City Attorney Ethics: The Client, Confidentiality and Misconduct

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CITY ATTORNEY ETHICS

THE CLIENT, CONFIDENTIALITY AND MISCONDUCT

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Introduction

The City Attorney, as a public official, is held to a higher standard of conduct than a private attorney representing a private party. This principle was recognized by the California Supreme Court in *People Ex.Rel. Clancy v. Superior Court, 39 Cal.3d 740, 746-747(1985)*. Acknowledging that a city attorney is a public official, the court concluded that special considerations apply to a lawyer who also is a public official. These special considerations include the duty to act with impartiality and refrain from abusing the power of government by failing to act evenhandedly. The court admonished that an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his or her public position to further professional success or personal interests. Further, in a civil action or administrative proceeding, the government lawyer has the responsibility to seek justice and to develop a full and fair record.

Understanding and believing in the higher duties and responsibilities of the City Attorney as a public official, City Attorneys face a peculiar dilemma when evidence of unlawful activity or other misconduct harmful to the City's interests is brought to his or her attention. The immediate instinct is that something needs to be done to address the problem, but further reflection can lead to a quandary as to what is the appropriate course of action when confidential information received through the attorney client relationship is involved. Despite the recognition by our Supreme Court that special considerations apply to a lawyer who is a public official, the California State Bar Rules of Professional Conduct (the "Rules" or "Rule") apply equally to public and private lawyers. Rule 3-600 prescribes a very specific course of action.

Defining the Client

First, Rule 3-600(A) clearly defines for City Attorneys who is the client. This rule states:

> "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."

Although the City Attorney regularly advises individual officers and employees in the City, the client is the City as an organization. This point is further explained by paragraph (D) of Rule 3-600 which provides:

> "In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent."

In *Ward v. Superior Court, 70 Cal.App.3d 23 (1977)*, the Los Angeles County Tax Assessor filed suit for defamation and violation of civil rights against two members of the Board of Supervisors and other County employees. The Assessor attempted to disqualify the County Counsel from representing the County defendants arguing that the Assessor had an attorney-client relationship with the County Counsel based on the past exchange of confidential communications unrelated to the pending lawsuit. The Court of Appeal concluded that the County Counsel was not disqualified from representing the defendants as the County Counsel did not have an attorney-client relationship with the Tax Assessor separate from the County itself. The court concluded that the Tax Assessor's Office was merely an arm of county government over which the Board of Supervisors had direct supervision. The court stated: "Communications by the assessor with respect to the operations of his office made to the county counsel are not subject to a claim of privilege as between the assessor and members of the board of supervisors, who are charged by law with the duty of supervising the conduct of the assessor's office. *Id. at 35.*

It is not uncommon for staff and individual Councilmembers to look to the City Attorney as their personal lawyer on city matters and that what is said to the City

Attorney will be kept confidential. The City Attorney will want to ensure that all city officers and employees know that the City Attorney's client is the city as an organization acting generally through the City Council as the highest authorized body. The ethics training required by AB1234 provides a good forum to reinforce this principle. An example of where this can become a problem is in providing conflict of interest advice to City Councilmembers. Although this advice is given to the affected Councilmember individually, the Councilmember should be informed that the entire Council is entitled to receive any written advice provided. Other examples are where a staff member seeks advice on a mistake made by the staff member that likely will harm the city's interests or a staff member on a confidential basis wants to disclose misconduct by another city officer or employee.

An exception to the definition of the "client," however, arises when an independent agency exists within the organization of a public agency whose powers are not subject to the final authority of the legislative body. *Civil Service Commission v. County of San Diego, 163 Cal.App.3d 70 (1985).* In this case, the County of San Diego sued the San Diego County Civil Service Commission over the Commission's reversal of personnel decisions by the County involving two employees. Under the County Charter, the Civil Service Commission, not the Board of Supervisors, was the final decision-maker on personnel matters. The County Counsel's office had advised both the County and the Commission on the subject personnel matters. The Court of Appeal concluded that this dual representation precluded the County Counsel from representing the County against the Commission. In distinguishing *Ward*, the court stated:

> "We are able to accept the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall governmental entity of which the agency is a part. Nonetheless we believe an exception must be recognized when the agency lawfully functions independently of the overall entity. Where an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the matter may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency is created." *Id. at 78.*

Addressing Misconduct

Rule 3-600(B) addresses the steps that the City Attorney may take when unlawful conduct or other misconduct harmful to the city's interests is discovered. It states:

> "If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:
>
> (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
>
> (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization."

This paragraph applies to both conduct that violates the law and conduct that is not unlawful but nonetheless is likely to result in substantial injury to the city. It also addresses conduct that has occurred and conduct that is threatened. Rule 3-600(C) addresses what happens if the City Council refuses to take any corrective action recommended by the City Attorney. It provides:

> "If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and where appropriate, duty to resign in accordance with rule 3-700."

Rule 3-600 does not require the attorney to report the unlawful or improper conduct up the hierarchy of the city. The rule uses the word "may." While taking no action at all may be acceptable for a private attorney, I believe that the role of the City

Attorney as a public official dictates that the actions authorized by this rule be taken when unlawful or other damaging conduct is discovered. In all cases, however, if the City Council refuses to take appropriate action, the City Attorney can do nothing more than resign.

The Attorney General has concluded that the state's whistleblower statutes do not apply to government attorneys. *84 Ops Cal. Gen 71 (Opinion No 00-1203).* In reviewing the language of the whistleblower statutes governing both state and local government, the Attorney General did not find any legislative intent to supersede any existing privileges. The opinion stated:

> "…it is to be presumed that when the Legislature intends to supersede a strong and long established public policy, it will do so in express and unequivocal terms and not by mere implication….an attorney's duty to maintain inviolate the confidences of a client lies at the core of the attorney-client relationship and of our legal system….Accordingly, we may not conclude that the Legislature, by the enactment of the three whistleblower statutory schemes, intended to supersede or impair by mere implication the strong and long established public policy in support of the attorney-client privilege. In *General Dynamics Corp. v. Superior Court, supra,* 7 Cal.4th 1161, the court stated: 'except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.' (*Id.* at p. 1190, italics added.)." *Id. at 77.*

In the real world what makes these types of situations difficult is that the facts of a given situation may not be clear. The preliminary question for the City Attorney is whether an investigation is warranted, and if so, how extensive should the investigation be. A City Council may not want to take action in a case where a Council is reasonably not sure that wrongdoing has occurred. If wrongdoing is apparent, but additional investigation is required, a judgment must be made as to when to advise the City Council. In this case, the City Attorney may want to provide the City Council initially with a brief confidential memorandum, consistent with the privacy rights of the affected officer or employee, apprising the Council of the investigation in order to avoid the embarrassing situation of the Council first hearing about the matter from the press.

In certain cases, a question may arise as to who is the highest authorized body or official to address the misconduct. For example, in a city operating under the city manager form of government, the City Manager is the final decision maker on personnel issues involving subordinate staff. Unlawful conduct by staff would be

brought by the City Attorney to the attention of the City Manager for action. However, if the City Manager refused to take any action without reasonable cause and the conduct was harmful to the city, it would be appropriate for the City Attorney to take the matter to the City Council as the supervisor of the City Manager.

Rule 3-600 is based on Business and Professions Code Section 6068(1) which requires attorneys:

> "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

The California Supreme Court has treated the confidentiality of communications between an attorney and his or her client as being an overriding policy. In *People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc., 20 Cal.4th 1135, 1146 (1999)*, the court explained the importance of this statute:

> "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. To this end, a basic obligation of every attorney is to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Citations omitted.)

Although the Supreme Court has not addressed in a reported decision the application of Rule 6-300 to a City Attorney, the Court in 2002 rejected a proposed amendment to this rule that would have allowed a public agency attorney to report violations of law to an outside enforcement agency under specified circumstances because it believed that this proposed amendment would conflict with the statutory duties of confidentiality. It also is interesting to note that legislative efforts in 2002 and 2003 to authorize public agency attorneys to disclose confidential information concerning criminal or fraudulent conduct by their agency were vetoed by Governors Davis and Schwarzenegger.

The purpose of Rule 3-600 is to protect confidential communications. Some attorneys believe that possibly this rule does not prohibit a City Attorney from reporting to an outside enforcement agency unlawful conduct that was not discovered from confidential attorney client communications. For example, the City Attorney has

become aware that a Councilmember has voted in favor of a development project that is located within 500 feet of a parcel of commercial property that he owns but has not disclosed on his Form 700. The new project is a substantial one that will revitalize this area of the city that is currently depressed. The Council vote is 3-2 to approve the project. The City Attorney is tipped off to this fact by a resident and the City Attorney confirms the Councilmember's ownership of the nearby parcel in the public records of the County Recorder.

In this scenario, the City Attorney has become aware of alleged unlawful conduct from a non-client resident that is verified solely by public records. Arguably Rule 3-600 does not apply. However, Rule 3-500 requiring an attorney to inform his client of significant new developments within the scope of his or her engagement ultimately leads to Rule 3-600 becoming applicable.

Rule 3-500 governing communications with clients states:

> "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

The conduct of the Councilmember in this situation exposes the City to liability arising from the Councilmember's failure to abstain from participating in a decision involving a project within 500 feet of his undisclosed property. Therefore, under Rule 3-500, the City Attorney has an obligation to inform the City Council acting as the highest authorized body of the client city that this violation of law has occurred. As part of that communication, the City Attorney would advise the Council of what steps should be taken by the City to address this unlawful conduct. Once that confidential communication has occurred, Rule 3-600 applies. Once again, if the City Council refused to act in accordance with the City Attorney's recommendations and the City Attorney believed that such conduct was against the best interests of the City, his or her only remaining option is to resign.

Rule 3-600 and Rule 3-500 together can place the City Attorney in a position that is at odds with a course of action that the City Manager or staff may want to take. This arises when a situation comes to the attention of the City Attorney that he or she believes should be reported to the Council. The City Attorney is hired by the City Council and ultimately is accountable for his or her conduct to the Council. Rule 3-500 requires the City Attorney to keep the City Council reasonably informed of significant legal developments. There are times where a mistake is made by staff that can expose the City to liability or a statement is made by staff to the Council on an

agenda item that turns out not to be true. In these cases, the staff may prefer that these matters not be disclosed to the Council. Since the City Attorney's client is the City acting through its City Council, and not the City Manager or staff, the City Attorney is put into an awkward situation. There is pressure on the City Attorney to be part of the city management team. At the same time, the City Attorney's obligation to keep the City Council informed of significant legal developments may force the City Attorney to disclose information that the staff does not want disclosed. Usually a discussion with the City Manager will resolve this dilemma with the City Manager making the appropriate disclosure or correction to the Council.

Conclusion

The protection of client confidences is paramount under California law and the State Bar Rules of Professional Conduct. Rule 3-600 gives the City Attorney a roadmap for how to address official misconduct by reporting the misconduct up the organizational chart to the ultimate decision-maker—the City Council. Although the State Bar Rules do not require the City Attorney to refer the matter to the next higher authority, the expectation that the City Attorney will adhere to the highest ethical standards compels appropriate action to be taken based on the certainty and seriousness of the misconduct. The challenge we face as City Attorneys, however, is that it is often not clear at first whether misconduct has occurred. Over time, it is easy to become desensitized by the unfounded allegations routinely made in political discourse and disagreements. Knowing when an investigation is warranted and whether an investigation that has been conducted has established wrongdoing requires careful judgment. In exercising that judgment, our goal always should be to act in a manner that will promote the public trust in the office of the City Attorney and local government.