Practical Ethics: Conflict of Interest Considerations for City Attorneys

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Conflicts of Interest: Morality or Technicality?



The Evolution of the Rules of Professional Conduct

THE RULES REVISION COMMISSION'S CHARTER

1. The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.
2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.
3. The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.
4. The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.
5. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.

Rule 1.0: Scope and Function of the Rules of Professional Conduct

(a) Purpose

- Rules regulate the conduct of lawyers through discipline
- Rules binding on all lawyers

(b) Function

- (1) Willful violation of any Rule subjects lawyer to discipline;
- (2) California lawyers bound by Rules as well as State Bar Act (Bus. & Prof. Code § 6000 et seq.) and opinions of California courts;
- (3) Violation of Rule does not by itself give rise to cause of action for damages;

(c) Purpose of Comments

- Comments are not independent basis for discipline, but provide guidance in interpreting and complying with Rules

Comments

- [2] Violation of Rule can occur when a lawyer is not practicing law or acting in a professional capacity;
- [3] Willful violation of Rules do not require that lawyer intended to violate the Rule.
- [5] Disciplinary Rules do not address all of attorney's professional obligations. Lawyers have special responsibilities for quality of justice. Lawyers "encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel." Every lawyer should aspire to render at least 50 hours of pro bono service per year, with a substantial majority of those hours focused on the poor.

RPC Fun Facts

Numbering system of new rules generally conforms to ABA Model Rules, though there continue to be significant differences.

Aspirational comment [5] encourages minimum of 50 hours of annual pro bono work. Not meeting this goal will not subject an attorney to discipline.

California Lawyer Ethics

- Same general standards apply to all lawyers
- Rules of Professional Conduct
  - Specialized COI Rule for Governmental Lawyers (R 1.11)
- Business & Professions Code

  (State Bar Act)
- COPRAC Opinions

COPRAC COI Opinions: Examples

- CAL 2021-205: Duties to Prospective Client
- CAL 2020-201: Ethical Obligations When Departing Firm
- CAL 2014-190: Dissolving Firm and Moving to New Firm
- CAL 2013-187: Third-Party Payors
- CAL 1994-137: Conflicting Instructions

Framework for COI Analysis



Threshold Question: Who is the client?



RPC 1.13

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

(b) If a lawyer representing an organization knows* 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 a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization, the lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Comment to RPC 1.13

[1] This rule applies to all forms of private, public and governmental organizations. (See Comment [6].) An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

Comment to RPC 1.13

[6] 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 whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code section 6068, subdivision (e) and rule 1.6. This rule is not intended to limit that authority.



Do City Attorneys Have Individual Clients?

- Representation of individuals within the City government?
  - Government Code section 995
    - Except as otherwise provided in Section 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. . .

Do City Attorneys Have Individual Clients?

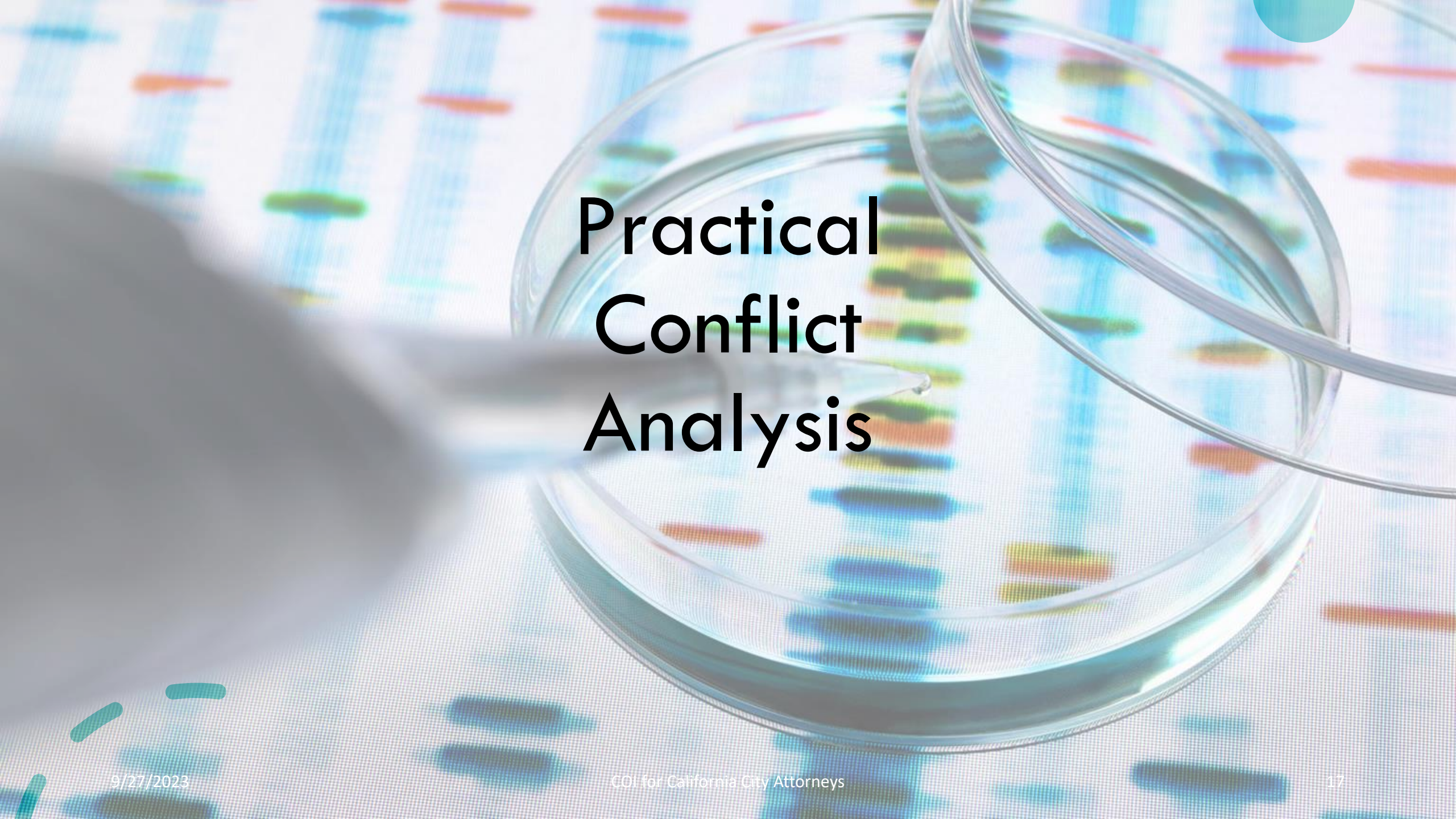
- Government Code section 41801
  - The city attorney shall advise the city officials in all legal matters pertaining to city business.
  - NOTE: This is advice to the person in their official capacity, in the course of their official duties, and not with regard to any interests that are separate and distinct from the City's interests.
- QUESTION: When do these individual people, officials, or agencies acquire separate client status for purposes of a conflict of interest analysis?
- Case studies
  - Ward v. Superior Court (May 24, 1997) 70 Cal.App.3d 23
  - Civil Service Com. v. Superior Court (1984) 163 Cal.App.3d 70
  - Castro v. Los Angeles Bd. of Supervisors (1991) 232 Cal.App.3d 1432
- Confidentiality considerations and admonitions





The State Bar's Guidance: COPRAC 2001-156

- An attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials.
- 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.
- 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.



Practical Conflict Analysis

Common COI Scenarios

- Direct adversity to a current client (1.7(a))
- Joint representation (1.7(b))
- Lawyer relationships and responsibilities (1.7(b)(c))
- Lawyer error (1.7(b))
- Business transactions with clients (1.8.1)
- Former clients (1.9)
  - Including prospective clients (1.18)
- Lawyer as witness (3.7)
- Lateral transitions (1.11)
  - Lawyers leaving government service to go to private practice
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Direct adversity to a current client (1.7(a))

- A lawyer cannot be directly adverse to a current client, even in a separate matter, without informed written consent.
- This is primarily because of the existence of the duty of loyalty.

Joint representation (1.7(b))

- An example is where the City Attorney's office is representing the City in litigation, and also representing an employee of the City in the same litigation.

COPRAC Formal Opinion 2001-156

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?

The State Bar's Answer

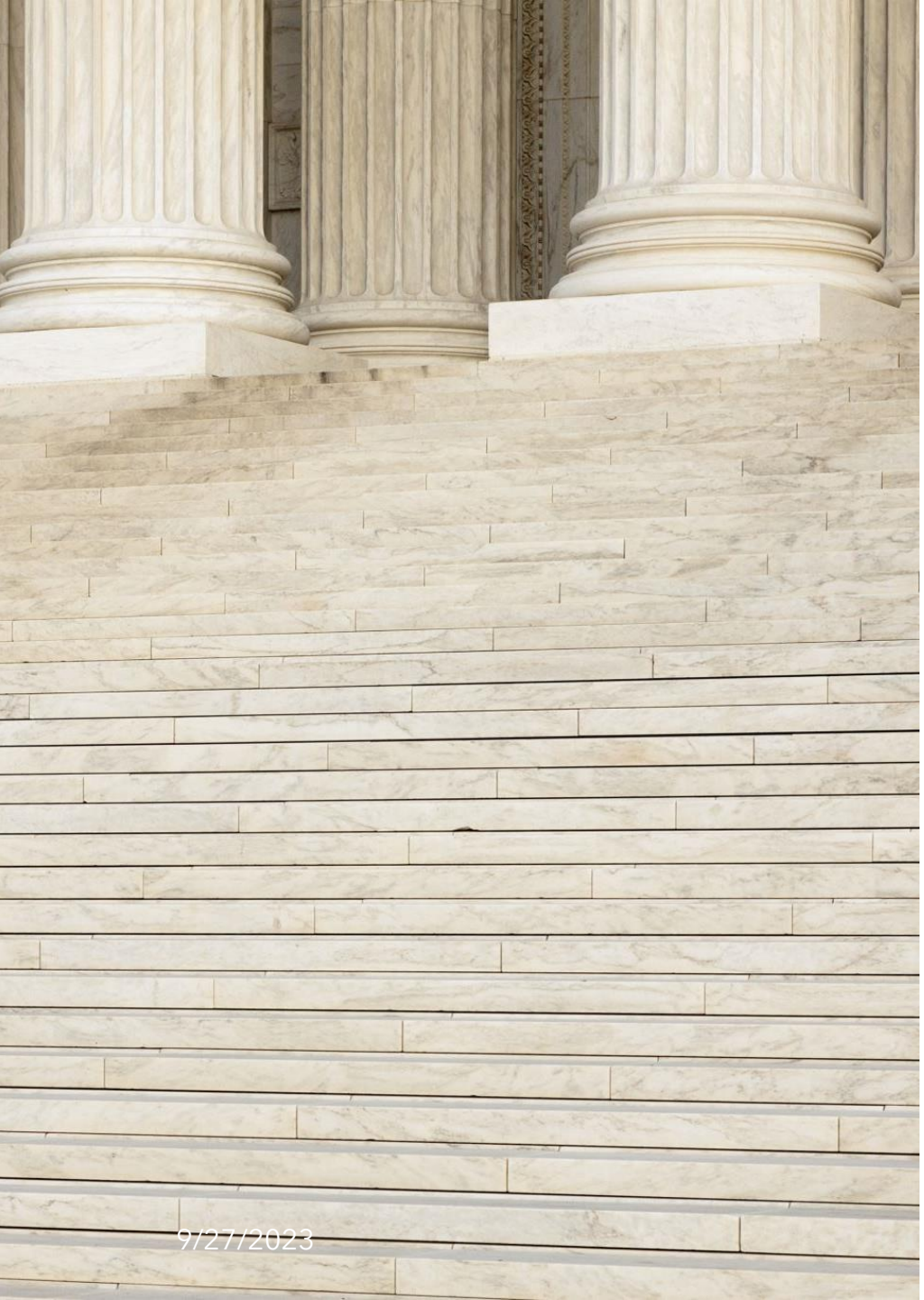
Whether a conflict of interest arises under rule 3-310(C) of the California Rules of Professional Conduct ordinarily depends on a determination of the city attorney's client.

An attorney who represents an entity generally has only one client, the entity itself.

This 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.

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.



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.[3] (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.)[4]

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.)

Lawyer relationships and responsibilities (1.7(b)(c))

- For informed written consent, the focus is on a **significant risk** of a **material limitation:**
  - Posed by the lawyer's responsibilities to or relationships to another client
  - Posed by the lawyer's responsibilities to or relationships with a former client or third person
  - Posed by the lawyer's own interests
- For disclosure:
  - Relationship with another party
  - Relationship with a witness
  - Familial or intimate relationships with the other party's lawyer

Lawyer error (1.7(b))

- Lawyers make mistakes.
- Does the mistake rise to the level of posing a significant risk of a material limitation in the lawyer's representation of the client, by virtue of the lawyer's own interests?
- If not, it is a mistake rise to the level of a significant development that needs to be disclosed? (RPC 1.4, B&P Code section 6068(m))

Business transactions with clients (1.8.1)

- Government Code section 1090 makes the scenario unlikely to arise in the context of municipal lawyers.
- The RPC requires that the terms be fair and reasonable, that they be put in writing, and that the client is advised to seek the advice of independent counsel– and then provides informed written consent.

Former clients (1.9), including prospective clients (1.18)

- Lawyers cannot be adverse to a former client in the same or a substantially related matter without informed written consent.
- A duty of confidentiality may be owed to prospective clients.
- This scenario could therefore implicate the same duties that are owed to former clients under RPC 1.9.
- This gives rise to the necessity to be cautious about soliciting or accepting confidential information.

Lawyer as witness (3.7)

- Lawyers cannot be the trial attorney and a witness unless:
  - The testimony relates to an uncontested issue
  - The testimony relates to the nature and value of the legal services rendered in the case
  - The lawyer has obtained the informed written consent of the client
- For governmental entities, the consent must be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed

Lateral transitions (1.11)

- Lawyers leaving government service to go to private practice
  - May not generally not use or reveal information protected by the duty of confidentiality
  - Shall not represent a client in connection with a matter in which the lawyer personally and substantially participated while with the governmental agency
  - The private practice law firm is prohibited from representation if the public lawyer is prohibited from representation, unless the there is ethical wall screening and written notice
- Lawyers leaving private practice to go to government service
  - Shall not participate in a matter in which the lawyer participated personally and substantially while in private practice without informed written consent of the governmental agency

Thank you

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