a “wrongful official act”¹⁰ is involved, as the comment notes, nor can it include matters where a clear duty of loyalty to an opposing position prevents such a confidence.

What limited situational confidence really calls for is the ability of the Mayor or individual City Council Members to consult with a City Attorney on an informal basis before asking for legal advice on a formal basis on the record. It calls for the City Attorney to give an initial impression of where an issue will likely lead or to provide a gut feel for a likely outcome.

Here again, the executive-legislative distinction is often pivotal. If a matter is clearly executive in nature, like a proposed executive order to reduce certain expenditures, then the Mayor’s expectation of confidence is, and should be, higher. If a matter is clearly legislative in *10 nature, it is somewhat trickier because you are dealing not with a unitary branch like the Administration: you are dealing with a divided branch of individual City Council Members, each with their own preferences and expectations. The key is to emphasize that confidence will be maintained to the extent possible, and that it may not be possible to maintain the confidence.

In my experience, limited situational confidence works better for policy than politics. That is, the legality of various policy initiatives is a natural fit for such confidence, while internal political maneuverings between the Mayor and City Council is less so. Here again, a bright line is difficult to establish, and a City Attorney (or any in-house counsel for that matter) would be well advised to think prudently and pragmatically on each issue as it arises.

2. Unlimited Openness in all Situations

The alternative to limited situational confidence is unlimited openness in all situations. That is, the City Attorney (or in-house counsel) makes clear that there is no such thing as a confidence, and that nothing is off the record. In my experience, while this is easy to voice, it is not likely to provide the kind of candid legal advice my various bosses demand or that my client, the City, deserves. Yet, it is a plausible approach to the confidence problem.

Finally, I should emphasize that the confidence problem deals with confidence in an informal, political sense not in a formal, legal one. This is the subject of the fourth problem, the privilege problem.

D. The Privilege Problem

As with the previous problems we have explored, the privilege problem springs from its predecessor, the confidence problem. While the confidence problem dealt with informal trust between a lawyer and his various client constituencies, the privilege problem deals with the formal duty to maintain

confidentiality among these constituencies and the limitations on attorney-client privilege in a corporate or governmental setting.

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Luckily, the solution here is simple, provided everybody remembers it: “Anything you say to me, can and will be used in a court of law, or at least the court of public opinion.” A City Attorney, or any general counsel, should make clear from the outset that the attorney-client relationship is with the entity, not its members, and as such the entity’s members should never confuse the entity’s attorney with being their personal attorney. While communication may still be privileged among individuals in the entity they should not assume that it is. This has not been much of an issue in my experience, and if everybody remembers the simple solution to the problem, it need never be an issue in anyone’s experience.

E. The Dueling Courts Problem

I mentioned the court of public opinion versus the court of law in the privilege problem,¹¹ and this highlights the fifth and final problem City Attorneys and general counsel face: the dueling courts problem. As attorneys, we are trained to understand the court of law, but we are often ill-equipped to handle the court of public opinion.

One key to handling the dueling courts problem is to realize that a win or loss in one court is not necessarily a win or loss in the other. For example, in my first year on the job, the Mayor ordered me to attempt to intervene in a federal lawsuit involving Michigan’s Proposal 2. Proposal 2 banned affirmative action and prompted a robust legal challenge. The case found its way to the Sixth Circuit, where we attempted to join the fray. We were quickly denied the opportunity to intervene.

We lost in the court of law, but won in the court of public opinion. Although we were rejected by the federal courts, the Mayor was pleased because he could demonstrate he was doing everything in his power to fight Proposal 2. Ultimately, whether we won or lost was less important than how we played the game.

This is a difficult concept for many lawyers to grasp: we are trained to advocate in law school and, perhaps even prior to law school, we are predisposed to being competitive. In any event, a City Attorney, and ***12** even a general counsel at a publicly visible corporation, must navigate the tension implicit in the two courts: one of law, and the other of public opinion. In my experience, the key is to provide your principals with clear expectations as to the likely outcome in the former, and to solicit from your principals clear expectations as to acceptable outcomes in the latter. In short, you should keep both your principals and your principles clear.

III. A FLOWCHART FOR DECIDING WHO’S THE BOSS

I have tried to outline five common problems for City Attorneys, and to underscore their applicability to all in-house counsel. I have also tried to outline solutions to each of these five problems. From this outline, I believe it is possible to create a decision-making flowchart. The key, as you will see, is

determining in the first instance whether a matter is executive in nature, and therefore the province of the Mayor or CEO, or legislative in nature, and therefore the province of the Council or Board of Directors. That said, I believe the “Who’s the Boss?” flowchart captures the decision-making process for actually determining “Who’s the Boss?”¹²

As you can see, the flowchart produces four outcomes depending on the inputs received. The first outcome is a duty of loyalty to the Mayor or CEO. This is the beginning and end of the discussion where a matter is executive in nature. And, especially in a strong mayor form of government like Lansing’s, as often as not, the problems begin and end in this fashion.

The remaining outcomes deal with legislative problems. The most common outcome is a finding of no duty of loyalty. This occurs where there is no majority for a proposition on City Council or a Board of Directors. Here, the Ethics Opinions control, and a City Attorney is well-served to keep in mind that in a democracy, the majority rules.

The third outcome is a duty of loyalty to the majority position on City Council. This is a common outcome, which results every time in an ordinance or a resolution being passed. In most cases, and in my case, ordinances and resolutions cannot be passed without their prior ***13** approval as to form by the City Attorney. This is an easy proposition where there is majority support, and each week I approve any number of ordinances and resolutions.

The fourth and final outcome is the thorniest—outside counsel. When a question is too close to call, or when there is an actual, legal conflict of interest, then outside counsel is an option. In my time as City Attorney, we have managed to avoid actual conflicts of interest and the need for outside counsel, although we have come close a number of times. The most likely way for this to arise is if the City Council moves to sue the Mayor, or if the Mayor sues the City Council. In that case, a City Attorney must recuse himself and appoint outside counsel for each side, while maintaining the duty to the City to make sure both sides are adequately represented and that the representation is efficiently handled.

The Court of Appeals recently addressed this outcome in the *Young* decision, finding for the City of Flint’s Chief Legal Officer (CLO) in litigation with the city’s retirement system.¹³ Substantively, the *Young* court held that Flint’s CLO “has sole authority to appoint legal counsel for parties governed by the Flint Charter.”¹⁴ Procedurally, the *Young* court determined that the best practice in the case of litigation between two parties governed by the Charter is for the CLO to appoint outside counsel and oversee the litigation without advocating for either side.¹⁵ In *Young*, the court stated that the Flint CLO’s “conduct did not create a conflict of interest as covered by the MRPC [Michigan Rules of Professional Conduct].”¹⁶ Nonetheless, the *Young* court found that the “clear alternative is to select and retain independent counsel for both parties,” and that “[o]nly by declining to personally represent either party, while in good faith choosing counsel for each can plaintiff comply with both the MRPC and the Charter.”¹⁷ Under the guidance of the *Young* decision, therefore, the best practice for a City Attorney ***14** is to recuse him or herself and in good faith choose counsel for each party to the litigation.

If a conflict is only potential, a City Attorney may still choose to appoint outside counsel, although as a general matter, I would avoid doing so. Lansing’s Charter,¹⁸ like many city charters, envisions the City Attorney as the sole and final legal authority for the City. Inviting additional chefs into the kitchen

may help prevent an immediate fire, but it poses the risk of creating many more.

IV. CONCLUSION

In many cases, and for each of the five problems, the only answer, I think, is to divide each issue according to separation of powers principles and, literally, “to thine ownself be true.”¹⁹ If an issue is executive in nature, the Mayor generally controls, and the City’s interest is defined by the Administration. If an issue is legislative in nature, the Council generally controls, and the City’s interest is defined by the legislative body.

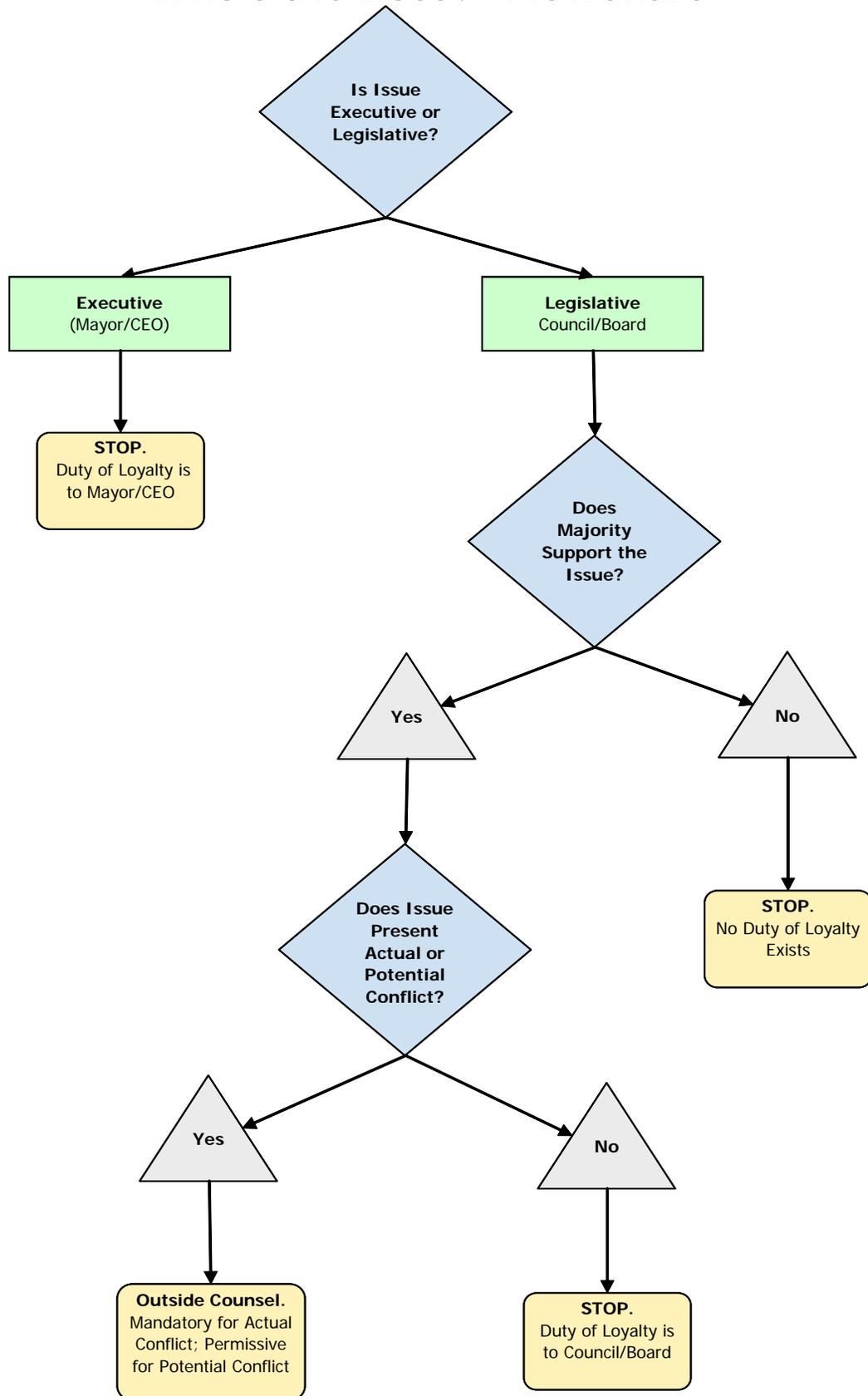
This answer, of course, is good as far as it goes, but it still does not go that far. Anyone who has taken Administrative Law will tell you that the distinction between the legislative and the executive is tenuous. And, as with any legal question, the best answer is often, “It depends.” Still, if a black-and-white rule is impossible, focusing on legislative versus executive powers is often the best way for a City Attorney to distinguish among shades of gray.

I have suggested throughout, and conclude here, that the City Attorney’s problems are the problems of all in-house lawyers. The solutions, too, while in some cases unique to the City Attorney, nonetheless provide guidance to the general counsel. Whether you are dealing with a Mayor or a CEO, or a City Council or a Board of Directors, you face tensions between and among the individuals in the entity and between and among those individuals and the entity itself. If it is true that all politics is local, it is also true that the only thing tougher than local politics is office politics. Nonetheless, I hope that *15 these observations, and my decision-making flowchart, are helpful to City Attorneys and in-house counsel alike in distinguishing among shades of gray.

Of course, even when a lawyer properly distinguishes among shades of gray, the reaction from the executive and legislative branches is often shades of red. But, that is endemic to the job itself, and like the Peace Corps, being a City Attorney may be the toughest job you will ever love. I know it has been for me.

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"Who's the Boss?" Flowchart



Footnotes

^{a1} Brigham Smith was appointed City Attorney of Michigan's capital city, Lansing, on March 13, 2006. Prior to that, Mr. Smith was a partner at Honigman Miller Schwartz and Cohn, LLP. He graduated with highest distinction from the University of Michigan and cum laude from Harvard Law School.

¹ City of Lansing, Conference on Charter, Aug. 25, 1978, at 30-31.

² Id.

³ Mich. Prof. Cond. R. 1.13(a)(2008).

⁴ Mich. Prof. Cond. R. 1.13(a) cmt. (2008) (emphasis added).

⁵ Mich. Prof. Cond. R. 1.7(b).

⁶ Opinion Number RI-259 (Apr. 9, 1996).

⁷ Id.

⁸ Opinion Number RI-254 (Apr. 3, 1996) at 2-3 (emphasis added).

⁹ Mich. Prof. Cond. R. 1.13(a) cmt. (2008).

¹⁰ Id.

¹¹ Id.

¹² See *infra* Appendix A.

¹³ *Young v. Flint City Council*, No. 263310, 2006 WL 3826976 (Mich. Ct. App. Dec. 28, 2006).

¹⁴ Id. at 3.

¹⁵ Id. at 2.

¹⁶ Id. at 3.

¹⁷ Id. at 2.

¹⁸ The Charter of the City of Lansing, § 4-304.

¹⁹ William Shakespeare, Hamlet sc. 3.

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