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MCLE ETHICS SELF-STUDY

Joint Defense of Suits Brought Against Public Entities and Their Employers: Are Conflicts of Interest Manufactured or Real?

By Manuela Albuquerque, Esq.*

Introduction

By now, it is not subject to reasonable dispute that public lawyers are governed by general ethical considerations applicable to other lawyers, although the application of ethical constraints to public lawyers must take account of the role that public lawyers play and the public interest.[1] Moreover, even the most cautious city attorney or county counsel would concede that the issue of who they represent has been well established: the city or county is the client, not the myriad subordinate entities and officials that collectively embody the client when those officials and entities act in their official capacities. (E.g. *Ward v. Superior Court* (1977) 70 Cal.App.3d 23; State Bar Rule of Professional Conduct 3-600)[2]

On rare occasions, there may be more than one client, for example when a quasi-independent entity and the governing body are involved in litigation against one another.[3] This article does not, however, concern the conflicts of interests which may arise in such litigation between the governing body and a quasi-independent constituent body when they are adverse parties in litigation. Instead, it focuses on whether, and to what extent, a public lawyer may run afoul of the State Bar Rules of Professional Conduct regulating conflicts of interest when that lawyer is engaged in the joint representation of a public entity and a public employee or official when both are defendants and thus on the same side in a civil action.

In order to analyze this issue it is important first to become familiar with the statutory duties of public entities with respect to the defense and indemnification of public employees and officials. The California 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.[4] Thus, this article next discusses this statutory scheme.

The Scope and Nature of the Public Entity's Duty to Defend and Indemnify Employees

The critical duty to provide a defense is imposed upon the public entity by Government Code Section 995, which provides in pertinent part:

"Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee

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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 puhlic entity. For the purposes of this part, a cross-action, counterclaim or cross-complainr against an employee or former employee shall be deemed to he a civil action or proceeding brought against him."

This provision has been held to apply to actions pursuant ro 42 U.S.C. § 1983.[5]

Under Government Code § 995.2, this basic duty to defend is qualified by three additional limirations:

"(a) A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:
(1) The act or omission was not within the scope of his or her employment.
(2) He or she acted or failed to act because of actual fraud, corruption, or actual malice.
(3) 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 statue already 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 hy employing other counsel for this purpose or hy purchasing insurance which requires that the insurer provide the defense".[6] Finally, Government Code § 825 provides thar where the employee has timely requested the defense, the act or omission arose our of rhe course and scope of the public employment and 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". (Emphasis added.)[7] These sections have been read to give the public entity and not the employee the right to control the employee's defense.[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 and 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 puhlic 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]

Before turning to the specific obligations imposed on lawyers to avoid a conflict of interest and their application to particular circumstances which confront a puhlic lawyer, this article discusses certain threshold principles which have heen enunciated in cases dealing with public attorneys' conflicts of interest. In other words, conflict of interest issues concerning public sector attorneys must be analyzed hearing in mind several important caveats articulated by the courts.

Special Considerations Applicable to Public Sector Attorneys

The courts have articulated special considerations which are applicable to evaluating claims of conflict of interest in the public sector and which suggest that these issues merit a nuanced and careful approach. In *In Re Lee G.*,[11] the Court of Appeal pointed out that the conflict of interest rules "developed in the private secror...do nor squarely fit the realities of the public attorney's practice."[12] Similarly, another Court of Appeal has observed that the financial incentives are not the same in the puhlic sector as those in the private sector and thus, there is less concern about conflicts of interest.[13] Because disqualification of public counsel can result in increased expenditures for legal representation and thus substantially heightened demands on an "already severely sttained tax base," disqualification should be imposed with caurion.[14] Another factor militating against disqualificarion is the "potential deprivation of the clrent of the services of an attorney highly skilled in a particular area of the law...."[15]

Accordingly, the staturory scheme for the defense and indemnification of public employees and the special considerations applicable to analyzing conflict of interest issues in the public sector must be kept in mind when evaluating the application of the State Bar's Rules of Professional Conduct to the joint defense of public employees and entities in civil actions.

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State Bar Rule of Professional Conduct 3-310 Concerning Conflicts of Interest

The key provision of the State Bar Rules of Professional Conduct governing conflicts of interest in the context of reptesenting two clients who may be adverse to one another is Rule of Professional Conduct 3-310.[16] The operative language is contained in 3-310 (C). That subsection provides in pertinent part as follows:

(C) A member shall not, without the informed written consent of each client:
(1) Accept representation of more than one clenr 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 separare matter accept as a client a person or entity whose interest in the first matter is

adverse to the client in the first matter.

A cursory review of the language in Rule 3-310 (C), which requires the employee's written consent to joint representation when the clients' claims "potentially conflict," may suggest that the Rule is at odds with the statutory scheme for the defense and indemnification of public employees, since the Government Code authorizes the entity to choose the means of defense, including its own lawyer,[17] and to deny a defense only when there is a "specific conflict of interest between the public entity and the employee ...."[18] Nevertheless, the only cases which have considered the issue have found no conflict and have found no reason for the courts to usurp the legislative prerogative in determining the rights of public employees to defense and indemnification based upon imagined conflicts.

Interestingly, these cases have arisen in the context of a private firm - not the one chosen by the city or county to represent the employee- that claims that it is entitled to defend the employee at public expense because of a claimed conflict by the counsel representing the entity. It is no small irony that the firm constituting the "independent counsel" purporting to represent the interests of the individual employee has itself a pecuniary interest (and thus arguably a conflict of interest) in arguing that the entity and the employee have a conflict of interest, since this argument is designed to ensure that the entity pays the firm to defend the suit even though it has the effect of requiring the entity to pay twice for the defense of the same action.

Cases Applying Rule 3-310 in the Public Sector in the Context of the Defense of Public Employees

There are three reported cases considering the application of Rule 3-310 to claims of public employees that they are entitled to independent counsel. All three flatly rejected the argument. In the first, *Laws v. County of San Diego*,[19] employees of a county sheriff 's department sought a writ of mandate to compel the county to provide them independent counsel in connection with the defense of a police misconduct suit asserting a violation of civil rights. The suit sought both compensatory and punitive damages.

The county's letter advising the defendant deputy sheriffs of their right to a defense and indemnification stated that the sheriffs would be personally liable for punitive damages if any were awarded, and that the county would defend against the entire suit but advised them that if they wished to retain independent counsel in light of the claim for punitive damages, the county would cooperate with any independent counsel they retained. The deputies then retained independent counsel to review the letter. He advised the county that the limitations contained in the county's letter constituted a reservation of rights which triggered to a conflict of interest which would not be waived by the deputy sheriffs. He asserted, therefore, that they were entitled to retain the firm as independent counsel at county expense.

The claimed conflict in *Laws v. County of San Diego* was premised on *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*[20]. In that case an insurance company attorney who defended the insured under a reservation of right as to coverage was found to have a conflict of interest in representing both the insured and the insurance company where the defense of the action could have been conducted in a way which buttressed the insurance company's claim that the suit was not covered under the policy, and worked to the detriment of the insured who would then be denied indemnification. The essence of the *Cumis* court's holding was that, under those facts, it was not possible for the counsel undertaking the joint representation of the insurer and the insured to advance the interests of the insurance company in the litigation, without compromising the interests of the insured, as a result of the reservation of rights. The coverage issue turned on whether the acts were willful and were grounded on breach of contract, rather than on tort. The latter would result in coverage the former would not.

The court in *Laws v. County of San Diego* rejected the claims of the deputy sheriffs that the counsel selected by the county had a conflict of interest. It did so on several grounds. In general, the court found the insurance context not analogous to the statutory scheme for defending and indemnifying public employees. First, it noted that, unlike the insurer in the *Cumis* case, the county had not reserved its rights on the issue of whether the conduct arose out of the course and scope of employment.[21] Second, the county has the discretionary power to approve the payment of a claim of punitive damages unlike an insurer for whom it would be against public policy.[22] Third, the court noted that a post *Cumis* case had held that the mere existence of a punitive damages claim does not create a *Cumis* conflict.[23]

Finally and perhaps most importantly the court observed:

> [C]hanges in the manner in which defenses in civil actions are provided for public employees have the potential for enormous fiscal impact on state and local governments. The relationships of public employee groups and their respective employers are also matters of considerable importance to the functioning of government in this state. These are not problems well suited to ad hoc judicial solution. We therefore decline to attempt modification of the existing legislative scheme. Our analysis of existing law convinces us Laws's claims are unfounded.[24]

The second case to consider whether a conflict of interest existed between an employee and entity in the context of the joint defense of a civil action, *Stewart v. City of Pismo Beach*,[25] likewise rejected the claim. There, the defendant police officer Stewart resigned during the pendency of the civil action, and gave an interview to the plaintiffs' investigator making various incriminating statements about himself and the city in exchange for the plaintiffs' assurance that he would be dismissed from the action. Stewart then boldly claimed that there was a conflict of interest with the city and that he was therefore entitled to independent counsel in the civil action. The city denied Stewart a defense on the grounds of a specific conflict of interest and his failure to cooperate in his defense. The Court upheld both determinations, noting that "here Stewart is essentially asking the City to pay for a lawyer to help Stewart (and the plaintiffs) dig the City's grave in the federal action. We think this is exactly the result that [Government Code § 995.2 (C)] was intended to avoid."[26]

The final appellate case to address the issue of whether the employee has a right to demand independent counsel is a Ninth Circuit case, DeGrassi v. City of Glendora.[27] In rejecting the employee's argument, the Ninth Circuit appeared to consider the matter largely disposed of by *Laws v. County of San Diego*. In *DeGrassi*, a city council member had repeatedly made charges that the owner of a landmark building was a child molester, despite the advice of counsel that she not do so. The owner of the building then filed a defamation action against the council member

and the city agreed to assume her defense subject to the condition that she cooperate in her defense, and that the city control the ...igation and approve any settlement. The ...ouncil member refused to accede to representation on these terms and instead retained her own attorney and sought reimbursement from the city for her legal expenses. The court upheld the trial court's rejection of her claim for reimbursement, finding that the city's action in conditioning the defense was completely consistent with the statutory scheme for the defense and indemnification of public employees.[28]

Interestingly, the court specifically rejected the notion that the employee can claim independent counsel on the grounds of a conflict of interest. It concluded that Government Code § 996.2 gave only the city the right to decline a defense on the grounds that there was a specific conflict of interest between it and the employee. If the city provided a defense, however, the employee had no basis to decline it and demand independent counsel on the grounds that there was a conflict of interest.[29] The court found that the council member's reliance on Government Code § 996.4 was misplaced, since that section only provides a right to seek reimbursement ...en the entity fails to provide a defense.

Although these cases seem to resolve conflict of interest issues with sole reference to the Government Code statutory scheme, a recent federal district court in the Central District of California in a case involving the City of Riverside appeared to completely ignore the *DeGrassi and Laws* cases and ordered disqualification of counsel on the grounds that the entity and employee's interests "potentially conflicted" and that the employee's continued representation was therefor impermissible without the employee's informed written consent pursuant to Rule 3-310.[30] Thus, a closer look at the relationship between the statutory scheme for public employee defense and indemnification and the Rules of Professional Conduct appears to be in order to determine whether the Central District Court's decision broad ruling in the Riverside case is warranted by Rule 3-310 and the case law. This article concludes that it is not.

The Judicial and Legislative ...ower Relating to Conflicts of ...nterests

Conceptually, both the judicial and legislative branches jointly undertake the regulation of the legal profession. "In the field of attorney-client conduct, we recognize that the judiciary and the legislature are in some sense partners in regulation."[31] In *Santa Clara County Counsel Attorneys Association v. Woodside*, the California Supreme Court held that the Meyers- Milias- Brown Act (MMBA), authorizing public lawyers to form unions and to sue their employer/clients for violations of the MMBA, did not violate the constitutional separation of powers doctrine by authorizing violations of ethical duties imposed on lawyers to avoid conflicts of interest under Rule 3-310 and the common law duty of loyalty. In reaching that conclusion, the Court noted that "We have never held a statute of general application, which does not affect the traditional areas of attorney admission, disbarment and discipline, unconstitutional."[32]

If Rule 3-310 were to be read to conflict with and supercede the Government Code, the court would in effect be holding the statutory scheme unconstitutional on separation of powers grounds. In the *Santa Clara* case, the California Supreme Court rejected claims that the Rules and common law duty of loyalty precluded suits by lawyers to enforce MMBA rights, thus revealing its careful and nuanced approach to identifying conflicts. Thus, the question remains whether and when a conflict of interest arises under Rule 3-310 in cases involving the joint defense of public employees and the employing by entities.

Rule 3-310 and Joint Representation

Rule 3-310 (C) requires informed written consent solely when a lawyer accepts representation of two clients whose interests "potentially conflict". The prior discussion has established that the cases and statutes establish some clear legal principles when an employee is named as a defendant. The employee's defense is paid for by the entity, controlled by the entity and any ensuing damages, other than punitive damages are paid by the entity. The mere fact that punitive damages are claimed does not by itself create a conflict of interest. The employee has a duty to fully cooperate in the defense and thus to disclose all relevant facts to the entity, a duty presumably required irrespective of the existence of the suit, and this duty of cooperation is not consistent with conspiring with the plaintiff to make the entity and not the individual liable. These duties apply irrespective of which lawyer undertakes the defense. If there are adverse facts in the record regarding disciplinary action, those facts are adverse to the pecuniary interest of both the entity and the employee since the entity's liability is derivative. Both have an interest in excluding any discipline as inadmissible subsequent remedial action.

Although the legal basis for holding an individual rather than an employee liable may be different under various causes of action, the ultimate interests of the entity are in avoiding or limiting liability either direct or indirect. Thus, the entity's interests are no different with respect to the defense of the employee when it is named directly. In short, the entity and the individual do not have divergent interests merely because the individual insists on asserting, like the council member in the *DeGrassi* case, that she did no wrong. The entity has the right to insist upon controlling the defense and agreeing to a settlement so as not to tilt at legal windmills at great cost. For all these reasons, under normal circumstances, the employee and entity will not have cognizable interests in the civil action which "potentially conflict" within the meaning of Rule 3-310 (C).

On the other hand, if a defense is conducted under a reservation of rights, it would appear to be a conflict of interest for an attorney to conduct a joint defense if the entity intends to argue in the civil action that the employees' conduct did not arise out of the course and scope of employment. The courts in both the *Laws* and *DeGrassi* cases pointed out that the entities in those cases were not reserving their rights to argue that the acts or omissions in the civil actions did not arise out of the course and scope of the employment and thus, the defense of the action could not adversely affect the employee's right to indemnification. Those cases may well have been resolved differently had the very right to indemnification been at issue.

In addition, where the entity is investigating imposing disciplinary action based on the conduct at issue in the civil action, it would appear to be a conflict of interest for the same firm or office (city attorney or county counsel) to both advise the entity on discipline adversely to the employee and simultaneously represents the employee in the civil action based upon the same conduct.

Conclusion

In conclusion, the reported cases appear to reject the principle that the joint defense of employees and entities per se poses conflicts of

interest which require the employee's informed written consent to the entity's choice of counsel. Nonetheless, in this writer's opinion, if an entity requires reservation of rights on the question of whether the act or omission arose out of the course and scope of employment or pursues simultaneous disciplinary action against the employee based upon conduct at issue in the civil action, the entity would be required to appoint separate counsel for the employee.

* *Manuela Albuquerque is a member of the Executive Committee of the Public Law Section of the State Bar of California and presently serves as the City Attorney of the City of Berkeley.*

Endnotes

1 See, e.g., *People ex. rel. Deukmejian v. Brown* (1981) 29 Cal. 3d 150, 157. Accord, *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal. 4th 525, 548.)
2 Rule 3-600.
3 See, e.g., *Civil Service Commission v. Superior Court* (1984) 163 Cal. App. 3d 70, 75-78.)
4 Government Code Sections 825 *et. seq.*
5 *Williams v. Horvath* (1976) 16 Cal. 3d 834, 843.)
6 Government Code Section 996.
7 Section 825.
8 *DeGrassi v. City of Glendora* (9th Cir. 2000) 636 F. 3d 636, 642.)
9 Government Code Section 825(a).
10 Government Code Section 825(b). See text of section in note 2, supra.
11 (1991) 1 Cal. App. 4th 17, 34.
12 See also, *People v. Christian* (1996) 41 Cal. App. 4th 986, 999.
13 *Castro v. Los Angeles County Board of Supervisors* (1991) 232 Cal. App. 3d 1432, 1441.
14 In *Re Lee G., supra*, 1 Cal. App. 4th 28.
15 Id.
16 Rule 3-310. Avoiding the Representation of Adverse Interests [Prof. Conduct, Rule 3-310 (West LawDesk CD-ROM with amendments received through December 1, 1999)]
17 Government Code Section 996.
18 Government Code Section 995.2(a)(3).
19 (1990) 219 Cal. App. 3d 189.
20 (1984) 162 Cal. App. 3d 358.
21 *Laws v. County of San Diego, supra*, 219 Cal. App. 3d at 199-200.
22 Id.
23 Id.; citing *Foremost Insurance Co. v. Wilks* (1988) 206 Cal. App. 3d 251, 261-262.
24 *Laws v. County of San Diego, supra*, 219 Cal. App. 3d at 201.
25 (1995) 35 Cal. App. 4th 1600.
26 Id. ar 1606.
27 (9th Cir. 1999) 207 F. 2d 636, 642-643.
28 *DeGrassi v. City of Glendora, supra*, 207 F. 3d ar 642-643.
29 Id. at 642-643.
30 *Miller v. City of Riverside*, United States District Court for the Central District of California, No ED Cv 99-0176 RT (RZx). The City of Riverside is seeking Ninth Circuit certification of an interlocutory appeal.
31 *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal. 4th 525, 543.
32 Id.