Government Lawyer - 101

“I’m from the Government ... and I’m Here to Help.”
Today’s Roadmap

- Introduction to Government Law in NM
- What can you expect as your “cases”?
- Special Considerations in the Rules
  - Civil Procedure
  - Professional Responsibility
- Hypotheticals
- Questions & Answers
Context for Today

I’ve been a lawyer who practices public law for over 80% of my legal career

- Private firm associate – variety of clients including a local govt. entity and non-profit board
- Assistant County Attorney, Santa Fe
- Deputy General Counsel, NMDOT

NM Bar Statistics (as of 6/1/2019)

- ≈ 1700 government attorneys; ≈ 1550 in NM out of 9999 members, of which 5620 in NM (28%)
Government Law in NM

- State Government
  - Judiciary
  - Legislative
  - Executive aka Governor’s Cabinet Agencies

- Local Government

- Quasi-Governmental Organizations

- Federal Government

- Tribal Governments
Common Elements

- Delegated Authority
  - Know your entity’s swim lane
  - Constitutional or Statutory Authority
  - Regulations, Ordinances, Municipal Codes

- Organizational Client

- Possible Immunity from Certain Suits

- Inspection of Public Records Act (IPRA)
You May Wear Many Hats

As a representative of a public entity your duties will vary depending on the size of the entity and the nature of the entity’s purpose.

You may likely be assigned to:

- Draft rules, ordinances, policies, legislation
- Handle litigation, administrative hearings, appeals
- Conduct research & interpret laws and rulings
- Advise your client(s) & entity employees
- Assist with policy, program & procedure development
What types of law?

- Depending on the type of entity:
  - Tax
  - Environmental &/or Water Law
  - Civil Rights
  - Employment
  - Procurement - Contracts
  - Torts
  - Land Use – Eminent Domain
What else?

- Your entity may have associated boards
- Your entity may have compliance enforcement authority
- Some decisions may be subject to administrative review
- Turning policy into programs or projects may come with rulemaking obligations – public hearings
- IPRA (NMSA §14-2-1) will apply to the business records
Duty of Competency

- Rule 16-101 NMRA: Competence
  - A lawyer shall provide competent representation to a client.
  - Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
Competence: Rule 16-101

From the Commentary:

[2] ... A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. ...

[9] To maintain requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice ...
Sources

- Redbooks (Paper Statutes & Rules)
- NMOnesource.com (E-Statutes & Rules)
- SOPA (NM case filings) & PACER (Fed)
- Fastcase and on-line legal research providers
- Supervising attorney, co-workers, BTG Mentors
- Your entity’s “historians”
Relevant to What?

- Compliance enforcement
- Civil Litigation
- Appellate Review: Agency Decisions
- Business Transactions
- Permitting Functions
- Assessments & Valuations
Competency & Conflicts

Two important aspects of being in-house or contract counsel to a government entity:

- You have to know the special rules that apply to your client’s actions (e.g. civil procedure, open meetings act, IPRA)
- You have to know the special rules that apply to your actions as the entity’s attorney (e.g. professional conduct, entity codes of conduct)
Civil Procedure

- Your entity is the plaintiff if you are starting a suit, such as code enforcement.

- Often however, the entity is the defendant, being sued by an unsatisfied party.
  - Unsuccessful bidder on a procurement
  - Taxpayer challenging an assessment
  - Disgruntled employee
Basic Civil Procedures

- The Complaint: Rule 1-003 NMRA
- Process: Rule 1-004 NMRA
- Service & Filing Pleadings: Rules 1-005, 1-005.1, 1-005.2 NMRA
- Time: Rule 1-006 NMRA
- Motions: Rules 1-007, 1-007.1 NMRA
- Form: Rules 1-008, 1-010
- Subpoena: Rule 1-045 NMRA
Other Key Rules

- Local Rules
  - May alter the standards from the CP based on the Court’s preferences.

- Rule 1-004(H) NMRA
  - Special service requirements for the state and political subdivisions

- Rules 1-074 & 1-075 NMRA
  - Governing appellate review of a final decision

- Supreme Court Citation Rule, 23-112 NMRA
Conflicts – Special Rules

- The Rules of Professional Conduct apply to all attorneys.
  - Competence, Diligence & Confidentiality

- There are some rules with special applicability for government attorneys:
  - 16-102 Scope of representation
  - 16-111 Special conflicts of interest for former and current government attorneys
  - 16-113 Organization as client
Hypothetical #1

*Happy Rump Stables: City Zoning Laws*

*The players:*
  - Deputy City Atty – George Dawg
  - Assistant City Atty – Eager Achiever
  - Assistant City Atty – Candi Doo
  - Assistant City Atty – Connie Conflict
The City Zoning board is an adjudicative body that Attorney Eager must appear before.

The Scenes

- Deputy City Attorney Dawg meets with newly hired assistant attorney Eager Achiever.
- Eager calls her friend Candi Doo for advice and to vent a little.
- Eager stops by to see Connie Conflict, the office’s land use expert.
The Facts

See the Facts sheet in the materials
Questions for you:

- May Eager represent the city in the zoning matter while at the same time her office colleague, Connie, represents the adjudicative body Eager will appear before?
- Is it permissible under the RPC for Eager to approach Connie for assistance?
- Can Connie help Eager? If so, how much? Where is the line?
Analysis & Discussion

Rule 16-111 NMRA

- Special conflict of interest for former and current government officers and employees
  - Effective screening (See 16-100, Terminology)
  - Written disclosure

Q-1: Eager may represent the city in the zoning matter if Connie is carefully screened.
Rule 16-101: Competent Representation

- Special Training or experience is not required
- Adequate representation in a novel field
  - Analysis of precedent, evaluation of evidence, legal writing
  - Consult with a lawyer with established competence in the field

Q2: Eager may approach Connie seeking general help with the ordinance but must avoid any confidential information related to the proceedings before the Board.
Where is the line?

- Proper screening in the City Attorneys’ office protects confidential information
  - Obligation not to communicate with any of the lawyers with respect to the Board’s work
  - All lawyers should know the screen is in place
- Q3: Attorney Conflict may assist Eager
  - General Information about the ordinance
  - Available in the public domain
Hypothetical #2

Make It So: Concessions Contract

The players:

- County Attorney – Percy Politico
- Assistant Co Atty – Arbie Trary
- County Exec – Ivy Bringiton
- Piñon & Chili CEO – Patty Cakes
- Assistant Co Atty – Ben Here
The City Zoning board is an adjudicative body that Attorney Eager must appear before.

The Scenes

- Build-it-Here County Exec., Ivy Bringiton, speaks with County Attorney, Percy Politico about the upcoming expiration of the Piñon & Chili concession contract.
- Bringiton gets a call from the CEO of Piñon & Chili
- Politico meets with Attorney Trary about the Piñon & Chili contract
- Arbie Trary stops by Ben Here’s office
- Arbie Trary gets a call from Politico
Questions for you:

- May Arbie Trary ethically argue that the concessions contract should be a sole source award?
- Should Arbie ask to be recused from the matter based on the relationship with a board member of the Piñon & Chili company?
- If Politico decides to advise the County that a sole source award contract is appropriate, does Arbie have an obligation to report his boss for professional misconduct?
Analysis & Discussion

Rule 16-301 NMRA

- Meritorious claims & contentions
  - As an advocate – use legal procedure to fullest benefit of the client’s cause without abusing legal procedure

Q-1: Arbie must research the issue for any non-frivoulous basis to support an argument for sole source.

- If none, the written brief should objectively, explain the results of the research.
Rule 16-107 – Conflict of interest

A disqualifying conflict of interest may arise based on
- a significant risk that an attorney’s representation of the client will be
- materially limited based on a relationship with another party

Q2: Arbie could ask to be recused based on the intimate relationship with the Piñon & Chili board member; however:
- Reasonable argument no conflict
- Personal interest too tangential to matter at hand.
Where is the Line?

Rule 16-803 Reporting Misconduct

- A violation of the RPC,
- Raising a “substantial” question about
- The lawyer’s honesty, trustworthiness or fitness as a lawyer.

Obligation is based on factual knowledge.

Q3: Arbie is not obligated to report if the question is not substantial.

Briefing to include persuasive argument to reach an alternate conclusion
Questions & Discussion

 Who was that speaker?
   Elizabeth “Liz” Travis
     Deputy General Counsel for NMDOT
     Board of Bar Commissioners, District 3
     Member of the State Bar Disciplinary Board and Ethics Advisory Committee

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