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August 1, 2014

VIA ELECTRONIC AND OVERNIGHT MAIL

Mr. Bruce M. Slavin
Deputy Attorney General
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Re: Opinion No. 14-301

Dear Mr. Slavin:

This letter is sent on behalf of the League of California Cities (“League”) with respect to your Request for Views dated April 10, 2014, regarding the question of whether an attorney who serves on a city council but who has a client with an interest adverse to the city violates any legal duty, either to the city or to his or her client, by such representation.

The League of California Cities is an association of 473 cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation and requests for views of concern to municipalities and identifies those cases or requests that have statewide or nationwide significance. The Committee has identified this Request for Views from the Attorney General as having statewide significance to the League’s member cities.

This Request raises at least three different, but overlapping, areas of the law, each of which involve various duties and conflicts of interest. These three areas are: (1) an attorney’s duty of fidelity to his or her client and ethical rules regarding adverse representation; (2) a city council member’s duty of loyalty and fiduciary duty to the city; and a similar duty to be an unbiased decision-maker; and (3) the statutory requirements that a city council member not participate in decisions in which he or she has a financial conflict of interest.



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1. Attorneys' Duties Under the Rules of Professional Conduct

Every licensed attorney in the State of California must act in compliance with the California Rules of Professional Conduct. The rules cover, among other duties and responsibilities, an attorney's duty to maintain a client's confidentiality and the duty to zealously advocate for a client. The State Bar's Committee on Professional Responsibility and Conduct (COPRAC) is a standing committee of the State Bar Board of Trustees. Its primary duty is to issue advisory ethics opinions concerning the California Rules of Professional Conduct. Its rules are not binding but have been cited in judicial opinions.

The question raised here is slightly different from the more typical ethical issues confronted by practicing attorneys as the attorney here would not be representing two clients with adverse, or potentially adverse, interests. Rather, the attorney/council member has a client with interests adverse to the city council, of which the attorney/council member also serves as one of five members. The situation is similar to one where an attorney represents a client with interests that are adverse to a board of directors on which the attorney sits, and the attorney is faced with conflicting duties of loyalty and fiduciary obligations.

Rule 3-310(B) of the California Rules of Professional Conduct provides that a member of the Bar of the State of California has a duty to avoid the representation of adverse interests but may do so following written disclosure to the client. The rule specifically states that written disclosure to the client must be provided before the member accepts or continues representation when the member has a "legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter." Importantly, the "other person or entity" is not necessarily the attorney's client.

The Bar's COPRAC analyzed an issue similar to the one presented here and issued Formal Opinion No. 1981-63 ("Opinion") (copy enclosed). Cal. Compendium on Prof. Responsibility, pt. II, State Bar Formal Opn. No. 1981-63. In that opinion, COPRAC determined that the law firm of a member of a city council could not represent tort plaintiffs in actions against the city, even with the informed consent of the city council.

The Opinion analyzes former Rule 5-102(B) (the predecessor to Rule 3-310), which stated that a member "shall not represent conflicting interests, except with the written consent of all parties concerned." The COPRAC opines that a conflict of interest may arise "where an attorney's relationship with a person or entity creates an expectation that the attorney owes a duty of fidelity," such as to the city council. *Id.* at 3. The COPRAC also opines that a conflict "may also arise where the attorney has acquired confidential information in the course of such a relationship which will be, or may appear to the person or entity to be, useful in the attorney's



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representation in an action on behalf of a client.” *Ibid.* The Opinion notes that a city council member would have access to confidential information that may be useful in lawsuits against the city. Thus, the Opinion concludes that a city council member cannot represent a client where there is a conflict of interest with his or her council position.

The Rule (both the former and current rule) permit the client to provide informed written consent in order for the representation to continue. The Opinion, however, states that in the event a lawsuit is brought against the city by a law firm whose member is on the city council, that litigation creates “such an appearance of improper conduct that it cannot ethically be permitted.” *Id.* at 4. Thus, even with the informed written consent of the city council, the attorney could not represent the client according to this Opinion and the Rules of Professional Conduct.

Important to the issue presented here, this Opinion also appears to stretch beyond actual litigation as the Opinion states that the attorney/council member may not ethically represent clients in their dealings (and not just litigation) with the city. That opinion is “grounded upon the need to promote public confidence in our legal system and in the legal profession and upon the need to avoid the appearance of professional impropriety.” *Id.* at 5.

Here, we are unaware of all of the facts giving rise to this opinion request, but the League recommends review of this COPRAC opinion regarding an attorney’s ethics when serving on a city council or other legislative body as it raises similar issues to the one raised in the Request for Views.

2. Council Member’s Fiduciary Duty and Duty of Loyalty

As the COPRAC Opinion states, avoiding representation of a client with interests adverse to the city promotes both the public’s confidence in, and the integrity of, the legal system. A similar concern, also noted in the Opinion, is maintaining the integrity of the city and the city council. The Opinion notes that, “The public expects its elected representatives to represent them ‘with undivided fidelity.’” *Id.* at 4.

This concept of fiduciary duty and loyalty to a city to which a council member serves has also been expressed in case law. As one court notably stated, “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public.” *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928). Stated another way, a public official has a fiduciary duty to exercise the powers of the office for the benefit of the public and may not use those powers for the benefit of private interests. *Nussbaum v. Weeks*, 214 Cal. App. 3d 1389 (1989), *Terry v. Bender*, 143 Cal. App. 2d 198, 206 (1956).



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These principles of representation of public interests – rather than private ones – is at the heart of the State’s conflict of interest laws and are based on the underlying principle that no person may properly serve two masters. When a person has an interest in a private matter (whether it be a financial interest, strong personal bias, or other) that person is not properly serving the city council (or other legislative body or board of directors) by having conflicting loyalties.

The concept of divided loyalties and unacceptable bias is commonly referred to as having a common law conflict of interest because the officials involved in these situations did not necessarily violate a specific statutory prohibition (discussed further under section 3 below). Common law conflicts of interest typically arise when a legislative body is acting in a quasi-adjudicatory capacity rather than a legislative capacity. That is, they tend to arise when a body is deciding on a specific application or appeal rather than a policy matter. For example, in *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996), the court concluded that a city council member had a conflict of interest when his personal interests outweighed his duty to the city council. In that case, the city council member harbored personal animosity towards project applicants whose addition to their home would have impeded the council member’s view from the apartment he rented. His animosity went so far that he yelled as he ran by the neighbors’ house and purportedly urinated on the house and in the planters. *Id.* at 1167, fn. 12. The court held that the council member had a conflict of interest in voting to deny the project as he would personally benefit from that vote. The court also held that the specific project would have had a direct impact on the quality of the council member’s own residence and that his personal animosity contributed to him not being a “disinterested, unbiased decisionmaker.” *Id.* at 1172-1173.

Another case involving a planning commissioner who anonymously authored an article in a homeowners’ association newsletter is also instructive. *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 470. In the newsletter, the planning commissioner referred to a proposed project as a threat to a wildlife corridor. The commissioner also introduced a project opponent to the homeowners’ association at a meeting. The planning commissioner then voted against the project when the commission considered an appeal. The court held that the commissioner’s article gave “rise to an unacceptable probability of actual bias.” *Id.* at 482-283.

In the subject Request for Views, it is unclear whether the question presented involves pending litigation and a council member’s competing loyalties and obligations. We note, however, that in the event a council member is involved in litigation against the city (either personally or on behalf of a client), the council member’s duties would be clearly split and in conflict. The council member could not adequately serve both the client and the city and would potentially obtain confidential information advantageous to the client and detrimental to the



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city's position. *See Hamilton v. Town of Los Gatos*, 213 Cal. App. 3d 1050 (1989). In *Hamilton*, a council member who was conflicted from participating in closed session discussions about litigation could not thereafter obtain a tape of the closed session discussion. The court stated that allowing the council member access to confidential information that could affect his business interests gives the appearance of impropriety, and he might use the confidential information to his personal advantage or improperly disclose it.

Thus, depending on the situation and the facts involved, the council member here could also have a common law conflict of interest if his/her personal interests and biases are so pervasive as to prevent impartial decision-making. Additionally, being in conflict with the city that the city council member serves raises issues of duty, loyalty, and the possibility of improperly obtaining and/or using confidential information to the city's detriment. In these situations where a council member is either so biased that he or she cannot be an impartial decision-maker or is in actual conflict with a city in litigation, that member cannot participate in the decisions as doing so impermissibly puts the council member in a situation of divided loyalties.

3. Making Decisions Free of Financial Conflicts of Interest

The Political Reform Act and Government Code section 1090 are the state's statutory conflict of interest laws for public officials. The Political Reform Act sets forth conflicts of interest rules for six types of financial interests while section 1090 concerns financial interests in contracts. Each will be discussed in turn. However, we note that conflicts of interest analyses under these sections are very fact specific, and it is difficult to meaningfully analyze their application without a specific set of facts to review.

A. Political Reform Act

The state's primary conflict of interest law, the Political Reform Act (Gov't Code §§ 87100 *et seq.*), is administered and enforced by the Fair Political Practices Commission ("FPPC"). The Political Reform Act concerns conflicts of interest in which a public official has an economic interest (as specifically defined in the law) in a public agency's decision. This law is much broader than section 1090 because it applies to any decision or action of a public agency rather than only to contracts.

The Political Reform Act's six different types of economic interests are:

(1) any business in which a public official has a direct or indirect interest worth \$2,000 or more (including holding stock);



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(2) any real property in which a public official has a direct or indirect interest worth \$2,000 or more;

(3) a source of income aggregating \$500 or more in value provided to, received by, or promised to the official within 12 months prior to the time the decision is made;

(4) any business in which a public official is a director, officer, partner, trustee, employee, or in any position of management;

(5) any donor of (or intermediary or agent for a donor of) a gift(s) aggregating \$440 or more in value provided to, received by, or promised to a public official within twelve months prior to the time the decision was made; and

(6) personal finances and those of the public official's immediate family. Gov't Code § 87103; 2 Cal. Code Regs., § 18703.5.

A public official may have more than one economic interest in a decision. Because different rules and exceptions apply to each type of economic interest, each must be analyzed separately. Again, this is a highly fact-dependent inquiry, and each situation requires a separate analysis.

If a council member is a solo practitioner, for example, and has a paying client (paying \$500 or more) as a source of income, that client would be a source of income to the council member. Any decision that affects the client could create a conflict of interest for the council member. The council member would be required to recuse him or herself from all participation – including negotiations, discussions, and voting – on the matter. He or she would be required to announce the financial interest, leave the council chambers at the beginning of the item, and not return until the item has been voted on or otherwise concluded. 2 Cal. Code Regs., § 18702.5. If the council member is an employee of a law firm (in a salaried position) that client may not necessarily present the same financial conflict of interest because the law firm is the source of income to the city council member rather than the individual client. However, that would not negate the fact that the attorney/council member would still have a conflict of interest under the laws discussed above.

B. Government Code Section 1090

Government Code section 1090 prohibits officers and employees from being financially interested in any contract made by them in their official capacity. It provides, in part, that “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



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capacity, or by any body or board of which they are members.” Unlike the Political Reform Act, section 1090 does not specify financial interests. One way to determine what the disqualifying financial interests are, though, is to examine the exceptions to section 1090. For example, one such exception provides that a public official has a financial interest by serving as an officer or employee of a non-profit corporation that is a contracting party, even if such service is not compensated. *See* § 1091(b)(1) (specifying that a remote interest in a contract includes that of an officer or employee of a nonprofit entity).

The general rule under section 1090 is that members of a board are conclusively presumed to be involved in the making of a contract. *Thomson v. Call*, 38 Cal. 3d 633, 649 (1985). This means that even if a board member disqualifies himself or herself from participating in the making of a contract, there is a conclusive presumption that the board member “made” the contract. Additionally, the term “making” a contract has been construed broadly and includes preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans, and soliciting bids. *Millbrae Assn. for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 236 (1968).

The courts have established, for the most part, that any contract made in violation of section 1090 is void, and the public agency is entitled to receive all funds expended for the contract. *Thomson v. Call*, 38 Cal. 3d 633, 650 (1985). A contract made in violation of section 1090 is unenforceable, and no recovery shall be afforded the contracting party for services rendered under the contract. *Id.* Violations of section 1090 can be serious, and a willful violation can result in a permanent forfeiture of public office in the state. § 1097.

If, for example, a council member were to vote on a contract approving a grant of funds to a client, that council member could have a conflict of interest under Government Code section 1090. The conflict may not be “cured” by recusal as there is a presumption under section 1090 that the council member “made” the contract even if he or she did not participate in the discussion or vote on the contract.

The council member would have two choices. The council member could resign from office and continue to represent the client. Or, the council member could divest himself or herself of the financial interest. Importantly, however, the council member may not resign from office at the very last minute in order to have used his or her council position first to their advantage. *Stigall v. City of Taft*, 58 Cal. 2d 565 (1965). As the California Supreme Court noted in *Stigall*, permitting a last minute resignation would allow a council member to participate in all contract negotiations and then resign at the last minute in order to be free of the conflict of interest. *Id.* at 570. That, the court said, violates the intent of the conflict of interest laws and is not permitted.

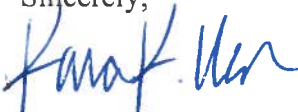


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4. Conclusion

In sum, the question presented in this Request for Views raises issues in at least three different subject areas: attorney ethics, duty of loyalty and fiduciary duty/common law conflict of interest, and statutory conflicts of interest under the Political Reform Act and Government Code section 1090. All three areas should be analyzed in the Attorney General's opinion rendered on the question. Please do not hesitate to contact me if we can be of further assistance or if you have any questions about our comments provided in this letter.

Sincerely,


Kara K. Ueda
Partner
of BEST BEST & KRIEGER LLP

KKU:cp
Enclosure
cc: Patrick Whitnell, General Counsel, League of California Cities

FORMAL OPINION NO. 1981-63

ISSUE: May the law firm of a member of a city council ethically represent tort plaintiffs in actions against the city when the city has given informed consent?

DIGEST: The law firm of a member of a city council may not represent tort plaintiffs in actions against the city, even with the informed consent of the city council.

AUTHORITIES INTERPRETED: Rules 4-101, 5-101 and 5-102 of the Rules of Professional Conduct of the State Bar.

DISCUSSION

A. Introduction.

A member of a city council is also a member of a law firm. The city council has consented to the law firm representing tort claimants in actions against the city. The Committee has been asked whether such representation is unethical. The Committee concludes that it is.

The city is a party to a joint powers agreement wherein a number of cities have formed a self-insurance pool system. The system is administered by an independent authority. Each city has direct liability up to a certain level. In the case of the particular city involved here, it is \$25,000. The system is self-insured beyond that up to a stated maximum, beyond which excess insurance is carried. The adjuster has authority to settle claims below \$1,000 without approval, but settlements of \$1,000 or more must be recommended by the adjuster and approved by the defendant city. The authority retains private counsel to provide legal defense.

The city council has passed a resolution consenting to representation of tort claimants in actions against the city by one of its member's law firm. The approval is subject to three conditions:

1. The council member will disqualify himself or herself from voting on any matter relating to the claim;
2. The council member will not influence the council or its staff in disposition of the claim; and
3. The council member will not personally litigate any tort actions against the city.

B. Applicable Rules.

The Committee's analysis has considered the following Rules of Professional Conduct in determining whether the representation described above is ethical.

"RULE 4-101. ACCEPTING EMPLOYMENT ADVERSE TO A CLIENT.

"A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

"RULE 5-101. AVOIDING ADVERSE INTERESTS.

"A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto."

"RULE 5-102. AVOIDING THE REPRESENTATION OF ADVERSE INTERESTS.

"(A) A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under the rule shall first obtain the client's written consent to such employment.

"(B) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."

C. Conflict of Interest.

Generally a conflict of interest arises when clients with conflicting interests seek representation by the same lawyer. Rule 4-101 of the Rules of Professional Conduct permits such representations with the informed written consent of the clients. Here, however, we have something entirely different from the normal one-attorney, multiple-client conflict. While the attorney-council member here might be considered to represent the tort claimant indirectly through the law firm, the city is not the attorney's client. At the outset, therefore, it is necessary to determine whether the Rules of Professional Conduct regulate conflicts of interest which arise outside of the attorney-client relationship.

Rule 4-101 of the Rules of Professional Conduct does not apply. Rule 4-101 prevents an attorney from accepting employment adverse to a client. Since the city is neither the attorney-council member's client, nor the firm's client, representation of the tort claimant would not be adverse to a client under the provisions of this rule. (Pepper v. Superior Court of Los Angeles County (1977) 76 Cal.App.3d 252 [142 Cal.Rptr. 759].)

Rule 5-101 of the Rules of Professional Conduct also does not apply here. Rule 5-101 prohibits an attorney from acquiring a pecuniary interest adverse to a client unless the client consents. The city council member's representation of a tort claimant in a claim against the city, presumably under a contingent fee arrangement, might be considered an acquisition of a pecuniary interest. However, such representation would not be adverse to a client under rule 5-101 because the attorney-council member is not the city's attorney.

Rule 5-102(A) of the Rules of Professional Conduct requires the council member's firm to disclose its relationship with the city before undertaking to represent a tort claimant in a claim against the city, but the claimant is unlikely to object. Rule 5-102(B) of the Rules of Professional Conduct might arguably apply. It prohibits an attorney from representing conflicting interests of multiple parties and is not limited to conflicting interests among clients.

The question, then, is whether the provisions of rule 5-102(B) of the Rules of Professional Conduct apply when a member's duties of representation arising out of an attorney-client relationship conflict with a member's duties of representation arising out of some other relationship (e.g., as a public official, as an executor of an estate, or as an officer of a private organization). In Pepper v. Superior Court of Los Angeles County, supra, 76 Cal.App.3d 252 at pages 256-258, the Court of Appeal for the Second Appellate District said that an attorney's membership in a club does not prevent him or her from representing parties in an action against that club, absent the potential for breach of confidences.

In a matter involving a member of a city council, Los Angeles County Bar Association Committee on Legal Ethics, opinion No. 273 (1962) stated, at page 399:

"When a lawyer is elected to the legislature, his duty as the holder of such office requires him to represent the public with undivided fidelity. His obligation as a lawyer continues. It is improper for him, as for any other lawyer, to represent conflicting interests. . .'
[Quoting from Persig, "Cases on the Legal Profession," p. 44.]"

Opinion No. 273, supra, concluded that a city council member-attorney could not represent a client charged with violation of a city ordinance in a matter prosecuted by the city attorney and in which a police officer was a material witness.

For the purpose of rule 5-102(B) of the Rules of Professional Conduct, a conflict of interest may arise from an attorney's relationship with a nonclient. Such a conflict of interest may arise where an attorney's relationship with a person or entity creates an expectation that the attorney owes a duty of fidelity. It may also arise where the attorney has acquired confidential information in the course of such a relationship which will be, or may appear to the person or entity to be, useful in the attorney's representation in an action on behalf of a client.

In the case of a member of a city council, both of these elements are present. The public expects its elected representatives to represent them "with undivided fidelity." The public also expects that its representatives will have access to confidential information which may be useful in lawsuits against the city. (For example, information concerning settlement parameters and weaknesses in the city's litigation cases would be helpful in a claim.) For these reasons, a city council member-attorney may not undertake representation of a client where there is a conflict of interest with his or her council position.

Furthermore, any conflict of interest which exists as to the council member-attorney would apply as well to his or her office partners and associates, precluding them from undertaking representation of claimants against the city. (64 Ops.Cal.Atty.Gen. 282 (April 19, 1981) CV 80-1204; ABA Committee on Prof. Ethics, opn. No. 16 (1929); ABA Committee on Prof. Ethics, informal decisions Nos. 691 (1963) and 1003 (1967); L. A. Co. Bar Assn. Committee on Legal Ethics, opn. No. 242.)

D. Consent.

Rule 5-102(B) of the Rules of Professional Conduct permits conflicting representation with the parties' consent. There have been suggestions that there can be no consent where the public is involved. (See, e.g., ABA Committee on Prof. Ethics, opns. Nos. 16, supra, and 34 (1931).) Los Angeles County Bar Association Committee on Legal Ethics, opinion No. 273, supra, stated, at page 399:

"If the interests of the public and the client conflict, the exceptions contained in [ABA Code of Prof. Responsibility] Canon 6 is inapplicable because the public is a party and cannot consent."

In contrast, California Attorney General's Opinion 77118 (61 Ops.Cal.Atty.Gen. 18 (1978)) concluded that, pursuant to rules 4-101 and 5-102 of the Rules of Professional Conduct, a county may consent to permit legal counsel retained by it for litigation purposes to represent other parties in unrelated actions against the county.

The Committee believes that the Attorney General's conclusion is more compelling than the conclusions of the American Bar Association. Consent is a discretionary decision no different in kind or effect from numerous other discretionary decisions made by public officials, such as the decisions concerning whom to hire as attorney for the public and whom to sue. The public entrusts such decisions to their officials. There is nothing in the Rules of Professional Conduct or in case law which would prohibit officials from providing the consent required by rule 4-101 or 5-102(B) of the Rules of Professional Conduct.

E. Appearance of Impropriety.

The city's consent to representation of a claimant by the council member-attorney's law firm may waive the conflict of interest. There remains, however, another problem, this one incurable. A lawsuit brought against the city by a law firm whose member is on the city council creates such an appearance of improper conduct that it cannot ethically be permitted.

The concept of "appearance of impropriety" is an ethical consideration, even though it is not included in the Rules of Professional Conduct. American Bar Association Model Code of Professional Responsibility, canon 9, provides that, "[a] lawyer should avoid even the

appearance of impropriety." This concept has also been recognized by California courts. For example, in People v. Rhodes (1974) 12 Cal.3d 180 [115 Cal.Rptr. 235], the Supreme Court of California held that a city attorney with prosecutorial responsibilities may not defend a person accused of a crime. After citing the conflicting loyalties of defense counsel and prosecutor, the Court said, at page 185:

"[T]here are other compelling public policy considerations which render it inappropriate for a city attorney with prosecutorial responsibilities to represent criminal defendants. It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities, but also that such officials avoid, as much as is possible, the 'appearance' of impropriety."

In People v. Municipal Court (Wolfe) (1977) 69 Cal.App.3d 714, [138 Cal.Rptr. 235] the Court of Appeal for the Fourth Appellate District held that it is better practice for members of city councils to avoid representing defendants in criminal actions which are prosecuted by the city attorney or which involve police officers as witnesses. The right of an accused to counsel of his or her choice is not absolute and it is subject to other values of substantial importance.

"One such value is the preservation of public confidence in the integrity and impartiality of our criminal justice system, and here it should prevail. While the California Rules of Professional Conduct do not expressly prohibit members of the bar in general from accepting employment which in fact involves no conflict of interest but which might, to the layman, appear to be improper, an ethics committee of the American Bar Association has stated: 'If the [legal] profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but likewise avoid the appearance of evil.' (ABA Opinion 49 [Dec. 12, 1931].)" (Wolfe, supra, 69 Cal.App.3d at pp. 719-720.)

(See also People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 269 [137 Cal.Rptr. 476]; Love v. Superior Court (1980) 111 Cal.App.3d 367, 374 [168 Cal.Rptr. 577]; In re Airport Car Rental Antitrust Litigation (N.D. Cal. 1979) 470 F.Supp. 495, 507; L. A. Co. Bar Assn. Committee on Legal Ethics, opn. No. 273 (1962); cf. Graham v. Municipal Court (1981) 123 Cal.App.3d 1018 [177 Cal.Rptr. 172].)

Members of an attorney-city council member's law firm may not ethically represent clients in their dealings with the city (64 Ops.Cal.Atty.Gen. 282 (Ap. 1981) CV 80-1204). This opinion is grounded upon the need to promote public confidence in our legal system and in the legal profession (ABA Code of Prof. Responsibility, EC 9-1) and upon the need to avoid the appearance of professional impropriety.

This Committee concluded in its opinion No. 1977-46 that neither an attorney nor his or her partner or office associate may represent a criminal defendant being prosecuted by a city in which the attorney serves as a council member. The opinion also held that the attorney and his or her partners and associates may not represent a client in contract negotiations

with the city. The opinion cited American Bar Association Code of Professional Responsibility, Disciplinary Rule 8-101(A), which provides that a lawyer who holds public office must not use his or her position to gain advantage for the lawyer or his or her client. The opinion then stated:

"Although there may be no actual conflict of interest in the representation of a client in the negotiations of a contract with the city, the potential of such conflict and the danger of an appearance of impropriety are of such magnitude and public concern as to require that such representation be declined. In the eyes of the public, it is highly possible that representation in such cases would be viewed with a suspicion that the attorney was using his or her position and influence with the city for the purpose of extracting favorable special treatment for his or her clients in furtherance of their interests and his or her own."

There is much potential for the appearance of conflict and for actual conflict in the representation proposed here. Even if the council member-attorney abstains and if the council approves settlement, there would still appear to be an attorney council member approving a settlement, and probably also a fee, in his or her own firm's case. Assuming the public appreciates that the attorney-council member has not voted, it will nonetheless appear that the other council members have approved a settlement to the benefit of the attorney-council member. Fellow council members might also be reluctant to oppose a settlement for this reason. City employees could be witnesses at trial and might appear to shade testimony to benefit the attorney-council member's case presentation. A case might require the attorney-council member's firm to criticize prior city council action as contributing to the tort. It could appear that the attorney-council member has influenced other members of the council or city employees and officials.

The Committee is aware that California decisions which rely upon the appearance of impropriety standard generally concern the administration of the criminal justice system. The Committee is also aware that disqualification of counsel on the sole ground of the appearance of impropriety has come under much criticism.

The February 6, 1981 draft of the Model Rules of Professional Conduct prepared by the American Bar Association's Commission on Evaluation of Professional Standards, for example, eliminated the appearance of impropriety standard now present in canon 9 because "literal application of such a test would logically result in a per se prohibition on all representations adverse to a former client without regard to subject matter. . ." (Notes, Rule 1.9.) The Commission points out that:

"Concern with adverse appearances apparently originated in cases involving lawyers who were concurrently employed by the government and engaged in representation of private clients in unrelated matters. [Citations.] Preservation of public confidence in governmental affairs was held to preclude representation even in unrelated matters and despite any consent by the parties [citations], an approach that seems appropriate to government employees as such rather than lawyers as such."

At least with respect to attorneys who are also public officials, the legal profession's interest in maintaining public confidence in lawyers and the judicial system is sufficient to render representation of the type proposed here unethical. It is the public official's visibility to the public which places his or her conduct, as an official and as a lawyer, before the public. The greater the public scrutiny to which an attorney's conduct is subject, the greater the legal profession's interest in ensuring that the attorney's conduct appear to be proper.

An attorney must exercise the highest degree of care to avoid giving the public the impression that he or she has improperly used the influence of public office. It is therefore our conclusion that the city council member's firm may not represent tort claimants in suits against the city.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of The State Bar of California. It is advisory only. It is not binding upon the courts, The State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.