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California State Bar
Standing Committee on Professional Responsibility ISSUES: WHAT ASPECTS OF
PROFESSIONAL RESPONSIBILITY AND CONDUCT and Conduct
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***1 ISSUES: UNDER RULE 3-310(C) OF THE CALIFORNIA RULES OF PROFESSIONAL
CONDUCT, DOES A CONFLICT OF INTEREST ARISE WHEN CONSTITUENT SUB-ENTITIES OR
OFFICIALS OF A CITY (E.G., THE CITY COUNCIL AND THE MAYOR) SEEK LEGAL ADVICE ON
THE SAME MATTER AND THE CONSTITUENTS' POSITIONS ON THE MATTER ARE ANTAGONISTIC?**
Formal Opinion Number 2001-156

2001

DIGEST: Whether a conflict of interest arises under [rule 3-310\(C\) of the California Rules of Professional Conduct](#) ordinarily depends on a determination of the city attorney's client. An attorney who represents an entity generally has only one client, the entity itself. This is true when an attorney represents a private corporation, which acts through its directors, officers, and others. This also is generally true when an attorney represents a municipal corporate entity, which acts through its constituent sub-entities and officials. Consequently, since the constituent sub-entities and officials of a city are normally not separate clients of the city attorney, a city attorney's provision of legal advice on the same matter to constituent sub-entities and officials will not necessarily give rise to a conflict of interest even if the constituent sub-entities and officials take contrary positions on the matter. In representing the client, the city attorney, like a private attorney, "shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement" as required by rule 3-600(A). Constituent sub-entities may become separate clients only if they have lawful authority to act independently of the public entity and if they take a position contrary to the overall public entity's position on a matter within the ambit of the constituent sub-entities' independent authority.

AUTHORITIES INTERPRETED: [Rules 3-310](#) and [3-600 of the California Rules of Professional Conduct](#).

STATEMENT OF FACTS

The charter of the City of Prosperity establishes the city as a municipal corporation with the council as the governing body except as elsewhere provided in the charter. The city attorney is appointed as a full-time employee of the city by the mayor and is confirmed by the council. The charter gives the city attorney the power to represent the city in litigation, subject to council direction, and to advise the council, other city bodies, and city officials (including the mayor) on legal questions. [FN1] The city faces a fiscal crisis, and a member of the city council introduced a motion to supplement the city's general fund by borrowing \$100 million in earmarked funds. City law requires an ordinance to approve such borrowing, which must be adopted by the city council. The mayor can either approve the ordinance or veto it. If the mayor vetoes the ordinance, the council can then override the mayoral veto by a three-quarters vote.

***2** After consulting the city attorney, who opined that the borrowing would be lawful, the council adopts the ordinance. The mayor also consults the city attorney concerning the ordinance and receives the same legal advice. The mayor disagrees with the advice and accuses the city attorney of having a conflict of interest in advising both the council and the mayor in the matter.

The Committee has been asked to provide guidance on whether these facts present a conflict of interest [FN2] governed by [rule 3-310\(C\) of the California Rules of](#)

Professional Conduct.

DISCUSSION

1. Although Attorneys in the Public Sector Are Governed by the Same Conflict of Interest Rules as in the Private Sector, the Application of the Rules Must Take Into Account Factors Peculiar to the Government Context.

All members of the State Bar of California, including those who represent governmental entities, are governed by the Rules of Professional Conduct. [FN3] (See [Santa Clara County Counsel Attys. Assoc. v. Woodside \(1994\) 7 Cal.4th 525 \[28 Cal.Rptr.2d 617\]](#); [People ex rel. Deukmejian v. Brown \(1981\) 29 Cal.3d 150, 157 \[172 Cal.Rptr. 478\]](#); [Ward v. Superior Court \(1977\) 70 Cal.App.3d 23, 32-33 \[138 Cal.Rptr. 532\]](#); and L.A. County Bar Assn. Formal Opinion No. 459.) [FN4]

The courts have, however, articulated special considerations applicable to evaluating claims of conflict of interest in the public sector. For example, in [In re Lee G. \(1991\) 1 Cal.App.4th 17, 34 \[1 Cal.Rptr.2d 375\]](#), the Court of Appeal pointed out that the conflict of interest "rules developed in the private sector ... do not squarely fit the realities of public attorneys' practice." (See also [People v. Christian \(1996\) 41 Cal.App.4th 986, 999 \[48 Cal.Rptr.2d 867\]](#) (hereinafter *People v. Christian*)).

Application of the rules, especially conflict of interest rules, in the governmental context is complicated by the difficulty of identifying the client of the government attorney. Although attorneys in the public sector are governed by the same conflict of interest rules as those in the private sector, the application of the rules must take into account factors peculiar to the governmental context (See [Ward v. Superior Court, supra, 70 Cal.App.3d at p. 30.](#))

2. Whether the City Attorney Faces a Conflict of Interest Ordinarily Depends on Who Is the City Attorney's Client.

[Rule 3-310\(C\)](#) provides, in part:

"A member shall not, without the informed and written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

*3 (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict"

Since [rule 3-310\(C\) \(1\)](#) is framed in terms of an attorney's potential conflicts in representing two or more clients in the same matter, it is necessary to identify the attorney's clients in order to ascertain the existence of potential conflicts. [FN5] There appears to be no case or statutory authority which provides a definitive test for determining if and when a constituent or official of a main governmental entity ought to be characterized a client of the attorney for the main entity. However, taken together, [rule 3-600](#) and the case of [Civil Service Com. v. Superior Court \(1984\) 163 Cal.App.3d 70 \[209 Cal.Rptr. 159\]](#) (hereinafter *Civil Service Commission*) are instructive. [FN6] They are authority for two propositions: (1) that an attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials; and (2) that a constituent sub-entity or official may become an independent client of the entity's attorney only if the constituent sub-entity or official possesses the authority to act independently of the main entity and if the entity's attorney is asked to represent the constituent sub-entity or official in its independent capacity. (See [Ward v. Superior Court, supra, 70 Cal.App.3d 23](#); see also [80 Ops.Cal.Atty.Gen. 36 \(1997\)](#) [a public attorney may advise both the governmental entity and its independent retirement board as long as the written consent of both clients was obtained]; [Castro v. Los Angeles Bd. of Supervisors \(1991\) 232 Cal.App.3d 1432, 1441 \[284 Cal.Rptr. 154\]](#) [different financial motives between the public and private sectors].) Thus, no conflict for the governmental attorney is created by a disagreement between a government entity and its constituents, or between constituents of the entity; a conflict can occur only in the unusual situation of a constituent or official with this independent right of action that might require the

attorney "to choose between conflicting duties" ([Anderson v. Eaton \(1930\) 211 Cal. 113, 116 \[239 P. 788\].](#))

A. [Rule 3-600](#)

[Rule 3-600](#) suggests this approach. Paragraph (A) of this rule provides:

"In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."

*4 Although this rule does not explicitly indicate that a governmental entity is an organization within the scope of the rule, the Committee believes that the rule applies to a municipal corporation and is best viewed as applicable to all governmental entities. [FN7] In general, the scope of [rule 3-600\(A\)](#) has been broadly construed in case law involving non-governmental settings. [FN8] In particular, the drafters' intent for the rule to apply to attorneys for governmental entities may be inferred from the citations found in the discussion after the rule, which include a reference to [People ex rel. Deukmejian v. Brown, supra, 29 Cal.3d 150](#), a case involving representation of governmental entities.

B. Civil Service Commission

Civil Service Commission also supports this approach. [FN9] Civil Service Commission explicitly addresses the identity of the client issue in the context of an intramural dispute in which the public attorney advised both the disputants. [FN10] Like [Rule 3-600](#), Civil Service Commission affirms the general proposition that a governmental attorney ordinarily has only one client, namely the overall entity itself. [FN11] However, it also articulates an exception to the general proposition.

The facts of Civil Service Commission are as follows. The County of San Diego fired two employees. The San Diego County Civil Service Commission (hereinafter SDCCSC) ordered their reinstatement. The county counsel's office had advised both the SDCCSC and the county department involved. The county, acting through its Board of Supervisors and represented by the county counsel, sued the SDCCSC in superior court seeking to overturn the reinstatements. The SDCCSC sought to disqualify the county counsel from representing the county against the SDCCSC. The superior court denied the disqualification motion.

The Court of Appeal reversed the superior court and held that the county counsel's office, which had advised the SDCCSC in connection with the termination, could not represent the county against the SDCCSC in the resulting litigation. The Court of Appeal focused on section 904.1 of the San Diego County Charter, which stated that the SDCCSC decisions on personnel matters shall be followed by the county unless overturned by the courts on appeal. ([Civil Service Commission, 163 Cal.App.3d at p. 77.](#)) The court, in distinguishing [Ward v. Superior Court, supra, 70 Cal.App.3d 23](#), relied on the fact that, based on the charter provision, the SDCCSC was "quasi-independent" from the county, so that litigation between it and the county could ensue. The court concluded that the SDCCSC itself could become a client of the county counsel and that a separate attorney-client relationship had therefore been created between the county counsel and the SDCCSC when he advised the SDCCSC about the matter which was subsequently the subject of the suit by the county against the SDCCSC. The court stated ([Civil Service Commission, 163 Cal.App.3d at p.78](#)):

*5 "We are able to accept the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall government entity of which the agency is a part. Nonetheless we believe an exception must be recognized when the agency lawfully functions independently of the overall entity. When an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the matter may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency

is created."

In the case of [In re Lee G., supra, 1 Cal.App.4th 17](#), the Court of Appeal restated that the key factor in this analysis is the constituent agency's independent right of action. It stated: "Our decision in part [in Civil Service Commission] was based on the quasi-independent nature of the commission, which had independent authority over matters within its jurisdiction. [Citation.]" ([Id. at p. 32, fn. 10.](#))

Civil Service Commission stands for two principles: (1) that in the usual situation a public attorney has only one client, which is the overall governmental entity; and (2) that there is a potential for a separate attorney-client relationship between the government attorney and a constituent sub-entity or official which has the legal authority to act independently of the main entity. In this limited circumstance, the court found that a constituent sub-entity or official may become a client in its, his, or her own right. [FN12] Independent action for this purpose must be differentiated from a grant of discretionary authority from an entity to a constituent sub-entity or official. For example, a city council might authorize its building department to issue permits conforming to law and to policies set by the entity, acting through the council and mayor. The authority flows from and through the entity; the hypothetical building department lacks authority to depart from standards set by the entity; and any digressions by the building department are subject to correction short of litigation.

By comparison with Civil Service Commission, district attorneys and public health officers, among others, have legal authority to take certain actions within their spheres which do not comport with the wishes of the governmental entities with which they are associated. The discretion of district attorneys regarding what cases to prosecute and how to deploy staff and the discretion of public health officers to declare public health emergencies are not subject to control by the associated governmental entities. [FN13] Their actions, within their legal spheres of operation, may only be attacked in court. It is only this truly independent right of action that can give rise to a conflict of interest for a public attorney.

3. Under the Facts Presented, the City Attorney Does Not Have a Conflict of Interest.

*6 The charter of the City of Prosperity requires the city attorney to provide advice on legal questions to the mayor and city council. It therefore contemplates no conflict in these roles. The charter is a legislative enactment which reflects a policy determination that a single city attorney is responsible for all legal matters involving the city and that the city is a single municipal corporation with responsibility for its operations divided among various officers, none of whom is given the power to act independently of the city. As a result, neither the mayor nor the city council, independent of the city itself, established an attorney-client relationship with the city attorney by seeking legal advice on proposed ordinances, because neither had the potential to become the city attorney's client against the other. The city attorney does not represent the city council or the mayor; in advising the council and the mayor, the city attorney represents the municipal corporation as an indivisible unit. There is no attorney-client relationship formed with the component parts, because the component parts cannot function as independent entities under the City of Prosperity's charter.

This is not to say that conflicts and grounds for disqualification never arise for public attorneys. Other circumstances may give rise to a conflict or require recusal where the rights of third parties are involved. Public attorneys need to keep these other potential situations in mind. For example in [Walker v. City of Berkeley, supra, 951 F.2d 182](#), a public attorney who was counsel to a decision-making body in administrative hearings was disqualified from defending a wrongful termination suit by a former employee based upon considerations of due process. Similarly, conflicts may arise in proceedings involving minors and parents. (See [In re Richard H., supra, 234 Cal.App.3d 1351](#); [In re Katrina W. \(1994\) 31 Cal.App.4th 441 \[37 Cal.Rptr.2d 7\]](#).)

CONCLUSION

The following two-part test is a tool that can assist in determining whether a city attorney faces a potential conflict of interest governed by [rule 3-310\(C\)\(1\)](#) when asked to advise different bodies or officials within the city government regarding a matter: Do constituent sub-entities or officials (a) have a right to act independently of the governing body of the entity under the city charter or other governing law so that a dispute over the matter may result in litigation between the agency and the overall entity [FN14] and (b) have contrary positions in the matter. Both elements must be present to create a potential conflict of interest governed by [rule 3-310\(C\)\(1\)](#). [FN15] Even when both elements are present, the result for disqualification purposes is not always predictable under current law. *People v. Christian and Civil Service Commission*, as well as other cases cited above, suggest that a court might be less rigorous in interpreting the scope of the Rules of Professional Conduct relating to conflicts of interest when applied to governmental attorneys than to other attorneys. [FN16]

*7 Finally, regardless of any issue of conflict of interest and consistent with [rule 3-600\(D\)](#), a city attorney must not mislead constituent sub-entities or officials who have no right to act independently of the governing body of the entity and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city's interest if that interest is or becomes adverse to the constituent or official.

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

FN1. This opinion addresses only the situation in which a government attorney advises on official, as opposed to personal, matters. However, attorneys should note the risk that personal attorney-client relationships could be formed intentionally or inadvertently with government officials if the attorney's conduct and the circumstances create a reasonable expectation on the part of the official that he or she enjoys a personal confidential relationship with the attorney. In determining the existence of an attorney-client relationship between a government attorney and a government official, all factors bearing on the reasonableness of such a belief should be considered, including the fact, if applicable, that the government attorney is barred by rules of the entity, applicable law, or his or her employment contract from engaging in private practice, and the official's knowledge of this prohibition. (See, e.g., [People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.](#) (1999) 20 Cal.4th 1135, 1147-1152 [86 Cal.Rptr.2d 816]; [Responsible Citizens v. Superior Court](#) (1993) 16 Cal.App.4th 1717, 1733-1734 [20 Cal.Rptr.2d 756].) To avoid unintended formation of such personal attorney-client relationships with constituent officials, attorneys should comply with [rule 3-600\(D\)](#), which requires the attorney not to mislead the official into believing that the attorney represents the official in his or her personal capacity when the attorney cannot do so.

FN2. We use the phrase "conflict of interest" solely with regard to legal ethics and do not allude to the concept of financial interest for which the same phrase sometimes is used in the public sector.

FN3. Unless otherwise indicated, all rule references are to the California Rules of Professional Conduct.

FN4. The California Rules of Professional Conduct are also binding on non-member lawyers to the extent stated in rule 1-100(D) (2).

FN5. Other circumstances may require recusal or result in disqualification. For example, disqualification may result from representation of a single entity client in two different proceedings. (See, e.g., [Walker v. City of Berkeley](#) (9th Cir. 1991) 951 F.2d 182, 184.) Other situations resulting in disqualification can arise where, for example, a public attorney represents the entity through a department of children's services along with a minor who is a ward of the entity. ([In re Richard](#)

H. (1991) 234 Cal.App.3d 1351 [285 Cal.Rptr. 917]; In re Candida S. (1992) 7 Cal.App.4th 1240 [9 Cal.Rptr.2d 521].) In each case, representation of different aspects of a single situation resulted in disqualification of the public attorney on due process or fairness grounds arising from the dual and differing capacities of the public attorney in the proceedings.

FN6. Walker v. City of Berkeley, supra, 951 F.2d 182, 184, involves a different, but analogous issue. A deputy city attorney was participating in a city's post-termination hearing as advisor to the decision-maker and at the same time represented the city in defense of the employee's wrongful termination lawsuit. The court found that the city denied the employee due process at the required hearing when it caused the same deputy city attorney to function both as the city's attorney in the federal case and as a decision-maker in the post-termination hearing.

FN7. Rule 3-600 was adopted from American Bar Association (hereinafter ABA) Model Rule 1.13. (Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation, Dec. 1997, p. 37.) Comment [6] to ABA Model Rule 1.13 states that it "applies to governmental organizations." (Annotated ABA Model Rules of Professional Conduct (3d ed. 1996) p. 201.)

FN8. Rule 3-600(A) is broadly construed in Responsible Citizens v. Superior Court, supra, 16 Cal.App.4th 1717, 1729-1730. The issue confronted was whether a partnership was an organization regulated by rule 3-600(A). In analyzing that issue, the court stated:

"Although the rules do not define the term 'organization,' its common, ordinary meaning is sufficiently broad to include partnerships. The pertinent dictionary definition of 'organization' is 'any unified, consolidated group of elements; systematized whole; esp.; a) a body of persons organized for some specific purpose, as a club, union, or society.' (Webster's New World Dict. (3d college ed. 1988) p. 954.) In addition, the rule refers to the highest authorized 'constituent' of the organization. A 'constituent' is a component. (Webster's, op. cit. supra, p. 298.)

"Without belaboring the point, we see nothing in the text of rule 3-600(A) evidencing an intent to exclude partnerships from its ambit."

As in the case of a partnership, a municipal corporation fits within the plain meaning of the term "organization" and a sub-entity or an official generally should be regarded as a "constituent" of the overall entity. The discussion section of the rule cautions that it "is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor ... to deny the existence or the importance of such formal distinctions." The discussion recognizes that in resolving multiple relationships, members must conform to case law. Because of the very limited case law governing public lawyers, logical analysis is necessary.

FN9. Our conclusion is not altered by the fact that rule 3-600 was adopted after Civil Service Commission was decided. The Committee has found nothing in the wording of rule 3-600 or the history of its adoption that would indicate Civil Service Commission is no longer valid authority. Indeed, it is clear for purposes of ABA Model Rule 1.13, upon which rule 3-600 was patterned, that the highest authority in a given situation may be a governmental agency, rather than the governmental entity as a whole. (Annotated Model Rules of Professional Conduct, supra, at p. 201 ["Although in some circumstances the client may be a specific agency, it is generally the government as a whole."]) In this case, the civil service commission was an example of just such a "specific agency."

FN10. The subsequent decision of Howitt v. Superior Court (1992) 3 Cal.App.4th 1575, 1578-1580 [5 Cal.Rptr.2d 106] [county counsel's office in dual role as both advocate for a party in a contested matter and as adviser to the tribunal deciding that matter] also employs a client identification approach.

FN11. If the city attorney's client is the city and not its officials or constituent sub-entities, the city attorney must be careful to dispel the impression that the officials or constituent sub-entities are also clients. This impression may easily

arise in the ambiguous setting of a municipal organization. [Rule 3-600\(D\)](#) provides:

"In dealing with an organization's directors, officers, ... or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interests if that interest is or becomes adverse to the constituent."

FN12. This opinion does not address the right of public attorneys, without client consent, to use screening devices (often referred to as ethical walls or cones of silence) to avoid conflicts of interest. (See [Howitt v. Superior Court, supra, 3 Cal.App.4th at p. 1578](#); [In re Lee G., supra, 1 Cal.App.4th at p. 33](#).) Under these cases, with proper prior planning it may be possible for public attorneys to avoid conflicts of interest that otherwise would arise under Civil Service Commission and to avoid other circumstances which could create a conflict of interest. (See [People v. Christian; 80 Ops.Cal.Atty.Gen. 36 \(1997\)](#); [80 Ops.Cal.Atty.Gen. 127 \(1997\)](#), 138 ["When an ethical wall is properly established, taxpayer funds need not be spent to hire counsel outside of the county counsel's office."].)

FN13. District attorneys have exclusive authority regarding criminal prosecution ([Gov. Code, § 26500](#) et seq.; [Hicks v. Board of Supervisors \(1977\) 69 Cal.App.3d 228, 240-241 \[138 Cal.Rptr. 101\]](#).) Public health officers are charged with enforcement of local ordinances and independent enforcement of state laws and regulations, including advice to retirement associations and the declaration of a quarantine or health emergency. ([Health & Saf. Code, § 101030](#) et seq.)

FN14. This opinion does not address the situation in which a city charter gives the city attorney the right to act independently of the city council or other city officers, employees, and bodies.

FN15. This opinion does not address the manner in which public attorneys should resolve identified conflicts of interest. This opinion also does not address a public attorney's ethical responsibilities when advising a public official who has multiple offices (e.g., a county supervisor, city council member, or other government official who, by virtue of his or her office, also serves as a director of a sanitation district under [Health and Safety Code sections 4730 to 4730.1](#) or as a member of a retirement board under [Government Code section 31520](#)). (See [McClain v. County of Alameda \(1962\) 209 Cal.App.2d 73, 79 \[25 Cal.Rptr. 660\]](#) and [82 Ops.Cal.Atty.Gen. 126 \(1999\)](#).)

FN16. Civil Service Commission states: "[W]e do not mean to suggest that government attorneys must necessarily be treated identically with attorneys in private practice. But neither are they immune from conflict problems similar to those which confront the private bar." ([163 Cal.App.3d at p. 84](#).)

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