

Practicing Ethics:

A Handbook
for
Municipal
Lawyers





VISION

To be recognized and respected as the leading advocate for the common interests of California cities.

MISSION AND CORE BELIEFS

To restore and protect local control for cities through education and advocacy to enhance the quality of life for all Californians.

WE BELIEVE:

Local self-governance is the cornerstone of democracy.

Our strength lies in the unity of our diverse communities of interest.

In the involvement of all stakeholders in establishing goals and in solving problems.

In conducting the business of government with openness, respect, and civility.

The spirit of public service is what builds communities.

Open decision-making that is of the highest ethical standards honors the public trust.

Cities are vital to the strength of the California economy.

The vitality of cities is dependent upon their fiscal stability and local autonomy.

The active participation of all city officials increases the League's effectiveness.

Focused advocacy and lobbying is most effective through partnerships and collaboration.

Well-informed city officials mean responsive, visionary leadership, and effective and efficient city operations.

ABOUT THE LEAGUE

Established in 1898, the League of California Cities is a member organization that represents California's incorporated cities. The League strives to protect the local authority and autonomy of city government and help California's cities effectively serve their residents.

In addition to advocating on cities' behalf at the state capitol, the League provides its members with professional development programs and information resources, conducts educational conferences and research, and publishes *Western City* magazine.



Practicing Ethics: A Handbook for Municipal Lawyers

ACKNOWLEDGEMENTS

The League thanks the following individuals for their work on this publication:

Manuela Albuquerque

*City Attorney
City of Berkeley*

Michele Beal Bagneris

*City Attorney
City of Pasadena*

Juliet E. Cox

*Richards, Watson & Gershon
Assistant City Attorney
Cities of El Cerrito, Fairfield,
and Mill Valley*

Steve Dorsey

*Richards, Watson & Gershon
City Attorney
Cities of Buena Park, Norwalk,
and San Marino*

Wynne S. Furth

*Senior Assistant City Attorney
City of Palo Alto*

Adam U. Lindgren

*Meyers Nave
City Attorney, City of Half Moon Bay
Assistant City Attorney,
City of Rancho Cordova*

Jennifer M. McGrath

*City Attorney
City of Huntington Beach*

Heather C. McLaughlin

*City Attorney
City of Benicia*

Joseph W. Pannone

*Kane, Ballmer & Berkman
Assistant City Attorney,
City of Baldwin Park
Agency General Counsel,
Cities of Baldwin Park and
Culver City*

Raul F. Salinas

*Adorno Yoss Alvarado & Smith
City Attorney
City of South Gate*

Additional copies of this publication may be purchased by using the order form located on the last page or by calling (916) 658-8257. Visit CityBooks online at www.cacities.org/store.

Table of Contents

FOREWORD	4
INTRODUCTION	5
CHAPTER 1: DEFINING THE CLIENT: WHOM DOES THE CITY ATTORNEY REPRESENT?	7
A. INTRODUCTION	7
B. THE CITY IS THE CLIENT	7
C. RULE 3-600 OF THE STATE BAR RULES OF PROFESSIONAL CONDUCT	7
D. THE "HIGHEST AUTHORIZED OFFICER, EMPLOYEE, BODY, OR CONSTITUENT"	8
E. REPRESENTING MORE THAN ONE CLIENT	8
F. CITY ATTORNEY'S RIGHT AND DUTY TO REMONSTRATE UP THE HIERARCHY	8
G. CITY ATTORNEY'S DUTY NOT TO TREAT CITY OFFICIAL AS CLIENT OR TO PROMISE CONFIDENTIALITY	9
H. JOINT REPRESENTATION OF THE CITY AND ITS EMPLOYEES	9
I. QUASI-INDEPENDENT BOARD OR OFFICIAL	9
CHAPTER 2: RULE 3-310 AND THE PROHIBITION ON THE CITY ATTORNEY'S REPRESENTATION OF CONFLICTING INTERESTS	11
A. INTRODUCTION	11
B. RULE 3-310 AND CLIENT REPRESENTATION	11
C. THE CITY ATTORNEY'S CLIENT	11
D. THE SCOPE AND NATURE OF THE PUBLIC ENTITY'S DUTY TO DEFEND AND INDEMNIFY CITY OFFICIALS AND EMPLOYEES	12
E. TWO OR MORE SEPARATE "CLIENTS" WITH ADVERSE INTERESTS AND RULE 3-310	13
1. Employee Representation	13
2. Quasi-Independent Bodies and Officials	13
F. SIMULTANEOUS AND SUCCESSIVE REPRESENTATION OF CLIENTS WITH ADVERSE INTERESTS	13
1. Simultaneous Representation	13
2. Successive Representation	13
G. SPECIAL CONSIDERATIONS FOR ATTORNEYS IN THE PUBLIC SECTOR	14
H. ADVICE TO MAYORS AND COUNCILS WITH DIFFERING POWERS AND CONFLICTING AGENDAS	14
I. JOINT REPRESENTATION OF CITY AND EMPLOYEES IN LITIGATION	14
J. ETHICAL WALLS TO AVOID CONFLICTS OF INTEREST	16
K. JOINT POWERS AGREEMENTS – ADVANCE WRITTEN CONSENT	16
CHAPTER 3: THE POLITICAL REFORM ACT: ETHICAL CONSIDERATIONS FOR THE CITY ATTORNEY	19
A. INTRODUCTION	19
B. THE POLITICAL REFORM ACT APPLIES TO BOTH IN-HOUSE AND CONTRACT CITY ATTORNEYS	19
C. DECISIONS AFFECTING THE CITY ATTORNEY'S COMPENSATION OR PAYMENTS TO THE CITY ATTORNEY'S LAW FIRM	19
D. DECISIONS AFFECTING OTHER CLIENTS OF THE CITY ATTORNEY	21
CHAPTER 4: CITY ATTORNEYS' FINANCIAL INTERESTS IN CONTRACTS: 1090 CONFLICTS	23
A. INTRODUCTION	23
B. GOVERNMENT CODE SECTION 1090 AND CITY ATTORNEYS GENERALLY	23
C. NEGOTIATING CITY ATTORNEY EMPLOYMENT CONTRACTS	23
1. Avoid Giving Legal Advice on the Contract	23
2. Additional Legal Services: In-house City Attorneys	24
3. Additional Legal Services: Contract City Attorneys	24
D. SERVING AS LEGAL COUNSEL TO A JOINT POWERS AGENCY	26
E. CONTRACTS BETWEEN THE CITY AND OTHER CLIENTS OF THE CITY ATTORNEY	27

CHAPTER 5: THE CITY ATTORNEY’S ROLE AS PROSECUTOR 29

- A. INTRODUCTION 29
- B. FACTORS TO CONSIDER WHEN FILING CRIMINAL CASES 29
 - 1. Impartiality and Objectivity 29
 - 2. Probable Cause 30
 - 3. Prosecutorial Immunity 30
 - 4. Recusal of the City Attorney 30
- C. CRIMINAL FILINGS CANNOT BE BASED ON OR INFLUENCED BY CIVIL ACTIONS 30
- D. CONTRACT CITY ATTORNEYS AND THE ABILITY TO PROVIDE CRIMINAL DEFENSE SERVICES 31

CHAPTER 6: THE CITY ATTORNEY AND OUTSIDE COUNSEL 33

- A. INTRODUCTION 33
- B. AVOID IMPROPER GROUNDS FOR HIRING/FIRING OUTSIDE LAWYERS 33
 - 1. State Bar Rules of Professional Conduct, Rule 2-400 33
 - 2. State and Federal Laws 34
 - 3. Decisions to Terminate Outside Counsel Based on the Lawyer’s Public Criticism 35
- C. IMPLEMENT AND UTILIZE STANDARD PROCEDURES 35
- D. CONFLICTS OF INTEREST 36
- E. BILLING AND OTHER PRACTICES OF THE OUTSIDE FIRM 37

CHAPTER 7: WHISTLEBLOWING AND THE DUTY OF CONFIDENTIALITY 39

- A. INTRODUCTION 39
- B. CONFIDENTIALITY 39
 - 1. Confidentiality in the Public Sector 39
 - 2. Government Malfeasance 39
- C. WHISTLEBLOWING STATUTES AND THE DUTY OF CONFIDENTIALITY 41
 - 1. California Whistleblower Protection Act (CWPA) 41
 - 2. Whistleblower Protection Act (WPA) 41
 - 3. Local Government Disclosure of Information Act (FGDIA) 41
- D. EFFECT ON DUTY OF CONFIDENTIALITY 42
 - 1. Statutory Reconciliation 42
 - 2. Lack of Express Provisions Overturning Well-Established Law 42
 - 3. Separation of Powers 42
- E. THE LEGISLATURE’S REACTION 43
 - 1. Assembly Bill 363 – 2002 43
 - 2. Assembly Bill 2713 – 2003 43

CHAPTER 8: THE CITY ATTORNEY AND GRAND JURIES 46

- A. INTRODUCTION 46
- B. THE LAW 46
- C. ETHICAL ISSUES RAISED BY WORK INVOLVING GRAND JURIES 47
 - 1. Who is the Client? 47
 - 2. Attorney-Client Privilege and Disclosable Materials 47
 - 3. Recusal of the City Attorney 48

ANNOTATED BIBLIOGRAPHY 50



FOREWORD

The City Attorneys Department of the League of California Cities has three primary missions:

- To provide legal support for the work of the larger League;
- To provide education for city attorneys and their clients; and
- To provide a professional network for city attorneys to aid them in their practice.

This publication makes a meaningful contribution to all three missions. As to the first two, the book provides technical support to both public lawyers and their clients on the legal and ethical obligations of a public lawyer. As to the third, the ad hoc committee of the City Attorneys Department that wrote this book may prove to be the core of a network of public lawyers from around the state who have thought deeply about the ethics of public law practice and can provide moral support and practical advice to others facing ethical dilemmas in their work.

This guidebook is the initial product of a larger, ongoing ethics project undertaken by the City Attorneys Department's Ad Hoc Committee on Practice Management and Ethical Standards. It sets forth, in terms we hope are accessible to clients as well as to lawyers, what we understand to be the current rules of conduct for public lawyers in our state. Excluded from this book, but clearly related to it, is a discussion of the evolving law of due process as it applies to a public lawyer's representation of multiple agencies of a public client in a proceeding (such a land use or civil service matter) to which constitutional due process applies. Another ad hoc committee of the City Attorneys Department is developing materials specific to that problem. For the moment, however, I recommend "*Procedural Due Process Limitations on the Municipal Lawyer Combining Quasi-Judicial and Prosecutorial or Investigatory Functions*," a paper presented by Berkeley City Attorney Manuela Albuquerque to the City Attorneys Department in May 2004, which can be obtained online at www.cacities.org/attorneys.

Many thank-you's are in order. First, to those who make use of this guidebook, for it is your reliance on it that makes our work meaningful. Second, to those who contributed to the development of this work: the members of the ad hoc committee (*listed in the acknowledgements portion of this book*), League staff, and my fellow officers of the Department in 2003-04. Finally, to the public law community of which we are a part. It is that community of talented, ethical professionals that provides a context for this work and undergirds our understanding of what is lawful or unlawful, right or wrong, admirable or less than admirable. Our thanks to all of you for this valuable tool and for your continued involvement in challenging and supporting public lawyers in California to be the best lawyers – and best people – they can.

Michael G. Colantuono

*City Attorney of Barstow, Calabasas, La Habra Heights, and Sierra Madre
President of the City Attorneys Department of the League of California Cities
July 2004*



INTRODUCTION

In this handbook the Ad Hoc Committee on Legal Ethics and Practice Management has tried to provide guidance to city attorneys concerning professional ethical standards that govern different facets of a city attorney's practice. The handbook starts with examining the fundamental question of who is the "client" of the city attorney to whom ethical duties are owed. It goes on to analyze the ethical dilemmas that arise once this threshold question is answered. These include possible conflicts when representing quasi-independent boards and officials, the joint defense of employees and the city in litigation, the city attorney's duties and constraints as a prosecutor, the city attorney's role in a grand jury investigation, Government Code section 1090 and Political Reform Act limitations, and issues involved in selecting and managing outside counsel.

In each subject matter area we have tried to describe how the ethical issue might arise, what legal standards apply to its resolution, where those legal standards may be subject to more than one interpretation, and practical tips for navigating the pitfalls. This handbook reflects much discussion and debate by members of the committee over the past year and the City Attorneys Department as a whole over many years.

As careful readers and faithful attenders of Department meetings will note, this publication relies heavily on the work done over the years by many Department authors; their original papers are referenced in the Bibliography. We have synthesized and updated that information; we have also drawn on the experience of a number of additional lawyers. Fortunately, few city attorneys are personally familiar with the difficult decisions to be made when the Securities and Exchange Commission is investigating the city, or a majority of the council is the subject of a grand jury criminal proceeding, or the city attorney is a principal witness in a criminal case against the mayor.

Even if our cities avoid the horrors mentioned above, all city attorneys must deal with conflicts that generate most ethical issues. What must I do to faithfully represent my client? When do my economic interests, however attenuated, require that I step down? When are the interests of officers and employees genuinely in conflict with those of that imaginary person, the city? When am I a litigator who can and must take direction from the council, and when am I a prosecutor who must act independently? Can I, must I, "blow the whistle?" These are not questions of first impression, nor is the law on these topics entirely fixed. This handbook is intended to support you as you resolve these difficult questions so that you can take some comfort from the collective wisdom of your colleagues.

Wynne S. Furth

Chair of Ad Hoc Committee on Legal Ethics and Practice Management

Senior Assistant City Attorney, City of Palo Alto

Notes



DEFINING THE CLIENT: WHOM DOES THE CITY ATTORNEY REPRESENT?

A. INTRODUCTION

Lawyers owe the duties of both undivided loyalty and confidentiality to their clients. For the city attorney who represents a public entity rather than a natural person, the question often arises, “Who is the client?” This chapter discusses the nature of the professional relationship between the city attorney and his or her client.

“It is the duty of an attorney to... maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”¹

B. THE CITY IS THE CLIENT

Case law and the State Bar Rules of Professional Conduct are clear: the city attorney’s client is the city itself, “acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.”² This concept of representation is important to understand. Generally, an attorney’s duties of loyalty and confidentiality may be challenged when the interests of two or more clients conflict with one another. If the city attorney’s client were defined as each city official or employee who interacts with the city attorney, a conflict of interest could arise every time two or more of these individuals had opposing interests. As a result, each party would be entitled to his or her own attorney. Fortunately, this is not the case in the vast majority of cases confronting the city attorney.

Understanding that the city itself is the client is critical, especially when the interests of the city may conflict with those of its officials or employees. The city attorney has an interest in ensuring that the client city’s interests are free from the taint of the conflicting interests of a recalcitrant council member or city official who insists on participating in a decision in violation of the Political Reform Act (*see chapter 3*) or Government Code section 1090 (*see chapter 4*).

C. RULE 3-600 OF THE STATE BAR RULES OF PROFESSIONAL CONDUCT

Rule 3-600 governs the ethical obligations of the city attorney. Under the rule, these obligations are owed to the city itself, and not to any individual public official or community member. This rule is also consistent with case law.³ The rule obviates the need for the disqualification of the city attorney when council members are at odds with one another over an issue, or when the council and city manager have a dispute.

PRACTICE TIP:

City charters often contain language requiring the city attorney to advise specified officials. Most public lawyers do not believe that such language has any effect on the underlying principle that the city itself is the client. Officials are merely embodiments of the city, and the city attorney does not have a conflict of interest simply because the officials may have opposing agendas or positions.

The fact that the city itself, and not any particular official or subordinate board, is the city attorney's client is important because the city attorney typically advises individuals along the entire chain in the city's hierarchy. Since these individuals are the embodiments of the city – and not separate and independent clients – the city attorney has no obligation to keep information obtained from one individual confidential from others in the hierarchy. This is significant because a city attorney typically has to gather information from a number of officials in order to provide legal advice and representation to the city.

For More Information:

Links to online city charters can be found on the League's website at www.cacities.org/charters.

D. THE "HIGHEST AUTHORIZED OFFICER, EMPLOYEE, BODY, OR CONSTITUENT"

While the city attorney has but one client – the city itself – he or she may take directions from a number of different individuals. Determining who speaks for the city as the "highest authorized officer, employee, body, or constituent" at any given time requires a review of the organic law of the city that dictates the roles and responsibilities of city officials and employees with respect to the particular facts at issue.

For example, under the council-manager form of government, the city manager is the "highest authorized officer" when it comes to terminating or disciplining a city employee. As a result, most city attorneys conclude that there is no legal basis to allow council members to view personnel records of all city employees. Unlike the city manager, council members play no role in the day-to-day hiring, discipline, and firing of these employees.

However, the city council does hire, evaluate, and fire the city manager. As a result, the council may have the right to access employee files if it can make a particularized showing that city employee personnel files are necessary for a performance evaluation of the city manager. In that event, the "highest authorized body" would be the council. As a result, the city attorney may take his or her direction from the council in providing access to the files solely for the purpose of facilitating the evaluation of the city manager.

Furthermore, if the city manager's management practices become the subject of a lawsuit – or the threat of a lawsuit – the city council would have the authority to direct the resolution of the matter. The council could act by stipulating to reinstatement and payment of back pay to the affected city employee. This is true even though, in the absence of a lawsuit, the city manager would normally be the "highest authorized official" in charge of city personnel issues.

E. REPRESENTING MORE THAN ONE CLIENT

There are times when the city attorney has more than one client. The most common example of this is where the city attorney is representing an employee who is being sued – along with the city – in a lawsuit. Also, a quasi-independent board or official could be a separate client under exceptional circumstances. In such situations, however, if the city's interests are adverse to the other party's, the city attorney is disqualified from representing either pursuant to rule 3-310 (*see chapter 2*).

F. CITY ATTORNEY'S RIGHT AND DUTY TO REMONSTRATE UP THE HIERARCHY

When a city attorney learns that the conduct of a city official or employee is or may be a violation of law that may be "reasonably imputed to the organization" or is "likely to result in substantial injury to the organization," State Bar rules expressly authorize the city attorney to take the matter to the "highest internal authority within the organization."⁴ While reporting such activity up the city's hierarchy, the city attorney must not disclose any confidential information beyond the organization itself.

The State Bar has contemplated adopting the American Bar Association Model Code section 1.13(b) that requires the reporting of such behavior whenever the attorney believes it is in the best interests of the client to do so. (The ABA Model Code is not applicable in California.) In addition, the State Bar is considering a change to rule 3-600(B) that would make the reporting of such activities up the chain of command mandatory in certain situations.⁵

PRACTICE TIP:

Courts may conclude that the city attorney has a fiduciary duty to report significant wrongdoing to the highest authoritative body in the city when lower level officials fail to take recommended corrective action. Many city attorneys believe such a fiduciary obligation exists.

Finally, in the event the “highest internal authority” fails to heed the city attorney’s advice and that failure is likely to result in substantial injury to the client, the city attorney retains the right to resign employment.⁶

G. CITY ATTORNEY’S DUTY NOT TO TREAT CITY OFFICIAL AS CLIENT OR TO PROMISE CONFIDENTIALITY

Rule 3-600(D) requires that whenever the city attorney becomes aware that the interests of a city official or employee may be adverse to those of the city, the city attorney must make it clear that he or she represents the city and not the individual official or employee. The individual should be advised that any information shared with the city attorney is not confidential and cannot be withheld from others in the city with authority over the matter. A clear admonition may help prevent the official from misperceiving the nature of a communication with the city attorney. While such an admonition may cause the official to be less forthcoming or could harm an open working relationship, the official should be reminded that he or she has a duty to candidly report all relevant information to the city’s attorney.

PRACTICE TIP:

Do not promise confidentiality to an individual council member. Make it clear in periodic communications, in writing, that any advice given to individual council members cannot be withheld from the rest of the council.

For example, a council member’s conflict of interest may be of critical importance to the entire council if the council member does not disqualify him or herself and that failure to do so could invalidate the council’s action. It should be made clear that conflict of interest advice is provided to a council member in his or her official capacity and such advice is subject to disclosure to the entire council. This may be true of other types of advice, such as an opinion on whether legislation proposed by a council member is preempted or unconstitutional.

It is advisable to make it clear from the outset that the city attorney’s duty of loyalty and confidentiality is owed to the city itself – and the council as a whole – rather than to an individual. Some city attorneys make it a practice to provide standing memoranda to their councils explaining this principle.

PRACTICE TIP:

The California Attorney General has opined that when a city attorney obtains information in confidence from a council member as though a confidential relationship exists between the city attorney and the council member, the city attorney is precluded from prosecuting the council member under the Political Reform Act.⁷

H. JOINT REPRESENTATION OF THE CITY AND ITS EMPLOYEES

Rule 3-600(E) requires the consent of the city before the city attorney may undertake the representation of an individual official or employee. However, the Government Tort Claims Act imposes a mandatory duty on the city to defend and indemnify public officials and employees.⁸ While this statutory obligation, in effect, embodies the city’s consent to employee representation by operation of law, these areas of joint representation can create conflicts of interest (*see chapter 2*).

I. QUASI-INDEPENDENT BOARD OR OFFICIAL

At times, a quasi-independent board or official may become a separate client of the city attorney, usually when the city attorney undertakes litigation against the quasi-independent board as to a matter on which the city attorney advised the board.⁹

CHAPTER 1 ENDNOTES

- ¹ California Business and Professions Code section 6068(e)(1).
- ² State Bar Rules of Professional Conduct, rule 3-600, provides:
- A) 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.
- (B) 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.
- (C) 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.
- (D) 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.
- (E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.
- ³ See *Ward v. Superior Court*, 70 Cal.App.3d 23 (1977) (county counsel's only client is County of Los Angeles and had no separate attorney-client relationship with the county assessor and other county officials that he represented as part of his duties as county counsel; thus county counsel was not disqualified from representing the county assessor in his individual capacity and county counsel was not disqualified from representing the county in a suit brought against it by the county tax assessor, who was himself suing as an individual and taxpayer). See also *U.S. v. Troutman*, 814 F.2d 1428, 1437-1439 (10th Cir. 1987) (United States Attorney General is not precluded from prosecuting violation of Hobbs Act merely because he advises officials in their official capacity since there was no evidence they disclosed any personal confidential information to Attorney General that would result in disqualification). Compare *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150 (1981) (where Attorney General had given confidential advice to client board, he is subsequently precluded from suing the board on the very same matter).
- ⁴ State Bar Rules of Professional Conduct, rule 3-600(B).
- ⁵ AB 2713 would add section 6068.1 to the Business and Professions Code, authorizing attorneys representing governmental organizations, who learn of improper governmental activity, to urge reconsideration of the matter and to refer it to a higher authority in the organization. The bill was vetoed by Governor Arnold Schwarzenegger in September 2004.
- ⁶ State Bar Rules of Professional Conduct, rule 3-600(C).
- ⁷ 71 Ops. Cal. Atty. Gen. 255 (1988) (Opinion No. 87-302).
- ⁸ California Government Code section 995 provides, in part:
- [U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official capacity or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.
- Cal. Gov't Code § 995.
- ⁹ See *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150 (1981) (rule 3-310 prohibits Attorney General from suing client department on a matter on which he advised that department); accord, *Santa Clara County Counsels Assn. v. Woodside*, 7 Cal.4th 525, 548 (1994) ("duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice"); *Civil Service Comm. v. Superior Court*, 163 Cal.App.3d 70, 75-78 (1984) (under rule 3-310, county counsel may not represent county board of supervisors in suit against county's civil service commission, where county counsel's office advised commission on same matter and county failed to obtain the commission's informed written consent to subsequent adverse representation of the board of supervisors in its suit to invalidate the commission's decision).



RULE 3-310 AND THE PROHIBITION ON THE CITY ATTORNEY'S REPRESENTATION OF CONFLICTING INTERESTS

A. INTRODUCTION

State Bar Rules of Professional Conduct, rule 3-310, applies broadly to a wide range of possibly conflicting interests, including personal business or other interests of the lawyer that are adverse to those of the client. This chapter examines only those conflicts of interest caused by the simultaneous or successive representation of clients whose interests are adverse to one another. The issues addressed are those that arise when the city attorney represents more than one public client whose interests conflict with one another.¹

B. RULE 3-310 AND CLIENT REPRESENTATION

Rule 3-310 is the key provision governing conflicts of interest in the context of representing two clients who may be adverse to one another. Subsection (C) provides, in pertinent part, as follows:

A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Of course, this section is relevant only if the city attorney is deemed to have more than one client.

C. THE CITY ATTORNEY'S CLIENT

The city attorney usually has a single client, the city itself, as embodied in the city council and lower subordinate officials, employees and boards (*see chapter 1*). While officials may be entitled to seek and get advice in their official capacity, that advice is always rendered to them as city officials in their official capacity, not as individuals with interests separate and distinct from the city itself.

Government Code section 41801 provides that "[t]he city attorney shall advise the city officials in all legal matters pertaining to city business."

Because the city attorney represents a *single* client entity – manifested in different officials at any given time – there can be no conflict of interest caused by the adverse interests of two or more city officials. As a result, there are no rule 3-310 issues.

However, there are some circumstances where the city attorney does represent more than one client. Generally, these issues arise in:

- Defense of city employees pursuant to the Government Tort Claims Act;
- Disputes involving quasi-independent boards or commissions; and
- Joint powers agencies.

D. THE SCOPE AND NATURE OF THE PUBLIC ENTITY’S DUTY TO DEFEND AND INDEMNIFY CITY OFFICIALS AND EMPLOYEES

The Government Code sets out a comprehensive statutory scheme for determining the rights of public employees to a defense and indemnification from their employing entities with respect to suits filed against them arising out of the course and scope of their employment.² The critical duty to provide a defense is imposed by Government Code section 995 that provides, in pertinent part:

Except as otherwise provided in sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity. For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.³

However, under Government Code section 995.2, the duty to defend is qualified by three limitations:

- The act or omission was not within the scope of his or her employment;
- He or she acted or failed to act because of actual fraud, corruption, or actual malice; and

- The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee. For the purposes of this section, “specific conflict of interest” means a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the public entity.

Thus, the statute contemplates that a “specific conflict of interest” could result in the separate representation of the entity and the employee.

The Government Code goes on to explain that the public entity may provide for the employee’s defense by “its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense.”⁴ Furthermore, the code provides that (1) where the employee has timely requested the defense, (2) the act or omission arose out of the course and scope of the public employment, and (3) the employee has cooperated in good faith in the defense, the entity must pay any judgment arising from the suit or any settlement or compromise “*to which the entity has agreed.*”⁵ These sections have been interpreted to give the public entity – not the employee – the right to control the employee’s defense⁶ and to decide whether a conflict of interest exists.⁷

Where the lawsuit arises out of the course and scope of employment or office, the public entity has the duty to indemnify the employee or official.⁸

The statutory scheme also permits the entity to assume the defense of the employee under a reservation of rights as to whether the act or omission arose out of the course and scope of employment. In addition, it permits the public entity to pay the judgment or settlement “only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity.”⁹ If the governing body makes certain findings, the public entity may indemnify the employee against an award of punitive damages as well.¹⁰

E. TWO OR MORE SEPARATE "CLIENTS" WITH ADVERSE INTERESTS AND RULE 3-310

1. Employee Representation

In the context of the Government Tort Claims Act defenses, conflicts of interest requiring careful compliance with rule 3-310 typically arise when:

- The city attorney undertakes the defense of an employee in tort litigation, and the city is contemplating adverse personnel action against that employee; or
- The city defends an employee under a reservation of rights because the act or omission may not arise under the course and scope of employment.

2. Quasi-Independent Bodies and Officials

A conflict can also arise when the city council and a subordinate quasi-independent body or official are involved in litigation against one another. This situation is more likely to arise in charter cities, where the charter creates a quasi-independent official or body with the ability to make a binding decision and the city council seeks to overturn that decision by filing suit against the subordinate body.¹¹ By contrast, the organization of general law cities is generally more hierarchical in structure, with the council clearly established as the final decision maker with respect to most subordinate bodies.¹²

Civil service commissions and rent control boards are examples of quasi-independent bodies.

However, even if a city does not have quasi-independent boards or commissions, conflict of interest issues could be triggered if the city council is at odds with its city manager, or another public official, and files a lawsuit against him or her.

F. SIMULTANEOUS AND SUCCESSIVE REPRESENTATION OF CLIENTS WITH ADVERSE INTERESTS

Conflicts of interest can arise where a city attorney's former client from private practice is in litigation with the city. Such conflicts of interest generally fall into two categories:

- Simultaneous representation of adverse interests; and
- Successive representation of adverse interests.

1. Simultaneous Representation

The simultaneous representation of clients with adverse interests arises when the same lawyer, firm or office concurrently represents the parties in either the same or a different matter. Simultaneous representation as to the very same matter is *per se* prohibited because it violates the attorney's duty of loyalty and confidentiality.

PRACTICE TIP:

Notwithstanding the language of rule 3-310, clients cannot give informed written consent in cases of simultaneous representations of adverse interests as to the very same matter.¹³

2. Successive Representation

The successive representation of clients with adverse interests arises when the representation of a current client creates an adverse relationship with a former client. Successive representation is prohibited if there is a substantial relationship between the current matter and the prior representation. If there is, it is presumed that the lawyer acquired confidential information and the subsequent adverse representation is barred without the prior client's informed written consent.

PRACTICE TIP:

Under the rule of vicarious disqualification, not only the lawyer who represented the former client but also his or her entire firm or office is disqualified. The major ethical concern in such cases of successive representation is the violation of the duty of confidentiality.¹⁴

G. SPECIAL CONSIDERATIONS FOR ATTORNEYS IN THE PUBLIC SECTOR

The courts have recognized that there are special considerations that must be weighed before public lawyers should be found to have a conflict of interest under rule 3-310. For example, the general rule is that “a public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area.”¹⁵ “The question, therefore, is not whether a lawyer in a particular circumstance ‘may’ or ‘might’ or ‘could’ be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement ought to be forbidden categorically.”¹⁶

Conflict of interest rules were drafted with private attorneys primarily in mind. In the public sector, the financial incentive to favor particular clients over others or to ignore conflicts is reduced if not eliminated. The disqualification of a public attorney can result in minimal benefits while causing dislocation and public expense. For these reasons courts should not assume the existence of a conflict of interest in the public sector and should attempt to limit the reach of disqualification in such cases.¹⁷

PRACTICE TIP:

In the public sector, because of the somewhat lessened potential for conflicts of interest and the cost to the public for disqualifying whole offices of government funded attorneys, the use of internal screening procedures or “ethical walls” to avoid conflicts have been allowed.¹⁸

PRACTICE TIP:

Make it clear, preferably in writing, to all subordinate officials and boards, even quasi-independent ones, that your advice is being provided to the city as the client and not to the quasi-independent board or official in their separate capacity. Even so, if the advice was provided in confidence and the city attorney met with the board in closed session, he or she will likely be disqualified from subsequently suing the board or official. So far no case has applied a rule 3-310 disqualification to the city attorney’s purely advisory role to all officials in the entity, even where the warring officials have separate powers.¹⁹

H. ADVICE TO MAYORS AND COUNCILS WITH DIFFERING POWERS AND CONFLICTING AGENDAS

A city attorney may advise both the mayor and city council as to the legality of an ordinance where the council has the power to adopt the ordinance under the city charter and the mayor has the power to veto it, and the mayor and council have antagonistic positions.²⁰ The city attorney’s client is the city on these facts.

I. JOINT REPRESENTATION OF CITY AND EMPLOYEES IN LITIGATION

When conflicts arise in tort cases because (1) the city is contemplating disciplinary action against the employee or (2) the city is acting with a reservation of rights, the employee’s representation should be contracted out to outside counsel. However, one case suggests that the employee can simply be denied a defense.²¹

Whenever an employee is potentially subject to discipline for the same acts as the ones at issue in the suit, there will always be a conflict of interest under rule 3-310 because the interests of the entity and the individual are adverse to one another and the same lawyer simply may not represent both. Since under rule 3-600 the entity itself is the city attorney's primary client, it is the employee's or official's representation that should be contracted out while the city attorney continues to represent the entity. Occasionally this is not feasible. For example, where the subordinate official was advised by the city attorney's office before it became apparent that the city council had an adverse position, the city attorney will have to withdraw from representing both sides of the dispute.

Similarly, if the city has undertaken the defense under a reservation of rights as to whether the suit arises out of the course and scope of the employment and is also intending to defend the suit, in part, on this basis, the interests of the employee and the city will be adverse since it is in the employee's interests to obtain defense and indemnification at city expense and the city has a converse interest.²²

PRACTICE TIP:

In large city attorney law offices, it may be possible to employ screening devices to wall off the lawyers prosecuting a disciplinary matter from the lawyers handling a tort suit. However, screening has been employed in very limited circumstances. It may not satisfy the prohibitions imposed by rule 3-310 because of the fact that instances of simultaneous representation of two clients with adverse interests as to the same matter are deemed to be a *per se* violation of the attorney's duty of loyalty.

The mere fact that punitive damages are sought is not sufficient to trigger a conflict of interest between the entity and the employee and require separate representation.²³ Further, in *DeGrassi v. Glendora*, the court held that a city had no duty to reimburse a city council member for retaining a private lawyer to defend her in a suit brought against her in her official capacity, where the council member refused to agree to the city's condition that she agree to cooperate in her defense and allow the city to control the defense.²⁴ One case has suggested, in dictum, that any conflict issue must be resolved solely through review of the Tort Claims Act in cases involving the right of an employee or official to defense and indemnification.²⁵

For More Information

For a more detailed discussion of the issues presented by the joint defense of the entity and its employees and officials, see Albuquerque, *Joint Defense of Suits Brought Against Public Entities and Their Employees: Are Conflicts of Interest Manufactured or Real?* available online at www.cacities.org/attorneys.



PRACTICE TIP:

The way to avoid hiring duplicative counsel is to try to resolve any disciplinary issues at the claim stage, when there is only a single client, the city. It is only when a suit is filed that the city's duty to defend the employee under the Tort Claims Act is triggered and an additional client's representation is possible. Up to that point, the claim is simply filed with the city to evaluate and the city attorney represents a single client, the city. If the disciplinary issue is resolved by the time suit is filed, the city and the employee will no longer have adverse interests and the city attorney will be able to represent both the city and the employee without violating rule 3-310. Although the Tort Claims Act imposes time limits to respond to claims and gives the claimant the right to sue when action is not taken on the claim within statutory deadlines, the city can agree to toll time limits and take more time at the claims stage to either resolve the case or to ensure that a suit is not filed until after any possible adversity is resolved.

In cases where an issue is whether the injury arose in the course and scope of employment, it may be best to either deny the defense entirely and take the risk of being proven wrong later and having to pay the defense, or in close cases simply to provide the defense without a reservation of rights, since defending under a reservation of rights will require separate counsel for the city and the employee.²⁶

J. ETHICAL WALLS TO AVOID CONFLICTS OF INTEREST

Devices employed to screen lawyers in separate branches of publicly funded law offices from one another have been allowed for the representation of clients with adverse interests.²⁷ For example, a county counsel office may represent both the public guardian in the conservatorship proceeding and the county in a petition to declare the conservatee's child a ward of the court.²⁸ However, while such walls may be accepted in cases of successive representation or in very large offices they are fraught with danger in cases of simultaneous adverse representation as to the same matter and could be deemed a violation of rule 3-310.

K. JOINT POWERS AGREEMENTS – ADVANCE WRITTEN CONSENT

Agreeing ahead of time as to how to resolve conflicts by agencies engaged in exercise of joint powers rights can avoid problems when the conflict arises. In *Elliot v. McFarland Unified School District*,²⁹ two school districts entered into a joint powers agreement and the agency created was represented by one of their counsel. The parties agreed that if a conflict of interest arose between the members of the JPA, the school district counsel representing the JPA could continue to represent his own school district. The other district with a conflicting interest would obtain its own counsel since it had granted informed written consent to the successive adverse representation by the JPA counsel of his own district.

A city attorney representing a JPA should be aware of Political Reform Act (*see chapter 3*) and Government Code section 1090 (*see chapter 4*) issues that can arise in the course of representing a JPA.

PRACTICE TIP:

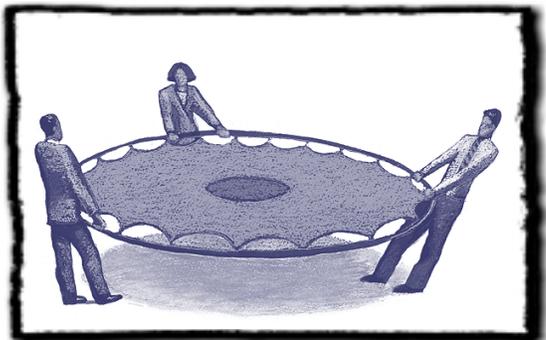
Remember that informed written consent must be based upon the circumstances actually contemplated by the consent granted. If the consent was not informed or circumstances change such that consent is vitiated, the waiver is not effective.

CHAPTER 2 ENDNOTES

- ¹ Rule 3-310 applies to a contract city attorney who has a private client whose interests conflict with the city in the same manner as if the interest of two private clients conflicted. However, the latter situation is not discussed in this chapter.
- ² See California Government Code sections 825 and following.
- ³ This provision has been held to apply to actions under 42 U.S.C. § 1983 (*Williams v. Horvath*, 16 Cal.3d 834, 843 (1976)).
- ⁴ California Government Code section 996.
- ⁵ California Government Code section 825 (emphasis added).
- ⁶ *DeGrassi v. City of Glendora*, 636 F.3d 636, 642 (9th Cir. 2000).
- ⁷ *City of Huntington Beach v. The Petersen Law Firm*, 95 Cal.App.4th 562 (2002).
- ⁸ *Firemen's Fund Ins. Co. v. City of Turlock*, 170 Cal.App.3d 988, 1004-05 (1985). (City's insurance carriers not entitled to reimbursement from city attorney's insurance carrier even though disclosure of confidential personnel settlement by city attorney resulted in liability to city. The city attorney was entitled to defense and indemnification from the city for acts arising within course and scope of employment, "not the other way around.")
- ⁹ California Government Code section 825.2(a).
- ¹⁰ California Government Code section 825.2(b).
- ¹¹ Rule 3-310 precluded a county counsel from advising a quasi-independent commission and then suing the board on behalf of the board of supervisors in the same matter. In *Civil Service Commission v. Superior Court*, 163 Cal.App.3d 70 (1984), the county counsel was disqualified under rule 3-310 from representing a board of supervisors in a suit against a county civil service commission. The suit challenged the commission's action in reversing a discharge and county counsel had advised the commission about the same matter. The major rationale for the court in concluding that there was more than one client represented by the county counsel was the fact that the quasi-independent board's decision was binding and could not be overruled by the board of supervisors. Since the county counsel had already advised the commission, he had to withdraw from representing the board of supervisors against the commission that he had advised as to the same matter. The court relied on *People ex. rel. Deukmejian v. Brown*, 29 Cal.3d 150 (1981). There, rule 3-310 prohibited the attorney general from suing a client department on a matter on which he advised that department.
- ¹² An independently elected sheriff may become a client separate from the county entitled to separate representation. See 80 Ops. Cal. Atty. Gen. 127 (1997) (Opinion No. 96-901) (when a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of the sheriff, a conflict of interest may, depending upon the individual circumstances, thereafter exist so as to entitle the sheriff to legal representation in that matter by independent counsel).
- By contrast where the subordinate board has no final power, the result was different and the county counsel was found to have a single client. A project advisory board with purely advisory powers was found not to be a separate client of the city attorney and thus not entitled to independent counsel. *North Hollywood Project Area Committee v. City of Los Angeles*, 61 Cal.App.4th 719 (1998).
- ¹³ *Flatt v. Superior Court (Daniel)*, 9 Cal.4th 275, 284-287 (1994), *rebrg. denied*.
- ¹⁴ *Id.*
- ¹⁵ *In re Lee G.*, 1 Cal.App.4th 17, 29 (1991).
- ¹⁶ *Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal.App.3d 1432, 1444 (1991). *Accord, In re Lee G., supra*.
- ¹⁷ *People v. Christian*, 41 Cal.App.4th 986, 997-98 (1996) (permitting lawyers from two separate branch offices of the public defender, screened off from one another, to represent criminal co-defendants with adverse interests). "Thus, in the public sector, in light of the somewhat lessened potential for conflicts of interest and the public price paid for disqualifying whole offices of government funded attorneys, use of internal screening procedures or "ethical walls" to avoid conflicts within government offices... have been permitted." *Id.* at 998.
- ¹⁸ *Id.* at 998. In *City and County of San Francisco v. Cobra Solutions, Inc.*, 119 Cal.App.4th 304 (2004), the newly elected city attorney was screened from all involvement in a criminal prosecution when it was learned that a former client of the city attorney was involved. The chief assistant city attorney and deputy city attorneys litigated the case. The court of appeal found that the entire office should be disqualified because the disqualified official was the head of the office. The court did not decide the general question of whether the conflict of a public lawyer must be attributed to the entire office in cases of subsequent representation but noted, "[w]e agree that... reasons exist to support a narrower disqualification rule in public sector cases." A petition for review was granted by the California Supreme Court on August 25, 2004.
- In *City of Santa Barbara v. Superior Court (Stenson)*, 2004 WL 2002519 (Sept. 9, 2004), the Stensons sued the city for damages caused by water and sewage from a city main. During litigation, one of their attorneys accepted a job as a deputy city attorney. Even though an "ethical wall" was constructed to prevent the attorney from having any access to any information, documents or other materials related to the case, the Stensons sought to disqualify the city attorney's office. The trial court agreed with the Stensons, concluding that an ethical wall was not sufficient and that disqualification of the entire office was required by the vicarious disqualification rule. The court of appeal disagreed, finding that the screening measures were both timely and effective in protecting the Stensons' confidences. "[I]n an ordinary civil case, disqualification of a nonsupervisory deputy city attorney should not result in the vicarious disqualification of the entire city attorney's office. Such would deprive the city of its counsel of choice, result in an unnecessary burden on the public fisc, and provide an unnecessary litigation disadvantage to the city."

CHAPTER 2 ENDNOTES, CONTINUED

- ¹⁹ However, there is some unfortunate language in a State Bar ethics opinion that suggests that a quasi-independent official may be entitled to separate legal advice even in the absence of litigation. This problem may be remedied in findings contained in pending legislation, AB 2713, which adds Business and Professions Code section 6068.1 to permit limited lawyer whistleblowing in cases of crime or fraud (*see chapter 7*).
- ²⁰ State Bar Ethics Opinion No. 2001-156 (Interim No. 93-004), August 31, 2001. This opinion, however, has some unfortunate language suggesting that a city attorney may have a conflict even in rendering advice to a city official with independent powers. Pending legislative approval, amendments adding Business and Professions Code section 6068.1 to permit limited whistleblowing contain League-sponsored language stating that, generally, the governmental organization itself is the client and not the official or entity within it, even where that official or entity can exercise independent power on behalf of the client organization.
- ²¹ *City of Huntington Beach v. The Petersen Law Firm*, 95 Cal.App.4th 562 (2002) (city may decline to provide a defense or to reimburse an employee for such a defense where the city determines that there is a conflict of interest between the city and the employee). This case appears to be an aberration, and is contrary to the prevailing view among city attorneys that the existence of a conflict of interest between the entity and the employee does not relieve the city of the duty to defend its employee by using separate counsel.
- ²² *See San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal.App.3d 358 (1984).
- ²³ *Laws v. County of San Diego*, 219 Cal.App.3d 189, 198-200 (1990).
- ²⁴ *DeGrassi v. Glendora*, 207 F.3d 636 (9th Cir. 1999).
- ²⁵ *Foremost Ins. Co. v. Wilks*, 206 Cal.App.3d 251 (1988).
- ²⁶ *See San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal.App.3d 358 (1984).
- ²⁷ *See cases discussed in People v. Christian*, 41 Cal.App.4th 986 (1996).
- ²⁸ *In re Lee G.*, 1 Cal.App.4th 17 (1991).
- ²⁹ *Elliott v. McFarland Unified School District*, 165 Cal.App.3d 562, 571 (1985).



THE POLITICAL REFORM ACT: ETHICAL CONSIDERATIONS FOR THE CITY ATTORNEY

A. INTRODUCTION

City attorneys, as public officials, are covered by the Political Reform Act (PRA).¹ However, there are some aspects of the PRA that apply differently to city attorneys than to other public officials. Also, some aspects of the PRA apply differently to contract city attorneys than to in-house city attorneys. This chapter will focus primarily on those situations. Since city attorneys need to routinely apply and interpret the PRA for their clients, they should already have a basic knowledge of the PRA and the Regulations. As a result, this chapter will presume a general understanding of the PRA and the eight part test set forth in Regulation 18700 of the Fair Political Practices Commission (FPPC).

For More Information

The League's *Municipal Law Handbook* provides practical advice on many areas of municipal law, including the PRA and the eight part test. The handbook can be found on the League's website in the MuniLaw Research Center at www.cacities.org/munilaw. The publication is available for purchase through CityBooks by calling (916) 658-8257 or online at www.cacities.org/store.

B. THE POLITICAL REFORM ACT APPLIES TO BOTH IN-HOUSE AND CONTRACT CITY ATTORNEYS

The PRA defines "public officials" as every member, officer, employee, or consultant of a state or local government agency.² Therefore, the individual serving as city attorney is a public official. Similarly, an individual serving a city by contract with the power to make governmental decisions or providing services normally provided by a city staff member is a "consultant" and, thus, also a public official.³ As a result, city attorneys are public officials covered by the PRA whether they work for the city in-house or pursuant to a contract.

C. DECISIONS AFFECTING THE CITY ATTORNEY'S COMPENSATION OR PAYMENTS TO THE CITY ATTORNEY'S LAW FIRM

The PRA, in defining "income," specifically excludes salary from a local government agency.⁴ The FPPC defines "salary from a local governmental agency" as including wages and fees paid to a consultant to perform duties for the agency.⁵ Therefore, the city is not a source of income to in-house or contract city attorneys.

However, contract city attorneys generally receive compensation from and/or have an ownership interest in a law firm that is paid by the city for city attorney services. Thus, while in-house city attorneys generally will not have a financial interest under the PRA prohibiting them from participating in decisions affecting their compensation from the city, contract city attorneys will likely have a financial interest in such decisions since the city will generally compensate their firm – and not the individual contract city attorney – for these services.

Regulation 18702.4 defines the phrase “make, participate in making or in any way attempt to use his official position to influence a governmental decision” to include exceptions for both in-house public officials and consultants, including contract city attorneys. Doing so permits these individuals to participate in decisions affecting their compensation. The ultimate effect of this regulation is that in-house city attorneys may participate in such decisions in their official capacity, but contract city attorneys may only do so in their private capacity. In pertinent part, the Regulation provides as follows:

(a) Making or participating in making a governmental decision shall not include:

...

(3) Actions by public officials relating to their compensation or the terms or conditions of their employment or contract. In the case of public officials who are “consultants,” as defined in Title 2, California Code of Regulations, section 18701(a)(2), this includes actions by consultants relating to the terms or conditions of the contract pursuant to which they provide services to the agency, so long as they are acting in their private capacity.

A similar exception is provided to the prohibitions on attempting to influence a decision. Regulation section 18702.4 (b)(3) provides in relevant part:

(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

...

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

For More Information:

Fair Political Practices Commission opinions and advice summaries can be found online at www.fppc.ca.gov.

The FPPC’s *Leidigh Advice Letter*⁶ applied the predecessor to these Regulations to city attorney contracts. The advice letter indicates that an attorney employed by a law firm where the firm has a contract with a government agency to provide services may negotiate changes in, a renewal of, or extension of, his or her firm’s contract with that agency, or negotiate a separate contract for his or her law firm, provided that the attorney does so while acting in the attorney’s private capacity.⁷ The FPPC concluded that such actions were within the scope of both of the consultant contract exceptions (the “participation” exception of Regulation Section 18702.3 (a)(3) and the “using his or her official position to influence” exception of Regulation section 18702.3 (b)(3)).

City attorneys are frequently requested to render advice to their clients on matters that could result in generating additional work for the city attorney or other members of his or her office. Rendering such advice does not usually implicate the PRA for in-house city attorneys because their compensation will generally not be affected by the amount of work they or their offices perform.

However, the compensation of contract city attorneys and their law firms frequently depends on the amount of work attorneys in the firm perform for the city. For example, the city attorney’s firm might receive additional compensation depending on whether the city attorney’s office files or defends a lawsuit on behalf of the city. It would be untenable if the PRA prevented a contract city attorney from participating in such decisions in his or her official capacity. The FPPC avoided this problem by providing that contract city attorneys and other consultants can participate in and use their official position to influence decisions that could result in additional compensation to them or their firm so long as the contract with the city specifically includes such services.⁸ The FPPC reasoned that the governmental decision to pay the law firm for the legal services enumerated in the contract had already been made by disinterested agency officials at the time the contract was approved. The city attorney’s participation in a decision that could require these services merely involved implementation of that preexisting decision.

PRACTICE TIP:

Contract city attorneys should make certain that their contracts contain provisions to provide specialized services prior to providing advice to the city on matters that might require such services. Otherwise, it could constitute a violation of the PRA if the attorney performs those services after having participated in the underlying decision necessitating the services. This area can become tricky if the decision on amending the city attorney’s contract and the underlying decision become intertwined.

City attorneys frequently are requested to participate in decisions on compensation of the city officials in general that could indirectly affect their own compensation. For example, a city attorney might be requested to advise the city on an issue relating to raising the CalPERS retirement benefit formula. This decision would affect the retirement benefits of in-house city attorneys. Most likely, Regulation 18704.2 would apply to these decisions for in-house city attorneys and they can participate in the decisions. However, this result is not entirely certain, since the city attorney would actually be negotiating the CalPERS contract, not his or her own contract.

The result with contract city attorneys is less certain, since the city attorney would not be negotiating in his or her private capacity the terms his or her firm’s contract with the city. For example, if the firm’s contract provides that the firm’s compensation will be increased by the same percentage as the management staff’s compensation, Regulation 18704.2 likely would not permit the city attorney to advise the city on issues related to the increase in the management unit’s compensation.



PRACTICE TIP:

Neither contract nor in-house city attorneys should attend a closed session at which their compensation is discussed. Contract city attorneys would violate the PRA by attending the closed session, since they would be using their official position to influence the decision merely by attending the closed session.⁹ Further, section 54957.6 (the meet and confer Brown Act closed session provision) provides the only authority to discuss the city attorney’s salary in closed session. That section, however, does not authorize the affected employee to attend the closed session. Both contract and in-house city attorneys would violate these Brown Act provisions by attending a closed session during which their compensation is discussed.

D. DECISIONS AFFECTING OTHER CLIENTS OF THE CITY ATTORNEY

City attorneys will sometimes be requested to participate in decisions affecting another client of the city attorney. This situation usually arises only for contract city attorneys who often represent clients in addition to the city. However, in-house city attorneys can also sometimes face such an issue. For example, in-house city attorneys might be called on to represent another entity, such as a joint powers authority, to which the city belongs. The PRA would not apply to this situation for either in-house or contract city attorneys if the individual is not compensated by the joint powers authority for providing services to the authority. Also, the PRA would not be implicated for in-house city attorneys so long as the other client is a public entity because the salary the city attorney receives from that entity is not income under the PRA.

The situation is a little more complicated for contract city attorneys who work for firms if the other entity compensates the attorney or the firm. Section 82030 provides that sources of income to a public official owning 10% or more of a business entity include sources of income to the business entity if the public official's pro-rata share of income from that source exceeds \$500. As a result, city attorneys owning more than 10% of a law firm will not be able to participate under the PRA in decisions affecting other clients of the firm if the city attorney's pro-rata share of the income from that other client exceeds \$500.¹⁰

However, sources of income to the firm will not be sources of income to city attorneys owning less than 10% of the law firm. In such cases, the PRA would require the city attorney to abstain from participating in decisions affecting the other client only if it is reasonably foreseeable the decision would have a material financial effect on the law firm. So long as the firm will not perform work for the client that would flow from the decision, it is unlikely that the PRA would be implicated.

For More Information:

Open & Public III, A Guide to the Ralph M. Brown Act, 2000, provides information on the open meeting laws for local governments. The publication is available for purchase through CityBooks by calling (916) 658-8257 or online at www.cacities.org/store.

CHAPTER 3 ENDNOTES

- ¹ See California Government Code sections 82000 and following.
- ² California Government Code section 82048.
- ³ California Code of Regulations section 18701(a)(2).
- ⁴ California Government Code section 82030(b)(2).
- ⁵ California Code of Regulations section 18232.
- ⁶ *Leidigh Advice Letter*, A-94-127 (1994).
- ⁷ The *Eckis Advice Letter*, A-93-270 (1993), which determined that contract city attorneys could not negotiate or renegotiate their contracts, was decided under different regulations and is no longer valid.
- ⁸ See *Ritchie Advice Letter*, March 19, 1979. This advice letter addresses the issue whether a contract city attorney can participate in a rezoning decision that would likely lead to a redevelopment agency bond sale from which the city attorney would receive a percentage commission as bond counsel. Although the advice letter did not reach the ultimate issue, it does indicate that the bond counsel payments, even if paid as a percentage of the bond proceeds, are considered salary from a government agency and, thus, are excluded from income under the PRA. The implication of the advice letter is that the city attorney could participate in the rezoning decision. In this case, the attorney was a sole practitioner.

Also see McEwen Informal Assistance Letter, I-93-481, I-92-523 and I-92-G14. This informal advice letter constitutes a comprehensive analysis of the PRA as applied to city attorneys. For purposes of this chapter, the relevant determination is that a city attorney can participate in decisions that could result in additional compensation from the city to the firm if the services for which the extra compensation will be earned are included in the contract. Some of the Regulations discussed in this informal advice letter have changed. For example, the portion of the letter prohibiting a contract city attorney from renegotiating the contract between the city and the city attorney's firm, even in his or her private capacity, is no longer valid. Thus, the analysis in this letter should be reviewed carefully.
- ⁹ California Code of Regulations section 18702.1(c).
- ¹⁰ See *McEwen Advice Letter*, A-89-454, for a discussion on this general issue.



CITY ATTORNEYS' FINANCIAL INTERESTS IN CONTRACTS: 1090 CONFLICTS

A. INTRODUCTION

California Government Code section 1090 prohibits city officers and employees from having financial interests in contracts made by them or by any board or body of which they are members.¹ Section 1090 reflects the common law prohibition against self-dealing and public officials must act in a manner that satisfies both the requirements of section 1090 and the Political Reform Act (*see chapter 3*). This chapter focuses on section 1090 conflicts that are of particular concern to city attorneys.

B. GOVERNMENT CODE SECTION 1090 AND CITY ATTORNEYS GENERALLY

Section 1090 prohibits public officials from being “financially interested in any contract made by them in their official capacity.” A city attorney, whether in-house or contract, is a “public official” within the meaning of section 1090.² Except in limited circumstances involving contracts between the city attorney and the city, a city attorney’s financial interests will not be a contract bar since the attorney can refrain from participating in his or her official capacity in the making of the contract and otherwise comply with the other requirements of section 1090.

The courts and the Attorney General have read section 1090 broadly so that the “making of a contract” includes actions preliminary to execution, including negotiations and involvement in decisions leading to the need for, or possibility of, the contract.³ Any contract made in violation of section 1090 is void and may not be enforced.

Under section 1097, a public official who willfully violates any of the provisions of section 1090 may be punished by:

- A fine of not more than one thousand dollars (\$1,000);
- Imprisonment in the state prison;
- Disqualification from holding any office in the state.

Three common circumstances in which city attorneys will encounter potential section 1090 conflicts are:

- Negotiating employment contracts with the city and other public agencies;
- Negotiating for the performance of additional services outside the scope of the existing employment contract;
- Serving as legal counsel to a joint powers agency of which the city is a member.

However, given the broad definitions of financial interests under section 1090, city attorneys need to be mindful of other conflicts that may arise for themselves and members of their staffs – for example, from their spouses’ employment.⁴

C. NEGOTIATING CITY ATTORNEY EMPLOYMENT CONTRACTS

1. Avoid Giving Legal Advice on the Contract

Section 1090 does not prohibit contract city attorneys from negotiating the terms of their employment contracts directly with the city so long as the attorneys are acting solely in their private capacity.⁵ However, city attorneys cannot provide legal

advice to interpret, define or negotiate the terms of the contract; if asked to provide such advice, the city attorney should advise the city to retain outside counsel.

While contract city attorneys are clearly subject to section 1090, it also applies to special counsel. In *Shaefer v. Berinstein*, the court applied section 1090 to a “special city attorney” reasoning that section 1090 applies to one in an “advisory position” to a city.⁶ Thus, both contract city attorneys and special counsel must carefully ensure that they do not advise their client agency on contracts in which they may be directly or indirectly financially interested.

PRACTICE TIP:

When negotiating your employment contract, create a wall between yourself and your legislative body. Make it clear that you are representing yourself in your personal capacity and not advising the body as the city attorney. Present your proposal to the city manager/executive director and allow him or her to present it to the city council or agency. Explain that if the legislative body wants legal advice about the contract it should retain independent counsel.

2. Additional Legal Services: In-house City Attorneys

City attorneys are often asked to perform litigation, bond counsel and other specialized services. Such requests usually do not present any questions under section 1090 for in-house city attorneys since they usually will not receive any additional compensation for performing such services.

3. Additional Legal Services: Contract City Attorneys

Whether a request for specialized legal services would raise section 1090 questions for contract city attorneys depends on two factors: (1) will the city attorney’s contract with the city require modification in order for the attorney to be paid for these services; and (2) will the city attorney’s involvement in the making of a contract between the city and a third party generate additional income for the city attorney? This last question is particularly important if the additional income would come from an entity other than the city.

PRACTICE TIP:

If you are an in-house city attorney, consider recommending that your city obtain legal advice on your contract from outside counsel, rather than from one of your subordinates.

A contract city attorney who is advising the city on the likelihood of success in litigation or on other matters that could affect the city attorney’s income or that of his or her law firm will not have a section 1090 issue arising from the additional income that could result from these services if the retainer agreement already provides for such services. This is because the provision of those services will not require a new contract or an amendment to the existing contract. Since no contract is involved, section 1090 is not implicated.

However, if the contract does not include those services, the city attorney will likely need to amend the contract. While city attorneys can represent themselves in such negotiations, they may not recommend the need for such services in their capacity as city attorney or advise the city as a client. There is language in one of the leading cases on city attorney contracts, *Campagna v. Sanger*, that a city attorney who has a contract with both a monthly retainer and an hourly rate for additional services may add a contingent fee agreement with the city without violating section 1090.⁷

There is no consensus legal opinion or direction on whether providing advice on decisions that **might** require additional services for which the city attorney **could** be selected by the city is a section 1090 violation. Such situations should be carefully evaluated on a case-by-case basis. If the firm’s existing representation of the city is on a limited basis and the city relies on its city attorney to advise it as to the wisdom of participating in litigation, then a section 1090 violation would very likely not occur.



Campagna v. City of Sanger: City Attorney Contracts and Compensation

In *Campagna v. City of Sanger*, a contract city attorney negotiated an agreement with the city whereby his firm and another firm would file a lawsuit against chemical companies on the city's behalf. The contingency fee agreement approved by the city council explained how the total fee would be calculated, but did not explain how the two firms would split the fee. In fact, under a separate oral agreement with the second firm, the city attorney's firm was to receive a 35% referral fee.

Twelve years later, after the attorney had stopped serving as Sanger's city attorney, the litigation ended with a favorable settlement for the city. The city agreed to pay the outside attorney firm its portion of the fee, but claimed that the fee arrangement as to the city attorney violated section 1090.

In analyzing the issue, the court first held that the Political Reform Act did not apply because public officials may negotiate their own compensation. The court noted that it was permissible for the city attorney to negotiate compensation with the city council, even if that compensation took the form of a contingency fee agreement.

However, the court found there was a conflict of interest under section 1090 because the city attorney was interested in the contract with the outside attorney by virtue of the private fee splitting arrangement. The attorney had improperly negotiated directly with the outside attorney for his compensation while acting in his official capacity as city attorney. As the court explained, “[a]lthough [the city attorney] was entitled to negotiate with [the city] regarding compensation for litigation related services beyond his basic retainer agreement without violating section 1090 or the Political Reform Act, he negotiated his compensation with [the outside firm,] not with [the city.]”

Applying the *Campagna* analysis, it would not be a conflict for a city attorney or agency general counsel to negotiate with the legislative body a contingency fee arrangement or other compensation beyond the basic employment agreement. In such negotiations, it is important to be clear that the attorney is negotiating as a private party, not as the agency's counsel or city attorney. However, it would be a conflict for city attorney or general counsel to negotiate with the outside firm for a portion of their fee.

For More Information:

Counsel and Council: A Guide for Building a Productive Employment Relationship contains essential basic information defining the structure of the employment relationship between the city attorney and the city council. The handbook contains suggested employment agreement provisions, including “scope of services” for both contract and in-house city attorneys. This publication is available for purchase through CityBooks by calling (916) 658-8257 or online at www.cacities.org/store.

PRACTICE TIP:

Contract city attorneys should include in their employment contracts all services they anticipate providing for the city and how such services will be compensated.

D. SERVING AS LEGAL COUNSEL TO A JOINT POWERS AGENCY

City attorneys are frequently asked to advise agencies closely affiliated with the city itself, or to work on the contract that will form a joint powers agency that will include the city as a member. Issues can arise when the city attorney advises two such legally distinct entities and receives compensation separate from the compensation provided for services as city attorney/general counsel. The leading case on this issue is *People v. Gnass*.⁸ In *Gnass*, the court found sufficient evidence to support a grand jury indictment of the city attorney for section 1090 violations when he was paid as disclosure counsel in connection with bonds issued by ten joint powers public financing authorities that he had helped create as counsel for his city’s public financing authority. The court

held that when the city attorney was advising the city on entering into these agreements, the temptation to ingratiate himself with those across the table in order to become disclosure counsel was sufficient to constitute a “financial interest in the contract.”

Gnass is disturbing in that it suggests the mere eligibility for a future contract with a third (or fourth) party is a section 1090 violation. However, in this particular case, it was clear that the city only entered into these financings to make money. The city attorney and his firm received \$243,750 from the financings, while the city and its financing agency received between \$500,000 and \$800,000 in “administrative fees.” It was the Attorney General’s investigation of the legality of the administrative fees that led to the grand jury indictment of the city attorney.

PRACTICE TIP:

Be particularly wary of any situation in which you or your firm will be paid by an entity that, directly or indirectly, is “across the table” from the city in a contract negotiation, even if the contract constitutes only one aspect of a more complex transaction.

A more typical joint powers agreement advances some agenda shared by a number of public agencies, whether for the landscaping of freeways, the abatement of seismic hazards, or the establishment of training programs. Often, the “lead” city hosts the new agency by providing staffing and facilities and is reimbursed by the authority for doing so. If the city attorney is a public employee, the contract forming the JPA usually does not present section 1090 issues because the city attorney will not receive additional compensation.

However, in the case of a contract city attorney, the issue is more complex. The creation of a joint powers authority is by contract; an attorney who expects to be considered as general counsel for the new agency may be deemed to be financially interested in that contract under the reasoning in *Gnass*. Therefore, in such cases, it may be prudent for the city attorney to advise the city that he or she will either (1) not participate in the formation of the authority or (2) not provide legal services to the new authority.

E. CONTRACTS BETWEEN THE CITY AND OTHER CLIENTS OF THE CITY ATTORNEY

Cities sometimes wish to contract with other clients of the city attorney. This situation is more common for contract city attorneys, who may belong to firms with many clients. It can also arise when an in-house city attorney represents other government entities such as joint powers authorities affiliated with the city. As long as the city attorney avoids involvement in the “making” of a particular contract, the city and the other client can contract without violating section 1090. There are also situations in which the city attorney may lawfully work on the contract, perhaps more in theory than practice. Whether the city attorney can participate in the making of the contract depends upon whether:

- The city attorney will receive “consideration” or “remuneration” as a result of the contract;
- The contract city attorney owns 10% or more of his or her law firm;
- The city attorney’s other client is a public entity.

PRACTICE TIP:

Even if you determine that you have no section 1090 conflict, you still need to check the State Bar Rules of Professional Conduct and the Political Reform Act for possible conflicts as well.

A city attorney who will “receive remuneration” as the result of a contract between the city and another of his or her clients is barred from working on the contract, whatever his or her ownership in the firm. An attorney owning less than 10% of his or her practice may participate in the making of the city’s contract with his or her client, as long as the city attorney, personally, will not receive any remuneration.⁹ No cases or Attorney General opinions analyze “personal” versus law firm remuneration. However, some indirect guidance can be gleaned from a court decision and an Attorney General opinion addressing other section 1090 issues.

In *Fraser-Yamor Agency, Inc. v. County of Del Norte*, the court held that the enhancement of an insurance agency’s reputation, and contribution to overhead, that would result from placement of an insurance policy was sufficient remuneration to create a section 1090 conflict when a county

supervisor was one of the agency owners.¹⁰ The court reached this conclusion despite the fact that the supervisor had followed the “remote interest” protocols of section 1091 and had agreed with his firm to share in none of the commission income.

The Attorney General recently issued an opinion that a city cannot contract for legal services from a law firm in which a city council member is a partner even though “the law firm would receive no fees from the city for the services and would agree to turn over to the city any attorney fees that might be awarded in the litigation.” Citing *Fraser-Yamor*, the Attorney General’s office determined that the “contract could...bring indirect economic gain to the law firm, notwithstanding that it would receive no legal fees from the city. Success in the litigation could be financially advantageous to the law firm and inure to the council member’s personal benefit by enhancing the value of his interest in the firm.” The Attorney General also believed that the law firm would have an incentive to settle the litigation to avoid incurring additional expenses and that the firm would reap “prestige, publicity, and goodwill associated with the success of the lawsuit.”¹¹

Neither *Fraser-Yamor* nor the Attorney General opinion involved the attorney exceptions found in sections 1091 and 1091.5. In fact, the Attorney General specially stated that those sections were not relevant to determining whether the law firm could provide *pro bono* services to the city. That was because the contract was with the firm, not a client of the firm. Nevertheless, these authorities show the expansive interpretation afforded to section 1090. Until courts or the Attorney General provide guidance, it would appear to be prudent even for a city attorney who owns less than 10% of a law firm not to represent the city in a contract negotiation with one of the firm’s other clients if the firm is representing the client in the same transaction, especially if the city attorney is a partner in the firm. In many such situations, the city attorney’s compensation may increase as a result of the income the firm would receive for representing the other client.

Another question is whether the city attorney can represent the city in a contract with another client of the firm if the firm does not represent the client in the transaction, but will represent the other client on later matters resulting from the contract. For example, can the city attorney assist the city in negotiating a development agreement with his or her firm’s developer client if the firm does not represent the developer in the development agreement negotiations, but will represent the developer in its dealings with the construction contractors that

are dependant on approval of the development agreement? Given the expansive approach in other cases, it is possible that the firm could be considered as a recipient to receive this income to assist the developer in building the project “as a result” of the contract. Each city attorney faced with such a situation will need to determine whether it falls within the section 1091.5 (a)(10) exception.

If the “other client” is another public agency, an additional subsection of section 1091.5 may be relevant. In addition to subsection (a)(10), which is specific to lawyers (and certain other professionals), subsection (a)(9) defines as a non-interest the receiving of salary, per diem, or reimbursement for expenses from a government entity, unless the contract:

Directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of the consideration of the contract, and provided further that it is noted in the official record.

An attorney with a non-interest is permitted to represent the city in a contract between the two public entities. However, there is an Attorney General’s opinion suggesting that whenever two exceptions to section 1090 could apply, it is necessary that the facts fall within both exceptions. Thus, even if a contract city attorney could participate in a contract under subsection (a)(9) of section 1091.5 with another public agency represented by the city attorney, the city attorney might still be prohibited from participating in the contract if the city attorney owns more than 10% of his or her law firm.¹²

The application of section 1091.5(a)(9) is fairly clear, when, for example, a city with a sheriff’s deputy on the council is considering contracting with the county for police services. It is less clear how to apply the rule to an attorney, who presumably is working as a lawyer for each agency. For example, would the section permit the city attorney to represent the city in a contract with a school district that the city attorney also represents, in contract negotiations for a recreation programs on school district property? Clearly, the city’s recreation department does not employ the city attorney. Even assuming that client waivers of conflict are both possible and forthcoming, a certain amount of caution should be exercised in this area since there are no clear authorities on which to rely.

CHAPTER 4 ENDNOTES

- ¹ California Government Code section 1090 provides:

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this article, “district” means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

Cal. Gov’t Code § 1090.
- ² In some circumstances section 1090 may also apply to lawyers serving as special counsel to a city. In *Shaefer v. Berinstein*, 140 Cal.App.2d 278 (1956), the court applied section 1090 to a “special city attorney” employed “for the purpose of rehabilitating tax-deeded and special assessment frozen properties within the city.” The court’s decision may have been influenced by the fact that the special city attorney also had a private financial interest in the same matter for which he was retained.
- ³ *See, for example*, 81 Ops. Cal. Atty. Gen. 169 (1998) (Opinion No. 98-401) (participation in the planning and approval of a revolving loan program precludes subsequent borrowing from the fund); Cal. Atty. Gen. Indexed Letter No. IL 92-1212 (January 26, 1993) (former city planning commissioner could not contract as a consultant when he had chaired a general plan revision committee involved in decision to contract work out). Normally, index letters are not cited to since they are informal opinions of the Attorney General and not readily available to legal researchers. However, this index letter was cited by the Attorney General’s Office in its 1998 publication, *Conflicts of Interest*, which is available online at www.caag.state.ca.us/publications.
- ⁴ *See* 85 Ops. Cal. Atty. Gen. 34 (2002) (Opinion No. 01-601) (a staff member may not participate in negotiation or drafting of a development agreement when her spouse is an employee of a firm that will provide outreach services for the project under a yearly retainer, even though he has no interest in the firm, he will not work on this project, and his income will not be affected by the negotiations or its outcome). Note that the result would have been different had the husband been providing legal services or acting as a real estate agent, Government Code section 1091.5(a)(10). Note also that the “non-interests” exclusions defined in Government Code section 1091.5 are not identical to the financial interests that are exempt under the Political Reform Act.
- ⁵ *Campagna v. City of Sanger*, 42 Cal.App.4th 533 (1996).
- ⁶ *Shaefer v. Berinstein*, 140 Cal.App.2d 278, 291 (1956).
- ⁷ *Campagna v. City of Sanger*, 42 Cal.App.4th 533 (1996).
- ⁸ *People v. Gnass*, 101 Cal.App.4th 1271 (2002).
- ⁹ California Government Code sections 1091(b)(6) and 1091.5(a)(10).
- ¹⁰ *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal.App.3d 201 (1977).
- ¹¹ 86 Ops. Cal. Atty. Gen. 138 (2003) (Opinion No. 03-302).
- ¹² *See* 81 Ops. Cal. Atty. Gen. 169 (1998) (Opinion No. 98-401).



THE CITY ATTORNEY'S ROLE AS PROSECUTOR

A. INTRODUCTION

City attorneys occasionally have dual roles, handling both civil and criminal matters. Generally, the performance of these dual functions will not result in the disqualification of the city attorney's office.¹ However, these dual responsibilities can become an issue of concern, particularly when decisions are made regarding code enforcement matters and the filing of criminal complaints against prospective or existing parties in civil actions. This chapter examines the city attorney's role as prosecutor and how that role may conflict with the city attorney's other duties and responsibilities.

B. FACTORS TO CONSIDER WHEN FILING CRIMINAL CASES

1. Impartiality and Objectivity

Ethical problems can arise when the city attorney files criminal actions. For instance, it may be alleged that a criminal case – often a code enforcement action – was filed as a result of pressure from the city council or an individual city council member. There may be allegations that a criminal case was filed against an individual in an effort to protect the city from civil liability; for example, filing an action for battery on a peace officer to counteract a potential suit for use of excessive force.

City attorneys acting as prosecutors have a special requirement for impartiality and are required to maintain objectivity, refraining from even an appearance of a conflict of interest. Their filing discretion is not to be unduly influenced by factors other than probable cause and the interest of justice. As the California Supreme Court observed in *People ex rel. J. Clancy v. Superior Court*:

[A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly.²

PRACTICE TIP:

Penal Code section 1424 provides for disqualification of a city attorney from a criminal matter where: (1) there is a reasonable possibility that the city attorney's office may not exercise its discretionary function in an evenhanded manner; and (2) if the conflict is so grave that it is unlikely that a criminal defendant will receive fair treatment.³

2. Probable Cause

Violations of municipal codes are misdemeanors or infractions.⁴ Accordingly, city attorneys involved in the enforcement of their city's municipal code are subject to rule 5-110 of the State Bar Rules of Professional Conduct, which prohibits the filing of criminal charges where the prosecuting attorney knows or should know that the charges are not supported by probable cause. If the prosecuting attorney discovers the lack of probable cause, the attorney must notify the court in which the charges are pending and seek dismissal of the action.

3. Prosecutorial Immunity

Federal law provides city attorneys with absolute immunity from liability for their acts in initiating or pursuing criminal charges.⁵ Likewise, under state law, city attorneys are immune from any actions for malicious prosecution.⁶

PRACTICE TIP:

The city attorney should periodically remind the city council that they cannot influence the filing of criminal cases and that prosecutorial discretion cannot be based on council direction. Inform council members that their efforts to encourage the filing of a criminal case may support a claim of prosecutorial misconduct. The defendant may assert that the case was not filed based on probable cause, but rather on council desire. Advise the city council that it is appropriate for the council to establish policy and budget issues regarding prosecutorial matters in general, but not for a particular case. It is best to give this advice prior to a "hot" case in which there is a lot of interest among the council. When a "hot" case does arise, this advice can be provided as a "reminder."

4. Recusal of the City Attorney

Conflicts of interest requiring recusal of the city attorney in a criminal case may arise when he or she acquires a conflicting personal or emotional – rather than a professional – interest in the case or where the city attorney seeks to use the criminal

proceedings as a means to advance "personal or fiduciary interests."⁷ Examples of conflicts of interests and appearance of conflicts that may require recusal include:

- Prosecution of an officer, employee or agent of the city for an act committed in the course and scope of his or her official duties;
- Prosecution of personnel of the city attorney's office;
- Cases involving prosecution of an officer, employee or agent of the city who has provided confidential information relating to the criminal prosecution to attorneys for a civil matter; and
- Cases in which an employee of the city attorney's office, or member of an employee's family, is the victim of an alleged crime.

Proper management and oversight should be provided to avoid situations of such potential conflicts of interest and ensure recusal at the earliest opportunity.

PRACTICE TIP:

A city attorney acting as a prosecutor should not seek direction from the city council when filing a criminal case. However, a city attorney filing a civil action can, and in many cases must, receive direction from the city council before filing the lawsuit. In the case of a nuisance abatement action, the city attorney may bring either a criminal action in the name of the "People" or a civil action in the name of the city. In the former case, no council direction is required or permitted. However, one consequence of proceeding with a criminal action is that there is no attorney-client privilege because the city is not the client.

C. CRIMINAL FILINGS CANNOT BE BASED ON OR INFLUENCED BY CIVIL ACTIONS

A common potential conflict of interest involving a city attorney's improper use of his or her position to gain advantage in a civil action arises in the context of the dismissal of a criminal action in exchange for the release of civil claims or a stipulation to probable cause for the underlying criminal

arrest. State Bar Formal Opinion 1989-106 holds that a prosecutor's "offer to dismiss a criminal prosecution may not be conditioned on a release from civil liability because that practice constitutes a threat to obtain an advantage in a civil dispute in violation of the Rules of Professional Conduct."⁸ Accordingly, it is a violation of the Rules to dismiss a criminal prosecution conditioned on a release from civil liability. By contrast, it is permissible for the prosecutor and defendant to stipulate to the existence of probable cause as part of the dismissal of the criminal case.⁹

PRACTICE TIP:

A city attorney is not disqualified from prosecuting defendants merely because the city attorney would also defend any civil action filed by the defendants against the city in cases of alleged use of excessive force by peace officers.¹⁰ Given the long history of government lawyers both prosecuting crimes and defending civil actions filed against the government, the harm from the court exercising its statutory and inherent powers to prohibit such a practice is outweighed by the speculative and minimal harm from allowing the practice to continue.¹¹

Similarly, it is not an ethical violation of the Rules to tell a potential defendant, either in person or in writing, of possible criminal and civil consequences of litigation as long as no threat of criminal prosecution is made to obtain an advantage in a civil matter.¹²

PRACTICE TIP:

It is recommended that city attorney offices that provide civil and criminal (including code enforcement) functions establish internal policies and procedures that avoid the appearance of conflicts of interest.¹³ City attorneys must exercise great care to avoid situations where there is evidence to support undue influence by others (for example, council members, city managers, and police chiefs) in decisions of whether or what to file in a criminal prosecution. City attorneys must not allow others to influence their prosecutorial discretion.

D. CONTRACT CITY ATTORNEYS AND THE ABILITY TO PROVIDE CRIMINAL DEFENSE SERVICES

In instances where law firms serve as city prosecutors enforcing municipal code violations, issues arise regarding whether lawyers in that firm can represent criminal defendants charged with state code violations. In *People v. Rhodes*, the California Supreme Court held that a city attorney with prosecutorial responsibilities should not accept an appointment to defend persons accused of crimes.¹⁴ The court observed that even in the absence of a direct conflict of interest with the city attorney's official duties, "there inevitably will arise a struggle between, on the one hand, counsel's obligation to represent his client to the best of his ability and, on the other hand, a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities."¹⁵

However, following the *Rhodes* decision, Government Code section 41805 was amended to allow a city attorney and his or her firm to represent criminal defendants in cases other than violations of city laws, as long as:

- The firm has been expressly relieved of all prosecutorial responsibilities on the city's behalf; and
- The accused had been expressly informed of the defense counsel's role as city attorney and had waived any conflict created by it.

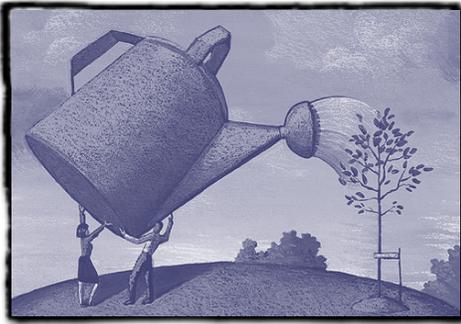
Notwithstanding section 41805, the court in *People v. Pendleton* found that since a city attorney did not prosecute city crimes and had aggressively represented the criminal defendant, there was no prejudice to the criminal defendant as a result of the city attorney's failure to comply with section 41805 and did not reverse the criminal conviction.¹⁶

PRACTICE TIP:

The Los Angeles Bar Association issued an ethics opinion reiterating that firms that engage in prosecutorial work in enforcing violations of the city's municipal code may not, as an ethical matter, represent criminal defendants. Even though such representation may not result in *per se* reversals of criminal convictions, such representation was clearly a violation of section 41805 and prior Supreme Court decisions.¹⁷

CHAPTER 5 ENDNOTES

- ¹ “[A] public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area.” *In re Lee G.*, 1 Cal.App.4th 17, 29 (1991). See also *People v. Superior Court (Hollenbeck)*, 84 Cal.App.3d 491 (1978) and *People v. Municipal Court (Byars)*, 77 Cal.App.3d 294 (1977).
- ² *People ex rel. J. Clancy v. Superior Court*, 39 Cal.3d 740, 746 (1985) (citing ABA Code of Prof. Responsibility, EC 7-14).
- ³ *Hamberian v. Superior Court*, 27 Cal.4th 826 (2002). (In a prosecution for crimes arising from a defendant’s allegedly having defrauded the city in connection with a trash disposal contract, the court appropriately denied a recusal motion where the record showed that the district attorney was fully in charge and there was nothing to suggest that the city exercised influence or control over the prosecution.) See also *People v. Parmar*, 86 Cal.App.4th 781 (2001). (In a misdemeanor nuisance abatement prosecution, the court held that the trial court erred in granting defendant’s motion to disqualify the prosecutor, her supervisors and office unit, and in finding that the contract to finance half of the prosecutor’s position to concentrate on nuisance abatement was contrary to public policy.) But see *People v. Choi*, 80 Cal.App.4th 476 (2000) (court found that there was a reasonable possibility that the district attorney’s office may not exercise its discretionary function in an even handed manner and recusal of entire district attorney’s office was appropriate).
- ⁴ California Government Code section 36900(a) provides:
- Violation of a city ordinance is misdemeanor unless by ordinance it is made an infraction. The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action.
- Cal. Gov’t Code § 36900(a).
- ⁵ *Imbler v. Pachtman*, 424 U.S. 409, 432 (1976) (prosecutor immune in section 1983 action); but see *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (attorney who participated in a pre-arrest investigation functioned as a detective searching for clues, not a prosecutor, and therefore, qualified, not absolute, immunity applied).
- ⁶ California Government Code section 821.6 provides:
- A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.
- Cal. Gov’t Code § 821.6.
- ⁷ *People v. Superior Court (Martin)*, 98 Cal.App.3d 515, 521 (1979) (citations omitted).
- ⁸ State Bar Rules of Professional Conduct, rules 5-100 and 5-110.
- ⁹ See *Salazar v. Upland Police Department*, 116 Cal.App.4th 934 (2004).
- ¹⁰ *People v. Municipal Court (Byars)*, 77 Cal.App.3d 294 (1978).
- ¹¹ *Id.*
- ¹² See *Cal. Criminal Law Procedure and Practice* (Cont. Ed. Bar 2002) Professional Responsibility, § 18.42, pp. 456-466 (citing California State Bar Formal Opinion No. 1991-124).
- ¹³ For instance, guidelines that include a statement that the potential civil consequences to any governmental entity shall not be considered in the exercise of prosecutorial discretion.
- ¹⁴ *People v. Rhodes*, 12 Cal.3d 180, 186-187 (1974).
- ¹⁵ *Id.* at 184.
- ¹⁶ *People v. Pendleton*, 25 Cal.3d 371 (1979).
- ¹⁷ Los Angeles Bar Association Opinion, 453 L.A. (April 1991).



THE CITY ATTORNEY AND OUTSIDE COUNSEL

A. INTRODUCTION

When selecting and managing outside counsel, it is important that city attorneys conduct themselves in a manner that does not condone or result in discrimination or create the perception of improper bases for selecting or terminating the services of outside counsel. The selection, utilization and management of outside counsel by city attorneys entails more than just hiring a firm. This chapter discusses several factors that may come into play when utilizing outside counsel, such as:

- How to deal with pressure from city council members to hire or fire particular outside lawyers;
- The ethics of billing and other practices;
- Appropriate management and oversight;
- Perceptions of favoritism; and
- Conflicts of interest.

B. AVOID IMPROPER GROUNDS FOR HIRING/FIRING OUTSIDE LAWYERS

It can be a challenging situation for city attorneys when, for instance, council members are bothered, based on either fact or perception, that their ethnicity, sex or sexual orientation is not represented among the outside lawyers selected by the city attorney. It is also challenging if the city has not had lawyers of particular groups in the past and the city manager feels that it's time for the city to hire someone from those unrepresented groups.

Another difficult situation may occur when the city is contemplating a jury trial involving allegations of discrimination based on race or sex. Of course, the traditional form of discrimination may still play a role in situations in which the city attorney feels that there is pressure to refrain from selecting someone because they represent a racial or ethnic group different from the majority in the community. Do you select someone because of the pressure from a council member or the city manager? Do you hire someone because they are the same race or sex as the plaintiff assuming that will look good to the jury?

In making decisions regarding selection of outside counsel, city attorneys must be guided by principles and laws set forth in the State Bar Rules of Professional Conduct, U.S. and California Constitutions, and in state statutes that prohibit discrimination in hiring outside counsel on the basis of race, national origin, or gender. Neither a perceived view of the jury regarding the sex or race of the lawyer, nor the feeling that the city should have more legal representation by members of a specific race, sex or sexual orientation should be a basis for selection of outside counsel.

1. State Bar Rules of Professional Conduct, Rule 2-400

Rule 2-400¹ prohibits discriminatory conduct in a law practice, which includes governmental legal departments, on the basis of race, national origin, sex, sexual orientation, religion, age, or disability in the hiring, discharge or other determination regarding the conditions of employment of any person. Accordingly, to avoid violating rule 2-400, city attorneys should select outside lawyers based on the lawyer or law firm's ability to provide quality legal representation in a cost effective manner rather than based on pressure from a council member to select someone of a particular race or sex.

PRACTICE TIP:

Develop and maintain a broad based list of lawyers that includes lawyers of various ethnicities, both sexes, and without regard to sexual orientation. Drawing from such a list affords the city attorney the opportunity to utilize qualified lawyers from various groups based on their experience, skills, ability to deal effectively in court and with others, and other valid grounds for selection. Consistent with rule 2-400, the city should articulate its non-discrimination policy in its agreement with outside counsel.

2. State and Federal Laws

The California Constitution prohibits public entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.²

Further, public programs or benefits that are provided based on race or sex have generally been presumed invalid as suspect classifications that violate the equal protection clause, absent some showing that such discrimination was necessary to remedy prior discrimination.³ To support a determination of the necessity to hire someone based on race, ethnicity, or gender, there must be a showing that would support the need to create specific racial, ethnic or gender hiring requirements for law firms or lawyers. However, recently enacted California Government Code section 8315 seems to provide authority for the establishment of a preferential program.⁴ This section also appears to explicitly disclaim that proof of prior racial discrimination is required before taking “special measures for the purpose of securing adequate advancement of those racial minority groups needing that protection.”

PRACTICE TIP:

Unfortunately, there is no guiding authority on the nature of a preferential program that would pass constitutional muster. Therefore, when selecting outside counsel, city attorneys should regularly call on lawyers of diverse ethnicities and both sexes. This is an excellent way to maintain a broad base of qualified lawyers from whom to choose. If council members exert pressure to hire a lawyer or firm of a particular ethnicity, you may be able to deflect such pressure by telling them that you utilize lawyers from a diverse pool. You should also remind them that selecting or not selecting someone because of their race, sex or sexual orientation violates the rules of ethics for lawyers in California.

PRACTICE TIP:

If pressure is being exerted by a council member or city manager to fire or stop using a lawyer or law firm that is performing in a satisfactory manner and you sense that it's because they're not the “right” race, you should indicate that the matter is being handled appropriately. Further, advise them that, consistent with city policy and rules of ethics, while you may be able to fire or stop using them for any lawful reason or no reason, you can't make those types of decisions based on illicit reasons, such as those related to race, sex, or sexual orientation. On the other hand, if the lawyer is obnoxious, unable to communicate effectively with you or the council, or otherwise ineffective, then get rid of them.

3. Decisions to Terminate Outside Counsel Based on the Lawyer's Public Criticism

While the First Amendment's guarantee of free speech may protect some independent city contractors from termination because of their speech on matters of public concern,⁵ the Ninth Circuit Court of Appeals has held that political activities of lawyers who hold policymaking positions do not have such protection.⁶ Nevertheless, city attorneys should exercise care in decisions regarding termination of outside lawyers because they are outspoken critics of the city. Depending on the nature of comments made, the role played by the outside attorney, and issues related to a lawyer's duty of loyalty to his or her client, termination on the grounds of such First Amendment activity may or may not be protected.

PRACTICE TIP:

Contact local bar associations, including women's bar associations, various ethnic bar associations, and other bar organizations to expand the group of lawyers who are informed of opportunities to represent the city as outside counsel. Refer to the list maintained in your city, in addition to other sources of referrals such as word of mouth and MuniLink, when seeking attorneys for outside legal work. MuniLink can be found on the League's website at www.cacities.org/munilink.

C. IMPLEMENT AND UTILIZE STANDARD PROCEDURES

In addition to complying with the rules prohibiting discrimination, it is advisable to have systems in place to avoid allegations of "cronyism" in the selection of outside counsel. One such form of "cronyism" may occur when friends or colleagues of council members are chosen as outside counsel. This can become problematic if the attorneys are selected frequently, and even more so if the city attorney does not agree with their approach to a matter or if they do not effectively represent the city. To avoid this situation, it is advisable to refrain from selecting lawyers who are politically involved at the city level, unless they are clearly the best (or only) lawyer qualified to handle the matter.

Further, it is understandable and reasonable for a city attorney to select lawyers with whom he or she has positive experiences, especially when it comes to critical or high profile matters. However, when that happens on a consistent basis without providing opportunities for other firms or lawyers, the situation is ripe for charges of favoritism or elitism. This situation may be highlighted even further if the firms or individuals chosen happen to be of the same race, sex, and so on of the city attorney. One way to lessen the likelihood of this occurring is to establish and utilize standard procedures in the selection of lawyers, either overall or in particular types of situations.

Methods for selection can vary, based on such factors as timing, required technical/specialized expertise, prior experience with a firm or lawyer, and the type of legal matter involved. For example, if timing is a factor and selection must be done immediately, the city attorney may want to utilize legal counsel with whom he or she has worked on prior matters. If time permits, the city attorney may want to "shop around" for legal counsel and engage in a formal selection process. In any event, however, a city attorney should have general policy guidelines for the use and selection of special legal counsel.

PRACTICE TIP:

A thoughtful set of articulated policy guidelines not only provides the city attorney with a process and criteria with which to evaluate prospective outside counsel, but also provides outside lawyers with knowledge of the agency's philosophy, expectations, and approach regarding the selection and utilization of outside lawyers.⁷ The selection process can range from an informal interview to a formal request for proposals or qualifications.

D. CONFLICTS OF INTEREST

An agency's contract with outside counsel may provide that the attorney may not acquire a conflict of interest during the term of the employment. Some cities have policies precluding the hiring of lawyers who also represent clients adverse to the city.

PRACTICE TIP:

It may become embarrassing if it is discovered that an outside firm represents someone who has a controversial development project in the city on a matter unrelated to the firm's representation of the city. Such representation may not be "adverse" for purposes of State Bar Rules of Professional Conduct rule 3-310; however, it may still be problematic. One way to avoid problems in this regard is to include a clause in the engagement agreement that prohibits the lawyer from representing clients who seek entitlements from the city during the firm's representation of the city without full disclosure and written consent. In considering issues related to waiver and consent, the city attorney should keep in mind who has authority to grant a waiver and give informed consent to representation. Depending on the city's practice, either the city attorney or the city council may give such consent.

A conflict may arise when a contract city attorney participates in a decision to "assign" new work to his or her law firm. Government Code section 1090 generally applies to outside counsel once they are hired by the city (*see chapter 4*).

The Political Reform Act (PRA) and Fair Political Practices Commission (FPPC) regulations (*see chapter 3*), along with local ordinances or rules set forth guidelines regarding gifts to public officials and employees. City attorneys must be sure to report the value of gifts received from lawyers contracting with the city if the reporting trigger of \$50 in value from one source is reached in a year. In-house lawyers should keep track of meals paid for by outside counsel, tickets to various events, gifts of spa treatments, and so on, that are provided by law firms doing business with the city. While those lawyers who deal regularly with municipalities are probably aware of the gift restrictions, those who are newer to city representation may be unaware and may need to be educated regarding the FPPC rules regarding gifts.

PRACTICE TIP:

When you receive the occasional holiday gift that is to be used by you or your family members (as opposed to gift baskets of goodies shared by the entire office) and you suspect the value exceeds \$50, it may be prudent to return the gift or donate it to charity with a nice "thank you" to the donor. While it is legal to accept gifts valued in excess of \$50 if reported (although some cities have rules prohibiting acceptance of such gifts), returning such valuable items avoids possible allegations of being "bought off" by those with whom you contract. Also, when the value of meals paid for by a law firm during a 12-month period appear to be approaching the \$50 amount, you may offer to treat them to the meal, or pay for your own meal in order to avoid the reporting requirement. If the city has rules in this regard, they should be followed. If the city attorney is aware that the city's rules regarding gifts are unrealistic and/or that most or all employees do not follow the rules, he or she should assist in drafting rules in a manner such that they can and will be followed and enforced. Remember, as of January 1, 2003, it is illegal to accept gifts exceeding \$340 in a calendar year from certain sources.⁸ This amount changes on January 1 of each odd-numbered year.

E. BILLING AND OTHER PRACTICES OF THE OUTSIDE FIRM

To avoid questionable ethical practices by the outside lawyer or firm hired to represent the city, it is important that the city review the bills and monitor the billing and other practices of the law firm. The city attorney, or another lawyer or person familiar with the matter being handled, should review the bills submitted by the outside lawyer. The billing statement should provide the city attorney's office with a quick summary of case activity and tell how much time is spent on various aspects of a matter.

PRACTICE TIP:

The same person should review the bill on a particular matter each month and should look for content, time spent, and consistency with the agreed upon terms of representation. Block billing (where several items are grouped together with one large block of time attributed) should be discouraged in most, though not necessarily all, situations. Bill review is also helpful to ensure that major activities were cleared with the city attorney's office. Periodic questioning of items on the bill informs the firm that the city attorney is reviewing the bills. The city should not be charged for responding to questions about the bills.

It is important that the city attorney be aware of the status of matters handled by outside counsel. Frequently, the city attorney is charged with responsibility of all legal matters in which the city is involved. Reviewing the bills, pleadings and correspondence, and regular updates from outside counsel are important to the city attorney's ability to manage that responsibility. Accordingly, the agreement with the outside law firm should designate that the city attorney is in charge of all legal services. The city council and city manager should also understand that the city attorney must have the discretion in the manner in which litigation or other legal matters are handled, and that appropriate oversight is being exercised regarding the firm.

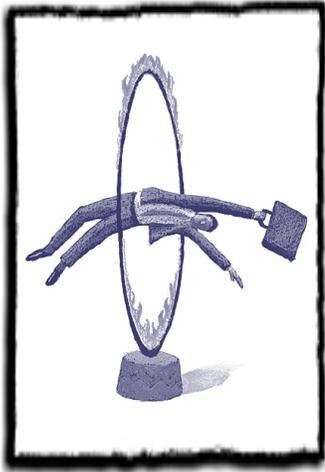
PRACTICE TIP:

Monitoring outside counsel includes doing such things as watching them in court or at a hearing, reviewing their work product, and periodically commenting on documents they prepare. Also, the city attorney should be in regular contact and communicate with the outside lawyer regarding the matter, including prospects for settlement and alternate means of dispute resolution. The city attorney should ensure that outside counsel does not delegate any aspect of the case without prior consultation and approval of the city attorney. Make sure that outside litigators know that they must justify discovery and show why other means of obtaining information have or will not succeed.

A key to success in handling outside counsel is ensuring that there is a mix of law firms and attorneys. This not only provides greater chances of not discriminating, but also creates a competitive situation and aids in cost effective representation. It is also critical to ensure that there are standards, policies, and contracts in place that are followed to avoid allegations of favoritism and discrimination in the selection and management of outside counsel.

CHAPTER 6 ENDNOTES

- ¹ State Bar Rules of Professional Conduct, rule 2-400, provides in relevant part:
- (A) For purposes of this rule:
- (1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
 - (2) “knowingly permit” means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
 - (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.
- (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:
- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
 - (2) accepting or terminating representation of any client.
- ² California Constitution, article 1, section 31 (Proposition 209).
- ³ See *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Richmond v. Croson Co.*, 488 U.S. 469 (1989). As the California Supreme Court observed, “the United States Supreme Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination.” *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 568 (2000).
- ⁴ California Government Code section 8315(c)(2) provides:
- Section 31 of Article I of the California Constitution shall not be construed as requiring the government to prove racial discrimination before undertaking special measures for the purpose of securing adequate advancement of those racial minority groups needing that protection pursuant to paragraph 1 of Article 2 of Part I of the International Convention on the Elimination of All Forms of Racial Discrimination.
- Cal. Gov. Code § 8315(c)(2).
- ⁵ *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). In *Umbehr*, the United States Supreme Court found that independent contractors are protected from termination of their at-will government contracts in retaliation for their exercise of free speech rights. The contractor must show initially that the termination was motivated by his or her speech on a matter of public concern. The government “will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions, and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech.” *Id.* at 2352.
- ⁶ *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999) (an associate attorney at a contract city attorney firm could be terminated because of political activity related to the city since she acted as a policymaker).
- ⁷ See, for example, “A Policy Guide For Law Firms Providing Legal Services To The Public Agency of Oakland,” Directory of Municipal Practitioners, Section V, Part A.
- ⁸ California Government Code sections 89503(c) and (f); California Code of Regulations section 18930(b)(8.1).



WHISTLEBLOWING AND THE DUTY OF CONFIDENTIALITY

A. INTRODUCTION

This chapter examines whether whistleblower statutes affect the city attorney's ethical duty of confidentiality and provides guidance to city attorneys confronted with suspected official malfeasance. It will also review:

- Evolving trends in the duty of attorney confidentiality;
- Whether whistleblower statutes affect the duty of confidentiality;
- The role the Legislature is playing in expanding exceptions to the duty of confidentiality; and
- The consequences for city attorneys engaging in whistleblowing at this time.

B. CONFIDENTIALITY

Among the most important duties owed to the client by an attorney is the duty of confidentiality (*see chapter 1*).¹ Given that confidentiality is the cornerstone of trust between the client and the attorney, California public policy has long held this duty is paramount, and may not be breached except in very limited circumstances.² Business and Professions Code section 6068 provides that it is the duty of an attorney to:

[M]aintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. . . [A]n attorney may, but is not required to, reveal confidential information relating to representation of a client to the extent that that attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

1. Confidentiality in the Public Sector

The duty of confidentiality takes on a special meaning in the public sector where the client is a public entity and not an individual.³ In the governmental setting, the client cannot speak for itself, but rather, must rely on its elected and other authorized officials to act in its interest. Thus, the issue of who possesses and who may exercise the attorney-client privilege, and to whom the duty of confidentiality is owed, becomes particularly relevant when the city attorney is faced with official malfeasance.

2. Government Malfeasance

Concurrent with strong public policy seeking to protect client confidences is a newly emerging public policy trend of encouraging government employees to report governmental malfeasance. Since 1993, the Legislature has enacted several "whistleblower" statutes designed to protect government employees from retaliation for disclosing waste, fraud, abuse of authority, violations of the law, or threats to the public health.

In the spring of 2000, Cindy Ossias, a government attorney for the California Department of Insurance became a whistleblower when she disclosed confidential information that allegedly evidenced governmental abuse of authority in her department. As a result of her actions, the Office of Trial Counsel (OTC) investigated her actions for potential violations of the ethical duty of confidentiality. While the OTC ultimately declined to prosecute Ossias, her story reflects the difficulty attorneys face in government representation. The city attorney is faced with a dual challenge, as he or she must uphold the attorney's ethical duty of confidentiality at all costs, while as a government employee, is encouraged to report government malfeasance.

PRACTICE TIP:

Courts have expressed the principle that city attorneys possess special ethical obligations to “further justice.”⁴ In the context of whistleblowing on an issue requiring a disclosure of suspected malfeasance, this special obligation to “further justice” may appear in conflict with the duty of confidentiality. For example, if city officials empowered to protect the city are themselves guilty of violating the law or committing waste that could inure back to the city, how can the city attorney protect his or her client? While the client is not the individual official who committed the malfeasance, the public official or officials may in fact be the voice of the client public entity. If so, to whom may the city attorney disclose the malfeasance?

Under State Bar Rules of Professional Conduct, rule 3-600(B), when an attorney representing an organization becomes aware that an agent of the organization intends to commit an illegality that may result in substantial injury to the organization, the attorney “shall not violate his or her duty of protecting all confidential information.”⁵ The attorney is limited to urging the agent to reconsider his or her actions, and to go up the chain of command to the highest level of the organization authorized to act. If the highest level of the organization refuses to act, the attorney is limited to resigning.⁶

While rule 3-600 makes the duty of confidentiality paramount, it does not directly address the unique nature of government representation as it relates to either the duty of confidentiality or whistleblowing. However, the issue was addressed in a 2001 Attorney General opinion.⁷ The opinion noted that in some respects, “rule 3-600 appears designed to meet the concerns of the private sector better than the concerns of public practice” and recognized there are real differences between city attorneys and private practitioners representing corporate entities.

This ability to move up the hierarchy is provided in rule 3-600(D), which permits attorneys to go up the chain of command to the next highest level of authority to resolve the matter. Therefore, it is critical to explain to city employees that the attorney, in his or her position, is counsel for the city, and avoid wherever possible the disclosure of unrelated confidential information so as to prevent complications due to potential dual representation.⁸ Additionally, the city attorney should make clear to the official that he or she is being advised as a representative of the government, and not as an individual, and that he or she has no right to have information kept confidential from other government officials up the hierarchy.

However, if the highest city officer refuses to act, or is also guilty of malfeasance, should the city attorney keep quiet and knowingly allow his client, the city, to suffer due to the purportedly illegal actions of its individual representatives? While rule 3-600(B) permits, but does not require, the city attorney to go up the chain of command, it prohibits the city attorney from disclosing any confidential information beyond the organization. Usually, the city attorney should conclude that the highest authority is the city council, and not a particular

individual within city government. If that is the case, the city attorney may then address his or her concerns to the council itself. However, if the highest representative of city government chooses not to act, and the city attorney is not required by statute to report the malfeasance to another agency, the attorney's only recourse is to resign his or her position.⁹

Critics of rule 3-600 have suggested that it has the unintended effect of protecting the agents of the organization, at the expense of the client governmental entity.¹⁰ If the client were simply a private entity such as a corporation, the only injured party would be the shareholders. However, because the city attorney arguably also possesses a special duty to "further justice," the city attorney should consider the consequences of non-disclosure.¹¹ Critics contend that it is the citizens and taxpayers that ultimately are injured by non-disclosure, and that public policy demands that the public be protected whenever possible from government malfeasance. In that sense, critics argue, the client city may possibly best be served if the city attorney discloses government malfeasance to the public, rather than keep silent under the guise of client confidentiality.¹²

In January 2002, the State Bar attempted to revise rule 3-600 to permit government attorneys to refer "the matter to the agency that is charged with responsibility over the matter or to any governmental agency or official charged with overseeing and regulating the matter" under certain circumstances.¹³ But the California Supreme Court rejected the proposed amendment, reasoning that "the proposed modifications conflict with [Business and Professions] Code section 6068(e)."¹⁴

However, beginning July 1, 2004, section 6068(e) will permit disclosure of confidential information "relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death or, or substantial bodily harm to, an individual."¹⁵ In modifying section 6068(e), the Legislature intended to "bring California law into accord with the law of many other states."¹⁶

C. WHISTLEBLOWING STATUTES AND THE DUTY OF CONFIDENTIALITY

Beginning in 1993, in order to protect government employees who report criminal action by government officials, the Legislature enacted three "whistleblower" statutes: the California Whistleblower Protection Act (CWPA),¹⁷ the Whistleblower Protection Act (WPA)¹⁸ and the Local Government Disclosure of Information Act (LGDIA)¹⁹ (jointly whistleblower statutes). The rationale behind the legislation was to prevent abuses within the government by protecting employees who would otherwise fear reporting abuses for fear of losing their jobs. The Whistleblower Statutes built upon the history of earlier code sections related to reporting government malfeasance in expanding whistleblower protections.²⁰ The Whistleblower Statutes were all designed to protect government employees from retaliation for disclosing potentially damaging information regarding their respective agencies.

1. California Whistleblower Protection Act (CWPA)

The California Whistleblower Protection Act was written to protect employees of state agencies who disclose activities that (1) violate state or federal laws or regulations, (2) constitute economic waste, or (3) involve gross misconduct, incompetence or inefficiency.²¹ The Office of the State Auditor administers the law, and investigates and reports on improper governmental activities.

2. Whistleblower Protection Act (WPA)

The Whistleblower Protection Act expanded the protections found in the California Whistleblower Protection Act and provided state employees with the right to disclose government malfeasance to the Legislature.²² However, the Whistleblower Protection Act included language that could be interpreted as barring attorneys from disclosing confidential client information. Specifically, the Act states that "[n]othing in [the operative] section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law."²³

3. Local Government Disclosure of Information Act (LGDIA)

The Local Government Disclosure of Information Act extended whistleblower protections to the municipal level by encouraging local government employees to disclose information regarding gross mismanagement, abuse of authority, or dangers to public health and safety.²⁴

PRACTICE TIP:

There is no case law on point indicating how the whistleblowing statutes relate to the duty of confidentiality. However, the Attorney General has opined that the statutes, as written, do not supersede section 6068(e). While the California Supreme Court has not ruled directly on the issue, its rejection of the proposed amendments to rule 3-600 in January 2002 that would have allowed limited whistleblowing implies that it concurs with the Attorney General's interpretation of existing law.

D. EFFECT ON DUTY OF CONFIDENTIALITY

The California Supreme Court has declined to modify rule 3-600 to protect city attorneys from professional discipline in the event they choose to disclose confidential information because of its conclusion that such a rule would conflict with statutory duties of confidentiality.

The Attorney General has addressed the question whether the whistleblower statutes supersede existing statutes and rules governing the attorney-client privilege.²⁵ In determining that the whistleblower statutes do not supercede these statutes and rules, the Attorney General cited the rule of statutory reconciliation and the lack of express intent by the Legislature to supercede the "strong and long established public policy" of the client confidentiality, and the issue of separation of powers.²⁶

1. Statutory Reconciliation

In citing the rule of statutory reconciliation, the Attorney General expressed that precept that "statutes must be harmonized to the extent possible...and construed in the context of the entire system of which they are a part."²⁷ Because some of the whistleblowing statutes included language-permitting disclosure "to the extent not expressly prohibited by law," the Attorney General interpreted this to mean that attorneys would be barred from disclosure under section 6080(e), a current and well-established law.²⁸

2. Lack of Express Provisions Overturning Well-Established Law

The Attorney General's opinion noted that none of the whistleblowing statutes contained express provisions overturning well-established law relating to client confidentiality. The opinion states that the statutory language would not be interpreted to change this rule simply "by mere implication."²⁹ The Attorney General noted that in *General Dynamics Corp. v. Superior Court*, the court made clear that "[e]xcept 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."³⁰ Since the Legislature neither made clear its wish to change the client confidentiality laws, nor modify the existing ethical code provisions, the Attorney General could not find that the whistleblower statutes superseded the duty of confidentiality.

3. Separation of Powers

The Attorney General also made a brief separation of powers argument noting that the regulation to practice law has been "recognized to be among the inherent powers of the courts; the courts are vested with the exclusive power to control the admission, discipline, and disbarment of persons entitled to practice before them."³¹ The opinion recognized the tension between the Legislature and the courts in this matter, stating that the Legislature may regulate and control the practice of law to a "reasonable degree," but may not restrict the court's authority to discipline persons entitled to practice before it. Any attempt to do so would "overstep its constitutional bounds."³²

Thus, current law does not permit attorney whistleblowing.

E. THE LEGISLATURE'S REACTION

1. Assembly Bill 363 – 2002

In an attempt to resolve the issue of how to balance the duty of confidentiality with the public policy goal of reporting malfeasance, the Legislature approved Assembly Bill 363 in August 2002.³³ AB 363 amended section 6068 to authorize an attorney who learns of improper governmental activity in the course of representing a government entity to: (1) refer the matter to a higher authority in the organization, and (2) refer the matter to law enforcement in specified circumstances. Additionally, AB 363 would have protected city attorneys from professional discipline for such disclosures. However, AB 363 was vetoed by Governor Gray Davis who cited the client confidentiality rule as “critical” for the “effective operation” of the legal system.³⁴

2. Assembly Bill 2713 – 2003

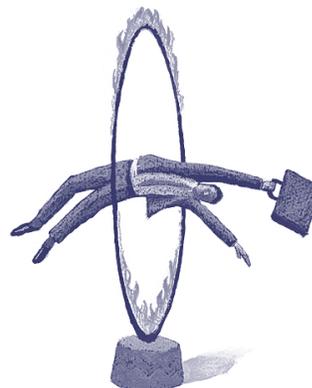
The Legislature, in attempting to harmonize the duty of confidentiality with the current public policy goal of disclosure of official malfeasance, introduced Assembly Bill 2713 in February 2004. AB 2713 would have expanded the exception to the duty of confidentiality by authorizing an attorney “who, in the course of representing a governmental organization, learns of improper governmental activity...to refer the matter to law enforcement or to another governmental agency and would exempt the attorney from disciplinary action for making a referral of the matter.”³⁵

AB 2713 would have allowed, but not required, city attorneys and outside counsel representing governmental organizations to disclose confidential information pertaining to their clients under the following circumstances:

- If they learn that their client is engaging in a crime or fraud and they have tried to remonstrate up the organization’s hierarchy; or
- The very head of the organization is engaged in the crime or fraud; or
- Reporting up the hierarchy would not be reasonable under the circumstances.

The rationale behind this radical change in the law relating to the duty of confidentiality stems from the public policy concern that the interests of the public are not served when illegal government activity is hidden from view behind the shield of client confidentiality. In introducing this legislation, the Legislature appeared to be reacting to the California Supreme Court’s indication that the state law creating the duty of confidentiality must itself be relaxed to allow this limited disclosure of confidential information.

AB 2713 was vetoed by Governor Arnold Schwarzenegger in September 2004. In his veto message, the Governor stated that while the bill was well-intended, it “would condone violation of the attorney-client privilege, which is the cornerstone of our legal system.”



CHAPTER 7 ENDNOTES

- ¹ California Business and Professions Code section 6068(e).
- ² *Id.* Assembly Bill No. 1101, effective July 1, 2004, amended section 6068 to permit an attorney to disclose confidential information “relating the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death or, substantial bodily harm to, an individual.”
- ³ *See Ward v. Superior Court* 70 Cal.App.3d 23, 35 (1977) (holding that the client of the county counsel was the county, acting through its board of supervisors).
- ⁴ In *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 745 (1985), a private attorney retained by a city under a contingent fee arrangement to prosecute civil nuisance abatement actions was ordered disqualified, in the interests of justice, because his personal stake in the actions was inconsistent with the neutrality required of a government lawyer when prosecuting a nuisance abatement action.
- ⁵ State Bar Rules of Professional Conduct, rule 3-600(B).
- ⁶ *Id.*
- ⁷ 84 Ops. Cal. Atty. Gen. 71 (2001) (Opinion No. 00-1203).
- ⁸ *See* 71 Ops. Cal. Atty. Gen. 255 (1988) (Opinion No. 87-302) (opining that where a city attorney obtains information in confidence from a council member and provides advice on conflict of interest to that council member as though a confidential relationship exists between the city attorney and the council member that attorney would be precluded from prosecuting the council member under the Political Reform Act).
- ⁹ State Bar Rules of Professional Conduct, rule 3-600.
- ¹⁰ Charles S. Duskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere)*, 25 Whittier L. Rev. 21, 36, (2003).
- ¹¹ *Id.* at 37.
- ¹² Proposed Amended State Bar Rule of Professional Conduct, rule 3-600 (available at <http://calbar.ca.gov/calbar/publiccomment/10-30-2001-2.html>).
- ¹³ *Id.*
- ¹⁴ *See* Assem. Bill No. 363 (2001-2002 Reg. Sess.).
- ¹⁵ California Business and Professions Code section 6068.
- ¹⁶ Duskow, *supra* note 13, at 21, fn. 39.
- ¹⁷ California Government Code sections 8547-8547.12.
- ¹⁸ California Government Code sections 9149.20-9149.22.
- ¹⁹ California Government Code sections 53296-53297.
- ²⁰ Former Government Code sections 10540, 10541, 10542, 10543, 10544, 10545, 10546, 10547 (Stats.1981, ch. 1168, § 7, pp. 4694-4696); former Government Code section 10549 (Stats.1984, ch. 1212, § 6, p. 4160); former Government Code section 10548 (Stats.1986, ch. 353, § 4, pp. 1511-1512); former Government Code sections 10550 and 10551 (Stats.1988, ch. 1385, § 3, pp. 4668-4669).
- ²¹ Duskow, *supra* note 13, at 30 (citing California Government Code section 8547.2).
- ²² Duskow, *supra* note 13, at 31 (citing California Government Code section 9149.21).
- ²³ *Id.*, citing California Government Code section 9149.23(c).
- ²⁴ *Id.*, citing California Government Code section 53926(a).
- ²⁵ *See* 71 Ops. Cal. Atty. Gen. 255 (1988) (Opinion No. 87-302).
- ²⁶ *Id.*
- ²⁷ *Id.*

CHAPTER 7 ENDNOTES, CONTINUED

²⁸ *Id.*

²⁹ *Id.*

³⁰ *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 4164 (1994).

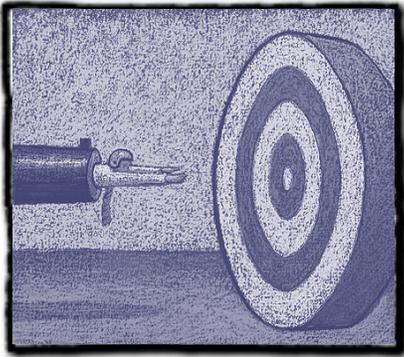
³¹ See 71 Ops. Cal. Atty. Gen. 255 (1988) (Opinion No. 87-302) (citing *Santa Clara County Counsel Attys. Assn. v. Woodside* 7 Cal.4th 525, 543 (1994)).

³² *Id.*, (citing *Hustedt v. Workers' Comp. App. Bd.* 30 Cal.3d 329, 337 (1981)).

³³ Doskow, *supra* note 13, at 23.

³⁴ *Id.*

³⁵ See Assem. Bill No. 2713 (2003-2004 Reg Sess.).



CHAPTER 8

THE CITY ATTORNEY AND GRAND JURIES

A. INTRODUCTION

City attorneys are often called upon to help their clients respond to grand jury investigations, subpoenas, reports, and, in rare cases, indictments. The vast majority of issues that city attorneys face are those arising with grand juries acting in their civil capacity. City attorneys may find themselves responding to a subpoena for testimony and/or documents directed to them or advising city officials and staff on how to respond to a subpoena for testimony and/or documents. City attorneys also may find themselves providing responses to grand jury reports on behalf of the city. This chapter addresses the ethical issues that may arise in each of these contexts and the roles and duties of the city attorney.

B. THE LAW

The California Constitution recognizes grand juries in article I, section 23. California's statutory provisions concerning the formation, composition and functioning of grand juries are found in Penal Code sections 888 through 939.91.¹ A grand jury is defined as having 19 to 23 persons (depending on the size of the county) "returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."²

Most grand juries have jurisdiction over both criminal and civil matters and serve three essential functions:

- Examine criminal charges and determine whether criminal indictments are necessary;
- Hear allegations regarding public official misconduct and determine whether formal accusations are necessary; and
- Investigate and report on local government misconduct or inefficiency.³

Grand juries have only those powers expressly authorized by statute.⁴ Accordingly, grand juries' authority to investigate cities, and issue reports, is only as extensive as expressly authorized by statute.⁵ The authority of grand juries to investigate cities, counties and special districts is set forth in Penal Code sections 925 through 933.5. Section 926 authorizes the employment of experts and assistants in the grand jury's discharge of its investigatory authority.⁶ Section 933(c) requires "agencies," including cities, redevelopment agencies, housing authorities, and districts, to respond in writing to the grand jury report no later than 90 days after the grand jury has submitted its report.⁷

Section 939 prohibits the presence of any non-witness at a grand jury session and has been held to apply to prohibit counsel for witnesses in civil questioning as well.⁸ Sections 939.2 and 939.4 authorize grand juries to issue subpoenas compelling attendance of witnesses.⁹

Grand juries may not compel the disclosure of information protected by attorney-client or work product privilege.¹⁰ Public entities have a right to assert the attorney-client privilege with respect to communications made in the course of the attorney-client relationship.¹¹ Grand juries are not entitled to other materials or information protected by constitutional, statutory or common law privileges.¹²

Grand juries are also prohibited from interfering with the day-to-day administrative functions and operations of cities.¹³ However, subsequent grand juries may probably conduct repeat investigations of issues addressed by previous grand jury inquiries.¹⁴

C. ETHICAL ISSUES RAISED BY WORK INVOLVING GRAND JURIES

Three common ethical questions arise in responding to grand jury investigations, subpoenas and reports:

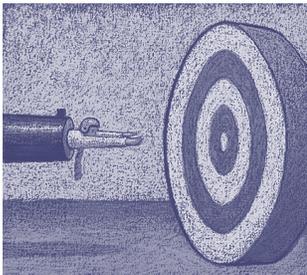
- Who is the client?
- What materials are not disclosable under attorney-client and other privileges?
- When is a city attorney required to disqualify him or herself?

1. Who is the Client?

The city attorney represents the city as a political entity and not individual elected officials or staff who may be the subjects of a grand jury investigation (*see chapter 1*).

PRACTICE TIP:

The city attorney cannot and should not promise to a particular public official that he or she will keep confidences from the city council and other city officials. City attorneys should remind staff or officials who approach them for advice regarding grand jury investigations or subpoenas that the city attorney's client is the city, not the individual staff member or official.



2. Attorney-Client Privilege and Disclosable Materials

City officers and employees may claim the attorney-client privilege derivatively.¹⁵ With regards to city business, the city itself is the client. However, the city is not a natural person and it communicates – like other corporations – through people. At times, the attorney-client privilege may attach to communications between the city attorney and those other city officials.¹⁶

Communications with the city attorney, made while acting in their official capacity by the mayor, council members, city manager, city clerk, city treasurer, and department heads are protected by the attorney-client privilege. Even in light of recent federal case law (whose applicability is uncertain as to California law regarding grand juries),¹⁷ it appears safe to say that where city staff or officials are acting in their official capacities and do not have interests adverse to the city, the advice they have sought from, or the information they have provided to, the city attorney is protected by attorney-client privilege. A grand jury could not obtain such information by subpoena.

However, the attorney-client privilege does not protect, and a grand jury could obtain, information disclosed to a city attorney by a staff member or official who was not acting in his or her official capacity. Similarly, the attorney-client privilege does not apply to communications to the city attorney from staff members or officials whose interests are adverse to that of the city. For example, communicating or seeking advice regarding some wrongdoing is not shielded by the attorney-client privilege.

PRACTICE TIP:

City attorneys should remind any staff person or official who starts to provide information about possible wrongdoing that the information is not covered by the attorney-client privilege and that the city attorney could be compelled to disclose it to the grand jury.

In circumstances where a staff member is being asked to disclose information to a grand jury that may be subject to the attorney-client privilege, the city attorney must keep in mind that the city council holds the privilege for the city. The city council should be consulted. As holder of the privilege, only the city council as a whole – not individual council members, or the staff member or attorney being contacted by the grand jury – can waive the privilege and disclose the information.

Where the grand jury is requesting information that is protected by the attorney-client privilege, the city council – acting through the city attorney – appears to have the authority to demand that the employee refuse to provide the requested information to the grand jury. However, three whistleblower statutes place an important limitation on this authority. The statutes are designed to protect government employees who report criminal activity by government officials. Public employees who disclose confidential information to a grand jury regarding criminal actions of the city may be protected against retaliation by the city, possibly in the form of loss of employment, if they carefully follow the procedural requirements of the whistleblower statutes. These statutes, however, do not protect city attorneys (*see chapter 7*).

3. Recusal of the City Attorney

When responding to or providing advice relating to a grand jury subpoena or report, it may be necessary – under certain circumstances – for the city attorney to recuse him or herself and have either another attorney in the city attorney's office handle the matter or hire outside counsel.

For example, the city attorney should recuse him or herself in the event a grand jury is investigating a subject on which the city attorney made errors, which, if revealed to the public in a grand jury report, might result in legal action, malpractice, negative performance review, or significant embarrassment for the city attorney. Because the city attorney may be more concerned with his or her personal interest in withholding particular information from the grand jury rather than with the best interests of the city, the city attorney should recuse him or herself and recommend that the city hire outside counsel under rule 3-310 (*see chapter 2*).

City attorneys working on grand jury matters should consider whether or not to recuse themselves on an on-going basis throughout a grand jury investigation. Grand juries work in a manner that can often make it difficult to determine the actual scope of the investigation based on their initial actions. Over time, the scope of a grand jury investigation may also evolve. City attorneys should not be too quick to conclude that there are no potential ethical issues. Rather, city attorneys should remain vigilant about possible ethical considerations that may arise as the investigation continues.

PRACTICE TIP:

City attorneys can teach grand juries how to work more effectively with cities. Broad, unfocused, or misdirected grand jury investigations and subpoenas can consume significant amounts of city attorney and city staff time. Grand juries receive formal training on numerous subjects when they are impaneled. Based on a series of interviews of grand jurors, grand jury experts, and a supervising judge, it appears that, at least in some cases, the curriculum includes very little, if anything, about how cities operate. City attorneys should consider contacting the supervising judge of their local grand jury and offering to supplement the current grand jury training program by meeting with the grand jury when it is impaneled to explain the structure of city departments, the city's major reports, and contact people at the city for various types of information.

CHAPTER 8 ENDNOTES

- ¹ See Thomas B. Brown, *The Investigatory and Reporting Authority of Civil Grand Juries Acting in Their "Watch Dog" Capacity*, League of California Cities Annual Conference, i, ii (1995) (footnote omitted).
- ² California Penal Code sections 888 and 888.2.
- ³ See John M.Fesser, Jr., *The California Grand Jury: From Watchdogs to Watched Dogs*, 30 MCGLR 748, 751 (1999) (citations omitted).
- ⁴ See *McClatchy Newspapers v. Superior Court*, 44 Cal.3d 1162, 1172 (1988) (citation omitted).
- ⁵ See Brown, *supra* note 1, at 5, 15.
- ⁶ See California Penal Code section 926; Brown, *supra* note 1, at 3.
- ⁷ See California Penal Code section 933(C); Brown, *supra* note 1, at 3.
- ⁸ See California Penal Code section 933(C); *Farnow v. Superior Court*, 226 Cal.App.3d 481 (1990); Brown, *supra* note 1, at 4.
- ⁹ See California Penal Code section 939.2.
- ¹⁰ Brown, *supra* note 1, at 9-10 (citing and discussing 70 Ops.Cal.Atty.Gen.28) (citations omitted).
- ¹¹ See *Roberts v. City of Palmdale*, 5 Cal.4th 363, 370 (1993).
- ¹² Brown, *supra* note 1, at 11 (citing and discussing 70 Ops.Cal.Atty.Gen. 28 (1987)).
- ¹³ See Brown, *supra* note 1, at 12 (citing and discussing 70 Ops.Cal.Atty.Gen. 28 and *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991)).
- ¹⁴ See Brown, *supra* note 1, at 14 (citations omitted).
- ¹⁵ See *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal.2d 723, 736-738 (1964); see also *Hamilton v. Town of Los Gatos*, 213 Cal.App.3d 1050, 1059 n.7 (1989).
- ¹⁶ *Id.* See also *Hamilton v. Town of Los Gatos*, 213 Cal.App.3d 1050, 1059 n.7 (1989).
- ¹⁷ See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied* (1997); *Office of the President v. Office of Independent Counsel*, 525 U. S. 996 (1998) (*cert. denied*); *In re Bruce Lindsey*, 148 F.3d 1100 (D.C. Cir.) (per curiam), *cert. denied* (1998).

ANNOTATED BIBLIOGRAPHY

ARTICLES

Adams, William S., *Practicing Law In a Fishbowl* (1985) LCC Spring Conference Papers, 3 pp.; published in LCC Deskbook.

Adams gives concise and useful advice, just what he proposes that city attorney should do when working with the press. Particularly useful to those feeling embattled, this paper argues that while “background” interviews may be appropriate, “off the record” ones are not.

Albuquerque, Manuela, *City Attorney Ethical Issues* (1993) LCC Spring Conference Papers, 15 pp.

This paper, which has been the basis of much further work by the League, provides a closely reasoned, fully annotated outline of the basic, formal ethical rules city attorneys must keep in mind in order to avoid serious pitfalls.

Albuquerque, Manuela, *The City Attorney – Monitor, Mentor or Meddler?* (1999) LCC Annual Conference Papers, 6 pp.

This paper, written for elected officials, is both a whimsical analysis of others’ expectations of their city attorneys and a close analysis of the professional rules that provide city attorneys with some useful limits and duties. Worth rereading when one is being, as the author says, “buffeted about.”

Albuquerque, Manuela, *Joint Defense of Suits Brought Against Public Entities and Their Employees: Are Conflicts of Interest Manufactured or Real?* (2000) volume 23, No. 4, Public Law Journal, 5 pp.

This detailed paper, which quotes the relevant statutes and Rules of Professional Conduct in full, analyzes three reported cases rejecting the argument that rule 3-310 entitles public employees to a private defense at the taxpayers’ cost. Two cases involve police officers and one a council member; all are instructive, particularly on the issues of what constitutes a “reservation of rights.”

Allen, Jr., Mark C., *Knowing the Law is Not Always Enough* (1994) LCC City Attorney’s Deskbook, 1994 Edition, 4 pp.

A brief but useful summary of effective ways to deliver legal advice to a municipal client. Allen, who served as city attorney for numerous California cities, emphasizes the value of taking time to give clear, comprehensive, and balanced answers. Allen also reminds his readers that on occasion, it is important not to give legal advice when roles conflict.

Brown, Thomas B., *The Investigatory and Reporting Authority of Civil Grand Juries Acting in Their “Watch Dog” Capacity* (1995) LCC Annual Conference, 20 pp.

A detailed analysis of the constitutional, statutory and common law of civil grand jury authority with respect to local governments. Civil grand juries can be useful overseers of the public interest, but they and those staffing them are at times somewhat uninformed about the limits of their powers; this paper is a good starting place for city attorneys whose agencies are the subject of grand jury investigations.

Dorsey, Steve, *Ethical Rules Affecting the Role of the City Attorney* (1993) LCC Papers, 11 pp.

An introductory guide written for council members.

Grimes, Alan, *The City Attorney: A Practice Manual, 2d Edition* (1984) LCC Spring Conference Papers, 67 pp.

This classic “monograph” on how to be a city attorney was written by the then-city attorney of Santa Maria, and former city attorney of Modesto, Beverly Hills, San Luis Obispo and Atascadero, who began his legal career working for the League of California Cities. Grimes also operated a municipal code codification service for many years. This highly personal, citation-free, manual has worn well. It was written before e-mail and when live TV broadcasts of city meetings were rare; it still provides useful advice on how to be a city attorney. Anyone in a city attorney’s office would benefit from reading it at least once. It is not the piece to read to figure out the application of a particular rule in a complex setting, but it is a good and comforting guide on how to manage a municipal law office and serve one’s always complicated client.

League of California Cities, *Counsel and Council: A Guide to Building a Productive Relationship* (2004) 50 pp.

A wonderful booklet, designed for use by city council members and city attorneys that starts with hiring and ends with amicable and effective termination of employment. In between are helpful discussions of “Who is the client?”, the role of the city attorney, how to distinguish between counsel and advocacy, why a city attorney cannot take direction from the city council when prosecuting, and ten traits of a city attorney’s “ideal” council member. The booklet is based on a 2001 survey of California city attorneys and provides interesting statistical information about city practices as well as model contracts for in-house and outside counsel. City attorneys Valerie Armento and Helene Leichter and public employment law expert Richard Whitmore participated in its preparation.

Martello, Michael, *When the City’s Interest and Those of The Elected Official Collide* (2003) LCC Spring Conference Papers, 34 pp.

A valuable and detailed account of the successful prosecution and removal from office of a charter-city mayor for misconduct in office, essentially for “interference with the administrative service.” In addition to practical advice on dealing with the grand jury and district attorney’s office, organizations with quite different practices than a city legal office, there is a checklist of steps to take, and actions to avoid, from the first indication that an elected official is ignoring important legal advice through trial itself. Among the key issues are confidentiality, the implementation of State Bar Rules of Professional Conduct, rule 3-600, the need for financial sophistication in prosecuting Political Reform Act violations, and the need to rethink everyday activities when a member of the client’s highest executive body may be defending his misconduct by attacking the city attorney’s office.

Miller, Michael, *Use and Control of Outside Counsel* (1991, rev. 1994) LCC Spring Conference Papers; LCC Desk Book, 11 pp.

A brief summary of the legal authority to hire outside counsel, and a longer discussion of when it is most likely to be useful to do so. The author, the former in-house city attorney of Arcadia, argues that an in-house lawyer is in the best position to effectively manage outside counsel. He also includes a list of desirable contract terms.

Scheidig, Ken, *The City Attorney Form of Government* (1986) LCC Spring Conference Papers, 7 pp.

An entertaining essay making the serious point that the increased regulation of cities, (once, in living memory, there was no California Environmental Quality Act), has made not only the council but also their manager and department heads dependent upon legal advice.

Shannon, Robert, *Factors in Deciding to Utilize In-House Legal Services or to Contract Out* (1997) LCC Annual Conference Papers, 6 pp.

This paper delivers what the title promises in a concise and thoughtful way. It includes some useful quotes from other “big city” offices.

Thorson, Peter M., *What City Officials Need to Know When Law Enforcement Investigates Elected Officials* (2003) LCC Spring Conference Papers, 13 pp.

This paper analyzes the difficult situation of a city that is the site of a criminal investigation of one of its elected officials for activities undertaken in his or her official capacity. The author, who speaks from some experience, discusses the crucial issues of communications, document management, and dealing with resignations. There is a good discussion of special counsel: if the FBI is in city hall, should the city be looking for a former U.S. Attorney to advise it? Thorson describes the benefits and costs of such arrangements fully.

Williams, Jayne W., *Effective Management of Outside Legal Counsel* (1997) LCC Annual Conference Papers, 43 pp.

A detailed discussion of Williams’s methods for managing outside counsel and legal services budgets, this paper includes sample contracts and policy guidelines for outside legal counsel, as well as samples of comparative cost studies that led to increased in-house staffing. The focus is primarily on litigation.

TREATISES

League of California Cities, *The California Municipal Law Handbook*, 2004 Ed. (2004) League of California Cities, Sacramento, California.



NEW LEAGUE PUBLICATION

PRACTICING ETHICS: A HANDBOOK FOR MUNICIPAL LAWYERS

All city attorneys must deal with conflicts involving ethical issues, and as public lawyers in our state, it is necessary to be current on the rules of conduct. *Practicing Ethics: A Handbook for Municipal Lawyers* provides guidance on the professional ethical standards that govern the different facets of a city attorney's practice. The handbook describes how ethical issues might arise, what legal standards apply to its resolution, where those legal standards may be subject to more than one interpretation, and practical tips for navigating the pitfalls. Further analysis of ethical dilemmas are explored in the handbook including Government Code section 1090, the Political Act Reform Act limitations, conflicts of interest, the city attorney's role and duties during litigation and issues involved in selecting and managing outside counsel.

Practicing Ethics: A Handbook for Municipal Lawyers is available from the League for \$20 plus shipping & handling; price includes sales tax. There is a 10 percent discount on orders of five or more of the same publication. For more information on League publications visit the CityBooks Bookstore at

www.cacities.org/store.

Price includes sales tax -- prepayment is required.

League of California Cities: *Practicing Ethics: A Handbook for Municipal Lawyers*

Price \$20 each:
SKU #: 1720

Quantity _____ Price _____ = \$ _____

Shipping/Handling Charges

Order Amount	Add
\$1 - \$9.99	\$3.00
\$10 - \$24.99	\$7.00
\$25 - \$74.99	\$9.00
\$75 - \$124.99	\$13.00
\$125 - \$199.99	\$16.00
\$200 - \$349.99	\$20.00
\$350 and up	\$8% of total

SHIPPING/HANDLING \$ _____

TOTAL \$ _____

Name _____

Organization _____

Title _____

Street Address (no P.O. box please) _____

City _____ State _____ Zip _____

Telephone _____

Please check which applies:

City Official Others

All orders are shipped UPS Ground unless otherwise requested. Shipping & handling are charged one time, up front, for the entire order.



Name of the Card Holder

Authorized Signature

Credit Card Number

Expiration Date

Please make checks payable to: **League of California Cities**
Mail payment to: League of California Cities, Attention: Publications
1400 K Street, 4th Floor, Sacramento, CA 95814
Credit card orders may be faxed to: 916/658-8220 or order online at www.cacities.org/store.
Questions: Call 916/658-8257



1400 K Street
Sacramento, CA 95814
916.658.8200
Fax: 916.658.8240
www.cacities.org

SKU #1720 • \$20.00

**To order additional copies of this publication,
call 916.658.8257 or visit www.cacities.org/store.**

©2004 League of California Cities
All rights reserved.