

# **Practicing Ethics** **& all that it entails**

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# Agenda

Cal Cities Practicing Ethics Handbook, 3<sup>rd</sup> ed.

Ch. 1: Representation

Ch. 2: Conflicts of Interest

Ch. 3: Political Reform Act

Ch. 4: Government Code § 1090

Ch. 5: Prosecutorial Role

Ch. 6: Outside Counsel

Ch. 7: Confidentiality

Ch. 8: Grand Juries

Cal. Rule of Prof. Conduct 8.3

Cal. Rule of Prof. Conduct 8.4.1



# PRACTICING ETHICS

REVISED 3RD EDITION

A Handbook for

## Ad Hoc Committee Members:

### **Michael Jenkins**

2023 Committee Chair  
Of Counsel, Best Best & Krieger

### **Valerie Silverman Massey**

Chief Deputy City Attorney, San Diego

### **Amy Greyson**

Assistant City Attorney, Calimesa and Seal Beach  
Richards, Watson & Gershon

### **William Curley**

Partner, Harper & Burns

### **Malathy Subramanian**

City Attorney, Albany, Clayton, and Lafayette  
Partner, Best Best & Krieger

### **Donna Mooney**

City Attorney, Pittsburg

# Chapter 1

## Your client is the City.

### Rule 1.13: Organization as the client

- Duty of loyalty
- Duty of confidentiality

# Chapter 1

## When your client is not just the City?

### Joint representation:

- Government Code section 995 et seq (California Tort Claims Act)
- Joint representation with Quasi-Independent Bodies/Agency/Depts.
- Conflict of interest (1.7)

### Constituent clients

- Communication with a represented party (4.2)
  - The public and “your” client
- Supervision rules (5.1, 5.2, 5.3)

# Chapter 2: Conflicts of Interest

## Rules 1.7, 1.9, & 1.11

Simultaneous Representation = Prohibited

Successive Representations: Prohibited if there is a substantial relationship between the current matter and the prior representation, requires informed written consent from former client.

Disqualification considerations: “In house” v. “out-of-house”

- “Significant risk” of material limitation to the representation by the lawyer’s own interest
- Special considerations for attorneys in the public sector: Rule 1.11

# Chapter 2: Conflicts of Interest

## Rules 1.7, 1.9, & 1.11

### Joint Representation Conflicts:

- Quasi-Independent Bodies/Officials & Joint Power Authorities
- Employee representation Pursuant to Government Code section 995 et seq. (California Tort Claims Act)
- Informed Written Consent:
  - Who can give consent
  - What are they consenting to
- Ethical Walls

# Chapter 3: Political Reform Act

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Gov't Code § 87100



# Chapter 3: Political Reform Act

- “In house” v. “out-of-house” considerations
- Contract city attorneys will likely have a financial interest in decisions affecting their compensation because the City will generally compensate their firm – and not the individual contract city attorney – for these services.
- Contract city attorneys 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 already specifically includes such services.



## **Chapter 4: Gov't. Code § 1090**

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.

# Chapter 4: Gov't. Code § 1090

- **Includes all aspects of contracting** including early discussions about the need for the contract and most everything else though final execution.
  - Not just initial contracts, includes settlement agreements
- **Two exceptions:**
  - non-interests: Government Code § 1091.5
  - remote interests: Government Code § 1091
- **Rule of Necessity:** A public official may carry out duties despite a conflict of interest when the official is the only one who may legally act.

# PRA & Gov't. Code § 1090

## Violation of PRA:

Voids the decision made by the public body

Formal advice letter can provide immunity

## Violation of Gov't. Code § 1090

Contract is Void and Unenforceable

- contractor returns payments
- Public entity is entitled to retain and benefits received under the contract

Advice does not provide immunity, but can evidence good faith.

# Chapter 5: City Attorney Prosecutor

**Client:** People of the State of California

- Duty of neutrality
- Heightened ethical standard of impartiality and objectivity.

**Rule 3.8 – Special Responsibilities of a Prosecutor**

- Probable cause requirement
- Disclosure of evidence

**Rule 3.10 – Cannot use a criminal proceeding to gain an advantage in a civil dispute**

**Penal Code section 1424 – Prosecutorial Disqualification**

- (1) there is a reasonable possibility that the prosecutor may not exercise their discretionary function in an evenhanded manner; and
- (2) the conflict is so grave that it is unlikely that a criminal defendant will receive fair treatment.

# Chapter 5: City Attorney Prosecutor

- **Conflicts of Interest:** city attorney seeks to use the criminal proceedings as a means to advance “personal or fiduciary interests.”
  - (1) Is there a conflict of interest
  - (2) Conflict “so grave as to render it unlikely that defendant will receive fair treatment”
- **Prosecutorial Immunity:**
  - Federal: absolute immunity from liability for initiating or pursuing criminal charges
  - State:
    - a. Absolute immunity from actions for malicious prosecution;
    - b. Qualified immunity for “media” statements regarding a criminal case
- **“Out-of-house” City Attorney’s:**
  - A city attorney with prosecutorial responsibilities may not defend persons accused of crimes
  - Government Code § 41805: city attorney can represent criminal defendants in cases other than violations of city laws **if** the law firm has no prosecutorial responsibilities on the city's behalf **and** the defendant(s) has waived any conflict

# Chapter 6: Outside Counsel

- **Rule 8.4.1:**
    - Don't Unlawfully Discriminate
    - Don't be complacent in discriminatory conduct
  - **Conflicts of Interest:**
    - Political Reform Act
    - Government Code § 1090
    - Rule 1.7 or 1.9
  - **Billing and Other Practices:**
    - Review Billing to avoid unethical practices and consistency with terms of representation
  - **Best Practice:**
    - Have procedures in place to ensure fairness in selection, avoid discrimination, review potential conflicts, and management of outside counsel.
- ❖ Special rules apply to outside counsel handling civil nuisance actions on a contingency fee basis

# Chapter 7: Confidentiality

- Rules 1.6, 1.13;
- Business & Professions Code § 6068(e)(1)
- Evidence Code § 954, § 955

## The Confidentiality Conflict:

California law has given more importance to maintaining the duty of confidentiality than to the public attorney's status as a government employee and would-be whistleblower.

Rule 1.13(b), (c), & (d)



# Chapter 7: Confidentiality & whistleblowing statutes

**Whistleblower Laws do not supersede existing statutes and rules governing the Attorney-Client Privilege:**

- Statutory reconciliation
- The failure of the Legislature to express its intent to supersede the “strong and long-established public policy” of client confidentiality.
- The separation of powers doctrine.

**Whistleblower Statutes:**

- California Whistleblower Protection Act (CWPA)
- Whistleblower Protection Act (WPA)
- Local Government Disclosure of Information Act (LGDIA)
- Whistleblower Protection Statute (WPS)

# Chapter 8: Grand Juries

Civil: Penal Code § 888 - § 939.91

- **Confidentiality:**
  - Attorney-Client & Attorney Work Product Privilege
  - Brown Act Confidentiality
  - Other constitutional, statutory, or common law privileges
- **Information outside the Privilege;**
  - Information disclosed while acting outside of their official capacity
  - Communications by other's whose interests are averse to the city's interest.
- No right to counsel during grand jury investigation/interviews
- City Attorney recusal may be necessary under certain circumstances
- **Best Practice:**
  - Establish processes for city attorney notification of requests, assist city staff with compliance of the request, review city response to report for compliance.

## **Rule 8.3**

A lawyer shall, without undue delay, inform the State Bar, or a tribunal\* with jurisdiction to investigate or act upon such misconduct, when the lawyer knows\* of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial\* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

CRPC 8.3(a)

# Rule 8.3

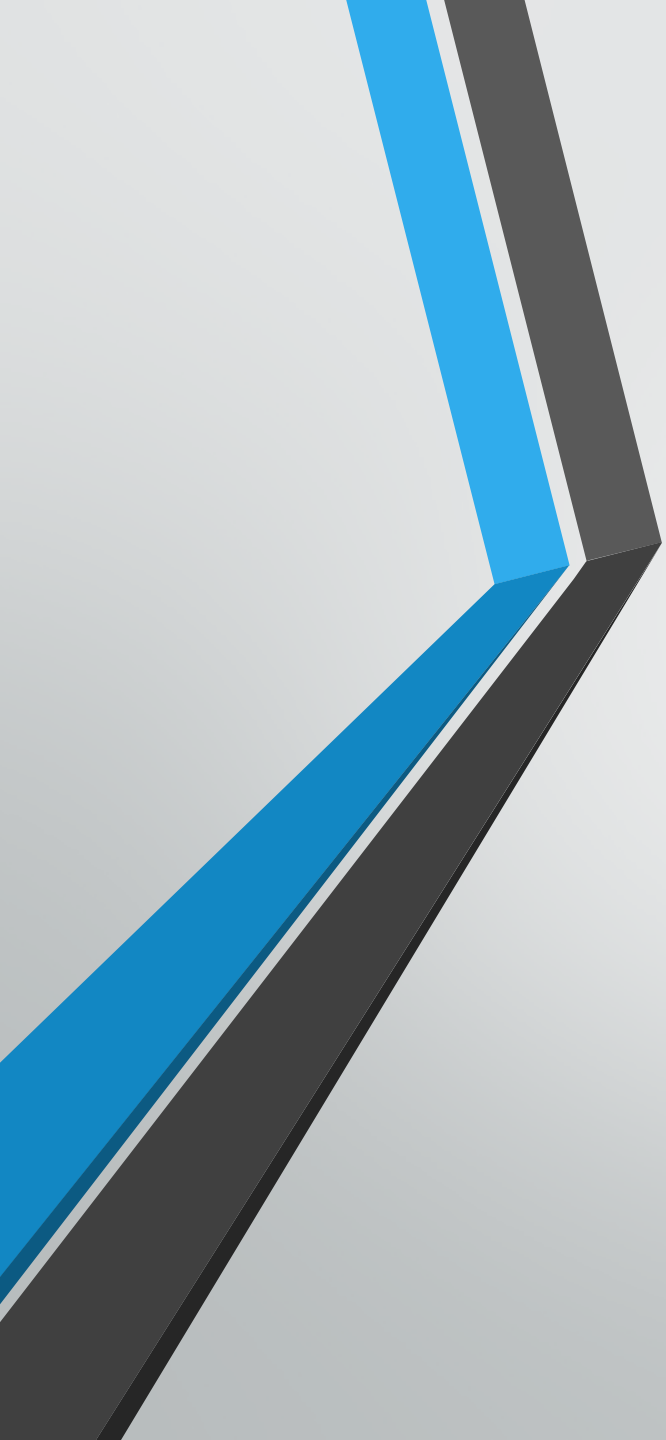
## Analysis of Rule 8.3

1. What is the state of knowledge one needs of the other attorney's "misconduct"?
  - Credible Evidence
2. What "misconduct" is one obligated to report?
  - Criminal Act
  - Dishonesty, Fraud, or Deceit
3. There must be a nexus between the misconduct and the practice of law.
  - Substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects

# Rule 8.3

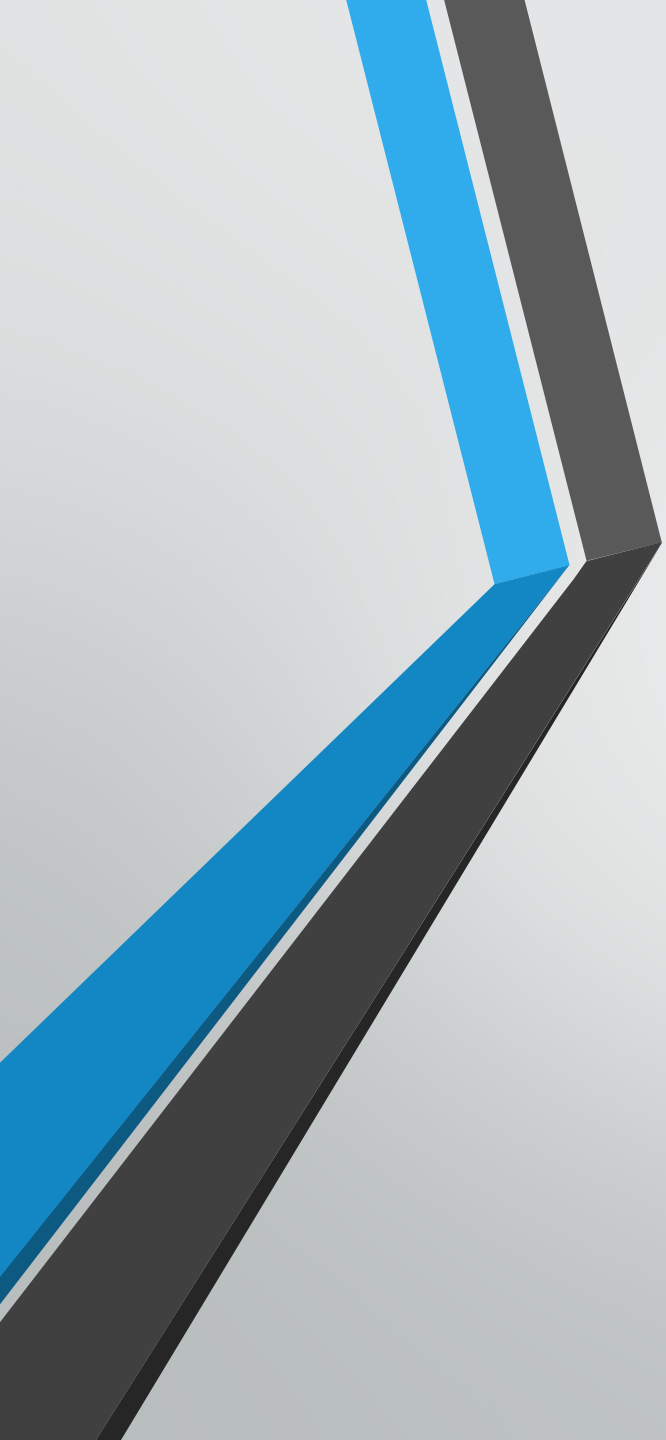
## Additional Considerations

- Exceptions/Non-Reportable Conduct
  - Rule 8.3(d), comments 2 and 5
- Who is obligated to report misconduct
  - Rule 1.0(a): “binding upon all lawyers”
- When to report misconduct
  - Rule 8.3, comment 3
- Retroactivity
- Who do you report to
  - Rule 8.3(a), comment 6
- Protections for reporting
  - Rule 8.3, comment 10
- Discipline for Rule 8.3 violation
  - Standards for Attorney Sanctions for Professional Misconduct 2.19



## **Rule 8.4.1:** Prohibited Discrimination, Harassment and Retaliation

In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer **shall not**: (1) unlawfully harass or unlawfully discriminate against persons\* on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.\*



# Rule 8.4.1:

## Prohibited Discrimination, Harassment and Retaliation

- Nov. 2018 expanded to apply to any lawyer (removed employment limitation)
- Expanded the types of prohibited conduct to expressly include harassment and retaliation (not just discriminatory conduct)
- Jurisdiction: Department of Fair Employment and Housing (DFEH) v. State Bar (OCTC)
  - No longer required adjudication on the merits by a court or other tribunal of competent jurisdiction

# Rule 8.4.1:

## Recent Examples of Application

"...I hope this doesn't sound unctuous, but just to end the weekend on a good note, I want to thank the court staff. I want to say to have a good weekend to Mr. DeMaria. I want to say have a good weekend to Ms. Frerich. And I want to say have a good weekend to both MTS counsel. I'll *See you next Tuesday. See you next Tuesday.*"

(Judge's Ex. 1 at p. 110, emphasis added.)

Completely unaware of the intended meaning of "See you next Tuesday," (see *infra*), the Court responded, "How kind." (Judge's Ex. 1 at p. 110.)

CALIFORNIA

Revenge served ice cold? Top L.A. law firm outs former partners' racist, sexist emails



# Thank You

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