

# PRACTICING ETHICS

REVISED 3RD EDITION



**A Handbook for  
Municipal Lawyers**

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# FOREWORD

*Practicing Ethics* is intended to provide a quick reference and starting point for issue spotting, problem solving, and, in some cases, behavior modification. In addition to confirming authorities and any new developments in the law, municipal attorneys should refer to these other resources from the City Attorneys Department of the League of California Cities:

***The California Municipal Law Handbook*** (updated annually by the City Attorneys Department and published by the Continuing Education of the Bar — see especially Chapter 2)

***“A Guide for Local Agency Counsel: Providing Conflict of Interest Advice”*** (2016)  
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Publications/Conflict-of-Interest-Guide-2016.aspx>

***“Ethical Principles for City Attorneys”*** <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring;-Montes-Ethical-Principles-for-City>



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# CHAPTER 1:

## DEFINING THE CLIENT: WHOM DOES THE CITY ATTORNEY REPRESENT?

### A. INTRODUCTION

Lawyers owe the duties of both undivided loyalty and confidentiality to their clients.<sup>1</sup> For the city attorney who represents a public entity the question often arises, “Who is the client?” This chapter discusses the nature of the professional relationship between the city attorney and their client, as well as the responsibility the city attorney bears for the actions of their staff in that regard.

“It is the duty of an attorney to ... maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”<sup>2</sup>

### B. THE CITY IS THE CLIENT

Case law and the California Rules of Professional Conduct (referred to hereafter collectively as “Rules” and individually as “Rule”) establish that the city attorney’s client is the city itself, “acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.”<sup>3</sup> Understanding that the city itself is the client is critical, especially when the interests of the city may conflict with those of its officials or employees.

1 *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846; *Havasu Lakeshore Investments, LLC v. Fleming* (2013) 217 Cal.App.4th 770, 777; California Rules of Professional Conduct, Rules 1.7 and 1.9.

2 Cal. Bus. & Prof. Code § 6068(e)(1).

3 California Rules of Professional Conduct, Rule 1.13(A); *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 784-785; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248, 254-255; *Skarbrevik v. Cohen* (1991) 231 Cal.App.3d 692, 703-704. But note, Comment 6 to Rule 1.13 states the following: “It is beyond the scope of this rule to define precisely the identity of the client and the lawyer’s obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistleblower reports from the organization’s lawyers, consistent with

Generally, an attorney’s duties of loyalty and confidentiality may be challenged when the interests of two or more clients conflict with one another. If the city attorney’s client were defined as each city official or employee who interacts with the city attorney, then a conflict of interest could arise every time two or more of these individuals had opposing interests. As a result, each party would be entitled to their own attorney. Fortunately, this is not the case in the vast majority of situations confronting the city attorney.

### C. RULE 1.13

Rule 1.13 governs the ethical obligations of the city attorney. Under the Rule, the city attorney owes these obligations to the city itself – as the client – and not to any individual public official or community member. This Rule is also consistent with case law.<sup>4</sup> The Rule obviates disqualification of the city attorney when council members are at odds with one another over an issue, or when the council and city manager have a dispute.

Business and Professions Code section 6068, subdivision (e) and Rule 1.6. This rule is not intended to limit that authority.” Note also that when the city attorney is acting as criminal prosecutor, the client is the People of the State of California; see chapter 5 for a discussion of the role of city attorney as prosecutor.

4 *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 32 [county counsel’s only client is County of Los Angeles and had no separate attorney-client relationship with the county assessor and other county officials that he represented as part of his duties as county counsel; thus county counsel was not disqualified from advising the county assessor and subsequently representing the county in a suit brought against it by the county tax assessor, who was himself suing as an individual and taxpayer]. See also *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150 [because Attorney General is the state’s attorney, where Attorney General had given confidential advice to a state board, he is subsequently precluded from suing the board on the very same matter]. California Rules of Professional Conduct, Rule 1.13(b). [See also cases cited in endnote 3.]

**Practice Tip:**

Government Code section 41801 and some city charters contain language requiring the city attorney to advise specified officials. These provisions have no effect on the underlying principle that the city itself is the client. The city necessarily acts through its elected and appointed officials and employees, but even though you routinely give them advice, none of those individuals is the client.

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

Although the city attorney has but one client, there are circumstances when due process considerations preclude the attorney from performing dual functions in an adversarial administrative proceeding. The limitation on dual functions is addressed in section D of chapter 2.

#### **D. THE “DULY AUTHORIZED DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS, OR OTHER CONSTITUENTS”**

While the city attorney has but one client – the city itself – they may take directions from a number of different individuals. Determining who speaks for the city as the “duly authorized directors, officers, employees, members, shareholders, or other constituents”<sup>5</sup> at any given time requires a review of the organic law of the city.

For example, while the city council might ordinarily be the ultimate authority, some cities have quasi-independent boards that possess final decision-making authority (see discussion in section E of chapter 2). Also, under the council-manager form of government,<sup>6</sup> the city manager is the

“duly authorized officer” when it comes to management of subordinate employees and has exclusive authority over personnel decisions involving those subordinates.<sup>7</sup>

Of course, if the city manager's management practices become the subject of a lawsuit – or the threat of a lawsuit – the city council would acquire the authority to direct the course of the litigation and would have access to all relevant information pertaining to same.

#### **E. CITY ATTORNEY'S DUTY TO REPORT MATTERS UP THE HIERARCHY**

When a city attorney learns (1) that the conduct of a city official or employee is or may be a violation of law that may be “reasonably imputable to the organization” and (2) is “likely to result in substantial injury to the organization,” State Bar Rules expressly require the city attorney to take the matter to the “highest internal authority within the organization.”<sup>8</sup> If only one factor is present, the city attorney is not required, but may “report up” the issue. When reporting such activity up the city's hierarchy, the city attorney must not disclose any confidential information beyond the organization itself. Whistleblower statutory protections applicable to employees of state and local public entities<sup>9</sup> do not supersede the statutes and rules governing the attorney-client privilege.<sup>10</sup>

Finally, in the event the “highest internal authority” fails to heed the city attorney's advice and that failure is likely to result in substantial injury to the client, the city attorney retains the right or, where appropriate, the obligation to resign employment pursuant to Rules 1.13(d) and 1.16.

5 California Rules of Professional Conduct, Rule 1.13(a); *Brooklyn Navy Yard Cogeneration Partners v. Superior Court*(1997) 60 Cal.App.4th 248, 254 .

6 Cal. Gov. Code §§ 34851 to 34859.

7 In some charter cities and in cities that have a city administrator form of government, multiple city officials are appointed directly by the city council and can be removed only by the city council. In those situations, the city manager would not be the “duly authorized officer” when it comes to terminating or disciplining those city officials.

8 California Rules of Professional Conduct, Rule 1.13(b).

9 These whistleblower protections include Labor Code section 1102.5, which prohibits employers from retaliating against employees for reporting an alleged violation of a state or federal statute, rule, or regulation.

10 California Rules of Professional Conduct, Rules 1.13(d) and 1.16; 84 Ops. Cal.Atty.Gen. 71, 78 (2001). See also *Cordero-Sacks v. Housing Authority of City of Los Angeles*(2011) 200 Cal.App.4th 1267, 1278 [citing holding of Attorney General's opinion]; see also chapter 7.



## F. CITY ATTORNEY'S DUTY NOT TO TREAT CITY OFFICIAL AS CLIENT OR TO PROMISE CONFIDENTIALITY

Whenever the city attorney becomes aware that the interests of a city official or employee may be adverse to those of the city, Rule 1.13(f) requires the city attorney to make clear that they represent the city and not the individual official or employee. The city attorney should advise the individual that the city attorney cannot withhold any information the individual shares from others in the city with authority over the matter.<sup>11</sup> A clear admonition may help prevent the official from misperceiving the nature of a communication with the city attorney.

Walking this line can be difficult. Commencing every meeting with city officials with a warning that they are not clients is not conducive to building trust. However this issue is handled, do not promise confidentiality to individual council members or other city officials or lead them to believe they have a confidential relationship. Further, the city attorney must let the officials know they will share information the official provides to any official or agency in the city with a business need to know.

For example, a council member's conflict of interest may be of critical importance to the entire council if the council member does not disqualify themselves, and that failure to do so could invalidate the council's action. The city attorney should make clear that conflict of interest advice is provided to a council member in their official capacity, and such advice is subject to disclosure to the entire council. This may be true of other types of advice to council members and to other city officials, such as an opinion on whether legislation proposed by a council member is preempted or unconstitutional.

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

### Practice Tip:

The California Attorney General has opined that when a city attorney obtains information in confidence from a council member under circumstances leading the council member to believe that a confidential relationship exists between the city attorney and the council member, the city attorney is precluded from prosecuting the council member under the Political Reform Act.<sup>12</sup>

## G. JOINT REPRESENTATION OF THE CITY AND ITS EMPLOYEES

Rule 1.13(g) provides that the consent of the city may be required before the city attorney may undertake the representation of an individual official or employee. However, the Government Tort Claims Act imposes a mandatory duty on the city to defend and indemnify public officials and employees.<sup>13</sup> While this statutory obligation, in effect, constitutes the city's consent to employee representation by operation of law (though not necessarily by the city attorney), these areas of joint representation can create conflicts of interest (see discussion in chapter 2).

## H. REPRESENTING MORE THAN ONE CLIENT

There are times when the city attorney has more than one client. The most common example of this is when the city attorney is representing an employee who is being sued – along with the city – in a lawsuit. Also, a quasi-independent city board, official, or agency (collectively "agency") could become a separate client under exceptional circumstances when the city and the agency become adverse to each other in litigation. The city attorney may provide advice to both the city and the agency in a particular matter. Nevertheless, in the event of litigation over the matter between the city and the agency, the city attorney who chooses to advise both may not represent either in the litigation.<sup>14</sup> In the alternative, the city attorney foreseeing potential adversity between the

11 State Bar of Cal. Standing Comm. on Prof'l. Responsibility and Conduct, CA Eth.Op. 2001-156, WL 34029610.

12 71 Ops.Cal.Atty.Gen. 255 (1988).

13 California Government Code section 995 provides, in part, the following: "[U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official capacity or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity."

14 See *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70. This topic is addressed further in section E of chapter 2.

city and the agency may elect at the outset of the matter to advise the city and inform the agency that it will need outside counsel<sup>15</sup> (see chapter 2).

## I. THE PUBLIC AND “YOUR” CLIENT

Rule 4.2 prohibits communication with a represented person about the subject of the representation without the consent of that person’s lawyer. In the context of a city client, this communication can become problematic, in both directions. First, members of the public may wish to speak with the city attorney or someone in the city attorney’s office. If that person is represented in a matter, the city attorney (and everyone on their staff – see section J, below) must be careful to ensure that any communication is either limited to matters outside of the representation (Rule 4.2, Comment 4), or has been authorized by the represented person’s attorney.

In the other direction, a lawyer representing a member of the public can communicate with a “public official, board, committee or body” (Rule 4.2(c)(1), which defines “public official” as a public officer of a city with comparable decision-making authority and responsibilities as an officer, director, partner, or managing agent of an organization (Rule 4.2(d)). Although Rule 4.2 applies to governmental organizations,

“special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and article 1, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to

this rule when the lawyer knows the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2)” [Comment 7].

Paragraph (b)(2) of the Rule prohibits communication with a constituent of the city if the subject of the communication is any act or omission of the constituent in connection with the matter that may be binding upon or imputed to the organization for purposes of civil or criminal liability.

### Practice Tip:

Keeping officials in your organization (and especially those in your office if you are the city attorney) apprised of pending matters can help those officials be alert to situations where communication with members of the public can create or exacerbate liability for the city. Note that Rule 4.2 does allow a lawyer to advise a client not to speak with a represented party (Comment 3). Finally, advising city officials that “listening” is always preferable to “speaking” may reduce exposure arising out of inadvertent statements or disclosures.

## J. THE CITY ATTORNEY’S RESPONSIBILITY FOR THE ACTIONS OF OTHERS

In representing the city as a client, it is important to remember that the most recent update to the Rules of Professional Conduct makes the city attorney (and other supervising attorneys) responsible for the actions of their staff – including the actions of non-lawyers. Rule 5.1 indicates that a lawyer who possesses managerial authority over the firm (for contract city attorneys) or the office (for in-house attorneys) shall make reasonable efforts to ensure that measures are in place to give reasonable assurance that all lawyers in the firm/office comply with the Rules of Professional Conduct and the State Bar Act.<sup>16</sup> This generally includes having policies and procedures in place to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised (Comment 1).

<sup>15</sup> *People ex. rel. Deukmejian v. Brown*, *supra*, 29 Cal.3d 150. [Rule 3-310 (now Rule 1.9) prohibits Attorney General from suing client department on a matter on which he advised that department]; accord, *Santa Clara County Counsels Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [“duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney’s counterpart in private practice”]; *Civil Service Comm. v. Superior Court*, 163 Cal.App.3d 70, 75-78 (1984) [under Rule 3-310 (now Rule 1.9), county counsel may not represent county board of supervisors in suit against county’s civil service commission in which county counsel’s office advised commission on same matter and county failed to obtain the commission’s informed written consent to subsequent adverse representation of the board of supervisors in its suit to invalidate the commission’s decision]; State Bar of Cal. Standing Comm. on Prof’l. Responsibility and Conduct, Formal Op. 2001-156, WL 34029610; see also chapter 2.

<sup>16</sup> Cal. Bus. & Prof. Code §§ 6000-6243.

A lawyer who has supervisory authority over another lawyer is charged with making reasonable efforts to ensure that those supervised comply with the Rules of Professional Conduct and the State Bar Act.<sup>17</sup> The supervisor is responsible for another lawyer's violation when the supervisor directs the conduct involved, or knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.<sup>18</sup>

Rule 5.2 provides an "out" for a supervised attorney who acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3(a) requires that the manager in an office (the city attorney) train and supervise non-lawyer staff appropriately to reasonably ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. Further, Rule 5.3(b) makes a supervisory lawyer responsible for the actions of non-lawyers in the office if the lawyer is aware of conduct that would violate a rule and fails to act timely to avoid or mitigate the consequences.

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<sup>17</sup> Rule 5.1(b).

<sup>18</sup> Rule 5.1(c).

# CHAPTER 2:

## CONFLICTS OF INTERESTS ARISING FROM THE CITY ATTORNEY'S SIMULTANEOUS OR SUCCESSIVE REPRESENTATIONS

### A. INTRODUCTION

Rules 1.7 through 1.9 broadly prohibit a range of possibly conflicting interests, including personal business or other interests of the lawyer that are adverse to those of the client. This chapter examines conflicts of interests arising from the simultaneous or successive representation of clients that are particular to city attorneys. These conflicts arise when the city attorney represents more than one public client whose interests conflict with one another.

City attorneys also need to be aware of conflicts between the interests of their public and current or former clients. These conflicts are the same as conflicts between the interests of private clients and are discussed only briefly in this chapter.

### B. RULES 1.7 AND 1.9 AND CLIENT REPRESENTATION

Rules 1.7 and 1.9 govern conflicts of interest arising from the representation of two clients who may be adverse to one another. Rule 1.7 requires informed written consent in the following circumstances:

- (a) A lawyer shall not, without informed written consent from each client ... represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent from each affected client ... represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client, or a third person, or by the lawyer's own interests."

Rule 1.7(c) requires a written disclosure to a client when:

- (1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

- (2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer."<sup>1</sup>

Representation of clients under Rule 1.7 (a)-(c) is further qualified by limitations in 1.7(d).

Rule 1.9 governs representation of a client whose interests may be adverse to those of a former client.

Rule 1.11 addresses special conflicts of interest for former and current government officials and employees who transition from public service to private and vice versa (see discussion in section G).

### C. SIMULTANEOUS AND SUCCESSIVE REPRESENTATION OF CLIENTS WITH ADVERSE INTERESTS

Conflicts of interest can arise when a city attorney's current or former clients have interests that are adverse to those of the city. Such conflicts of interest generally fall into two categories: (1) simultaneous representation of clients with adverse interests and (2) successive representation of clients with adverse interests.

#### 1. Simultaneous Representation

The simultaneous representation of clients with adverse interests arises when the same lawyer, firm, or office concurrently represents those clients in either the same or a different matter. Simultaneous representation by the same lawyer as to the very same matter in litigation or other proceeding before a tribunal is prohibited *per se* because it violates the attorney's duty of loyalty and confidentiality.<sup>2</sup>

<sup>1</sup> Note that Rule 1.8.10 expressly prohibits sexual relations with clients. In the context of an organization, this prohibition extends to sex with a constituent of the organization who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters.

<sup>2</sup> Rule 1.7(d)(3).

## 2. Successive Representation

The successive representation of clients with adverse interests arises when the representation of a current client is adverse to the interests of a former client. Successive representation is prohibited if there is a substantial relationship between the current matter and the prior representation. If there is, it is presumed that the lawyer acquired confidential information from prior representation. Accordingly, Rule 1.9 bars the subsequent adverse representation without the prior client's informed written consent to the later representation.

### Practice Tip:

Under the rule of vicarious disqualification, not only is the lawyer who represented the former client disqualified, but their entire firm or office may also be disqualified. The major ethical concern in cases of successive representation is the violation of the duty of confidentiality.<sup>3</sup>

## D. SPECIAL CONSIDERATIONS FOR ATTORNEYS IN THE PUBLIC SECTOR

The courts weigh special considerations before finding that a public law office must be disqualified because an attorney's prior representation of a party is adverse to the public entity for which the lawyer now works. The general rule is that "a public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area."<sup>4</sup> "The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement ought to be forbidden categorically."<sup>5</sup>

Conflict of interest rules were drafted primarily with private attorneys in mind. In the public sector, the financial incentive to favor particular clients over others or to ignore conflicts is reduced if not eliminated. Courts have recognized in this

context that disqualification of a public attorney can result in minimal benefits while causing dislocation and public expense. For these reasons, courts have not assumed that the existence of a conflict of interest for one member of a public entity's legal office warrants disqualification of the entire office.<sup>6</sup>

### Practice Tip:

In the public sector, because of the somewhat lessened potential for conflicts of interest and the cost to the public for disqualifying whole offices of government-funded attorneys, the use of internal screening procedures, or "ethical walls," to avoid conflicts has been allowed unless the disqualified attorney is the head of the office.<sup>7</sup> However, this general rule does not apply equally to city attorneys who are members of law firms and also does not apply equally to due process walls.<sup>8</sup>

Due process considerations unique to public sector practice prevent the same attorney from the city attorney's office from both prosecuting an administrative action or assisting staff with the prosecution of an administrative action and also serving as the advisor to that administrative tribunal.<sup>9</sup>

6 *People v. Christian* (1996) 41 Cal.App.4th 986, 997-98 [permitting lawyers from two separate branch offices of the public defender, screened off from each other, to represent criminal co-defendants with adverse interests]. "Thus, in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or "ethical walls" to avoid conflicts within government offices ... [has] been permitted." *Id.* at 998. Also see *City and County of San Francisco v. Cobra Solutions* (2006) 38 Cal. 4th 839 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17. See also discussion in section G and Rule 1.11.

7 *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 8 Cal.4th 839, 853-854 [city attorney's prior representation of corporation later sued by the city for fraud required vicarious disqualification of the entire city attorney office because as a head of a government law office, the city attorney was in the position of both making policy decisions and overseeing the attorneys who served under him such that both the city and the corporation could question the city attorney's confidentiality and loyalty].

8 *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489.

9 *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810. See also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10 ["Procedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality"]. But see *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 739-40 (narrowing the holding in *Quintero* and concluding that there is no per se rule requiring a separation of functions when the same attorney prosecutes a matter and advises the decision-making body in a completely separate, unrelated matter).

3 *Flatt v. Superior Court (Daniel)* (1994) 9 Cal.4th 275, 283-284. But see also *Kirk v. First American Title Insurance Company* (2010) 183 Cal.App.4th 776 [rejecting blanket rule of vicarious disqualification in the private context]. See also Rule 1.10 Imputation of Conflicts of Interest: General Rule.

4 *In re Lee G.* (1991) 1 Cal.App.4th 17, 29.

5 *Id.* at 28, quoting *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432, 1444.



An ethical wall may allow different attorneys in an in-house city attorney's office to both advocate and advise as long as proper screening functionally separates attorneys performing the two functions.<sup>10</sup> But the same will most likely not hold true for contract city attorneys and special counsel attorneys from the same outside law firm serving in those dual roles.<sup>11</sup> Because the rules in this area of the law are changing rapidly,<sup>12</sup> you should carefully review the relevant case law.

## E. TWO OR MORE SEPARATE "CLIENTS" WITH ADVERSE INTERESTS

The city attorney's client is the city itself, as embodied in the city council or other highest official or agency over the engagement.

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

The city attorney always advises city officials in their official capacity, not as individuals with interests separate and distinct from the city. Because the city attorney represents the city as a single client entity, the adverse interests of two or more city officials generally do not give rise to a conflict under Rules 1.7 and 1.9.

For example, county counsel is not disqualified from representing the county in a lawsuit filed by the county assessor merely because the assessor and county counsel exchanged confidential information concerning the operation of the assessor's office. Assessors are not independent, but are under the supervision of the county board of supervisors. The information exchanged between the assessor and county counsel is therefore not confidential as to the county and accordingly not grounds for disqualification.<sup>13</sup>

Similarly, a city attorney may advise both the mayor and city council as to the legality of an ordinance where the council has the power to adopt the ordinance under the city charter and the mayor has the power to veto it. The mayor and council may have antagonistic positions, but the city attorney's client is the city.<sup>14</sup>

There are, however, circumstances where individual officials or agencies of a public entity can acquire separate client status even though they are not necessarily separate legal entities. The most common of these circumstances are (1) disputes between the city and its quasi-independent boards or commissions or joint powers authorities of which the city is a member and (2) the defense of city employees pursuant to the Government Claims Act.

### 1. Representing Quasi-Independent Bodies and Officials and Joint Power Authorities

A conflict can arise when the city council and a subordinate quasi-independent body or official are involved in litigation against each other. This situation is most likely to arise in charter cities if the charter creates a quasi-independent official or body with the ability to make a binding decision and the city council seeks to overturn that decision by filing suit against the subordinate body.<sup>15</sup> By contrast, general law cities are generally more hierarchical in structure, with the council clearly established as the final decision-maker with respect to most subordinate bodies.

10 *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587. See also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11; *Richardson v. City and County of San Francisco Police Com.* (2013) 214 Cal.App.4th 671, 705. See also discussion concerning ethical screens in section G.

11 *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489.

12 For example, in *Drakes Bay Oyster Co. v. California Coastal Comm.* (2016) 4 Cal.App.5th 1165, the court concluded that due process considerations do not preclude the attorney serving as prosecutor in an administrative proceeding from defending the public agency in subsequent litigation arising out of the proceeding.

13 *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 35.

14 State Bar of Cal. Standing Comm. on Prof'l. Responsibility and Conduct, Formal Op. 2001-156, WL 34029610; see also chapter 1.

15 *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, in which the county counsel was disqualified under Rule 3-310 (now Rule 1.9) from representing a board of supervisors in a suit against a county civil service commission. The suit challenged the commission's action in reversing a discharge, and county counsel had advised the commission about the same matter. The major rationale for the court in concluding that there was more than one client represented by the county counsel was the fact that the quasi-independent board's decision was binding and could not be overruled by the board of supervisors. Since the county counsel had already advised the commission, he had to withdraw from representing the board of supervisors against the commission that he had advised as to the same matter. The court relied on *People ex. rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150. There, Rule 3-310 (now Rule 1.7) prohibited the attorney general from suing a client department in a matter on which he advised that department. 80 Ops.Cal.Atty.Gen. 127 (1997) (Opinion No. 96-901) [when a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of an independently elected sheriff, a conflict of interest may, depending upon the individual circumstances, thereafter exist so as to entitle the sheriff to legal representation in that matter by independent counsel].

***Civil service commissions and rent control boards are examples of bodies that can acquire quasi-independent status under the Rules.***

Representing a joint powers authority (JPA) can give rise to conflicts in a manner similar to quasi-independent bodies where an attorney who represents one of the participating public agencies is selected to act as an attorney for the JPA.

Agreeing ahead of time as to how to resolve conflicts between the JPA and its participating agencies can avoid problems when the conflicts arise. In *Elliott v. McFarland Unified School District*,<sup>16</sup> for example, two school districts entered into a joint powers agreement, and the agency created was represented by counsel for one of the districts. The parties agreed that if a conflict of interest arose between the members of the JPA, the counsel representing the JPA could continue to represent his own district. The other district with a conflicting interest would obtain its own counsel since it had granted informed written consent to the successive adverse representation by the JPA counsel of his own district.

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

## **2. Defending City Employees Pursuant to the Government Claims Act**

### **a. The City's Duty to Defend City Officials and Employees**

The Government Code sets out a comprehensive statutory scheme for determining the rights of public employees to a defense and indemnification from their employing entities with respect to suits filed against them arising out of the course and scope of their employment.<sup>17</sup> The duty to provide a defense is imposed by Government Code section 995, which provides in pertinent part as follows:

“Except as otherwise provided in sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or

both, on account of an act or omission in the scope of his employment as an employee of the public entity. For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.”

The duty to defend under Government Code section 995.2 is subject to three limitations:

- » The act or omission giving rise to the action must have been within the employee's scope of employment.
- » The employee cannot have acted or failed to act because of actual fraud, corruption, or actual malice.
- » The defense of the action or proceeding by the public entity cannot create a specific conflict of interest between the public entity and the employee or former employee.

For purposes of the third limitation, a “specific conflict of interest” is a conflict of interest or an adverse or pecuniary interest as specified by statute or by a rule or regulation of the public entity. Thus, the statute contemplates that a “specific conflict of interest” could result in the separate representation of the entity and the employee.

In the context of the Government Claims Act defenses, conflicts of interests requiring careful analysis of Rules 1.7 and 1.9 typically arise when the following occur:

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

The Government Code allows the public entity to provide for the employee's defense by “its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense.”<sup>18</sup> Furthermore, the Code provides that (1) where the employee has timely requested the defense, (2) the act or omission arose out of the course and scope of the public employment, and (3) the employee has cooperated in good faith in the defense, the entity must pay any judgment arising from the suit or any settlement or compromise “to which the public entity has agreed.”<sup>19</sup> These sections have been interpreted

<sup>16</sup> *Elliott v. McFarland Unified School District* (1985) 165 Cal.App.3d 562, 571.

<sup>17</sup> Cal. Gov. Code §§ 825 *et seq.*

<sup>18</sup> Cal. Gov. Code § 996.

<sup>19</sup> Cal. Gov. Code § 825 (emphasis added). *Stuart v. City of Pismo Beach*

to give the public entity – not the employee – the right to control the employee’s defense<sup>20</sup> and to decide whether a conflict of interest exists.<sup>21</sup>

The statutory scheme also permits the public entity to assume the defense of the employee under a reservation of rights as to whether the act or omission arose out of the course and scope of employment. In addition, it permits the public entity to pay the judgment or settlement only if it “is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity.”<sup>22</sup> If the governing body makes certain findings, the public entity may indemnify the employee against an award of punitive damages as well.<sup>23</sup>

### b. Joint Representation of a City and Its Employees in Litigation

Whenever an employee is potentially subject to discipline for the same acts as those at issue in the suit, there will always be a conflict of interest under Rule 1.7 because the interests of the entity as the employer and the individual are adverse to each other. Under those circumstances, the same lawyer simply may not represent both the employee and the employer. Since under Rule 1.13 the entity itself is the city attorney’s primary client, it is the employee’s or official’s representation that should be contracted out while the city attorney continues to represent the entity. Occasionally this is not feasible. For example, where the subordinate official was advised by the city attorney’s office before informing the official that the city could have an adverse position, the city attorney will have to withdraw from representing both sides of the dispute.

Law firms and large city attorney law offices employ ethical screening devices to wall off the lawyers prosecuting a disciplinary matter from the lawyers handling a tort suit.<sup>24</sup>

If a sufficient ethical wall cannot be created and maintained, outside counsel should be retained to represent the employee.

The way to avoid hiring duplicative counsel is to try to resolve any disciplinary issues at the claims stage when there is only a single client, the city. If possible, an ethical wall should be erected before the duty to defend arises. It is only when a suit is filed that the city’s duty to defend the employee under the Government Claims Act is triggered. Up to that point, the claim is simply filed with the city to evaluate and the city attorney represents a single client, the city.

If the disciplinary issue is resolved by the time suit is filed, the city and the employee will no longer have adverse interests, and the city attorney will be able to represent both the city and the employee without violating Rule 1.7 (although the circumstances should still be evaluated under Rule 1.9). Although the Government Claims Act imposes time limits to respond to claims and gives the claimant the right to sue when the entity fails to act on the claim within statutory deadlines, the city can agree to toll time limits and take more time at the claims stage either to resolve the case or to ensure that a suit is not filed until after any possible adversity is eliminated.

That punitive damages are sought is not sufficient to trigger a conflict of interest between the entity and the employee and require separate representation.<sup>25</sup> Further, in *DeGrassi v. City of Glendora*, the court held that a city had no duty to reimburse a city council member for retaining a private lawyer to defend her in a suit brought against her in her official capacity where the council member refused to agree to the city’s condition that she cooperate in her defense and allow the city to control the defense.<sup>26</sup>

Where a potential issue in litigation against a public agency and its employee is whether the employee was acting within the course and scope of employment, the public agency may undertake the defense with a reservation of rights as to that issue. Nevertheless, such a reservation may place in question the ability of the city attorney to defend both the city and the employee. For this reason, a better practice may be to

(1995) 35 Cal.App.4th 1600, 1607 [city could refuse to continue providing a defense to a police officer who was cooperating with the opposing party because such cooperation created a conflict of interest between the city and the officer].

20 *DeGrassi v. City of Glendora* (2000) 207 F.3d, 636, 642.

21 *City of Huntington Beach v. The Petersen Law Firm* (2002) 95 Cal.App.4th 562, 566-567.

22 Cal. Gov. Code § 825(a).

23 Cal. Gov. Code § 825(b). *Stuart v. City of Pismo Beach* (1995) 35 Cal. App.4th 1600, 1607 [city could refuse to continue providing a defense to a police officer who was cooperating with the opposing party because such cooperation created a conflict of interest between the city and the officer].

24 But see discussion in section G concerning limitations on the use of screens.

25 *Laws v. County of San Diego* (1990) 219 Cal.App.3d 189, 198-200. There is no conflict because city councils cannot agree in advance to indemnify officials and employees for punitive damages. See *id.* at 198 [contrasting the authority of public entities to make discretionary decisions after judgment is rendered to pay punitive damages awards with the public policy against the issuance of liability insurance against punitive damages].

26 *DeGrassi v. City of Glendora* (2000) 207 F.3d 636, 642-643.

decide the course and scope of employment issue before undertaking representation of the employee. Either decide to provide the defense without a reservation of rights or, in the rare situation where there is a significant course and scope issue, inform the employee that the city will not undertake their defense, thereby assuming the risk that a court will find the employee was in the course and scope requiring the city to pay for the defense.<sup>27</sup>

**For More Information:** For a more detailed discussion of the issues presented by the joint defense of the entity and its employees and officials, see Manuela Albuquerque, *Joint Defense of Suits Brought Against Public Entities and Their Employees: Are Conflicts of Interest Manufactured or Real?*, 24 Pub. L.J. 1 (2000), available at [www.cacities.org/attorneys](http://www.cacities.org/attorneys).

## F. OBTAINING INFORMED WRITTEN CONSENT

Rules 1.7 and 1.9 allow representation of clients with actually or potentially conflicting interests if the attorney first obtains each client’s informed written consent, as defined in Rule 1.0.1. This requires each client’s written agreement to the representation following written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client.

The particular problem for city attorneys in obtaining consent is determining who can provide it on the city’s behalf. As discussed in chapter 1, determining who speaks for the city in a given matter depends on who is the duly authorized director, officer, employee, member, shareholder, or constituent of the city. In many cases, this will mean obtaining the informed written consent of the city council or city manager. The particular facts of each case must be carefully evaluated to ensure that the person or body authorized to speak on the city’s behalf gives the consent. In some cases, that person may be the city attorney.

## Practice Tip:

Remember that informed written consent must be based upon the circumstances actually contemplated by the consent granted. If the consent is not informed or circumstances change such that consent is vitiated, the waiver is not effective.<sup>28</sup>

## G. ETHICAL WALLS TO AVOID CONFLICTS OF INTEREST

Devices employed to screen lawyers in separate branches of publicly funded law offices from one another have been allowed for the representation of clients with adverse interests.<sup>29</sup> For example, a county counsel office may represent both the public guardian in the conservatorship proceeding and the county in a petition to declare the conservatee’s child a ward of the court.<sup>30</sup>

However, while such walls may be accepted in cases of successive representation or in very large offices, they are fraught with danger in cases of simultaneous adverse representation as to the same matter and could be deemed a violation of Rules 1.7 and 1.9, especially where the conflict arises from the prior private clients of the city attorney.<sup>31</sup>

Prior to 2018, the California State Bar did not have an express rule on the use of ethical screens. With the latest update to the Rules of Professional Conduct, the State Bar has adopted a “limited” rule.

Rule 1.0.1 defines “Screened” as follows:

“[T]he isolation of a lawyer from any participation in a matter including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under

<sup>28</sup> See definition of “Informed consent” in Rule 1.0.1.

<sup>29</sup> See cases discussed in *People v. Christian* (1996) 41 Cal.App.4th 986, 993-995. Screening devices used to avoid conflicts of interest should be distinguished from similar arrangements used to avoid due process violations that would otherwise arise from the same attorney or attorneys simultaneously performing advocacy and advisory functions in administrative proceedings. *Howitt v. Superior Court* (County of Imperial) (1992) 3 Cal.App.4th, 1575, 1586-1587 [screening measures within county office avoided due process violation]; but see also *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489, 497-498 [screening measures did not avoid due process violation where attorneys representing city in advocacy and advisory functions were partners from the same private law firm].

<sup>30</sup> *In re Lee G.* (1991) 1 Cal.App.4th 17.

<sup>31</sup> *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 8 Cal.4th 839, 853-854.

<sup>27</sup> *San Diego Navy Federal Credit Union v. Cumis Ins. Society* (1984) 162 Cal. App.3d 358, 375. See also *Laws v. County of San Diego* (1990) 219 Cal. App.3d 189; Cal. Gov. Code § 825.

these rules or other law; and (ii) to protect against other law firm<sup>32</sup> lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.”

Rule 1.10 describes the proper use of ethical screens and may only be used to avoid a prohibited conflict under Rule 1.7 or 1.9 when the conflict arises out of a lawyer’s association with a prior firm. The Rules Commission that drafted the 2018 rules specifically rejected the broad use of ethical screens afforded under the Model Rules of professional conduct, limiting the use as follows:

“[T]he phrase ‘arises out of the personally prohibited lawyer’s association with a prior firm’ further limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against the former client.”<sup>33</sup>

Rule 1.10 also limits the use of screens to circumstances where the lawyer being screened did not have substantial involvement in the matter creating the conflict.

Rule 1.11 creates a special rule for lawyers moving between government and private practice, private practice and government, and governmental employment to governmental employment with another agency. The Rule allows the use of screens without the limitation on the extent of involvement by the government lawyer when that lawyer is moving into private practice or into another governmental office. For lawyers moving from private practice to government, Comment 10 to the Rule states that the extent to which any conflicts may be imputed to other lawyers in that governmental agency is governed by case law, rather than Rule 1.11.

Because the new Rules limit the use of ethical screens, the viability of prior case law or opinions authorizing such use beyond the limited scope described by the Rules is questionable.

32 Note “law firm” is defined to include the legal department of a government organization.

33 California State Bar Rules Revision Commission Report on Proposed Rule 1.10, Executive Summary, p. 3. [http://www.calbar.ca.gov/Portals/0/documents/rules/Rule\\_1.10-Exec\\_Summary-Redline.pdf](http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.10-Exec_Summary-Redline.pdf)



# CHAPTER 3:

## THE POLITICAL REFORM ACT: ETHICAL CONSIDERATIONS FOR THE CITY ATTORNEY

### A. INTRODUCTION

The Political Reform Act (PRA), adopted by the voters in 1974, governs disclosure of political campaign contributions and spending by candidates and ballot measure committees. It also creates ethical rules for state and local government officials that impose limits on certain actions they may take that affect the official's financial interests. The Fair Political Practices Commission (FPPC) was created by the PRA to oversee and implement its provisions. The PRA is set forth in Government Code sections 81000 *et seq.*, and the FPPC's implementing regulations are located in the California Code of Regulations (CCR), at Title 2, Division 6, sections 18110-18997.<sup>1</sup>

City attorneys are public officials subject to the PRA. However, there are some aspects of the PRA that apply differently to city attorneys than to other public officials. Also, some aspects of the PRA apply differently to contract city attorneys than to in-house city attorneys. These differences are the focus of this chapter. Because city attorneys routinely need to apply and interpret the PRA for their clients, they should already have a basic knowledge of the PRA and the Regulations. As a result, this chapter will presume a general understanding of the PRA and the guidance set forth in Regulation 18700 used to analyze potential financial conflicts.<sup>2</sup>

Distinct from the PRA, Government Code section 1090 prohibits public officials from making or participating in the making of contracts in which they have a financial interest; it also must be considered when analyzing possible financial conflicts of interest. See chapter 4 for a full discussion of Government Code section 1090 issues.

<sup>1</sup> All further references in this chapter to "Regulations" refer to the California Code of Regulations, Title 2, Division 6, sections 18110-18997.

<sup>2</sup> Regulation 18700 sets forth a four-step analysis to determine the existence of a conflict of interest.

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

The PRA defines "public officials" as every member, officer, employee, or consultant of a state or local government agency.<sup>3</sup> Therefore, an individual serving as city attorney (or assistant or deputy city attorney) in an in-house capacity is a public official. Similarly, an individual serving a city by contract with the power to make governmental decisions or providing services normally provided by a city staff member is a "consultant" and, thus, also a public official.<sup>4</sup> As a result, city attorneys are public officials covered by the PRA whether they work for the city in-house or pursuant to a contract.

#### Practice Tip:

Both in-house and contract city attorneys are required to file an annual California Form 700 Statement of Economic Interests pursuant to Government Code section 87200. In addition, assistant and deputy city attorneys will typically be designated filers under the city's local conflict of interest code because their duties involve them in the making of governmental decisions.

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

The basic rule regarding conflict of interests under the PRA is that a public official may not make, participate in making, or in any way use or attempt to use their official position to influence a governmental decision when they know (or have reason to know) that they have a disqualifying financial interest. A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, on their immediate family, or on any financial interest described in the Regulations.<sup>5</sup>

<sup>3</sup> Cal. Gov. Code § 82048.

<sup>4</sup> Regulation 18700.3.

<sup>5</sup> Regulation 18700(a).

Although “financial interest” generally includes any source of income to the official within twelve months before the decision is made, the PRA specifically provides that salary received from a local government agency is not considered income for purposes of the PRA.<sup>6</sup> Regulation 18232 defines salary from a government agency as follows:

“‘Salary’ from a state, local, or federal government agency means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official’s services to the government agency. Such payments include wages, fees paid to public officials as ‘consultants’ as defined in California Code of Regulations, Title 2, section 18700.3, pension benefits, health and other insurance coverage, rights to compensated vacation and leave time, free or discounted transportation, payment or indemnification of legal defense costs, and similar benefits.”<sup>7</sup>

Therefore, a salary from the city, paid directly to either in-house or contract city attorneys, is not defined as income under the PRA, and does not constitute a disqualifying financial interest.

Contract city attorneys typically do not receive compensation directly from the city. Rather, they receive compensation from and/or have an ownership interest in the law firm that is paid by the city for their services. Thus, 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.

Regulation 18704 defines “Making, Participating in Making, or Using or Attempting to Use Official Position to Influence a Government Decision.” Regulation 18704(d)(3) specifically provides that “[m]aking, participating in, or influencing a governmental decision does not include ... [a]ctions by a public official relating to compensation or the terms or conditions of the official’s employment or consulting contract.”

The FPPC’s Leidigh Advice Letter applied the predecessor to these Regulations to city attorney contracts.<sup>8</sup> The advice letter indicates that an attorney employed by a law firm where the firm has a contract with a government agency to provide services may negotiate changes in, a renewal of, or extension of their firm’s contract with that agency, or negotiate a separate contract for their law firm, provided that the attorney does so while acting in the attorney’s private capacity.<sup>9</sup> The FPPC concluded that such actions were within the scope of both of the consultant contract exceptions (the “participation” exception to then Regulation section 18702.4(a)(3) and the “using his or her official position to influence” exception to then Regulation section 18702.4(b)(3)).

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

However, the compensation of contract city attorneys and their law firms frequently depends on the amount of work attorneys in the firm perform for the city. For example, the city attorney’s firm might receive additional compensation depending on whether the city attorney’s office files or defends a lawsuit on behalf of the city. It would be untenable if the PRA prevented a contract city attorney from participating in such decisions in their official capacity. The FPPC avoided this result by providing that contract city attorneys and other consultants can participate in and use their official position to influence decisions that could result in additional compensation to them or their firm so long as the contract with the city already specifically includes such

6 Cal. Gov. Code § 82030(b)(2).

7 Regulation 18232.

8 Leidigh Advice Letter, No. A-94-127 (1994).

9 The *Eckis Advice Letter*, No. A-93-270 (1993), which determined that contract city attorneys could not negotiate or renegotiate their contracts, was decided under different regulations and is no longer valid.

services.<sup>10</sup> The FPPC reasoned that the governmental decision to pay the law firm for the legal services enumerated in the contract had already been made by disinterested agency officials at the time the contract was approved. The city attorney's participation in a decision that could trigger these services merely involved implementation of that preexisting decision.

### Practice Tip:

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

City attorneys are frequently requested to participate in decisions involving general benefits or compensation that could indirectly affect their own compensation. For example, a city attorney might be requested to advise the city on an issue relating to the CalPERS retirement benefit formula, which would affect their retirement benefits. Government Code section 82030(b)(2) and Regulations 18232 and 18704, discussed above, may apply to these decisions for in-house

10 *Ritchie Advice Letter*, No. A-79-045 (March 19, 1979). This advice letter addresses the issue whether a contract city attorney can participate in a rezoning decision that would likely lead to a redevelopment agency bond sale from which the city attorney would receive a percentage commission as bond counsel. Although the advice letter did not reach the ultimate issue, it does indicate that the bond counsel payments, even if paid as a percentage of the bond proceeds, are considered salary from a government agency and, thus, are excluded from income under the PRA. The implication of the advice letter is that the city attorney could participate in the rezoning decision. In this case, the attorney was a sole practitioner. McEwen Informal Assistance Letter, I-92-481, I-92-523, and I-92-G14. This informal advice letter contains a comprehensive analysis of the PRA as applied to city attorneys. For purposes of this chapter, the relevant determination is that a city attorney can participate in decisions that could result in additional compensation from the city to the firm if the services for which the extra compensation will be earned are included in the contract. Some of the Regulations discussed in this informal advice letter have changed. For example, the portion of the letter prohibiting a contract city attorney from renegotiating the contract between the city and the city attorney's firm, even in their private capacity, is no longer valid. Thus, the analysis in this letter should be reviewed carefully.

city attorneys, allowing them to provide advice, even though it could indirectly affect their compensation. This result is not certain; there is limited guidance on the issue.<sup>11</sup>

In the case of contract city attorneys, if the firm's compensation is not linked in any way to the benefits being discussed, they could advise the city because the decision would not impact the firm's compensation. If it were linked, Regulation 18704 may still permit the city attorney to provide advice to the extent that the action related to the terms or conditions of their consulting contract. But see chapter 4 for a discussion of the application of Government Code section 1090 to this issue.

### Practice Tip:

Independent from PRA considerations, neither contract nor in-house city attorneys should attend a closed session at which their compensation is discussed. Government Code section 54957.6 (the meet and confer Brown Act closed session provision) provides the only authority to discuss the city attorney's salary in closed session. That section, however, does not authorize the affected employee to attend the closed session. Both contract and in-house city attorneys would violate these Brown Act provisions by attending a closed session during which their (or their firm's) compensation is discussed.

11 *Wilpert Advice Letter*, No. A-21-114 (2021). This advice letter provides that Government Code section 1090 prohibited the council member, a former member of the San Diego Deputy City Attorneys Association of San Diego, from participating in decisions regarding the Public Employment Relations Board (PERB) and the making of agreements related to the make-whole remedy provision. No remote or noninterest exception applied, although the rule of necessity may apply to allow the city to enter into the agreement. McNeill Advice Letter, No. A-22-074 (Sept. 9, 2022). This advice letter provides that the exception to Government Code section 1090 for public services generally provided by the public body on the same terms and conditions as if they were not a member of the body under Government Code section 1090.5(a)(3) applies so council members could vote to extend PERB make-whole remedy provisions to themselves. McNeill Advice Letter, No. A-21-138 (Jan. 20, 2022). This advice letter provides that council members that are not included in the class of represented employees covered under PERB make-whole remedy provisions have no financial interest in the contract and are not subject to Government Code section 1090. Likewise, council members whose interests will not be affected by the PERB make-whole remedy provisions have no financial interest in the contract under Government Code section 1090.

#### D. DECISIONS AFFECTING OTHER CLIENTS OF THE CITY ATTORNEY

City attorneys will sometimes be requested to participate in decisions affecting another client of the city attorney. This situation arises more commonly for contract city attorneys, who often represent clients in addition to the city. Under the PRA, there may be a disqualifying economic interest depending on whether the other client is a source of income to the city attorney.<sup>12</sup> In addition, the Attorney General has opined that for purposes of Government Code section 1090, public officials who are attorneys for private clients have a financial interest in their clients' contracts.<sup>13</sup>

In-house city attorneys can also sometimes face such an issue. For example, in-house city attorneys might be called on to represent another entity, such as a joint powers authority, to which the city belongs.

The PRA would not be implicated for in-house city attorneys so long as the other client is a public entity because the salary the city attorney receives from that entity is not income under the PRA. Additionally, the PRA would not apply to this situation for either in-house or contract city attorneys if the individual is not compensated by the joint powers authority for providing services to the authority. Keep in mind that the Rules of Professional Conduct apply, and client waivers may be needed (see chapter 2).

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

able to participate under the PRA in decisions affecting other clients of the firm if the city attorney's pro-rata share of the income from that other client exceeds \$500.<sup>14</sup>

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

#### E. OTHER RESOURCES

1. City Attorneys Department, League of California Cities, *The California Municipal Law Handbook* (Cont.Ed.Bar 2017 ed.) §§2.114-2.202.
2. *Providing Conflict of Interest Advice* (2022) <https://www.cacities.org/resource/providing-conflict-of-interest-advice>

<sup>12</sup> *Mosely Advice Letter*, No. A-01-161 (2001). This advice letter analyzes whether a contract city attorney may represent a city in a contract dispute with the retired police chief even though the attorney's law firm had also provided legal services to the police chief in past years. In this particular case, no conflict was found since the firm had not provided any legal services to the police chief in the 12 months prior to the dispute. Therefore, since the firm did not have a disqualifying economic interest, the attorney could represent the city in the matter.

<sup>13</sup> 101 Ops.Cal.Atty.Gen. 1 (2018). This opinion concludes that a city council member who is also an attorney may not advocate on behalf of the client or participate in a governmental decision concerning a client's interests when the client's interests are adverse to the city.

<sup>14</sup> *McEwen Advice Letter*, No. A-89-454.

# CHAPTER 4:

## CITY ATTORNEYS' FINANCIAL INTERESTS IN CONTRACTS: CONFLICTS OF INTEREST UNDER GOVERNMENT CODE SECTION 1090

### A. INTRODUCTION

Government Code section 1090 generally prohibits public officials from making or participating in the making of contracts in which they have a financial interest.<sup>1</sup> This statute codifies the common law prohibition against self-dealing with respect to contracts entered into by government agencies. Public officials must comply with the requirements of both Section 1090 and the Political Reform Act (see chapter 3).

In contrast to the Political Reform Act, which has been interpreted in comprehensive administrative regulations and both formal and informal advice letters promulgated by the Fair Political Practices Commission, Section 1090 has in the past been interpreted and applied only through appellate court decisions and Attorney General opinions. Effective Jan. 1, 2014, however, the Fair Political Practices Commission was given authority to issue opinions and advice regarding prospective compliance with Section 1090.<sup>2</sup>

In light of the general and sometimes ambiguous statutory language, the task of analyzing Section 1090 issues and reaching definitive conclusions can be particularly challenging. This difficulty, combined with the especially severe penalties for violations, militates in favor of interpreting Section 1090 very conservatively. This chapter focuses on potential conflicts of interest under Section 1090 that are of particular concern to all city attorneys and some special counsel.

1 Section 1090 states:

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

(b) An individual shall not aid or abet a Member of the Legislature or a state, county district, judicial district, or city officer or employee in violating subdivision (a).

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

2 Government Code section 1097.1(c)(2).

### B. GOVERNMENT CODE SECTION 1090 AND CITY ATTORNEYS GENERALLY

#### 1. Elements of a Section 1090 Violation

Section 1090 prohibits “city officers or employees” from being “financially interested in any contract made by them in their official capacity.” The essential elements of a Section 1090 violation include all of the following:

- » a city officer or employee
- » acting in an official, rather than private, capacity
- » who participates in the making
- » of a contract entered into by the city
- » in which the official has a direct or indirect financial interest

#### a. City Officer or Employee

A city attorney holds a public office, and therefore is a “city officer” within the meaning of Section 1090, regardless of the individual’s status as an employee or independent contractor.<sup>3</sup> That much is clear. It is less clear whether Section 1090 also applies to lawyers serving as special counsel to a city if they are in a position to influence the decision to enter into a contract in which they have a direct or indirect financial interest.

In the early case of *Shaefer v. Berinstein*, the court held that an attorney retained as special counsel to handle certain real property matters was a city officer subject to Section 1090.<sup>4</sup> The attorney was hired to rehabilitate properties burdened by tax deeds and special assessments. The court held that he was acting as an officer of the city within the meaning of Section 1090 when he advised the city council to sell certain properties, which he then fraudulently purchased through dummy entities. Similarly, in *California Housing*

3 *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 747 [main holding of case is that city cannot retain special counsel to prosecute civil nuisance abatement cases via a contingency fee agreement]; 70 Ops.Cal. Atty.Gen. 271, 273-274 (1987) (Opinion No. 87-905).

4 *Shaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; see also companion case of *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206-207 [involving same nefarious scheme].



*Finance Agency v. Hanover*, the court held that an outside attorney who was in a position of influence over a public agency's contracting decisions was an "employee" within the meaning of Section 1090, even if he would be classified as an independent contractor under common law principles.<sup>5</sup> In *People v. Superior Court (Sahlolbei)*, the Supreme Court affirmed that Section 1090's reference to "officers" applies to an outside advisor or independent contractor "with responsibilities for public contracting similar to those belonging to formal officers."<sup>6</sup> The FPPC has also issued a few 1090 opinions on this topic.<sup>7</sup>

Given the uncertainty in this evolving area, special counsel should carefully consider the risks under Section 1090 when advising client agencies on contracts in which counsel may have a direct or indirect financial interest.

#### b. Acting in an Official Capacity

Section 1090 prohibits city officials from having a financial interest in contracts made by them "in their official capacity." It does not prevent them from entering into contracts made in their private capacity. This distinction is fact dependent, and there is no bright-line test for determining whether an official is acting in a private capacity.

In *Campagna v. City of Sanger*, a law firm provided contract city attorney services under an agreement providing a monthly retainer. The retainer excluded litigation, but the agreement provided that the firm would be paid reasonable fees for litigation, depending upon the type of services provided.<sup>8</sup> An attorney with the firm negotiated a legal services contract with the city providing that his firm and another law firm would represent the city in prosecuting a

toxic contamination lawsuit against chemical companies. The contingency fee agreement approved by the city council set forth how the total fee would be calculated but did not explain how the two firms would split the fee. Under a separate oral agreement with the second law firm, the city attorney's firm was to receive a certain percentage of the total contingency fee.

The court held that the city attorney did not violate Section 1090 when he negotiated with the city on his firm's behalf in his private capacity to provide additional legal services beyond the basic retainer agreement. However, the contingency fee agreement did not establish how the firm would be paid for this additional work; that was determined in the separate referral fee agreement between the city attorney's firm and the second firm. The attorney admitted and the court found that when negotiating this second agreement, he was acting within the course and scope of his official duties as the city attorney. Because he was financially interested in a contract made in his official capacity, a violation of Section 1090 had occurred, and the referral fee agreement was unenforceable. The court's discussion of the contingency fee agreement is confusing due to the unique facts presented in this case; however, the court did clearly hold that a city attorney can negotiate their contract with the city when acting in a private capacity.

In *People v. Gnass*,<sup>9</sup> a city attorney was a partner in a private law firm hired to provide part-time, contract city attorney services to the city of Waterford. Waterford formed a public financing authority (PFA) through a joint powers agreement with its redevelopment agency. The city attorney was criminally prosecuted for representing the Waterford PFA in connection with the formation of several other PFAs under the Marks-Roos Local Bond Pooling Act, then receiving compensation for serving as disclosure counsel for revenue bond issuances of the other PFAs. The court held that the city attorney was acting in his official capacity when he advised the Waterford PFA with regard to formation of the other PFAs in which he had a prohibited financial interest.<sup>10</sup>

5 *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690-694; see also *HUB City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1125 [independent contractor who managed the city's in-house waste division was acting as a public official within the meaning of Section 1090 when he advised the city to enter into a franchise agreement with a waste management company he created]; cf. *Handler v. Board of Supervisors* (1952) 39 Cal.2d 282, 286 [county charter provision requiring appointment of officers or employees by ordinance held inapplicable to attorney retained by contract to perform specialized legal services on a temporary basis].

6 *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 237-38 [specifically disapproving the holding in *People v. Christiansen* (2013) 216 Cal. App.4th 1181].

7 FPPC Advice Letters on Section 1090: Burns Advice Letter, A-14-060; Ennis Advice Letter, A-15-006; Webber Advice Letter, A-15-127; Chadwick Advice Letter, A-15-147; Green Advice Letter, A-16-084; Ancel Advice Letter, A-16-173.

8 *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533.

9 *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1289-1292 [note that the indictment in *Gnass* was set aside because of defective instructions to the grand jury on the question whether the Section 1090 violation was knowing and willful].

10 Following the *Campagna* decision, the FPPC ruled that an attorney serving as contract general counsel for a public entity was not prohibited by Section 1090 from entering into a contract with that public entity for him to serve as part-time in-house counsel so long as he refrained from making or participating in the making of the contract in his official capacity as general counsel. Cosgrove Advice Letter A-21-026.



### c. Making a Contract

The courts, the Attorney General, and the FPPC have read Section 1090 broadly so that the “making of a contract” includes actions preliminary to approval and execution. This includes involvement in early discussions about the need for the contract as well as negotiations of contract terms. The prohibition of Section 1090 applies when a public official has the opportunity to exert influence over decisions leading to a contract, even if the official does not personally participate in the actual approval or execution of the contract.<sup>11</sup> However, taking a ministerial action, such as striking language from a charter or ordinance as required by a court order, is not contractual and does not implicate Section 1090 even though subsequent actions would involve labor negotiations.<sup>12</sup>

#### Practice Tip

Try to identify potential Section 1090 conflicts as early as possible and refrain from any involvement in discussions that may lead to a prohibited contract. It will usually be impossible to “unring the bell” after you have participated in preliminary decision-making, with the possible result that the contract cannot be entered into at all.

### d. Financial Interest

The courts and the Attorney General have broadly interpreted the term “financial interest” to include both direct and indirect financial interests in a contract.<sup>13</sup> In the *Gnass* case, discussed above, the court found an indirect financial interest when a city attorney, acting in his official capacity, provided advice to a financing JPA regarding the

11 *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 571; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; 81 Ops. Cal. Atty. Gen. 169 (1998) [participation in the planning and approval of a revolving loan program precludes subsequent borrowing from the fund]; *People v. Gnass, supra*, 101 Cal.App.4th 1271, 1292-1298; Chadwick Advice Letter, A-16-090; Webber Advice Letter, A-15-127; but see Asuncion Advice Letter, A-14-062; Williams Advice Letter, A-15-029; Walter Advice Letter, A-15-050.

12 Wilpert Advice Letter, A-21-114 [council member who previously served as deputy city attorney in same city could participate in council decisions removing proposition language from city charter and making necessary amendments to municipal code as required by court order, even though the result of such actions would make her eligible to participate in the city’s retirement system, but Section 1090 prohibited her from participating in decisions regarding compliance with PERB-ordered make-whole remedy to implement the court order].

13 *Thomson v. Call* (1985) 38 Cal.3d 633; see also *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 402; *People v. Honig* (1996) 48 Cal.App.4th 289, 314-315; 92 Ops. Cal. Atty. Gen. 67, 69 (2009).

formation of several other JPAs, then reaped a financial reward by serving as disclosure counsel for bonds issued by the other JPAs. This case is troubling because it suggests that a contract that creates a mere possibility of future paid legal work can constitute an indirect financial interest.

The Attorney General has opined that a city council cannot enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit, even if the law firm would receive no fees for its services and would agree to turn over to the city any attorney fees that might be awarded in the litigation. The Attorney General pointed to the potential divergence of interests between the law firm and the city because the costs incurred by the firm in pursuing the litigation might give it an incentive to settle, as well as the potential for indirect economic gain to the firm through the marketing value of a successful outcome.<sup>14</sup>

Furthermore, the Attorney General has concluded that a member of a city council who is also an attorney may not advocate on behalf of a client’s interest when those interests are adverse to the city.<sup>15</sup> The council member, in his private capacity, represented a client in a dispute with the city over a ban of newspaper racks on city property. However, the council member ceased representation prior to the client filing suit against the city. In analyzing the council member’s financial interest in the representation of his client, the Attorney General determined neither the remote interests nor the noninterests exceptions applied, resulting in a violation of Section 1090. However, the Attorney General also noted that Section 1090 would not be implicated based solely on litigation between the city and the council member’s client, since a contract with a client for attorney representation is not a contract made in the council member’s official capacity.

In *Frasor-Yamor Agency, Inc. v. County of Del Norte*, the court found a financial interest arising out of a county supervisor’s status as an employee and part owner of an insurance brokerage that placed insurance policies in its capacity as an agent for the county, even though the supervisor had agreed with his firm to share in none of the commission income attributable to the insurance policies. In reaching this conclusion, the court relied on the potential impact of the overall financial success of the company on the value of the supervisor’s ownership interest. Additionally, the company

14 86 Ops. Cal. Atty. Gen. 138 (2003).

15 101 Ops. Cal. Atty. Gen. 1 (2018). See also Smith Advice Letter, A-19-008.

could potentially receive additional remuneration in the form of profit sharing, over and above ordinary commissions, based on the overall volume of business it produced.<sup>16</sup>

In 2016, the Attorney General issued an opinion on the question of whether a private attorney acting as a contract city attorney may also act as bond counsel for the same city and be paid based on a percentage of the bond issues.<sup>17</sup> In this type of arrangement, the bond counsel receives no fee unless the bonds are issued. The Attorney General opined that such an arrangement was prohibited by Section 1090.

City attorneys should also be aware that financial interests may arise from the employment or business activities of their spouse. Both the financial interests and exceptions applicable to the spouse will be imputed to the city attorney.<sup>18</sup>

## 2. Exceptions: Noninterests and Remote Interests

### a. Noninterests

Section 1091.5 provides that a public official is deemed not to have a financial interest in a contract and may fully participate in its formation if their interest falls within certain listed categories. Of particular interest to city attorneys are Subdivisions (a)(9) and (a)(10) of Section 1091.5. Subdivision (a)(9) is commonly referred to as the “governmental salary exception.” Under this provision, a public official is deemed to have a noninterest in a contract when the official’s interest is “that of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that

the interest is noted in its official record.” Subdivision (a)(10) provides that a public official who also serves as an attorney for a party contracting with the public agency has a noninterest in a contract if the attorney has not received and will not receive any remuneration as a result of the contract and has an ownership interest of less than 10% in the law practice or firm.

The exception contained in Subdivision (a)(9) was interpreted in *Lexin v. Superior Court*.<sup>19</sup> *Lexin* involved a felony prosecution of several city employees who also served on the board of the city’s municipal retirement system. The board of the retirement system, a separate legal entity from the city, voted to authorize an agreement that allowed the city to defer payments into the retirement fund in exchange for the city’s agreement to provide increased pension benefits for city employees, including the defendants. For most employees, the increased benefit consisted of an enhanced multiplier for calculating retirement benefits. The contract also created a special benefit for one board member who served as a union president, allowing him to use a higher salary for his retirement calculations.

The *Lexin* court had no difficulty concluding that the board members had participated in the making of a contract in which they had a financial interest. After an exhaustive analysis, the court concluded that Section 1091.5(a)(9) provides an exception to the prohibition of Section 1090 for an individual whose financial interest in a proposed contract is only the present interest in an existing employment relationship with a public agency that is a party to the contract, provided that the contract does not directly affect the individual’s own department. However, this exception does not apply when the contract effects prospective changes in the pension benefits or other elements of government compensation provided to the interested officials.

The court ultimately concluded that the board members did qualify for the “public services” exception under Section 1091.5(a)(3), which states that a noninterest exists when a member of a public body or board is a recipient of public services on the same conditions as if they were not a board member. In *Lexin*, board members’ financial interest arose because of their role as constituents of the retirement board and recipients of the public services it provided. There was no conflict, the court reasoned,

16 *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201.

17 99 Ops.Cal.Atty.Gen. 35 (2016).

18 E.g., *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal. App.4th 655 [community college district properly denied promotion to employee whose spouse sat on the district board that had to approve the appointment; noninterest exception provided in Government Code section 1091.5(a)(6) for preexisting employment held inapplicable when an employee is appointed to a new position]; 85 Ops.Cal.Atty.Gen. 34 (2002) [city employee may not participate in negotiation of or drafting of a development agreement when her spouse is an employee of a firm that provides services to the developer, even though he has no interest in the firm, he will not work on this project, and his income will not be affected by the negotiations or its outcome]; 81 Ops.Cal.Atty.Gen. 169 (1998) [city council could not execute a contract for purchase of equipment with a corporation because city council member and her spouse owned stock in corporation and the spouse was employed by corporation; noninterest and remote interest exceptions held to be inapplicable]; see also Kellner Advice Letter, No. A-15-021.

19 *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1079-1085.

because the pension benefits were broadly available to all others similarly situated, rather than narrowly tailored to favor a particular employee or group of employees. It is noteworthy that in reaching this interpretation, the court relied on legal authorities interpreting the “public generally” exception in the Political Reform Act. However, this defense was not available to the board member who received a special benefit.

Similarly, in *People v. Rizzo*, the governmental salary exception was held inapplicable to a city manager and assistant city manager who participated in modifying the city’s supplemental retirement plan to provide themselves with unique benefits not made available to other plan members.<sup>20</sup>

### b. Remote Interests

Government Code section 1091 provides that a public board may approve a contract in which one of its members has only a “remote interest,” provided that the interested official discloses their financial interest, has it noted in the board’s official records, and refrains from participating in the decision-making process leading to contract formation.

Section 1091(b)(13) applies to the interest “of a person receiving salary, per diem, or reimbursement for expenses from a government entity.” The Attorney General has interpreted the term “salary” as including other elements of compensation such as retiree health benefits. But the Attorney General also concluded that this provision encompasses only a public official’s employment with another government agency seeking to contract with the agency the interested official serves. Hence, it does not apply when a community college district board member receives retirement health benefits directly from the district as a former faculty member under a collective bargaining agreement and the district is renegotiating the amount of health benefits with employee representatives.<sup>21</sup> In contrast, it does permit a city council to contract with a sheriff’s office for law enforcement services, as long as a council member who was also a deputy sheriff refrains from participation in the making of the contract.<sup>22</sup> When Section 1091(b)(13) is read in conjunction with the noninterest provision contained

in Section 1091.5(a)(9), it appears that a member of a public agency board has a noninterest in salary and benefits received from employment with a different public agency, as long as the contract in question does not directly involve the department of the agency that employs the official. In this situation, the public official may participate in contract approval. Even if the contract affects the department employing the official, it may be approved without the official’s participation under the remote interest exception contained in Section 1091(b)(13).<sup>23</sup>

Another remote interest exception based on the duration of a business relationship exists under Section 1091(b)(8), which applies to the interest “of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.” The FPPC concluded the remote interest exception of Section 1091(b)(8) permits a city council to enter into an amended agreement with a third party represented by a council member’s law firm because the firm had represented the third party for more than five years prior to the council member’s election to office.<sup>24</sup>

Section 1091 makes one remote interest specifically applicable to attorneys and certain other occupations; this remote interest dovetails with the noninterest set forth in Section 1091.5(a)(10). Section 1091(b)(6) encompasses the interest of an attorney of a contracting party, if the attorney has not received and will not receive remuneration as a result of the contract and has an ownership interest of 10% or more in the law practice or firm. Prior to the addition of the 10% ownership provision, the Attorney General found that a city council member had only a remote interest in the client of a law firm in which his spouse was a partner because the law firm would receive no remuneration from the contract since the firm’s representation of the client concerned matters unrelated to the contract with the city.<sup>25</sup> Although this issue has not yet been addressed by the courts or the Attorney General, it seems reasonable to conclude that the references to receipt of remuneration under a contract found in Section 1091(b)(6) and Section 1091.5(a)(10) do not prevent a city attorney from being paid by the city for drafting the contract

20 *People v. Rizzo* (2013) 214 Cal.App.4th 921.

21 89 Ops.Cal.Atty.Gen. 217, 221 (2006) [but note that the contract in question was allowed to be approved under the rule of necessity].

22 83 Ops.Cal.Atty.Gen. 246 (2000); see also Ihrke Advice Letter, A-23-057.

23 *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081.

24 Ennis Advice Letter, A-23-051.

25 78 Ops.Cal.Atty.Gen. 230 (1995).

itself, as long as the city attorney is not going to receive remuneration from the other party to the contract in the future as a result of the contract.

### 3. Rule of Necessity

In limited circumstances, a public official or board may be permitted to carry out essential duties despite a conflict of interest when the official or board is the only one who may legally act. For example, a council member was required to recuse herself from participation in a project that included a development agreement because her husband was employed by the developer's law firm, but the "rule of necessity" permitted the remaining members of the city council to enter into a development agreement because the city council is the only governmental entity with the power to approve the development agreement.<sup>26</sup> A school superintendent who was married to a school employee was allowed to enter into a memorandum of understanding with school employees because he was the only official authorized to approve the agreement.<sup>27</sup> Similarly, even though one of its members was a retired faculty member whose retirement benefits would be affected, a community college board was allowed to negotiate health benefits with its faculty because only the board was legally authorized to act on this decision.<sup>28</sup> It is unlikely that there will be many situations where the rule of necessity might apply to a city attorney. One possible scenario might be a city charter provision that expressly requires approval of a particular contract by the city attorney.

### 4. Penalties for Violations

Any contract made in violation of Section 1090 is void and unenforceable even if the city official acted pursuant to legal advice from the city attorney, the violation was unintentional, and the contract was not unfair or fraudulent.<sup>29</sup> The city, or any other party except the financially interested official, may seek nullification of a contract made in violation of Section 1090, as well as the interested city official's disgorgement of profits and payment of restitution.<sup>30</sup> Actions to void contracts under Section 1090 must be commenced within four years after the plaintiff has discovered, or in the exercise

of reasonable care should have discovered, the violation.<sup>31</sup> A public official who knowingly and willfully makes a contract in which they have a financial interest can be punished by fines, imprisonment, and disqualification from holding any public office.<sup>32</sup> Effective Jan. 1, 2014, the Fair Political Practices Commission was given authority to bring administrative or civil actions to enforce Section 1090 after obtaining authorization from the district attorney, resulting in possible fines of up to \$10,000 or three times the financial benefit received by a defendant for each violation.<sup>33</sup>

#### Practice Tip:

If it is not clear whether a particular contract will give rise to a Section 1090 violation affecting the city attorney, it is advisable for the city attorney to abstain from any participation. This approach will minimize the risk of a successful criminal prosecution because the element of "making" a contract would be absent.

## C. IDENTIFYING AND ANALYZING POTENTIAL CONFLICTS OF INTEREST UNDER SECTION 1090

Several common circumstances in which city attorneys may encounter potential Section 1090 conflicts include the following:

- » Negotiating new or amended employment contracts with the city.
- » Representing the city in negotiations with employee groups for salary or benefit changes that may also apply to the in-house city attorney.
- » Negotiating for the performance of additional services outside the scope of an existing legal services agreement with the city attorney's law firm.
- » Entering into contracts with other clients of the city attorney's law firm.
- » Serving as legal counsel to a joint powers agency of which the city is a member.

26 Guina Advice Letter, A-22-076.

27 65 Ops.Cal.Atty.Gen. 305 (1982); see also 69 Ops.Cal.Atty.Gen. 102 (1986).

28 89 Ops.Cal.Atty.Gen. 217 (2006).

29 *Thomson v. Call*, *supra*, 38 Cal.3d 633; *People v. Chacon* (2007) 40 Cal.4th 558.

30 Cal. Gov. Code § 1092(a); *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533.

31 Cal. Gov. Code § 1092(b).

32 Cal. Gov. Code § 1097; *People v. Gnass*, *supra*, 101 Cal.App.4th 1271, 1305; *People v. Honig* (1996) 48 Cal.App.4th 289.

33 Cal. Gov. Code §§ 1097.1 to 1097.5, added by AB 1090, 2013 California Statutes, Chapter 650.



### 1. *Negotiating City Attorney Employment Contracts*

Section 1090 does not prohibit contract city attorneys from negotiating the terms of their employment contracts directly with the city so long as they are acting solely in their private capacity.<sup>34</sup> The Attorney General has acknowledged that a public employee's contract may be renegotiated "so long as the employee totally disqualifies himself or herself from any participation, in his or her public capacity, in the making of the contract."<sup>35</sup> Nevertheless, the Attorney General also stated that "when a contractor serves as a public official (e.g., a city attorney) and renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding about whether the contractor's statements were made in the performance of the contractor's public duties or in the course of the contractual negotiations."<sup>36</sup> Although this passage is not supported by references to legal authority, the Attorney General's recommendation merits consideration because the retention of legal counsel to conduct contract negotiations could provide additional factual support for the conclusion that the city attorney is truly acting in their private capacity.

#### Practice Tips:

When negotiating your employment contract or amendments thereto, notify the city council in writing that you are representing yourself in your personal capacity and not advising them in your official capacity as the city attorney. Any letter or memorandum providing this notification should be on personal or law firm letterhead.

Consider establishing further separation between your official service as the city attorney and representation of your personal financial interests in the contract negotiations. Options include presenting your proposal to the city manager or human resources director and allowing that individual to present it to the city council or even retaining personal legal counsel as suggested by the Attorney General.

Avoid advising the city on any matter related to the contract, such as manner of posting agenda items, budget preparation or hearings, or participation in open sessions relating to your contract. Refrain from providing legal advice on the city's negotiating strategy or how contract provisions should be interpreted. If asked to provide such advice, remind the city that you are acting in your private capacity and recommend that the city consult with independent counsel. If you are an in-house city attorney, consider recommending that your city obtain legal advice on your contract from outside counsel, rather than from one of your subordinates.

#### Practice Tips:

If you attend a closed session with the city council for your performance evaluation under Government Code section 54957, be careful not to allow the discussion to expand into a discussion of your contract terms to avoid any conflict. Your involvement in a closed session discussion about contract terms is also not allowed under Brown Act requirements relating to labor negotiations, which are separately regulated under Government Code section 54957.6.

### 2. *Representing the City in Negotiating Employee Benefit Changes that May Also Affect an In-House City Attorney*

An in-house city attorney may be called upon to provide advice and representation for negotiations with employee groups through the collective bargaining process. These negotiations sometimes cover compensation and benefit changes that can reasonably be expected to apply to the city attorney through a "me too" clause in the attorney's employment agreement, through local custom and practice, or otherwise. The *Lexin* and *Rizzo* cases hold that although the government salary exception applies to an interest in government compensation under an existing employment relationship, contracts that may result in future changes to that compensation do not qualify as noninterests under Section 1091.5. Moreover, even though the remote interest exception under Section 1091(b)(13) states that it applies to an interest "of a person receiving salary, per diem, or reimbursement of expenses from a government entity," *Lexin* reasoned on the basis of legislative history that it is inapplicable when

34 *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533, 539-540.

35 *Conflicts of Interest*, California Attorney General, 2010, at p. 66.

36 *Id.* at pp. 66-67.

the contract involves a direct financial impact on the official. The California Attorney General has also found that the exception in Section 1091(b)(13) applies only to a contract that involves an official who is a member of a board. It does not apply to an attorney who acts as an individual city officer.<sup>37</sup>

This authority presents a dilemma for a city attorney who is expected to advise the city in the collective bargaining process. The Section 1090 issue could be avoided if the city attorney abstains from participation in the making of a collective bargaining agreement when it is reasonably foreseeable that the compensation changes reflected in the agreement will be applied to the city attorney.<sup>38</sup> Another possible way to mitigate legal risk would be to avoid including a “me too” clause in the city attorney’s employment agreement.

The *Lexin* case provides little useful guidance on these important practical questions. Because of the lack of clarity in this area of the law, city attorneys may wish to consider seeking an opinion or advice from the Fair Political Practices Commission before proceeding.

There may be factual situations where it is appropriate to rely on the “rule of necessity” to allow participation in the formation of contracts with employee groups, even though the elements of a Section 1090 violation are present and no exceptions apply. As discussed above, this rule authorizes formation of a contract despite a conflict of interest when necessary to ensure that essential governmental functions are performed. The

*Lexin* case suggested that the rule of necessity could apply in appropriate circumstances to permit city officials to negotiate contracts affecting their personal salaries, but did not reach that issue.<sup>39</sup>

### 3. Negotiating to Provide Additional Legal Services

#### a. In-House City Attorneys

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

#### b. Contract City Attorneys

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

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

However, if the contract does not include those services, the city attorney will likely need to amend the contract. Although city attorneys can represent themselves in such negotiations, they may not recommend the need for such services in their capacity as city attorney or advise the city as a client with respect to the contract amendment.

37 99 Ops.Cal.Atty.Gen. 35 (Section 1090(b)(13) exception inapplicable to arrangement under which a contract city attorney’s compensation for providing the city with additional bond counsel services is based on a percentage of the city’s bond issuances). See also Crosthwaite Advice Letter, A-21-080 [FPPC found that an interim city manager with a contractual right to return to his director position after expiration of his interim term was prohibited by Section 1090 from representing the city in labor negotiations with the city’s executive bargaining unit because the labor negotiations would impact his future salary and benefits; and the Section 1091(b)(13) exception was inapplicable because he would be acting as an individual city officer, rather than as a member of a board].

38 See also Calabrese Advice Letter, A-17-087, in which the FPPC concluded that the San Bernardino County Employees’ Retirement Association (SBCERA) chief counsel and staff had conflict of interest under Section 1090 in participating in the SBCERA board’s decisions regarding the elimination of pick-up benefits from the employees’ individual employment contracts and are barred from participating in their official capacities, but the rule of necessity may allow limited participation in a situation where affected SBCERA employees are the only ones who may legally act to carry out an essential duty of their offices. The FPPC also found that SBCERA employees are not prohibited from participating in their individual capacities if they contact the board on their own behalf on the pick-up issue and make it clear that they are appearing in their individual capacities.

39 *Lexin v. Superior Court*, *supra*, 47 Cal.4th 1050, 1085.



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

#### Practice Tip:

Contract city attorneys should include in their retention agreements all services they anticipate providing for the city and specify the basis for determining the compensation for those services.

#### 4. *Contracts Between the City and Another Client of City Attorney's Law Firm*

Cities sometimes wish to contract with other clients of the city attorney. This situation is more common for contract city attorneys, who may be members of firms with many public and private clients. It can also arise for in-house city attorneys who represent other government entities, such as joint powers authorities, affiliated with the city. As long as the city attorney avoids involvement in the "making" of a particular contract, the city and the other client can contract without violating Section 1090. There may be situations in which the city attorney may lawfully work on the contract, perhaps more in theory than practice. The city attorney can participate in the making of the contract if the elements of the Section 1091.5(a)(10) noninterest exemption are met (city attorney will not receive remuneration as a result of the contract and has an ownership interest of less than 10% in the law practice or firm). The city attorney may, however, have an indirect financial interest if their compensation could increase as a result of the income the firm would receive for representing the other client, or through enhancement in the value of the partnership interest.<sup>40</sup>

If the city attorney's other client is a public entity, then potential Section 1090 issues must be addressed for that entity as well if the attorney advising that client qualifies as an "officer or employee" of that entity within the meaning of Section 1090.

#### Practice Tip:

Even if you determine that you have no Section 1090 conflict, you still need to check the Rules and the Political Reform Act for possible ethical or financial conflicts.

#### 5. *Serving as Legal Counsel to a Joint Powers Authority*

City attorneys are frequently asked to advise agencies closely affiliated with the city itself, or to work on the contract that will form a joint powers agency that includes the city as a member. Section 1090 issues can arise when the city attorney advises two legally distinct but related entities and receives compensation separate from the compensation provided for services as city attorney/general counsel. If faced with this situation, take a close look at the *Gnass case* and make an assessment whether you are facing an analogous fact pattern.

#### Practice Tip:

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

A more typical joint powers agreement advances policy objectives shared by a number of public agencies. Often, the "lead" city hosts the new agency by providing staffing and facilities and is reimbursed by the authority for doing so. If the city attorney is a public employee, the contract forming the JPA usually does not present Section 1090 issues because the city attorney will not receive additional compensation.

<sup>40</sup> See 86 Ops.Cal.Atty.Gen 138 (2003).

In the case of a contract city attorney, however, the issue is more complex. A joint powers authority is created by contract, and an attorney who expects to be considered as general counsel for the new agency may be deemed to be financially interested in that contract under the reasoning of *Gnass*. *Therefore, it may be prudent for the city attorney to advise the city that they will either (1) not represent the city in the formation of the authority or (2) not provide legal services to the new authority after it is formed.*

#### D. OTHER RESOURCES

1. An Overview of Section 1090 and FPPC Advice (2020). Available from the FPPC website at <http://fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/section-1090/Section%201090%20-%20Overview%20-%20Oct%202020.pdf>.
2. City Attorneys Department, League of California Cities, *The California Municipal Law Handbook* (Cont.Ed.Bar 2022 ed.) §2.149, p. 200.
3. *"Counsel and Council: A Guide for Building a Productive Employment Relationship."* This handbook contains basic information about structuring the employment relationship between the city attorney and the city council. It also contains suggested employment agreement provisions, including "scope of services" for both contract and in-house city attorneys. It can be downloaded from the League of California Cities website: <http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications.aspx>.
4. *"A Guide for Local Agency Counsel: Providing Conflict of Interest Advice"* (2022). Also available from the League of California Cities website. <https://www.cacities.org/resource/providing-conflict-of-interest-advice>
5. "Conflicts of Interest" (2010). Available from the website of the Office of the California Attorney General: <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/coi.pdf>
6. "When In Doubt, Sit It Out – Gov. Code Section 1090 Update," presented by Steven Dorsey at the May 2011 City Attorneys Conference. Available from the League of California Cities website.
7. "Section 1090 Overview and Recent Developments," presented by Jack C. Woodside and Sukhi K. Brar at the May 2017 City Attorneys Conference. Available from the League of California Cities website.

# CHAPTER 5:

## THE CITY ATTORNEY'S ROLE AS PROSECUTOR

### A. INTRODUCTION

City attorneys occasionally perform dual functions, handling both civil and criminal matters. Generally, the performance of these dual functions will not result in the disqualification of the city attorney's office.<sup>1</sup> But the intrusion of improper influences upon the city attorney's exercise of prosecutorial discretion can result in disqualification in criminal and code enforcement matters and possibly other proceedings where a city attorney is representing the city as a sovereign.<sup>2</sup>

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 [Meritorious Claims and Contentions] and 3.4 [Fairness to Opposing Party and Counsel]."<sup>3</sup>

This chapter examines those circumstances where a city attorney's other duties and responsibilities and improper influences may conflict with their role as a prosecutor.

1 "[A] public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area." *In re Lee G.* (1991) 1 Cal. App.4th 17, 29. See also *People v. Superior Court (Hollenbeck)* (1978) 84 Cal.App.3d 491, 504.

2 *People v. Municipal Court (Byars)* (1977) 77 Cal.App.3d 294, 296 [Court found that there was no conflict or appearance of impropriety that prevented city attorney from handling a prosecution. "Here we must determine whether the circumstances are appropriate to justify trial court action barring participation by a prosecuting attorney where: (1) a city attorney is charged by law with the obligation both of prosecuting misdemeanors within the city and of defending civil actions against the city and its agents; (2) a claim is pending against the city and its agents asserting liability to the defendants in the criminal prosecution arising out of the same incident which is the basis of the prosecution; (3) there is no evidence of personal, as opposed to purely professional and official, involvement of anyone in the prosecutor's office in the civil litigation; and (4) there is no evidence supporting an inference that the prosecutor is improperly utilizing the criminal proceeding as a vehicle to aid his function of defending claims against his employer."]

3 Rule 3.8 Special Responsibilities of a Prosecutor, Comment 1.

### B. FACTORS TO CONSIDER WHEN FILING CRIMINAL CASES

#### 1. Impartiality and Objectivity

Prosecuting criminal and quasi-criminal proceedings presents special ethical issues. For instance, it may be alleged that the city attorney filed a criminal complaint or a code enforcement action as a result of pressure from the city manager, chief of police, city council, or an individual council member. There may also be allegations that the city attorney filed the action in an effort to protect the city from civil liability; for example, filing a criminal complaint for battery on a peace officer to counteract or deter a potential civil action against the city for use of excessive force.

City attorneys serving as prosecutors on behalf of the people in civil nuisance abatement, Unfair Competition Law, and criminal proceedings are subject to heightened standards of impartiality and objectivity. City attorney decisions in these proceedings must not be influenced by factors other than probable cause and the interests of justice. As the California Supreme Court observed in *People ex rel. J. Clancy v. Superior Court*:

"[A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly."<sup>4</sup>

4 *People ex rel. J. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746 [citing ABA Code of Prof. Responsibility, EC 7-14]. *Clancy* involved a nuisance abatement action against an adult bookstore where the prosecuting attorney was being paid a contingency fee. The court concluded that certain nuisance abatement actions share the public interest aspect of criminal cases and often coincide with criminal prosecutions and found that the lawyer's contingent fee arrangement was improper, just as it would be in a criminal prosecution. The court analyzed the case under principles of neutrality and applied conflict of interest rules substantially similar to the conflict of interest rule applicable to criminal prosecutors. Later, in *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 54, the California Supreme Court clarified that the rules applicable to criminal prosecutors do not always apply in nuisance abatement actions, but principles of heightened neutrality are valid and necessary in such actions. Unlike *Clancy*, in *Santa Clara*, the court upheld the public agency's engagement

Indeed, courts are likely to apply these standards in any case where the government is exercising powers unique to a sovereign, as in civil nuisance abatement and condemnation actions.<sup>5</sup>

Penal Code section 1424 authorizes disqualification of a criminal prosecutor where (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.<sup>6</sup> The conflict must be more than apparent. “The statute does not allow disqualification because participation of the prosecutor would be unseemly, appear improper, or even reduce public confidence in the criminal justice system. An actual likelihood of prejudice must be shown.”<sup>7</sup> The disqualification of the entirety of a prosecutorial office is an extraordinary measure and is not typically warranted by disqualification of a single member.<sup>8</sup> Note that public agency attorneys operating under contingency fee agreements also face the potential for disqualification under Penal Code section 1424.

## 2. Probable Cause

Violations of municipal codes can be enforced criminally as misdemeanors<sup>9</sup> or infractions<sup>10</sup> or enforced administratively.<sup>11</sup> City attorneys prosecuting criminal violations of their city’s municipal codes are subject to Rule 3.8, which prohibits the filing of criminal charges where the prosecuting attorney knows or should know that the charges are not supported by probable cause. Likewise, if after filing the charges the prosecuting attorney discovers the lack of probable cause, or after conviction determines based upon

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of contingent-fee counsel where the public entity’s in-house lawyers retained and exercised exclusive approval authority over all critical prosecutorial decisions in the case, including the unfettered authority to dismiss the case. In that case, the court also noted that the action did not seek to put the defendant out of business and that the defendant had the resources to mount a full defense. See also *People ex rel. City of San Diego v. Experian Data Corp.* (2022) 77 Cal.App.5th 1006, 1012-1014.

5 *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860; *Clancy, supra*, 39 Cal.3d at 748-749.

6 *People v. Choi* (2000) 80 Cal.App.4th 476, 483. When a close personal friend of the district attorney was murdered close in time and location to the murder that occurred in the case being prosecuted, the court found that there was a reasonable possibility that the district attorney’s office might not exercise its discretionary function in an evenhanded manner and held recusal of the entire district attorney’s office was appropriate.

7 *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 197.

8 *Jensen v. Superior Court* (2021) 64 Cal.App.5th 1003, 1012-1013.

9 California Government Code section 36900.

10 *Ibid.*

11 California Government Code section 53069.4.

new evidence that the defendant did not commit the crime, they must notify the court in which the charges are pending and seek dismissal of the action or take other action to remedy the conviction.<sup>12</sup>

### Practice Tip:

The city council has budgetary authority over the resources that the city attorney may devote to criminal prosecutions. But the city attorney who also acts as a prosecutor needs to clearly warn the council, city manager, chief of police, and other interested officials early in their tenure that they must not try to influence the city attorney’s exercise of prosecutorial powers, including whether to file criminal complaints in specific cases. Attempts to influence these decisions expose the city to a defense claim that probable cause does not support the decision to prosecute or that the city attorney is not independently exercising prosecutorial powers. The city attorney who has already given this warning can more easily remind officials when a highly visible or political case arises that may invite interference.

### Practice Tip:

Situations giving rise to administrative penalties can trigger a criminal prosecution of the owner of the property or business. This connection between the civil and criminal aspects of the enforcement supports the need for the city attorney’s neutrality and objectivity.<sup>13</sup> Therefore, city attorneys should apply the same standards of review when deciding whether to institute actions to abate nuisances and to enforce administrative citations for municipal code violations.

12 Rule 3.8, Special Responsibilities of a Prosecutor.

13 *Clancy, supra*, 39 Cal.3d at p. 749, and *County of Santa Clara, supra*, 50 Cal.4th at p. 53, fn. 10.

### 3. Prosecutorial Immunity

Federal law provides city attorney prosecutors with absolute immunity from liability for their acts in initiating or pursuing criminal charges.<sup>14</sup> Likewise, under state law, city attorneys are immune from any actions for malicious prosecution.<sup>15</sup> However, immunity is qualified, not absolute, regarding statements a prosecutor makes to the media regarding a criminal case.<sup>16</sup>

#### Practice Tip:

Under Rule 3.6, city attorneys should exercise restraint in making statements to the media when exercising the sovereign or unique governmental powers to file or prosecute civil or criminal proceedings to avoid materially prejudicing a pending case. The prosecutor can, however, respond to recent publicity not initiated by the prosecutor or the client to the extent reasonably necessary to protect the city or one of its officers or employees from the substantial undue prejudicial effect of that publicity. The city attorney should limit the response to providing the information necessary to mitigate the recent adverse publicity. Note also under Rule 3.8(e), the city attorney as prosecutor is additionally charged with exercising reasonable care to prevent persons under their supervision (including investigators, law enforcement personnel, employees, or other persons) from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6. Where media interest is likely, the city attorney should consider advising the “team” to limit media responses to the city attorney or a specific identified person who can be trained on the limitations of Rule 3.6.

14 *Imbler v. Pachtman* (1976) 424 U.S. 409, 432 [lead conc. opn. of White, J.] [prosecutor immune in section 1983 action]; but see *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, 273 [attorney who participated in a pre-arrest investigation functioned as a detective searching for clues, not a prosecutor, and therefore, qualified, not absolute, immunity applied] and *Burns v. Reed* (1991) 500 U.S. 478 [no absolute immunity for prosecutor’s legal advice to police officers].

15 Cal. Gov. Code § 821.6 provides: “A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.”

16 *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, 278 [“Statements to the press may be an integral part of a prosecutor’s job ... and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and ... qualified immunity is the norm for them”].

### 4 Conflicts of Interest of the City Attorney

Conflicts of interest requiring recusal of the city attorney in a criminal or quasi-criminal proceeding may arise when they acquire a conflicting personal or emotional – rather than professional – interest in the case or when the city attorney seeks to use the criminal proceedings as a means to advance “personal or fiduciary interests.”<sup>17</sup> The California Supreme Court established a two-part test: (1) is there a conflict of interest and (2) is the conflict “so grave as to render it unlikely that defendant will receive fair treatment”?<sup>18</sup> In the event of a conflict of interest in the proceeding to be brought in the name of the people, the city attorney should refer the matter to the local district attorney’s office. Examples of conflicts of interest and appearance of conflicts that would likely require recusal include the following:

- » Prosecution of officers, employees, or agents of the city for an act committed in the course and scope of their official duties.
- » Prosecution of a city council member or personnel of the city attorney’s office, or continued prosecution of a matter against an individual who becomes a council member or department staff member after the criminal action is filed.
- » Prosecution of an officer, employee, or agent of the city who has previously provided confidential information relating to the criminal prosecution to members of the city attorney’s office for use in a civil matter.
- » Cases in which an employee of the city attorney’s office or a member of an employee’s family is the victim of the alleged crime.

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

17 *People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515, 521 [citations omitted].

18 *People v. Eubanks* (1996) 14 Cal.4th 580, 594.



**Practice Tip:**

A city attorney who serves as a prosecutor cannot seek direction from the city council when filing a criminal case. However, a city attorney filing a civil action can, and in many cases must, receive direction from the city council before filing the lawsuit. In the case of a nuisance abatement action, the city attorney may bring either a criminal action in the name of the “People” or a civil action in the name of the city.<sup>19</sup> In the former case, no council direction is required or permitted, and the case cannot be discussed in closed session because the People, not the city, are the client.

One consequence of proceeding with a criminal action is that there is no attorney-client privilege with respect to the city because the city is not the client in that instance; however, the attorney work product and other privileges that are held by prosecutors would still apply.<sup>20</sup> When seeking direction from the city council regarding institution of a potential civil nuisance abatement action, the city attorney should focus the council’s deliberations on factors that will enable the city attorney to comply with their obligation to file such actions with impartiality and neutrality and to pursue fairness and the interests of justice.

### C. CRIMINAL ACTIONS CANNOT BE USED TO GAIN AN ADVANTAGE IN CIVIL CASES

A common potential pitfall involves a city attorney prosecutor’s use of their position to gain an advantage in a civil action. Rule 3.10 expressly prohibits the threat of criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. However, the comments to the Rule make clear that a statement that the lawyer will present criminal, administrative, or disciplinary charges is not prohibited *unless* it is made to obtain an advantage in a civil dispute. Further, the Rule does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Finally, the Rule does not apply to a threat to bring a civil action.

A court may apply the same ethical principles to a city attorney’s use of administrative or civil enforcement proceedings to exert leverage in existing or potential civil disputes. The key distinction in these matters is the extent to which public criminal, administrative, or disciplinary charges are used to leverage concessions in a related civil matter.<sup>21</sup>

Prior State Bar opinions and prior rules stated that a prosecutor’s “offer to dismiss a criminal prosecution may not be conditioned on a release from civil liability because that practice constitutes a threat to obtain an advantage in a civil dispute in violation of the Rules of Professional Conduct.”<sup>22</sup> But Rule 3.10 now expressly allows a government lawyer to offer a global settlement or release/dismissal agreement in connection with related criminal, civil, or administrative matters, provided that the lawyer has probable cause for initiating or continuing criminal charges.<sup>23</sup>

Additionally, in response to an offer from defense counsel, the prosecutor and defendant may stipulate to the existence of probable cause as part of the dismissal of the criminal case where there is no basis for a finding that the prosecutor sought the stipulation to gain any civil advantage. Ultimately, the question will be whether the prosecutor acted in the interest of justice or sought to coerce the defendant into agreeing to the stipulation. In this inquiry, the defendant’s access to and receipt of advice from counsel on the stipulation will also blunt a claim of coercion.<sup>24</sup>

A city attorney is not disqualified from prosecuting defendants merely because the city attorney would also defend any civil action the defendants may file against the city and arresting officers alleging, for example, excessive force in the arrest leading to the prosecution.<sup>25</sup> There is a long history of government law offices both prosecuting crimes and defending civil actions that the criminal defendants file against the government, and courts have held that the a city attorney’s dual service as a city’s criminal prosecutor and civil defender does not *per se* warrant recusal of the city attorney from the criminal proceeding.<sup>26</sup>

21 *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 317-318.

22 State Bar of Cal. Standing Comm. on Prof’l. Responsibility and Conduct, Formal Op. 1989-106 and 1991-124. State Bar Rules of Professional Conduct, Rules 5-100 and 5-110; see also *MacDonald v. Musick* (9th Cir. 1970) 425 F.2d 373, 375.

23 Rule 3.10, Comment 4.

24 *Salazar v. Upland Police Department* (2004) 116 Cal.App.4th 934, 944.

25 *People v. Municipal Court (Byars)* (1978) 77 Cal.App.3d 294, 298.

26 *Id.* at 300.

19 Cal. Code Civ. Pro. § 731.

20 Cal. Pen. Code § 1054.6.



**Practice Tip:**

City attorney offices performing civil and criminal (including code enforcement) functions should establish internal policies and procedures that avoid the intrusion or appearance of intrusion of improper influences in the criminal proceeding.<sup>27</sup> For example, guidelines that separate civil and prosecutorial functions and prohibit communications between civil lawyers and criminal prosecutors could forestall claims that the office is using the criminal process to deter the filing of civil actions against the city and its officials. To that end, the city attorney should consider assigning to a chief assistant or chief deputy final authority over prosecutorial decisions on individual cases while the city attorney retains authority over general administrative and policy matters related to the criminal functions of the office.

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

In *People v. Rhodes*, the California Supreme Court held that a city attorney with prosecutorial responsibilities may not defend persons accused of crimes.<sup>28</sup> The court observed that even in the absence of a direct conflict of interest with the city attorney's official duties, "there inevitably will arise a struggle between, on the one hand, counsel's obligation to represent his client to the best of his ability and, on the other hand, a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities."<sup>29</sup>

27 "Ethics and Responsibility for the California Prosecutor," California District Attorneys Association, 3rd Edition (1992), Section 2.9 "Dual Function Offices," pp. 55-58.

28 *People v. Rhodes* (1974) 12 Cal.3d 180, 186-187. The Los Angeles County Bar Association issued an ethics opinion reiterating that firms that engage in prosecutorial work in enforcing violations of the city's municipal code may not represent criminal defendants. Even though such representation may not result in per se reversals of criminal convictions, the association concluded such representation violates Section 41805 and prior Supreme Court decisions. L.A. Co. Bar Assn. Form. Op. 453 (1991).

29 *Id.* at p. 184.

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

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

Notwithstanding Section 41805, the Court in *People v. Pendleton* found that since a city attorney did not prosecute city crimes (although his firm did handle prosecutions for another city) and had aggressively represented the criminal defendant, there was no prejudice to the criminal defendant as a result of the city attorney's failure to comply with Section 41805 and did not reverse the criminal conviction.<sup>30</sup>

30 *People v. Pendleton* (1979) 25 Cal.3d 371, 379.

# CHAPTER 6:

## THE CITY ATTORNEY AND OUTSIDE COUNSEL

### A. INTRODUCTION

A variety of important considerations should guide the retention of outside counsel by city attorneys. This chapter discusses several factors that may come into play when selecting and working with outside counsel:

- » Developing and using standard contracting procedures.
- » Avoiding improper grounds for hiring or terminating outside lawyers.
- » Conflicts of interest.
- » Billing and other practices of the outside firm.
- » Special rules for outside counsel in civil public nuisance contingency fee arrangement.
- » Confidentiality of billing records.

### B. DEVELOP AND USE STANDARD CONTRACTING PROCEDURES

It is advisable to have procedures in place to ensure fairness in selection of outside counsel. Methods for selection can vary based on such factors as timing, cost, required technical/specialized expertise, prior experience with a firm or lawyer, and the type of legal matter involved. For example, if timing is a factor and selection must be done immediately, the city attorney may want to use legal counsel with whom they have worked successfully on prior matters.

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

### C. AVOID IMPROPER GROUNDS FOR HIRING OR FIRING OUTSIDE LAWYERS

City attorneys must select and manage outside counsel in a manner that does not result in discrimination, or create the perception of an improper basis for selecting or terminating outside counsel. It can be a challenging situation for city attorneys when, for instance, council members have expressed concern, based on either fact or perception, that their race, national origin, sex, sexual orientation, religion, age, or disability is not represented among the outside lawyers selected by the city attorney. It is also challenging if the city has not had lawyers of particular underrepresented groups in the past, and the city manager feels that it is time for the city to hire someone from those unrepresented groups.

Another difficult situation may occur when the city is contemplating a jury trial involving allegations of discrimination based on race or sex. Does the city attorney select someone because of the pressure from a council member or the city manager? Does the city attorney hire someone because they are the same race or sex as the plaintiff, assuming that those characteristics will influence the jury?

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

### 1. Rule 8.4.1

Rule 8.4.1 prohibits discriminatory conduct in a law practice, which includes governmental legal departments, on the basis of race, national origin, sex, sexual orientation, religion, age, or disability in the hiring, discharge, or other determination regarding the conditions of employment of any person. Accordingly, to avoid the risk of violating Rule 8.4.1, city attorneys should select outside lawyers based on the lawyer's or law firm's ability to provide quality legal representation in a cost-effective manner, rather than on race, national origin, sex, sexual orientation, religion, age, or disability.

### 2. State and Federal Laws

The California Constitution prohibits public entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.<sup>1</sup>

Further, public programs or benefits that are provided based on race or sex have generally been presumed invalid as suspect classifications that violate the equal protection clause, absent some showing that such discrimination was necessary to remedy prior discrimination.<sup>2</sup> Therefore, to support a determination of the necessity to hire a law firm or lawyer based on race, ethnicity, or gender, there must be a showing of past discrimination that supports the need to create specific racial-, ethnic-, or gender-hiring requirements.

#### Practice Tip:

It is important for a city attorney to consider periodically how outside counsel is obtained and if there should be a broader approach, such as a widely disseminated request for proposal for a particular project or on-call for certain categories of services. There is no guiding authority on the nature of a preferential program that would pass constitutional muster. Therefore, when selecting outside counsel, city attorneys should regularly call on lawyers without regard to race, national origin, sex, sexual orientation,

religion, age, or disability. This is an excellent way to maintain a broad base of qualified lawyers from whom to choose. If council members exert pressure to hire a lawyer or firm of a particular ethnicity, the city attorney may be able to deflect such pressure by telling them that they utilize lawyers from a diverse pool. The city attorney should also remind them that selecting or not selecting someone because of their race, national origin, sex, sexual orientation, religion, age, or disability violates the Rules of Professional Conduct for lawyers in California.

#### Practice Tip:

If pressure is being exerted by a council member or city manager to fire or stop using a lawyer or law firm that is performing in a satisfactory manner and the city attorney senses that it is because they are not viewed as a member of the "right" group, the city attorney should indicate that the matter is being handled appropriately. Further, the city attorney should advise them that, consistent with city policy and rules of professional conduct, they can fire or stop using a lawyer or firm for any lawful reason or no reason, but they cannot make those types of decisions based on illicit reasons, such as those related to race, national origin, sex, sexual orientation, religion, age, or disability.

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

While the First Amendment's guarantee of free speech may protect some independent city contractors from termination because of their speech on matters of public concern,<sup>3</sup> the Ninth Circuit Court of Appeals has held that lawyers who hold policymaking positions do not have such protection.<sup>4</sup>

1 California Constitution, art. 1, section 31 [Proposition 209].

2 *Shaw v. Reno* (1993) 509 U.S. 630, 642; *Richmond v. Croson Co.* (1989) 488 U.S. 469. As the California Supreme Court observed, "[T]he United States Supreme Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination." *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 568.

3 *Board of County Commissioners v. Umbehr* (1996) 518 U.S. 668. In *Umbehr*, the United States Supreme Court found that independent contractors are protected from termination of their at-will government contracts in retaliation for their exercise of free speech rights. The contractor must show initially that the termination was motivated by their speech on a matter of public concern. The government "will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions, and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech." *Id.* at p. 685.

4 *Biggs v. Best, Best & Krieger* (9th Cir. 1999) 189 F. 3d 989 [an associate attorney at a contract city attorney firm could be terminated because of

Nevertheless, city attorneys should exercise care in decisions regarding termination of outside lawyers because they are outspoken critics of the city. Depending on the nature of comments made, the role played by the outside attorney, and issues related to a lawyer's duty of loyalty to their client, it can be difficult to know if termination on such grounds will or will not be protected by the First Amendment.

#### D. CONFLICTS OF INTEREST

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

##### Practice Tip:

It may become embarrassing if it is discovered that an outside firm represents another client that is adverse to the city. Even if such representation may not be "adverse" for purposes of Rules 1.7 and 1.9, the situation will likely still be problematic.

One way to avoid perceived conflict problems is to include a clause in the engagement agreement that prohibits the lawyer from representing clients who are adverse to the city. In considering issues related to waiver and consent, the city attorney should keep in mind who has authority to grant a waiver and give informed consent to the representation. Depending on the city's practice or the language in the engagement agreement, the city attorney, the city manager, or the city council may give such consent.

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

The Political Reform Act and Fair Political Practices Commission (FPPC) regulations (see chapter 3), along with local ordinances or rules, set forth guidelines regarding gifts to public officials and employees. City attorneys, like many other public officials, must be sure to report, as required, the value of gifts received from lawyers. City attorneys should keep track of meals paid for by outside counsel,

political activity related to the city since she acted as a policymaker]. See also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

tickets to various events, gifts of spa treatments, and so on that are provided by law firms doing business with the city. While lawyers who deal regularly with municipalities are probably aware of the gift restrictions, those who are newer to city representation may be unaware of the requirements and may need to be educated regarding the FPPC rules regarding gifts.

#### E. BILLING AND OTHER PRACTICES OF THE OUTSIDE FIRM

The city attorney or their staff should review the bills and monitor the billing and other practices of outside counsel in order to avoid questionable ethical practices by outside counsel. The city attorney, or another lawyer or person familiar with the matter being handled, should review the bills submitted by the outside lawyer. The billing statement should provide the city attorney's office with a quick summary of case activity and tell how much time is spent on various aspects of a matter.

##### Practice Tip:

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

It is important that the city attorney be aware of the status of matters handled by outside counsel. Frequently, the city attorney is charged with responsibility for all legal matters in which the city is involved. Reviewing the bills, pleadings and correspondence, and regular updates from outside counsel is important both to the city attorney's ability to manage that responsibility and to their ability to answer questions from staff or council members about a particular matter. Accordingly, any agreement with the outside law firm should designate that the city attorney is in charge of all legal services and tactical decision-making. The city council and city manager should also understand that the city

attorney must have the discretion to control the manner in which litigation or other legal matters are handled, and that appropriate oversight is being exercised regarding the firm.

### Practice Tip:

Supervising outside counsel includes doing such things as watching them in court or at a hearing, reviewing their work product, serving as a conduit with staff regarding discovery, and periodically commenting on documents they prepare. Also, the city attorney should be in regular contact and communicate with the outside lawyer regarding the matter, including prospects for settlement and alternate means of dispute resolution. The city attorney should ensure that outside counsel does not delegate any aspect of the case without prior consultation with and approval by the city attorney. That being said, the city attorney and the outside lawyer should view the relationship as a partnership to provide the client with the best possible representation.

## F. SPECIAL RULES FOR OUTSIDE COUNSEL IN CIVIL PUBLIC NUISANCE CONTINGENCY FEE ARRANGEMENTS

At times, cities may find it advantageous to employ outside counsel on a contingency fee basis. Special rules apply when outside counsel is retained on a contingency fee basis to handle civil nuisance actions.

A public lawyer or outside counsel acting as a public lawyer must observe the rules of prosecutorial neutrality even in *civil* nuisance actions by avoiding a pecuniary interest in the outcome of the matter.<sup>5</sup> California courts have general authority to disqualify counsel when necessary in the furtherance of justice.<sup>6</sup> The courts will exercise their authority to disqualify outside counsel hired on a contingency fee basis by a city to prosecute a civil public nuisance action when important constitutional concerns (such as the First Amendment) are implicated, ongoing business activity is threatened, and there is a threat of criminal liability.<sup>7</sup>

In *County of Santa Clara v. Superior Court*, the California Supreme Court has upheld the use of contingency fee arrangements with outside counsel in civil public nuisance actions, while pointing out that “a heightened standard of neutrality is required for attorneys prosecuting public-nuisance actions on behalf of the government.”<sup>8</sup> This heightened standard is generally met, and the retention of private counsel on a contingent-fee basis is permissible, if neutral, conflict-free government attorneys retain the power to control and supervise the litigation and the government’s action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business.<sup>9</sup>

The power to “control and supervise” public-nuisance actions must be reflected in a contingency fee agreement, which must include several specific criteria indicating control of “critical discretionary decisions” by the supervising in-house public agency attorney, including at a minimum the following:

- » The authority to settle the case.
- » The ability for any defendant to contact the lead government attorneys directly.
- » The retention by the government attorneys of complete control over the course and conduct of the case.
- » The retention by the government attorneys of veto power over any decisions made by outside counsel.
- » The government attorney with supervisory authority must be personally involved in overseeing the case.<sup>10</sup>

<sup>5</sup> *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 50.

<sup>6</sup> *Id.* at p. 48.

<sup>7</sup> *Id.* at p. 54.

<sup>8</sup> *Id.* at p. 57.

<sup>9</sup> *Id.* at p. 58.

<sup>10</sup> *Id.* at pp. 63-64.

## G. CONFIDENTIALITY OF OUTSIDE COUNSEL BILLING RECORDS

The League of California Cities publication *The People’s Business: A Guide to the California Public Records Act (2022)* contains an excellent discussion on disclosure of outside counsel billing records. In general, billing records are exempt from disclosure under the attorney-client privilege or attorney work product doctrine to the extent they describe an attorney’s impressions, conclusions, opinions, legal research, or strategy.<sup>11</sup> Recent court decisions have also drawn a distinction as to whether a matter is pending, or has concluded, although even some fee totals for concluded matters may not be subject to disclosure.<sup>12</sup>

### PRACTICE TIP:

City attorneys may wish to direct outside counsel to provide a cover sheet with a billing summary showing disclosable information, such as who did the work, the number of hours expended, and the amount of the bill.

11 *U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189; *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127; *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639.

12 Cal. Gov. Code § 7927.705, formerly 6254(k); The Ninth Circuit Court of Appeals has stated that “[o]ur decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.” *Clarke v. American Commerce Nat’l Bank* (1992) 974 F.2d 127, 129. *United States v. Amlani* (1999) 169 F.3d 1189, 1194; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 [approving redaction of law-firm billing records, “to show [only] the information that is not work product – the hours worked, the identity of the person performing the work, and the amount charged.”] But see *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 297-298 [“When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees....The same may not be true for fee totals in legal matters that concluded long ago.”]



# CHAPTER 7:

## THE DUTY OF CONFIDENTIALITY

### A. INTRODUCTION

This chapter examines the ethical duty of city attorneys to maintain the confidentiality of matters involving their clients. It also discusses the impact of whistleblower laws on city attorneys' ethical responsibilities of confidentiality.

### B. CONFIDENTIALITY

Among the most important duties an attorney owes to the client is the duty of confidentiality (see chapter 1). Given that confidentiality is the cornerstone of trust between the client and the attorney, California public policy has long held this duty is paramount and may not be breached except in very limited circumstances. Business and Professions Code subsection 6068(e) requires an attorney to observe the following:

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

The California Supreme Court put it this way:

“Protecting the confidentiality of communications between attorney and client is *fundamental to our legal system*. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring ‘the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.’”<sup>1</sup>

1 *People, ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 [emphasis added, citations omitted].

Additionally, Evidence Code section 954 allows a client to refuse to disclose, and to prevent others from disclosing, confidential communications between the client and the client's attorney. The attorney-client relationship has been characterized by at least one court as “sacred,”<sup>2</sup> while another court has admonished that the relationship “must be of the highest character.”<sup>3</sup> The duty of confidentiality survives the termination of the attorney-client relationship, apparently indefinitely.<sup>4</sup>

Furthermore, Evidence Code section 955 requires the lawyer to claim the privilege: “The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the complication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.”

If a city attorney finds themselves in federal court on behalf of a client, the Federal Rules of Evidence include specific provisions related to the attorney-client privilege, and circumstances under which it may be waived in the context of the federal matter. The Rules generally provide that the federal common law on privileges controls unless otherwise provided for in the United States Constitution, federal legislation, or a rule of the Supreme Court,<sup>5</sup> but they also contain specific provisions related to waivers of the attorney-client privilege in federal litigation.<sup>6</sup> There is an ongoing debate as to the scope of the privilege in the federal context, and it is likely that the scope of the privilege is narrower in federal proceedings.

2 *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 457 [quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600].

3 *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167 [citations omitted].

4 *Ibid.* [“So fundamental is this precept that an attorney continues to owe a former client a fiduciary duty even after the termination of the relationship.”]

5 Federal Rules of Evidence, Rule 501.

6 Federal Rules of Evidence, Rule 502.

## 1. Confidentiality in the Public Sector

The duty of confidentiality takes on a special meaning in the public sector where the client is a public entity and not an individual.<sup>7</sup> In the governmental setting, the client cannot speak for itself, but, rather, must rely on its elected and other authorized officials to act in its interest. Thus, the issues of who possesses and who may exercise the attorney-client privilege, and to whom the public entity attorney owes the duty of confidentiality, become particularly relevant when the city attorney faces or suspects official malfeasance.

## 2. Government Malfeasance

In the spring of 2000, Cindy Ossias, a government attorney for the California Department of Insurance, disclosed confidential information that allegedly evidenced governmental abuse of authority in her department. The State Bar's Office of Trial Counsel (OTC) investigated her actions for potential violations of the duty of confidentiality. While the OTC ultimately declined to prosecute Ossias, her story reflects the difficulty attorneys face in government representation.

The Rules powerfully reinforce the standard of confidentiality set forth in Business and Professions Code section 6068(e), even in the context of an attorney "know[ing] that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization."<sup>8</sup> The Rules provide that the attorney "shall not reveal information protected by Business and Professions Code section 6068, subdivision (e)," and if the client "insists upon action or fails to act in a manner that is a violation of a legal obligation to the organization or a violation of law and is reasonably imputable to the organization, and is likely to result in substantial injury to the organization," the attorney's response may include "the lawyer's right, and, where appropriate, duty to resign or withdraw in accordance with rule 1.16."<sup>9</sup> This duty is the highest duty for a city attorney to preserve and apply in practice.

The Rules require attorneys to protect the confidences of the client, at all costs, while state whistleblower statutes (discussed below) encourage all government employees to report government malfeasance. 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.

Courts have expressed the principle that city attorneys are subject to special ethical obligations in the "furtherance of justice."<sup>10</sup> In the context of whistleblowing on suspected malfeasance, that special obligation appears in conflict with the duty of confidentiality. For example, if city officials empowered to protect the city are themselves guilty of violating the law or committing waste that harms the city, then how can the city attorney protect their client? While the client is not the individual official who committed the malfeasance, that official may be the highest officer over the engagement. If so, then to whom may the city attorney disclose the malfeasance?

Even when an attorney representing an organization becomes aware that an agent of the organization intends to commit a crime that may result in substantial injury to the organization, the attorney "shall not reveal information protected by Business and Professions Code section 6068, subdivision (e)."<sup>11</sup> The attorney has limited options, including (1) urging the agent to reconsider their actions or (2) going up the chain of command to the highest level of the organization authorized to act. If the highest level of the organization refuses to act and no other legally permissible options can be discerned, then the attorney's only remaining option may be to resign.<sup>12</sup> Rule 1.16 delineates the circumstances under which withdrawal from representation of a client is mandatory and when it is permissive.<sup>13</sup>

While Rule 1.13 makes the duty of confidentiality paramount, it does not directly address the unique nature of government representation as it relates to either the duty of confidentiality or whistleblowing. A 2001 Attorney

7 *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 35 [holding that the client of the county counsel was the county, acting through its board of supervisors].

8 California Rules of Professional Conduct, Rule 1.13(b).

9 *Id.* at subsections (c) and (d).

10 In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 745 [a private attorney retained by a city under a contingent fee arrangement to prosecute civil nuisance abatement actions was ordered disqualified, in the interests of justice, because his personal stake in the actions was inconsistent with the neutrality required of a government lawyer when prosecuting a nuisance abatement action].

11 California Rules of Professional Conduct, Rule 1.13(c).

12 *Id.* at subsection (d).

13 California Rules of Professional Conduct, Rule 1.163-700(a) and (b).

General opinion did, however, address this issue.<sup>14</sup> The opinion noted that, in some respects, “[R]ule [1.13] appears designed to meet the concerns of the private sector better than the concerns of public practice” and recognized there are real differences between city attorneys and private practitioners representing corporate entities.<sup>15</sup> The opinion ultimately concluded, however, that the Legislature *did not* intend to “supersede or impair the attorney-client privilege” when it enacted several laws (discussed below) to protect government employee whistleblowers.<sup>16</sup> Accordingly, the city attorney’s duty is to maintain client confidentiality.

If the highest city officer refuses to act, or is also guilty of malfeasance, then should the city attorney keep quiet and knowingly allow their client, the city, to suffer due to the putative illegal actions of its individual representatives? While Rule 1.13 requires the city attorney to go up the chain of command, it prohibits the city attorney from disclosing any confidential information beyond the organization. If the highest authority is the city council, and not a particular individual within city government, then the city attorney may address their concerns to the council itself. Since California cities function under various forms of city government (council-manager, strong mayor, etc.), the general rule should be considered in light of the particular governing structure of the city in question. For example, in a strong-mayor form of government, the mayor may be the highest level of authority empowered to speak or act on behalf of the city, though even that broad authority may be limited or applied based on particular charter or municipal code provisions.

#### Practice Tip:

City attorneys facing the difficult question of whether they should or must withdraw from representing a client that may be violating the law may wish to seek the advice and assistance of special ethics counsel.

### 3. Grand Jury Proceedings

For a discussion of the privilege in grand jury proceedings, see chapter 8.

<sup>14</sup> 84 Ops.Cal.Atty.Gen. 71 (2001).

<sup>15</sup> *Id.* at p. 74.

<sup>16</sup> *Id.* at p. 76.

## C. WHISTLEBLOWING STATUTES AND THE DUTY OF CONFIDENTIALITY

To protect government employees who report criminal action by government officials, the California Legislature enacted four “whistleblower” statutes: the California Whistleblower Protection Act,<sup>17</sup> the Whistleblower Protection Act,<sup>18</sup> the Local Government Disclosure of Information Act,<sup>19</sup> and the Whistleblower Protection Statute<sup>20</sup> (jointly the “Whistleblower Laws”). The legislation sought to prevent abuses within the government by protecting employees who might otherwise not report wrongdoing for fear of losing their jobs. The Whistleblower Laws built upon the history of earlier statutes related to reporting government malfeasance by expanding whistleblower protections.<sup>21</sup> The Whistleblower Laws protect from retaliation those public employees who disclose nonpublic information regarding malfeasance in their respective agencies that harms the public interest.

### 1. California Whistleblower Protection Act (CWPA)

The CWPA protects employees of state agencies who disclose activities that (1) violate state or federal laws or regulations, (2) constitute economic waste, or (3) involve gross misconduct, incompetence, or inefficiency.<sup>22</sup> The Office of the State Auditor administers the law and investigates and reports on improper governmental activities.

### 2. Whistleblower Protection Act (WPA)

The WPA expands the protections found in the CWPA and gives state employees the right to disclose government malfeasance to the Legislature.<sup>23</sup> However, the WPA includes language that a court would likely interpret as excluding government attorneys’ disclosure of confidential client information from the protections of the WPA. Specifically,

<sup>17</sup> Cal. Gov. Code §§ 8547-8547.12.

<sup>18</sup> Cal. Gov. Code §§ 9149.20-9149.22.

<sup>19</sup> Cal. Gov. Code §§ 53296-53297.

<sup>20</sup> Cal. Lab. Code § 1102.5.

<sup>21</sup> Former Cal. Gov. Code §§ 10540, 10541, 10542, 10543, 10544, 10545, 10546, 10547 (Stats.1981, ch. 1168, § 7, pp. 4694-4696); former Cal. Gov. Code § 10549 (Stats.1984, ch. 1212, § 6, p. 4160); former Cal. Gov. Code § 10548 (Stats.1986, ch. 353, § 4, pp. 1511-1512); former Cal. Gov. Code §§ 10550 and 10551 (Stats.1988, ch. 1385, § 3, pp. 4668-4669).

<sup>22</sup> Charles S. Duskow, “The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere),” 25 Whittier L. Rev. 21 (2003), at p. 30 [citing Cal. Gov. Code § 8547.2].

<sup>23</sup> Duskow, *supra* note 1, at p. 31 [citing Cal. Gov. Code § 9149.21].

the WPA states “[n]othing in [the operative] section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.”<sup>24</sup>

### 3. Local Government Disclosure of Information Act (LGDI)

The LGDIA extends whistleblower protections to the municipal level by encouraging local government employees to disclose information regarding gross mismanagement, a significant waste of public funds, abuse of authority, or dangers to public health and safety.<sup>25</sup>

### 4. Whistleblower Protection Statute (WPS)

California Labor Code section 1102.5 prohibits employers from retaliating against an employee for disclosing a violation of state or federal law.<sup>26</sup>

## D. THE WHISTLEBLOWER LAWS VS. THE DUTY OF CONFIDENTIALITY

When updating the Rules of Professional Conduct in 2018, the California State Bar declined to modify Rule 1.13 to protect public agency attorneys from professional discipline in the event they choose to disclose confidential information relating to official malfeasance, noting that such a modification would conflict with the fundamental duty of confidentiality state law imposes on attorneys.<sup>27</sup> Also, two attempts by the Legislature to provide that protection were vetoed.<sup>28</sup>

The Attorney General has also addressed whether the Whistleblower Laws supersede existing statutes and rules governing the attorney-client privilege.<sup>29</sup> In determining that Whistleblower Laws do not supersede those statutes and rules, the Attorney General relied on the rule of statutory reconciliation, the failure of the Legislature to express its intent to supersede the “strong and long established public policy” of client confidentiality and the separation of powers doctrine.<sup>30</sup>

### 1. Statutory Reconciliation

The Attorney General stated that “statutes must be harmonized to the extent possible ... and construed in the context of the entire system of which they are a part.”<sup>31</sup> Some of the Whistleblower Laws included language permitting disclosure “to the extent not expressly prohibited by law.” The Attorney General interpreted the express enumeration of statutory bans that would not apply to whistleblowers to manifest legislative intent to not alter the obligation of attorneys under Business and Professions Code subsection 6068(e), a current and well-established law that is not enumerated in the Whistleblower Laws.<sup>32</sup>

### 2. Lack of Express Provisions Overturning Well-Established Law

The Attorney General noted that in *General Dynamics Corp. v. Superior Court*, the court made clear that “[e]xcept in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.”<sup>33</sup> Since state law does not make clear an intent to either change the client confidentiality laws or modify the existing ethical code provisions, the Attorney General declined to conclude the Whistleblower Laws supersede the duty of confidentiality.<sup>34</sup>

24 *Id.* [citing Cal. Gov. Code § 9149.23(c)].

25 Doskow, *supra* fn. 1 at p. 31, [citing Cal. Gov. Code § 53296(c)].

26 Cal. Lab. Code § 1106 and *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537 [applying that section to public employees]. However, *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191 [determining that section only applies to disclosure of state or federal laws, not enactments of a charter city].

27 Report of the Commission for the Revision of the Rules of Professional Conduct, Rule 1.6, at p. 49 [referencing a prior failed attempt to revise Rule 3-600], available at [http://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final\\_rules/rrc2-1.6\\_3-100-all.pdf](http://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.6_3-100-all.pdf).

28 AB 363 (2002) would have protected city attorneys from professional discipline for referring a matter regarding malfeasance in office (1) to a higher authority in the organization, and (2) to law enforcement in specified circumstances. However, that bill was vetoed by Gov. Gray Davis. AB 2713 (2004) would have expanded the exception to the duty of confidentiality by authorizing an attorney “who, in the course of representing a governmental organization, learns of improper governmental activity ... to refer the matter to law enforcement or to another governmental agency and would exempt the attorney from disciplinary action for making a referral of the matter.” AB 2713 was vetoed by Gov. Arnold Schwarzenegger.

29 84 Ops.Cal.Atty.Gen. 71 (2001).

30 *Id.* at p. 77.

31 *Id.* at p. 76.

32 *Id.* at p. 77.

33 *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190.

34 84 Ops.Cal.Atty.Gen., *supra*, at pp. 76-78.

### 3. Separation of Powers

The Attorney General also made a brief separation of powers argument noting the regulation of the practice of law has been “recognized to be among the inherent powers of the courts; the courts are vested with the exclusive power to control the admission, discipline, and disbarment of persons entitled to practice before them.”<sup>35</sup> The opinion recognized the tension between the Legislature and the courts in this area, stating the Legislature may regulate and control the practice of law to a “reasonable degree,” but may not restrict the courts’ authority to discipline persons entitled to practice before them.<sup>36</sup> Any attempt to do so would “overstep constitutional bounds.”<sup>37</sup>

No law requires a city attorney to become a whistleblower, and, as stated previously, no law protects city attorneys who choose to do so. Nevertheless, a city attorney representing a client who is committing malfeasance in office is confronted with the personal ethical choice of whether to terminate that representation knowing they cannot make a public disclosure about the reasons underlying that potential departure.<sup>38</sup>

As a public official and officer of the court, a city attorney may feel a personal obligation to make the public aware of wrongdoing where communicating with the highest level of authority in the city has not succeeded in bringing about a termination of the wrongdoing. However, disclosure may subject the city attorney to charges of violating Rule 1.13 and Business and Professions Code section 6068.

### E. FEES AND BILLINGS

Occasionally the billing records of a contract city attorney or outside counsel are sought through a public records request or other means, and the issue arises as to whether those records are confidential. Such demands can originate internally, such as from an individual city council member(s), or from external sources, including opposing legal counsel. Generally, billing records pertaining to pending litigation are not subject to disclosure, but other billing records, including billings from closed matters and bill totals, may be. The response to such requests requires a careful, fact-specific evaluation by the city attorney as to whether the content of the billing entries disclose substantive communications pertaining to the legal consultation.<sup>39</sup> Disclosure of privileged materials requires a majority vote of the city council.

35 84 Ops.Cal.Atty.Gen., *supra*, at p. 78 [citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 543].

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

37 84 Ops.Cal.Atty.Gen., *supra*, at p. 78.

38 California Rules of Professional Conduct, Rules 1.13(d) and 1.16.

39 *County of Los Angeles Board of Supervisor v. Superior Court* (2016) 2 Cal.5th 282.



# CHAPTER 8:

## THE CITY ATTORNEY AND GRAND JURIES

### A. INTRODUCTION

City attorneys are often called upon to help their clients respond to civil and criminal grand jury investigations, subpoenas, reports, and, in rare cases, state and federal indictments. The vast majority of grand jury issues that city attorneys face arise out of grand juries acting in their civil capacity. This chapter addresses the ethical issues that may arise in each of these contexts and the roles and duties of the city attorney.

### B. CALIFORNIA LAW

California requires the summoning of a grand jury each year in every county.<sup>1</sup> California's statutory provisions concerning the formation, composition, and functioning of grand juries are found in Penal Code sections 888 through 939.91.<sup>2</sup> A grand jury has 11 to 23 persons (depending on the size of the county) "returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."<sup>3</sup>

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

- » Act as the public's "watchdog" by investigating and reporting on local government operations, accounts, and records.<sup>4</sup>
- » Examine criminal charges and determine whether criminal indictments should be returned.<sup>5</sup>
- » Hear allegations regarding willful or corrupt misconduct by a public official and determine whether to present formal accusations requesting the official's removal from office.<sup>6</sup>

Grand juries have only those powers expressly granted by statute.<sup>7</sup> Accordingly, the authority of grand juries to investigate cities and issue reports is only as extensive as

expressly authorized by statute.<sup>8</sup> The authority of grand juries to investigate cities, counties, and special districts is set forth in Penal Code sections 925 through 933.6.

Initially, the investigatory power of grand juries was limited to cities' finances. But in 1983, the grand juries' authority to investigate cities was greatly expanded, and grand juries are now authorized to "examine the books and records of any incorporated city" as well as "investigate and report upon the operations, accounts, and records of the officers, departments, functions, and the method or system of performing the duties of any such city."<sup>9</sup> The grand jury's authority, however, may be limited to procedural matters and not substantive policy concerns.<sup>10</sup>

Civil grand juries gather most of their information in committees of at least three grand jurors that interview city officials and take the information back to the full grand jury. Most information is confidential, but a grand jury may obtain judicial approval to release non-privileged information to the public.<sup>11</sup>

In conducting investigations, grand juries may employ experts and assistants to supplement their investigations.<sup>12</sup> Grand juries may also request issuance of subpoenas to compel witnesses to attend grand jury proceedings.<sup>13</sup>

When a grand jury is questioning witnesses at a grand jury session, the presence of non-witnesses (including counsel for witnesses in civil proceedings) is prohibited.<sup>14</sup> This prohibition protects the confidential nature of the grand jury proceedings. Also, a grand jury may admonish a

1 Cal. Cons. Art. I, § 23.

2 Cal. Pen. Code §§ 888 *et seq.*

3 Cal. Pen. Code §§ 888 and 888.2.

4 Cal. Pen. Code §§ 925 *et seq.*

5 Cal. Pen. Code § 917.

6 Cal. Pen. Code § 922; Cal. Gov. Code §§ 3060 *et seq.*

7 *McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1172.

8 Thomas B. Brown, "The Investigatory and Reporting Authority of Civil Grand Juries Acting in Their 'Watch Dog' Capacity," League of California Cities Annual Conference 1, i, ii (1995) [footnote omitted]. The grand juries' authority may or may not apply in a charter city. *See e.g., People v. Hulbert* (1977) 75 Cal.App.3d 404; *Curphey v. Superior Court In and For Los Angeles County* (1959) 169 Cal.App.2d 261.

9 Cal. Pen. Code § 925a.

10 78 Ops.Cal.Atty.Gen 290 (1995).

11 Cal. Pen. Code §§ 924, 924.1-924.6, 939.1; *City of Woodlake v. Tulare Cnty. Grand Jury* (2011) 197 Cal.App.4th 1293.

12 Cal. Pen. Code § 926(a).

13 Cal. Pen. Code § 939.2.

14 Cal. Pen. Code § 939; *Farnow v. Superior Court* (1990) 226 Cal.App.3d 481, 489. Minors are entitled to be accompanied under limited circumstances per Penal Code section 939.21.



witness not to disclose what the witness learns in the grand jury room, but it cannot require the witness to execute an admonishment form.<sup>15</sup>

Although there is no “right” to counsel in a grand jury interview, city staff members may ask the city attorney to accompany them to these interviews to explain the laws that underlie the staff action on a specific matter.<sup>16</sup> The city attorney should advise the official that the city attorney may not be present in the interview without the consent of the members of the committee. Should the interviewee want the presence of the city attorney during the interview, the official who will be meeting with the grand jurors should ask in advance of the meeting whether the city attorney may be present during the interview.

#### Practice Tip:

Although an interviewee’s request for the presence of counsel during the interview is rarely granted, the city attorney may be available to the interviewee either outside the interview room or by telephone. The city official being interviewed may request a “break” in the interview to consult with counsel should the need arise. As a matter of practice, the presence, or availability, of the city attorney during the grand jury interview should be at the discretion of the city or the city official.

While grand juries have much latitude in conducting investigations, the California Attorney General has opined that grand juries may not compel the disclosure of information protected by attorney-client or attorney work product privileges.<sup>17</sup> In fact, based on the broad interpretation of the Attorney General regarding the applicability of the attorney-client and attorney work product privileges in the non-criminal setting, it is arguable that grand juries are not entitled to other materials or information protected by constitutional, statutory, or common law privileges.<sup>18</sup> It is possible, however, that this standard could be relaxed when grand juries are investigating misconduct of public officials.

15 70 Ops.Cal.Atty.Gen. 28 (1987).

16 *Farnow v. Superior Court* (1990) 226 Cal.App.4th 481.

17 86 Ops.Cal.Atty.Gen. 101 (2003).

18 70 Ops.Cal.Atty.Gen. 28 (1987).

#### Practice Tip:

Prior to conducting a formal investigation, grand juries will sometimes issue requests for information and documents to determine whether the grand jury should initiate a formal investigation. These requests for information are often directed to staff, and the city attorney should ensure that a process is in place so the city attorney is notified of these requests and available to assist city staff with the response. The city attorney should assist the client in responding to the request made while maintaining any privileges or confidential information that may be sought through the request.

After a civil investigation is concluded, the grand jury issues a final report that contains its findings and recommendations.<sup>19</sup> No later than 90 days after the grand jury has submitted its report, Penal Code section 933(c) requires “agencies” (including cities, housing authorities, and districts) to submit a written response to the grand jury report to the presiding judge of the superior court.<sup>20</sup> The respondent must respond in writing to each finding, indicating whether it agrees or disagrees, in whole or in part, with the finding.<sup>21</sup> In addition, the written response must indicate whether the recommendation has been implemented, will be implemented, requires further analysis, or will not be implemented.<sup>22</sup> Although not required by statute, some municipalities have expanded the municipalities’ obligations relating to implementation of agreed-upon recommendations.<sup>23</sup>

Also, grand juries may issue a final report that is not directed to the city council or city manager.<sup>24</sup> For instance, a grand jury may send the final report to the chief of police for response. In these situations, it is important to confirm that a process is in place to ensure that the city council and city manager are made aware of the final report so the city council can approve a response to the findings and recommendations as required by law.

19 Cal. Pen. Code § 933.

20 Cal. Pen. Code § 933, subd. (c).

21 Cal. Pen. Code § 933.05, subd. (a).

22 Cal. Pen. Code § 933.05, subd. (b).

23 San Francisco Administrative Code, Chapter 2, Article 2, section 2.10. City of San Diego Council Policy 000-33 (Apr. 22, 2015). San Diego Admin. Reg. 10.02.

24 Cal. Pen. Code § 933, subd. (a).

### C. FEDERAL LAW

Grand juries are recognized in the Fifth Amendment to the United States Constitution, which provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”<sup>25</sup> This protects against unwarranted prosecution by requiring charges to be brought by presentment or indictment.<sup>26</sup>

The formation, composition, and function of federal grand juries can be found in Rule 6 of the Federal Rules of Criminal Procedure.<sup>27</sup> Federal grand juries are formed by the court’s order when “the public interest so requires” and are composed of between 16 and 23 persons.<sup>28</sup> However, no matter how many grand jurors are on the grand jury, it takes a vote of 12 grand jurors to issue an indictment.<sup>29</sup>

Currently, there are two different types of grand juries in the federal system: “regular” grand juries and “special” grand juries.<sup>30</sup> A regular grand jury primarily considers whether, based on the evidence presented, there is probable cause to believe a crime has been committed and that they should “return” an indictment (i.e., charge a person with those crimes).<sup>31</sup> In addition to regular grand juries, in 1970, to combat organized crime, Congress created special grand juries that may issue not only an indictment but also a report on its investigation. Generally, special grand juries are created for specific investigative purposes.<sup>32</sup>

A federal grand jury is highly dependent upon the prosecutor for many of its functions. This is because, while the grand jury can also investigate matters and subpoena evidence, it is usually the prosecutor who proposes the charges and gathers the required evidence for consideration.<sup>33</sup>

Like California grand juries, the power of the federal grand jury to investigate and subpoena documents is limited. Under Rule 501 of the Federal Rules of Evidence, privileges are “governed by the principles of common law.”<sup>34</sup> Rule 1101(d)

(2) of the Federal Rules of Evidence states that the privileges are applicable to grand jury proceedings.<sup>35</sup> Thus, the attorney-client privilege and attorney work product doctrine recognized by Rules 501 and 502 of the Federal Rules of Evidence apply to grand jury proceedings. However, because federal grand juries are criminal in nature, the privileges applicable to federal cases are more limited. In fact, the Supreme Court has warned against expansive construction of privileges for criminal cases since the proceedings of a criminal trial are a “search for the truth,” and civil cases do “not share the urgency or significance of the criminal subpoena request.”<sup>36</sup>

### D. ETHICAL ISSUES RAISED BY WORK INVOLVING GRAND JURIES

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

- » Who is the client?
- » What materials are not protected by the attorney-client, attorney work product, and other privileges?
- » When are city attorneys required to recuse or disqualify themselves?

#### 1. Identifying the Client

The city attorney represents the city as a legal entity and not individual elected officials or staff who may be the subjects of a grand jury investigation (see chapter 1). While the city is the client, in certain circumstances, it may be in the city’s interest to disclose information that would be subject to the attorney-client privilege so that the grand jury is fully informed of all relevant facts. In this instance, the city attorney should seek a waiver of the attorney-client privilege from the city council or other authorized official or agency.

25 U.S. Constitution amendment V.

26 *Wood v. Georgia* (1962) 370 U.S. 375, 390.

27 Fed. R. Crim. P. 6.

28 Fed. R. Crim. P. 6(a)(1).

29 Fed. R. Crim. P. 6(f).

30 Fed. R. Crim. P. 6; 18 U.S.C.A. § 3331-3334.

31 Fed. R. Crim. P. 6.

32 *United States v. Handley* (N.D.Ind. 1976) 407 F.Supp. 911, 914; 18 U.S.C.A. § 3333(a).

33 *United States v. Sells Eng’g, Inc.* (1983) 463 U.S. 418, 430.

34 Fed. R. Evid. 501.

35 Fed. R. Evid. 1101(d)(2).

36 *In re: Bruce R. Lindsay* (D.C. Cir. 1998) 148 F.3d 1100; *Cheney v. U.S. Dist. Court for Dist. of Columbia* (2004) 542 U.S. 367, 384.

**Practice Tip:**

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

**2. The Attorney-Client Privilege and Attorney Work Product Privilege**

As referenced above, grand juries may not compel the disclosure of information protected by attorney-client or attorney work product privilege.<sup>37</sup> In California, despite the absence of an express statutory exemption from the privilege for grand jury proceedings, the Attorney General has issued an opinion that the protections for attorney-client communications afforded by Evidence Code section 910 apply to grand jury proceedings.<sup>38</sup>

The California Attorney General has also opined that the attorney work product privilege applies in county grand jury proceedings because of the common law's recognition of the broad applicability of the privilege, the similarities between grand jury proceedings and pretrial discovery, and "the various privileges found in the Constitution, statutes and common law historically have been applied in grand jury proceedings."<sup>39</sup> It is this last rationale that allows cities to put up a broad resistance to grand jury inquiries of privileged communications in grand jury proceedings. But as noted above in discussing the attorney-client privilege in the context of a federal grand jury's investigation of a federal official, courts could conclude that in the context of public agencies the need for the grand jury to conduct thorough investigations outweighs the protections of attorney-client privilege.

Public entities have a right to assert the attorney-client privilege with respect to communications made in the course of the attorney-client relationship.<sup>40</sup> With regard to city business, the city itself is the client; however, the city is not a natural person and it communicates – like other

corporations – through people.<sup>41</sup> City officers and employees may claim the attorney-client privilege derivatively. At times, the attorney-client privilege may attach to communications between the city attorney and other city officials.<sup>42</sup>

Communications between the city attorney and the mayor, council members, city manager, city clerk, city treasurer, and department heads, while acting in their official capacity, are protected by the attorney-client privilege. While the applicability of the attorney-client and/or attorney work product privileges to public officials may be more limited in criminal matters, it appears reasonably settled that where city staff or officials are acting in their official capacities and do not have interests adverse to the city, and there is no alleged wrongdoing, the advice they have sought from, the information they have provided to, and the advice they have received from the city attorney are protected by attorney-client privilege, and a grand jury may not obtain such information by subpoena.

That said, the attorney-client privilege does not protect, and a grand jury can obtain, information disclosed to a city attorney by a staff member or official who was not acting in their official capacity. Similarly, the attorney-client privilege does not apply to communications to the city attorney from staff members or officials whose interests are adverse to the city's interest.<sup>43</sup> For example, the attorney-client privilege will not shield communications or requests for advice regarding crime or fraud.<sup>44</sup>

As discussed in chapter 7, federal courts have limited the applicability of the attorney-client privilege when a federal grand jury is investigating a federal official for commission of a crime in office and the federal official asserts the attorney-client privilege to prevent the grand jury from questioning the government attorneys who advised the official. The core rationale for the decision is that the attorney-client privilege belongs to the government and should not prevent the grand jury, another governmental agency, from attaining information regarding official misconduct in office. A federal grand jury might take the same approach when investigating local and other non-federal officials.

37 70 Ops.Cal.Atty.Gen. 28 (1987).

38 70 Ops.Cal.Atty.Gen. 28 (1987); Cal. Evid. Code §§ 901, 910, 950.

39 70 Ops.Cal.Atty.Gen. 28 (1987).

40 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370-72.

41 *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 736-38; *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050, 1059 n.7.

42 70 Ops.Cal.Atty.Gen. 28 (1987).

43 Cal. Evid. Code §§ 950 *et seq.*

44 Cal. Evid. Code § 956.

**Practice Tip:**

City attorneys should remind any staff member or official who starts to provide information about possible criminal wrongdoing that the attorney-client privilege does not protect this information and that the city attorney may be compelled to disclose it to the grand jury and is obligated to disclose it to the city council.

In circumstances where a staff member is being asked to disclose information to a grand jury that may be subject to the attorney-client privilege, the city attorney must keep in mind who holds the privilege for the city, which will usually be the city council. In most cases, as holder of the privilege, only the city council or other highest agency or officer with jurisdiction over the subject matter – not individual council members, or the staff member or attorney being contacted by the grand jury – can waive the privilege and disclose the information. In the event the city council or other Brown Act body holds the privilege, it must therefore deliberate in open session when considering waiver of the privilege, absent an applicable Brown Act closed session justification.

Where the grand jury is requesting information that is protected by the attorney-client privilege, the city council or other authorized agency or officer – acting through the city attorney – has the authority to demand that the employee refuse to provide the requested information to the grand jury. However, four whistleblower statutes place an important limitation on this authority.<sup>45</sup> These statutes are designed to protect government employees who report criminal activity by government officials. Whistleblower statutes may protect from retaliation public employees who disclose confidential information to a grand jury regarding criminal actions of the city if they follow the procedural requirements of the whistleblower statutes. These statutes, however, do not protect city attorneys. (See chapter 7.)

Additionally, the Brown Act may limit the information a public official or staff member may provide in response to a grand jury inquiry.<sup>46</sup> However, the grand jury may be a remedy for a violation of unlawful disclosure of confidential information subject to the Brown Act.<sup>47</sup>

45 Cal. Gov. Code §§ 8547-8547.13, 9149.20-9149.23, 53296-53299; Cal. Lab. Code § 1102.5.

46 Cal. Gov. Code § 54963, subd. (a).

47 Cal. Gov. Code § 54963, subd. (c)(3).

**3. Recusal or Disqualification of the City Attorney**

When responding to or providing advice relating to a grand jury subpoena or report, it may be necessary under certain circumstances for the city attorney to recuse themselves and hire outside counsel to handle the matter. For example, the city attorney should recuse themselves in the event a grand jury is investigating an issue on which the city attorney made errors, that, if revealed to the public in a grand jury report, might result in legal action, malpractice, negative performance review, or significant embarrassment for the city attorney. Because the city attorney may be more concerned with their personal interest in withholding particular information from the grand jury than with the best interests of the city, the city attorney should recuse themselves and recommend that the city hire outside counsel under Rule 1.7. (See chapter 2.)

**Practice Tip:**

City attorneys can assist grand juries in working more effectively with cities. Broad, unfocused, or misdirected grand jury investigations and subpoenas can consume significant amounts of city attorney and city staff time. Grand juries generally receive formal training on numerous subjects when they are impaneled. Based on a series of interviews of grand jurors, grand jury experts, and a supervising judge, it appears that, at least in some counties, the curriculum includes very little, if anything, about how cities operate. City attorneys should consider contacting the presiding judge of their superior court and offer to supplement the current grand jury training program by meeting with the grand jury when it is impaneled to explain the city governance, structure of city departments, the city's major reports, and identify contact people at the city who may be able to provide for various types of information during the grand jury's investigation. City attorneys should also encourage the city's officers and employees to fully cooperate with the grand jury.





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