



**PROFESSIONAL RESPONSIBILITY
CHALLENGES FOR TODAY'S CITY
ATTORNEY**

**2011 CITY ATTORNEYS SPRING
CONFERENCE**

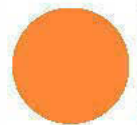
MAY 4-6, 2011



PRESENTED BY:

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DIRECTOR, STATE BAR OF CALIFORNIA**

**WITH THANKS TO CRISTINA TALLEY, CITY
ATTORNEY, ANAHEIM**



I. *“QUIT TALKING TO MY CLIENT!”*

COMMUNICATIONS WITH AN ADVERSE PUBLIC OFFICIAL CLIENT:

CRPC Rule 2-100 currently prohibits direct or indirect communications with a represented opposing “party.”

California’s rule expressly excepts from this prohibition, represented “public officers, boards, committees or bodies.”

The State Bar’s Commission to Revise the Rules of Professional Conduct is recommending that the term “party” be replaced with “person” to conform to the ABA’s Rule 4.2 standard on this subject.



Current California Rule 2-100: Communication With a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Proposed California Rule 4.2: Communication With a Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) For purposes of this Rule, a "person" includes:

(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or

(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.

(c) This Rule shall not prohibit:

(1) Communications with a public official, board, committee or body; or

(2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or

(3) Communications authorized by law or a court order.



II. *INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS.*

State Compensation Ins. Fund v. WPS, Inc., (1999) 70 Cal. App. 4th 644, 656-657, endorsed by the California Supreme Court in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal. 4th 807: ["When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, *the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged.* The parties may then resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."] [Emphasis added.]

In *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal. 4th 807, this standard was extended to attorney work product. The court also added: "An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."

What about data that is not privileged but is still confidential?

See also, ABA Model Rule 4.4(b) [duty to notify sender of inadvertently received documents]; *Jasmine Networks, Inc. v. Mavell Semiconductor* __ Cal 4th __ (2004) 12 Cal. Rptr 3d. 123, rev.den. __ Cal 4th __, 76 Cal. Reprtr. 3d 172 [misdirected voicemail].

III. *KNOWING WHAT'S GOING ON: THE DUTY TO SUPERVISE.*

CRPC Rule 3-110 (B): A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

“Competence” means: “to apply the 1) diligence, 2) learning and skill, and 3) *mental, emotional, and physical ability* reasonably necessary for the performance of such service.”

The duties imposed by Rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.

In the City Attorney context, what about: form agreements, templates, utilized by other departments? Workloads that exceed the ability to competently perform?



Current California Rule 3-110 Failing to Act Competently

- (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
- (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.

Proposed Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

- a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:
- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Proposed Rule 5.2 Responsibilities of a Subordinate Lawyer:

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.



Proposed Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and [knows] of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

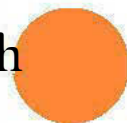


IV. PUBLIC CHARGES: “DON’T THREATEN ME!!”

CRPC Rule 1-500 prohibits threatening criminal, administrative or disciplinary charges to gain an advantage. Business & Professions Code Section 6090.5 prohibits agreements not to file disciplinary complaints.

People v. Pic'l (1982) 31 Cal. 3d 731 [Attorney entering into an agreement not to report prosecuted for obstruction of justice].

Cohen v. Brown (2009) 172 Cal. App. 4th 302 [Attorney committed an act of “extortion” under the Penal Code, by his assistance given to client in filing of a State Bar complaint against second attorney, who had been associated with their personal injury action, for the purpose of using the complaint as an express threat of disciplinary action unless second attorney agreed “immediately” to sign client's settlement checks with no conditions regarding attorney fees which were in dispute between the two attorneys.]



Current California Rule 5-100: Threatening Criminal, Administrative, or Disciplinary Charges

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Proposed Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this Rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.




V. DISCRIMINATORY CONDUCT: ISN'T THIS DOUBLE JEOPARDY OR SOMETHING?

CRPC Rule 2-400: 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.

This applies to “corporate and governmental legal departments.”

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law.



See also, California Fair Employment & Housing Act, Government Code Sections 12900, et seq.; Title 7 of the Civil Rights Act of 1964, 42 U.S.C.A 2000e, et seq.; California Unruh Civil Rights Act, California Civil Code Sections 51 et seq.

Current California Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice.

(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.

Proposed California Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation

(a) For purposes of this Rule:

(1) "knowingly permit" means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and

(2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

VI. CONFLICTS OF INTEREST IN THE CITY ATTORNEY'S OFFICE:

CRPC Rule 3-310: Prohibits representation of adverse interests without the appropriate waiver and consent, and presumes imputation to all within a law office environment.

San Francisco City and County v. Cobra Solutions, Inc. (2006) 38 Cal. 4th 839 [The elected City Attorney represented a client while in private practice and that client later is added as a defendant in the City's civil action alleging fraud and other statutory violations in connection with City contracts. The entire City Attorney staff is disqualified from representing the City in the civil action].

Waivers recommended where the City Attorney's Office will represent the City and individual named City employees, officials in civil actions (e.g., employment, civil rights excessive force cases).

What about the in-house attorney as a complainant against the public entity? The court in *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal. 4th 525, held that such a lawsuit did not, per se, violate Rule 3-310. See also, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164.




VII. *SEX WITH CLIENTS: TROLL FOR LOVE ELSEWHERE!*

CRPC, Rule 3-120: A member shall not demand sexual relations with a client incident to or as a condition of any professional representation; employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of Rule 3-110.

How does this rule play out in the City Attorney context?

See also, ABA Model Rule 1.8(j) [No sex with clients unless a consensual sexual relationship commenced before the attorney-client relationship]; *McDaniel v. Gile* (1991) 230 Cal. App. 3d 363 [Quid Pro Quo Sex for Services]; Civil Code Section 51.9 [Sex Harassment].



Current California Rule 3-120 Sexual Relations With Client

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

- (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
- (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
- (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Proposed California Rule 1.8.10 Sexual Relations With Client

(a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.




VIII. “UP OR OUT?” CONFIDENTIALITY ISSUES FACING A CITY ATTORNEY.

CRPC Rule 3-100: A member shall not reveal information protected from disclosure by Business and Professions Code Section 6068 without the informed consent of the client.

Death or substantial bodily harm exception? Yes. See also, Evidence Code Section 956.5 [Prevention of Criminal Acts]

Substantial injury to financial interests exception? No. But see, ABA Model Rule 1.6(a)(2); 15 U.S.C. Section 7245; 17 C.F.R. Part 205 [Sarbanes-Oxley Act].

Whistleblower statutes [e.g., California Government Code Section 53296 applicable to local government agencies]. See, 84 Ops. Atty. Gen. 71 (2001) [Even though public attorneys fall within the definition of “employee,” whistleblower statutes do not supersede the statutes and rules governing the attorney-client privilege].



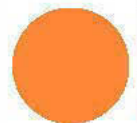
IX. *WHO IS THE CLIENT, ANYWAY?*

CRPC Rule 3-600: 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.

In the context of a City Attorney, the “client” can take many forms: city council, boards, commissions; individual officials and employees acting in the course and scope of their office or employment.

Not members or employees with regard to personal legal issues.

What about individuals with issues that are within the course and scope of their employment or office, but in conflict with the city or with others acting within the course and scope of their duties?



***X. RECORDS: YOU ARE A PUBLIC
RECORD AND YOU NEED TO KEEP YOUR
RECORD CURRENT: E-MAIL ADDRESS
MANDATORY AS OF FEBRUARY 1, 2010:***

California Rules Court 9.7 [Online Reporting by Attorneys].

Business & Professions Code Section 6002.1 [Official Membership Record].

Business & Professions Code Section 6068(j) [Membership Record].

www.calbar.ca.gov [Member Profile].



XI. FIGURING OUT WHAT TO DO: PROFESSIONAL RESPONSIBILITY RESEARCH TOOLS:

Rules of Professional Conduct [West's Annotated Codes, Court Rules, State Bar
[West's Volume 23, Part 5].

California Business & Professions Code [Sections 6000 *et seq.*].

**The State Bar of California Publication 250, The State Bar Act/Rules of Professional
Conduct.**

**Advisory Opinions of State Bar and Local County Bar Association Ethics Committees.
California Compendium on Professional Responsibility.**

State Bar Ethics Hotline [1-800-238-4427].

State Bar Ethics Information on Line [<http://www.calbar.ca.gov>].

American Bar Association Model Rules of Professional Conduct

[<http://www.abanet.org/cpr/>] [Not binding in California: *State Compensation Insurance
Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644*].

ABA/BNA Manual on Professional Responsibility

(<http://www.abanet.org/cpr/manual.html>).

**American Law Institute (ALI) Restatement of the Law Governing Lawyers (Third) (2000).
Professional Responsibility, The Rutter Group.**

Ethical Standards in the Public Sector ABA Section of State & Local Government Law.

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

