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ADVISING THE “SMART CITY”: WHEN ARTIFICIAL INTELLIGENCE AND BIG DATA ARE THE SUBJECTS OF PROFESSIONAL ADVICE, WHAT IS A LOCAL GOVERNMENT LAWYER TO DO?

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INTRODUCTION

AS technology is redefining life at a breakneck pace, lawyers who represent local governments face uncertainty as they rush to incorporate these new technologies into their practice. Artificial intelligence, for instance, allows attorneys to become more efficient when performing mundane, formerly time-consuming tasks, such as legal research and contract drafting. Moreover, these technological advances have allowed lawyers to focus instead on higher-level tasks, including legal strategy and entrepreneurial lawyering. These new technologies touch lawyers in every practice area. Consequently, lawyers who advise local government entities—whether they are employed by governmental agencies or as outside legal counsel—must be aware of these new technologies and be ready to incorporate them into their practices, where appropriate.

When incorporating new technologies, local government lawyers face an additional challenge: the city itself. Just as technology is changing the practice of law, it is also reshaping urban life, as cities become “smarter.” New “smart city” technologies often incorporate sensors and interactive devices that generate huge amounts of data (commonly referred to as “Big Data”) that are then processed via artificial intelligence (“AI”) and may be shared via connected devices that comprise part of the Internet of Things (“IoT”).

As smart city technologies enter the urban landscape, local government lawyers who are advising city leaders on implementation and policy-making are tasked with taking into account both the needs of their client—presumably, the city¹—and the dictates of professional ethics.² Thus, in the “smart city” context,

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1. Issues surrounding identifying a government lawyer’s client are discussed in Part I.A.

2. Any representation or professional advice rendered by a lawyer falls under the dictates of the ethics rules. The Preamble of the American Bar Association Model Rules of Professional Conduct, for instance, notes that certain of the Model Rules “apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.” MODEL RULES OF PROF’L CONDUCT Preamble ¶ 3 (AM. BAR ASS’N 2016) [hereinafter MODEL RULES]. Thus, a rule like Rule 8.4, which prohibits a lawyer from “engag[ing] in conduct involving

“As disruptive innovations challenge business-as-usual, the legal profession will need to revisit its own regulations to strike a balance between protecting the public and providing access to ... [information].”³ As one commentator has noted:

Some might ask why ethics is of special significance to technology and, moreover, why the point of view of lawyers should have particular significance in the discussion of changing technology. Ethics is a system for judging the moral efficacy of human choices. Ethical issues arise in the use of technology in society, and lawyers play a central role in social ordering.⁴

The American Bar Association (“ABA”) has in recent years addressed lawyers’ ethical obligations with regard to the introduction of new technologies to the practice of law. For instance, Rule 1.1 of the ABA Model Rules of Professional Conduct (the “Model Rules”) states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁵

Comment 8 to Rule 1.1 clarifies the role of continued education as it relates to technological advancements:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.⁶

Comment 8 clearly indicates that a lawyer is obliged to keep abreast of practice technology. Comment 8 can also be read to impose upon lawyers an obligation to keep abreast of the technology in the industries to which their clients belong. Despite this reasonable reading of Comment 8, little attention has been devoted to lawyers’ ethical obligations when technology itself is the focus of legal practice, particularly in the context of the role of local government lawyers. This essay begins to fill that gap. Thus, the goal of this essay is to provide a framework

dishonesty, fraud, deceit, or misrepresentation” or “conduct that is prejudicial to the administration of justice,” would apply to such lawyers. *Id.* r. 8.4(c), (d).

3. Jamila Jefferson-Jones, *Innovation, Regulation and the Legal Profession*, RES IPSA, Spring 2017, at 15. This sentence originally read, “As disruptive innovations challenge business-as-usual, the legal profession will need to revisit its own regulations to strike a balance between protecting the public and providing access to *justice*.” (emphasis added). The same holds true with regard to norms of legal professionalism and their intersection with urban innovation.

4. Irma S. Russell, *Introduction—21st Century Law, Technology, and Ethics: The Lawyer’s Role as a Public Citizen*, 35 U. MEM. L. REV. 619, 620-21 (2005).

5. MODEL RULES, *supra* note 2, r. 1.1.

6. *Id.* r. 1.1 cmt. 8 (emphasis added). Thirty-one states have included similar language in their rules addressing the ethical and professional conduct of lawyers. Tad Simons, *For a Lawyer, What Does “Technology Competence” Really Mean?*, LEGAL EXECUTIVE INST. (Apr. 20, 2018), <http://www.legalexecutiveinstitute.com/lawyers-technological-competence/>.

through which local government lawyers can analyze the issues that may present themselves as their clients strive to become "smart cities."

This essay begins by focusing on the foundational inquiry of the identity of the client in the local government law context. Part II examines the role of government lawyers in the implementation of smart city regimes, arguing that their proper roles are that of "advisor-evaluators."

I. THE ETHICAL ROLE OF THE LOCAL GOVERNMENT LAWYER

Attorneys are regulated by multiple sources of law including the common law, legislation, administrative regulations (some of which include federalism implications), and judicial regulation, including disciplinary rules, rules of procedure, rules of evidence, and the inherent authority of courts of the contempt power.⁷ However, because most jurisdictions have adopted the Model Rules, in whole or in part, this essay will analyze local government attorneys' obligations under those rules.

A. *Who Is the Client and What Are the Contours of the Client-Lawyer Relationship?*

Paragraph 18 of the Scope of the Model Rules contemplates that the relationship between government lawyers and their clients will differ from that of private lawyers and their clients:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. ... Also, [government] lawyers ... may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.⁸

This paragraph acknowledges that government lawyers may have authority that those representing private clients do not have, such as the ability to accept or reject settlement offers or decide whether to take up an appeal.⁹ Paragraph 18, however, does not precisely identify the government lawyer's client. In fact, the Model Rules note that such a task is not only difficult, but is outside of its scope.¹⁰

Despite the Model Rules' reticence, it is, however, necessary to determine the identity of the client in order to apply the Model Rules in the context of government lawyers' ethical obligations. Moreover, the answer to the question,

7. BARBARA GLESNER FINES, PROFESSIONAL RESPONSIBILITY: A CONTEXT AND PRACTICE CASEBOOK 22 (2013).

8. MODEL RULES, *supra* note 2, Scope ¶ 18.

9. *Id.* See also *id.* r. 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter.").

10. *Id.* r. 1.13 cmt. 9 ("Defining precisely the identity of the client and prescribing the resulting obligations of ... lawyers [who represent organizations] may be more difficult in the government context and is a matter beyond the scope of these rules.").

“Who is the client?” will guide many of the actions made and decisions taken by local government lawyers who are advising cities in the implementation and regulation of smart city regimes.

Although, the answer to the question, “Who is the government lawyer’s client?” may seem straightforward at first blush, it is not. Commentators have noted many ways in which one can identify the local government lawyer’s client. For instance, one commentator suggests that for government lawyers generally—regardless of whether they work for local, state, or federal agencies—there are five possible clients: (1) the public interest; (2) the government as a whole; (3) the branch of government; (4) the particular agency or department; and (5) the agency decision makers.¹¹ Moreover, it is possible for a client to fit more than one of these categories.

1. *The Local Government Lawyer’s Client as the Public Interest*

The first of these possibilities—that the local government lawyer’s client is the public interest—though compelling, also presents significant challenges:

The ... theory of who [is] the client of a government lawyer [that] ... focuses on the public interest ... is the most amorphous theory because it is so hard to determine what the public interest is, or who has the power or ability to determine or specify it. ... Even if an attorney’s client is the public interest, it is questionable as to whether it is a good idea to have the attorney himself defining who his client is.¹²

The public interest model, however, “does allow the public to feel like it is actively a part of participatory government.”¹³ This is particularly important in the context of smart city technology implementation, where citizens may have concerns about the impact of such technology on their day-to-day lives and on their current and future privacy rights.

2. *The Local Government Lawyer’s Client as the Government as a Whole, a Branch of the Government, or a Particular Agency or Department*

The theories positing that the government lawyer’s client is the government or a subdivision of the government are “based on the idea that the employing [governmental] agency is paying as any private client would, and is thus owed the same duties.”¹⁴ Moreover, “The[se] agency argument[s] ... [are] also ... furthered by the fact that Model Rule 1.13,¹⁵ which delineates the professional duties attorneys owe to organizations, is often traditionally interpreted to apply to

11. Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). See also Kristina Hammond, Note, *Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers*, 18 GEO. J. LEGAL ETHICS 783, 788-90 (2005).

12. Hammond, *supra* note 11, at 790.

13. *Id.*

14. *Id.* at 788.

15. Model Rule 1.13 is discussed in more detail in subsection B of this Part.

government agencies as well as to businesses.”¹⁶ As previously noted, the Model Rules do not profess to precisely define the identity of the government lawyer’s client.¹⁷ Comment 9 to Model Rule 1.13 does, however, note that these “whole government” or “governmental agency” theories are viable modes of identifying the client of the government lawyer.¹⁸ Moreover, the distinction between these theories is most useful and applicable in the case of larger cities. In smaller cities and towns, those functioning in the role of city attorney or other government lawyer may not be attached to a particular agency, commission or unit of the local government.

3. *The Local Government Lawyer’s Client as Agency Decision Makers*

The fifth and final theory—that of the client as the agency decision makers—is made dubious by the dictates of Model Rule 1.13. Model Rule 1.13 states very clearly that the decision makers are mere conduits through which the will of the government organization is expressed and are not the actual client: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”¹⁹

B. *Rule 1.13 and the Government as Client*

Per Rule 1.13(a) of the Model Rules, although the lawyer takes direction from individual “constituents,” those decision makers are not the actual client. Thus, the lawyer’s duty of loyalty and to act in the best interest of her client flows to the client, not its constituents.²⁰

As noted above, Model Rule 1.13 applies to governmental organizations, as well as business organizations.²¹ Although the Model Rules do not presume to identify the client of the government lawyer, they do note that whomever the actual client is—whether agency, branch, the government as a whole, or the public—may shift over time depending on the actions of the governmental organization’s constituents or those constituents’ failure to act: “[I]f 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 purposes of this Rule.”²²

Comment 9 to Rule 1.13 further notes that government lawyers may have different ethical obligations under Rule 1.13 than do lawyers for business organizations. Such obligations may arise under the law: “[I]n a matter involving

16. Hammond, *supra* note 11, at 789.

17. MODEL RULES, *supra* note 2, r. 1.13 cmt. 9 (“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.”).

18. *Id.* (“[I]n some circumstances the client [of a government lawyer] may be a specific agency, it may also be a branch of government, ... or the government as a whole.”).

19. *Id.* r. 1.13(a).

20. *Id.* r. 1.7 cmt. 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

21. *Id.* r. 1.13 cmt. 9.

22. *Id.*

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 circumstance.”²³ Comment 9 goes on to conclude that “when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act [of an elected or appointed official or other government employee] is prevented or rectified, for public business is involved.”²⁴ Given the challenges of identifying the client, the possibility that the client, once identified, may change, and the dictates of Model Rule 1.13, a government lawyer who is tasked with aiding a municipality in the implementation of smart city technology must remain keenly aware of her role as both an advisor to her client and as an evaluator of the legal aspects related to the adoption of that technology.

II. WHAT IS THE ROLE OF A GOVERNMENT LAWYER IN SMART CITY IMPLEMENTATION AND COMPLIANCE?

A. *What Is a “Smart City?”*

Like many of today’s emergent technological advances, it is not always easy to pin a definition to the term “smart city.” Most definitions have in common the recognition of the convergence of connectivity via the IoT, the collection of Big Data via that connectivity, and the resulting governmental aggregation of and response to that data. However, in constructing their definitions, commentators focus on different aspects of these attributes. For example, some focus on the intersection of connectivity, “place-making,” and the behavioral impact on the inhabitants of smart cities:

The smart city can be defined as an urban digital infrastructure supporting, amongst other activities, technologically-enabled responsive environments. These spaces are governed by big data collected by various means, which allow “the city” to talk back to its inhabitants by offering real time information and a range of choices designed to alter behaviour or encourage different relationships to place.²⁵

Other commentators focus their definition on governmental responses to the data collected via IoT connectivity: “A smart city is one that integrates information and communication technologies (“ICTs”) and the IoT to manage the city’s assets and delivery of services.”²⁶ Thus, “[a] typical smart city initiative might include installation of internet-connected sensors in public places, value-added services like free Wi-Fi or public information kiosks, big data analytics of publicly held

23. *Id.*

24. *Id.*

25. Mary Griffiths, *Imagine if Our Cities Talked to Us’: Questions About the Making of ‘Responsive’ Places and Urban Publics*, in MAKING PUBLICS, MAKING PLACES 27, 28 (Mary Griffiths & Kim Barbour eds., 2016).

26. Jesse W. Woo, *Smart Cities Pose Privacy Risks and Other Problems, But That Doesn’t Mean We Shouldn’t Build Them*, 85 UMKC L. REV. 953, 955 (2017).

data, an online portal through which to share municipal data, or some combination of the above and more."²⁷

The emergence of the "smart city" raises many questions regarding the collection, use and retention of Big Data, including issues of privacy, equity and the implementation of compliance regimes. Which information should governments collect, request, and retain? How is data stored? Who owns the data and who has access to it? How should state and local governments organize ongoing compliance information infrastructures? When and how should citizens' privacy be protected in the "smart city" structure? And what about vulnerable populations and citizen engagement in governance?

One of the hallmarks of the smart city is flexibility and adaptability to locally-driven needs.²⁸ Thus, it must be kept in mind that not all cities will adopt or develop the same suite of "smart" technologies. Likewise, the methods of data-gathering employed by various smart cities will vary among them. For instance, a municipality that is seeking to develop its "smart" capabilities may install sensors to gather data. A city may also seek to enlist the data collected via digital sharing economy firms and their digital platforms. Cities may facilitate the collection of this data via new regulatory and licensing schemes—such as those requiring sharing economy firms to share data with a city as a condition of operating there. Moreover, a sharing economy firm's willingness to sell and a governmental entity's willingness to purchase the information gathered on a digital matching platform may also facilitate Big Data collection.

B. The Smart City and the Government Lawyer as Advisor-Evaluator

The flexibility and adaptability of smart city technology presents a challenge to those lawyers who are tasked with helping local governments implement such technology. The Preamble to the Model Rules notes that "lawyer[s] perform[] various functions."²⁹ In particular, these roles include that of "advisor," "advocate," negotiator," and "evaluator."³⁰ Municipal government lawyers whose cities are implementing smart city technologies and strategies should be particularly aware of their roles as "advisor" and "evaluator." As one commentator has noted:

When cities adopt smart technologies, the municipal government is the consumer, shopping in the market on behalf of the residents they serve. In so doing, municipalities act as consumers for the public interest in a wide variety of markets, contracting with firms in the digital economy to develop both specialized and off-the-shelf information technologies.³¹

27. *Id.*

28. *See id.* at 953 ("The beauty of the smart cities movement is the diversity of ideas enabled by the focus on locality.")

29. MODEL RULES, *supra* note 2, Preamble ¶ 2.

30. *Id.*

31. Jan Whittington, *Remembering the Public in the Race to Become Smart Cities*, 85 UMKC L. REV. 925, 926 (2017).

The “shopping” that is inherent in smart technology adoption necessitates that the local government lawyer participates in both evaluating the impact of various smart “products” and advising the city of the legal impacts of adoption.

1. *Government Lawyer as Smart City Advisor*

One of the functions of the lawyer as advisor is as “a regulatory officer [who] upholds professional ethical standards to promote societal trust.”³² According to the Preamble of the Model Rules, “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.”³³ The importance of the role of the lawyer as advisor is hard to overstate. One commentator wrote the following with regard to advising the corporate client. Her observations can easily be extended to other organizations such as government clients: “[T]he role of legal advisor is of crucial importance to the welfare of the corporate client and others who depend on the viability of that corporation.”³⁴

Model Rule 2.1 gives further guidance regarding the lawyer’s role as “advisor”:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.³⁵

The use of “shall” in Rule 2.1 can put the lawyer in a tough place and debunks the idea of merely telling the client what the client wants to hear. This is further driven home by Comment 1 to Model Rule 2.1 which provides, “A client is entitled to straightforward advice expressing the lawyer’s honest assessment.”³⁶ Such assessment can only be made by also embracing the role of the lawyer as evaluator. Thus, these two often overlapping roles can inure to the benefit of both the city as client and to members of the public. This is true even when those members of the public are not considered the client and despite the earlier-stated possibility of the “public interest” as client.

2. *Government Lawyer as Smart City Evaluator*

The Preamble to the Model Rules states that, “As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client *or to*

32. Katherine Medianik, Note, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1517 (2018).

33. MODEL RULES, *supra* note 2, Preamble ¶ 2.

34. Irma S. Russell, *Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513, 514 (2003).

35. MODEL RULES, *supra* note 2, r. 2.1.

36. *Id.* r. 2.1 cmt. 1.

others.”³⁷ As noted above, providing advice to a client per Model Rule 2.1 necessitates that the lawyer first evaluates the governmental client’s “legal affairs.” However, the evaluation and reporting contemplated by the Preamble may also be made on behalf of those other than the governmental client. Model Rule 2.3(a) states, “A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.”³⁸ Thus, in the context of a government lawyer’s evaluation of a proposed smart city regime, Model Rule 2.3 may allow the lawyer to overcome the challenge of determining whether her client is the public interest or the government itself. For, even if the client is not the public interest, it is reasonable, and under other sources of law may be mandated, that the lawyer provide an evaluation to the public.

CONCLUSION

Any city taking on the “smart city” mantle should seek advice to aid in navigating the possible legal pitfalls involved. The city must be cognizant of potential privacy, data safety, and digital inclusion and equity issues, among others. This new era of urban development poses an opportunity for local government lawyers to provide value-added services to their municipal clients. Such lawyers, however, must be ever-vigilant in ensuring that they fulfill their roles as “advisor-evaluators” of this new technology in a manner that complies with their professional ethical obligations.

37. *Id.* Preamble ¶ 2 (emphasis added).

38. *Id.* r. 2.3(a).

