Ethical Preparedness Training: Rules of Conduct in Action

(MCLE Specialty Credit for Ethics sub-field credit)

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Christi Hogin, City Attorney, Lomita, Malibu and Palos Verdes Estates, Partner, Jenkins & Hogin LLP
Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills and West Hollywood, Partner, Jenkins & Hogin LLP

Notes:

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MANHATTAN TOWERS
1230 ROSECRANS AVENUE, SUITE 110
MANHATTAN BEACH, CALIFORNIA 90266
(310) 643-8448 • FAX(310) 643-8441
WWW.LOCALGOVLAW.COM

WRITER'S EMAIL ADDRESS:
CHOGIN@LOCALGOVLAW.COM
@CHRISTIHOGIN

ETHICAL PREPAREDNESS TRAINING: Rules of Professional Conduct in *Action*

Christi Hogin*
Michael Jenkins**
Jenkins & Hogin, LLP

*Christi's law firm, Jenkins & Hogin, LLP, specializes in representing public agencies. She currently serves as city attorney for Lomita, Malibu and Palos Verdes Estates and has an active litigation practice representing public agencies. Christi is the immediate past President of the City Attorneys' Department. She is married to a lawyer with whom she coached AYSO soccer and raised four children.

**Mike's law firm is also Jenkins & Hogin, LLP. He currently serves as city attorney for Hermosa Beach, Rolling Hills, and West Hollywood and he is interim city attorney for Goleta. Mike served as President of the City Attorneys' Department in 1991. He is also married to a lawyer, is a certified AYSO ref, and raised the same four children as Christi.

NOTE OF SUGGESTION AND GRATITUDE: The City Attorneys' Department's publication *Practicing Ethics: A Handbook for Lawyers,* 2d Ed. is a great resource for ethical issues relating to city attorneys. In fact, we relied heavily on it in preparing this presentation. We acknowledge and thank the members of the Practicing Ethics Drafting Committee for their work.

INTRODUCTION

The best way to avoid an ethical disaster is to be prepared. Know the rules of professional responsibility, of course. But also anticipate the likely scenarios where the rules direct how city attorneys are to handle their professional obligations. That exercise helps prepare us for when an ethical issue crops up unexpectedly (as they often do). In addition to drills and tabletop exercises, we are also well-served by keeping an inventory of all the resources available to us as city attorneys (and making regular use of them). Along with the Department's publications (which were reintroduced to the Department last spring, have all been updated, and are available at the City Attorneys' Forum and through the League, the City Attorneys' Department is comprised of committees that take deeper dives into specific areas. The committees keep Department members informed and help develop best practices. This paper takes the opportunity to (re)acquaint Department members with the committees that serve us as we explore professional rules of responsibility in the context of situations we regularly encounter as city attorneys.

Ethical standards for California lawyers are derived mainly from the Rules of Professional Conduct of the State Bar of California. Public lawyers are governed by the Rules and the ethical standards of the profession. See, e.g., *People ex. rel Deukemejian v. Brown* (1981) 29 Cal.3d 150 (Bar rule prohibiting taking of a position adverse to a client precludes Attorney General from suing client department on a matter on which he advised that department); accord *Santa Clara County Counsels Association 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"). In addition to the Rules, California lawyers are subject to common law standards. *Santa Clara County Counsels Association, supra.*

Public lawyers have special ethical obligations to further justice. The heightened ethical responsibilities of government lawyers apply whether they are prosecuting criminal actions or representing the government in a civil action. *People ex. rel Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 745. California courts have relied on the ABA Model Code's Ethical Considerations to define the city attorneys' duties, including EC 7-14, which provides, "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." See, e.g., *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746 (contingent fee arrangement creates conflict for public lawyer); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871 (city

attorney may not argue parking not required where he knows the city determined there was a shortage).

We bring these high ethical standards to our representation of cities. Rule 3-600 governs the ethical obligations of a lawyer who represents an entity rather than a natural person. The client in such a representation is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement."

As we know, as city attorneys, if we are aware of conduct by city officials or employee which may be or is a violation of law "reasonably imputable to the organization" or "is likely to result in substantial injury to the organization," we may (should?) take the matter to the "highest internal authority within the organization" but may not disclose any confidential information beyond the organization. Our recourse if we cannot persuade those in command to change course? The city attorney retains the right to resign employment.

Ethical preparedness can help us work to avoid that last resort when disaster does strike (and it will occasionally) putting us uncomfortably on the horns of a dilemma. To prepare for the unannounced appearance of an ethical conflict in the middle of an otherwise ordinary day, in this paper, we reacquaint you with are some resources (the Department committees) and offer up some exercises.

R E S O U R C E
California Public Records Act Committee

This committee stays on top of legislation to amend the CPRA, monitors the case law developments in the area of public records, and keeps our members up to speed in this particularly demanding area of municipal practice. The committee also updates *The People's Business: A Guide to the California Public Records Act* and the CPRA section of *The Municipal Law Handbook.* As of the date of this paper, Department members should be aware that the CPRA Committee is also actively engaged in the California Law Revision Commission's recently initiated "nonsubstantive revision" of the CPRA, which is likely to include a renumbering of long familiar provisions of the Act.

E X E R C I S E

A city attorney becomes aware of the city manager's misuse of the city credit card for personal meals and a bar tab at the local pub. When the city attorney confronts the city manager, the city attorney is told that the city council is well aware of the situation and to butt out. The city receives a Public Records Act request from the local newspaper for all credit card statements and requests for reimbursement from the city manager. When asked for the records by the city attorney, the city manager states that he is destroying the records. Worried that this situation is going to end badly, the city attorney writes a comprehensive 85 page memorandum to the city council documenting the alleged misuse of public funds and violations of records retention policy. After receiving the memorandum, the city council fires the city attorney due to the

council's impression that the trust relationship between the city manager and the city attorney is impaired. When local newspaper files a lawsuit claiming that it had not received all the responsive records, the city sues the former city attorney for malpractice, given that he was in charge of responding to the PRA request. The former city attorney cross complains for wrongful termination.

FUN FACT FOR HAIRSPLITTERS: The attorney-client privilege is distinct from the duty of confidentiality. These two concepts are often used interchangeably. While both apply to confidential information, the duty of confidentiality, as contained in the California Business and Professions Code is broader than the attorney-client privilege, which is a rule of evidence found in the California Evidence Code. *Compare* Bus. & Prof.Code § 6068 ("It is the duty of an attorney to do all of the following: ... (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.") *with* Evid. Code § 954 ("[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer ....").

Lawyers don't blow whistles (usually). A California Attorney General's opinion concludes that the whistleblower statutory protections applicable to employees of state and local public entities do not supersede the statutes and rules governing the attorney-client privilege. 84 Cal. Op. Att'y Gen. 71 (2001). But remember, the courts do not have to give the AG the last word. *Freedom Newspapers, Inc. v. Orange County Employees Ret. Sys.* (1993) 6 Cal.4th 821, 829 (the Attorney General's views are not binding although they are entitled to "considerable weight").

Indeed, in an unpublished case, one federal district court "declines defendants' invitation to accept as persuasive authority the California Attorney General's published opinion ("AG Opinion"), which concludes that attorneys cannot maintain CWPA[1] suits." *Carroll v. California ex rel. California Com'n on Teacher Credentialing* (E.D. Cal., Aug. 19, 2013, No. 2:13-CV-00249-KJM) 2013 WL 4482934, at *6 (allowing a retaliation lawsuit by fired in-house counsel to survive demurrer because it was too soon to determine whether the claims pleaded required disclosure of confidential information in order to prove them.) The federal district court rejected the AG Opinion because it found that the whistleblower statute's text does not say what the AG Opinion says it does (specifically, the court states that the AG improperly reads "individual in the exercise of official authority" into the provisions of Gov't Code §8547.8(f), which is the basis for the AG's analysis); and that the AG's interpretation that follows from this textual misrepresentation contravenes California Supreme Court precedent (specifically, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, which held that attorneys may sue when they allege they were terminated for refusing to violate a mandatory ethical duty.).

An attorney may not pursue a lawsuit if it cannot be decided without breaching the lawyer-client privilege. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 (in-

[1]California Whistleblower Protection Act, Gov't Code §§8547-8547.12

house attorneys may bring retaliatory discharge claims in two circumstances: (a) attorneys may sue when they allege they were terminated for refusing to violate a mandatory ethical duty embodied in the Rules of Professional Conduct, such as refusing to commit a crime; and (b) where it can be shown both that "the employer's conduct is of the kind that would give rise to a retaliatory discharge action by a *nonattorney* employee" and that "some statute or ethical rule specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' conduct for which he was terminated .").

The *General Dynamics* court's rationale for permitting in-house attorney-employees to bring retaliatory discharge claims against their private employers, notwithstanding the attorney-client privilege, applies with even greater force when the employer is a public agency with an explicit duty to the public. *See* 7 Cal.4th at 1180 ("[T]he theoretical reason for labeling the discharge wrongful in such cases is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy." (quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 667).) Moreover, government lawyers are widely recognized to have responsibilities and obligations different from those facing members of the private bar. The unique role of governmental lawyers requires a nuanced interpretation of California's Rules of Professional Conduct. *See* Cal. Rules Prof. Conduct Rule 3–600 ("In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."); *c.f.* Restatement (Third) of Law Governing Lawyers § 97 (2000) ("No universal definition of the client of a governmental lawyer is possible.").

Lawyers suing their employers may not breach their duty of confidentiality to provide evidence to support their claims and risk state bar discipline if they do:

> Acknowledging the confidentiality concerns of companies with in-house attorney employees, the California Supreme Court noted several additional limitations on retaliation claims. For example, "where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the lawyer-client privilege, the suit must be dismissed in the interest of preserving the privilege." *Id.* However, the court "underline[d] the fact that such drastic action will seldom if ever be appropriate at the demurrer stage of litigation." *Id.* The court also instructed that "the trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege." *Id.* at 1191, 4 Cal.Rptr.2d 874, 824 P.2d 680. Some of these measures are "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings." *Id.* The court also noted that an attorney who unsuccessfully

pursues a retaliation claim risks being subject to State Bar disciplinary proceedings. *Id.* at 1191, 4 Cal.Rptr.2d 874, 824 P.2d 680.

Carroll v. California ex rel. California Com'n on Teacher Credentialing (E.D. Cal., Aug. 19, 2013, No. 2:13-CV-00249-KJM) 2013 WL 4482934, at *5

In finding that in-house counsel may maintain a retaliatory discharge claim, the Supreme Court explained, "Our conclusion with respect to the tort cause of action is qualified; our holding seeks to accommodate two conflicting values, both of which arise from the nature of an attorney's professional role-the fiducial nature of the relationship with the client, on the one hand, and the duty to adhere to a handful of defining ethical norms, on the other. As will appear, we conclude that there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, *provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship." *General Dynamics, supra,* 7 Cal.4th at 1169.

HANDY DEFINITIONS: Evidence Code section 952 defines a "confidential communication between client and lawyer" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons...." In turn, Evidence Code section 954 provides that "the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...."

R E S O U R C E
Cannabis Regulation Committee

Newly transitioned from an *ad hoc* committee to a standing committee of the Department (because we finally admitted after years that we can't live without this committee's sage advice), this committee assists with the education of our members in implementing medical and recreational marijuana laws, monitors case law and legislation in this rapidly changing area of municipal interest, and provides endless source of puns and munchie jokes for a grateful Department.

E X E R C I S E

A city council has asked the city attorney to draft a law that would allow the sale of recreational marijuana in the city and impose a tax on it. In addition, the city council has asked for a resolution declaring the city a "sanctuary city."

Marijuana - schedule I controlled substance under federal law. Comprehensive Drug Abuse Prevention and Control Act of 1970 is a comprehensive regime to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Title II of the Act is the

Controlled Substance Act (21 U.S.C. § 801 et seq.). Under federal law, it is unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.

Even though state law allows certain activities related to marijuana and cities may impose regulations under state law, a city attorney that advises a city council on regulatory options that comply with state laws may be offering advice that results in conduct that violates the Controlled Substance Act. Provided that the client limits his or her activities to those that comply with state law and provided that the lawyer counsels against otherwise violating the Controlled Substances Act, a lawyer should be permitted to advise and represent a client regarding matters related to medical marijuana under state law.

One of the duties of a lawyer is to support the laws of the United States and of California. Bus. & Prof. Code § 6068(a). In the unusual circumstance where state and federal law directly conflict, the city attorney must be careful to advise, assist, and represent the client in complying with state laws while, at the same time, counseling against conduct that may invite prosecution for violation of federal laws. This is an ethical obligation.

Rule 3-210 of the California Rules of Professional Conduct states as follows:

> A member shall not advise the violation of any law . . . unless the member believes in good faith that such law . . . is invalid.

Strictly construed, this rule might be read to mean that a city attorney cannot assist in drafting an ordinance or advising a city to promote conduct that violates the CSA. However, many legal commentators and bar associations have concluded that the marijuana situation raises an unanticipated dilemma under Rule 3-210. There is no other subject in which California law permits what is forbidden by federal penal law. California's public policy conflicts with federal law. Accordingly, legal commentators are concluding that, even if lawyers do not believe that the federal laws regarding marijuana are invalid, they may advise and assist their clients in complying with state laws, as long as they advise clients about the risks involved in violating federal law.

Given state policy, it would follow that a lawyer's assistance to a city who wants to regulate marijuana sales, cultivation, and/or delivery in accordance with state law should not be considered an act of moral turpitude because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. *Cf.* Bus. & Prof. Code § 6106 (allowing disbarment or suspension for commission of acts involving moral turpitude, dishonesty or corruption).

All this said, city attorneys should be aware that they assume the risk that the State Bar's Office of Chief Trial Counsel may interpret Rule 3-210 or of Business & Professions Code section 6106 to the opposite conclusion reached above. In that case, the lawyers may be subject

to discipline. Also, the lawyers are at risk of federal prosecution for aiding and abetting violation of federal law.

If your city does anything other than ban marijuana, be sure to tell the city about the risks of legislating in this area. Isn't that the city attorney's role anyway?[2]

(Thanks to the San Francisco Bar Ass'n for the above analysis)

Sanctuary City. The sanctuary city proposal does not raise the same ethical consideration. The legal authority for the interrogation, arrest, detention, and removal of noncitizens from the United States is found in the Immigration and Nationality Act ("INA").[3] The INA contains both civil and criminal provisions. Entering the U.S. without "inspection" in the manner prescribed by law is a crime. Few individuals are prosecuted under these provisions. Most undocumented individuals arrested by federal immigration authorities are placed in civil administrative proceedings to determine whether they should be deported. Violations of the INA that result in deportation are civil, not criminal, in nature. This distinction is important. State and local law enforcement may enforce only the criminal provisions of the INA. Illegal presence in the U.S. is a civil offense that is enforceable only by the federal government.

While illegal presence may be enforced only by the federal government, attention has turned to what assistance, short of actual enforcement, may be provided by officials at the state and local level. Federal statutes prohibit state and local governments from restricting communication with the federal government regarding the immigration status of any individual.[4] Neither law, however, mandates collection of information or cooperation or sharing of information with federal immigration authorities. These provisions have been cited both by those seeking greater local involvement in immigration enforcement, and by those seeking less local

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[2]The lawyers who have been advising the dispensaries have taken comfort in the premise that lawyers are supposed to help people figure out what is and what is not legal. Canon 2 of the American Bar Association Code of Professional Responsibility was "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." EC 2-1 stated as follows:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. [citations omitted].

I suppose this same perspective may be applied to city attorneys advising city councils looking to regulate marijuana.

[3] 8 U.S.C. § 1101 et seq.

[4] 8 U.S.C. §§ 1373, 1644.

involvement. Many cities have adopted policies that limit their own jurisdiction's involvement in federal civil immigration enforcement efforts. The policies take a variety of shapes. Despite their diversity, these policies are sometimes lumped together under the label, "sanctuary policies." While many object to the label, the jurisdictions that have adopted these policies are sometimes referred to as "sanctuary cities" or "sanctuary jurisdictions."

Regardless of the precise approach a city takes, as long as the focus of the policy is on the city's level of cooperation or sharing of information with federal immigration authorities, the policy is not in conflict with a federal law, unlike the marijuana regulation situation with the federal Controlled Substance Act.

It is important when advising your city on such policies to carefully review the Executive Order and applicable federal statutes implicated by the various policy choices cities may wish to make.

R E S O U R C E
Municipal Finance Committee

This committee monitors proposed legislation that impacts municipal finance and helps develop resources for advising Revenue & Taxation Policy Committee of the League as well as monitoring the case law developing in this area. The committee updates the *Propositions 26 and 218 Implementation Guide* and assists with the finance sections of *The Municipal Law Handbook.*

E X E R C I S E

A city is in financial trouble. Every department has been asked to make cuts. A contract city attorney offers an alternative to hourly billing for lawsuits filed to abate nuisances. Instead, the law firm would limit its compensation to cost recovery from the defendant. In this way, the city attorney's office will function more like the planning department, which charges fees in the amounts that recover the costs of services provided, thereby alleviating the burden on taxpayers. The city council is thrilled with the cost-saving proposal except that one member of the council (who is not a big fan of the city attorney) thinks the city has to issue a request for proposals to consider changing the contract and thinks that the city attorney cannot advise the city council about whether an RFP is required or negotiate her law firm's contract without violating Section 1090.

Because city attorneys exercise government authority on behalf of the public, they are subject to heightened standards of impartiality. City attorney decisions in criminal and nuisance abatement proceedings must be made only based on probable cause and the interests of justice. *People ex rel. J. Clancy v. Superior Court*, 39 Cal.3d 740, 746 (1985) (citing ABA Code of Prof. Responsibility, EC 7-14). Consequently, the contingency fee itself – even if it saved the taxpayers money – is improper. *Clancy* involved a nuisance abatement action against an adult bookstore where the prosecuting attorney was being paid a contingency fee. The court of appeal

concluded that certain nuisance abatement actions are like criminal prosecutions and thus raise the specter of the public interest in justice being served (over any other consideration). In *County of Santa Clara v. Superior Court* , 50 Cal. 4th 35, 54 (2010), 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 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. *City of Los Angeles v. Decker*, 18 Cal.3d 860 (1977); *Clancy*, *supra*, 39 Cal.3d at 748-749.

If a city has a purchasing ordinance that sets out the types of contracts that must be subject to a request for proposal process, a contract city attorney could point city staff and the council to the relevant sections. A contract city attorney has an interest in whether a contract is subjected to RFP and should recuse himself/herself from that decision.

Government Code Section 1090 prohibits city officials, including city attorneys, from having a financial interest in contracts made by them "in their official capacity." Section 1090 does not apply to 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. But 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. In *Campagna v. Sanger* (1996) 42 Cal.App.4th 533, 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. 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 the agreement 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, basically a "finder's fee" deal.

The court looked at both transactions. The court concluded the city attorney did not violate Section 1090 when he negotiated with the city on his firm's behalf. In that transaction, the attorney was functioning in his private capacity to negotiate a contract to provide additional legal services beyond the basic retainer agreement. However, when the city attorney cut his deal with the other law firm, the court found he was acting as a city official and therefore subject to Section 1090. Because he was financially interested in a contract made in his official capacity, the city attorney violated Section 1090. Consequently, the referral fee agreement was unenforceable.

R E S O U R C E
FPPC Committee

This committee monitors the proceedings of the Fair Political Practices Commission, advises the FPPC of city concerns and the practical implications of proposed policies (which is way harder than you would think), and keeps members up to date on the constantly moving target of FPPC regulations.

E X E R C I S E

A city councilmember asks the city attorney for an opinion as to whether he has a financial conflict of interest involving an upcoming agenda item. In order to prepare the opinion, the city attorney asks the councilmember for certain financial information, which he provides in a written document marked "confidential." The city attorney prepares a written opinion concluding that the councilmember has no conflict. When the item comes up on the agenda, the councilmember is asked whether he intends to recuse himself; he responds saying that the city attorney has provided him with a written opinion concluding that he has no conflict. Another member of the council asks to see a copy of the opinion; the councilmember objects, arguing that it contains sensitive, private financial information. He also states that the city attorney accepted the confidential information from him, without any hint that it could be shared with others. If he'd known that was a possibility, he would have engaged a different lawyer to advise him.

Lawyers owe a duty of undivided loyalty and confidentiality to their clients. *See* Rule 3-310 (C) and (E) of the California Rules of Professional Conduct; *see also* Bus. & Prof. Code §6068(e)(1) ("It is the duty of an attorney to do all of the following… To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.). The city attorney's client is the city "acting through its highest authorized officer, employee, body…." Rule 3-600(A) of the California Rules of Professional Conduct. The city attorney generally answers to the city council as a body and has no obligation or right to keep information obtained from an individual councilmember from his colleagues.

The city attorney shall advise the city officials in all legal matters pertaining to city business. Gov. Code, § 41801. But the "city" is still the client. Under the ethical rules, city attorneys are obligated to make clear that they represents the city and not individual councilmembers or officers:

> **(D)** In dealing with an organization's directors, officers, employees, members, shareholders, 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 interest if that is or becomes adverse to the constituent.

Rule 3-600 (D) of the California Rules of Professional Responsibility. Accordingly, when advising individual councilmembers, we need to pay close attention to the impression given regarding the confidentiality of our interactions with individual councilmembers or staff.

GOOD TO KNOW: The California Attorney General opined that when a city attorney obtains information in confidence from a councilmember under circumstances leading the councilmember to believe that a confidential relationship exists between the city attorney and the councilmember, the city attorney is precluded from prosecuting the council member under the Political Reform Act. 71 Ops. Cal. Atty. Gen. 255 (1988).

R E S O U R C E
Legal Advocacy Committee

The Department administers the League's legal advocacy program in accordance with the policy adopted by the League board of directors. In addition to making recommendations on the League's participation in litigation of broad importance to cities and the League's mission to promote home rule and local control, committee members regularly solicit input from and report the committee's actions back to their respective local city attorneys associations, if any.

E X E R C I S E

The contract city attorney law firm for a small city also performs unrelated legal work for a nearby but not adjacent, large city. The large city has an in-house city attorney but sometimes contracts with outside law firms, especially to handle litigation. The large city takes an action that severely impacts traffic patterns to the detriment of residents of the small city. The city council of the small city asks the city attorney to notice a closed session to discuss whether to file a CEQA lawsuit against the large city.

FUN FACT ABOUT LITIGATION CLOSED SESSIONS: The Brown Act permits the legislative body to go into closed session to consult with legal counsel. A litigation closed session cannot take place under the Brown Act without legal counsel present.

California Rules of Professional Conduct Rule 3-310. Avoiding the Representation of Adverse Interests (as relevant):

"(C) A member shall not, without the informed 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

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

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter….

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment. [Emphasis added.]"

Representing two or more clients with adverse interests simultaneously in different matters is prohibited unless both (or all) clients give informed written consent.

"'In evaluating conflict claims in dual representation cases, the courts have accordingly imposed a test that is more stringent than that of demonstrating a substantial relationship between the subject matter of successive representations. [Footnote omitted.] Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required.* Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or "automatic" one.

The reason for such a rule is evident, even (or perhaps especially) to the non-attorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter *wholly unrelated* to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances. As one commentator on modern legal ethics has put it: "Something seems radically out of place if a lawyer sues one of the lawyer's own present clients on behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's *sense of loyalty* is askew." (Wolfram, Modern Legal Ethics (1986 ed.) § 7.3.2, p. 350, italics added.) It is for that reason, and not out of concerns rooted in the obligation of client confidentiality, that courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even where the substance of the representations are unrelated. [Footnote:] There are, of course, exceptions even to this rule. The principle of loyalty is for the *client's* benefit; most courts thus permit an attorney to continue the simultaneous

representation of clients whose interests are adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict."

Flatt v. Sup.Ct. (Daniel) (1994) 9 Cal.4th at 282–283; *see also* Cal. Rule of Prof. Conduct 3-310(C)(1),(2) (Counsel may accept or continue representation of clients whose interests *actually or potentially* conflict if *each client* gives "*informed* written consent" to the representation).

The Discussion under Cal. Rule of Prof. Conduct 3-310 states that this Rule "is intended to apply to representations of clients in both litigation and transactional matters."

In this instance, the law firm may represent City A in the CEQA action if it obtains both clients' informed written consent. Of course, some clients may be wary of such arrangements, in which event the law firm is best advised to recuse itself from the CEQA matter.

R E S O U R C E
Brown Act Committee

The committee vigilantly monitors legislation proposing changes to the Brown Act (more amendments are introduced than you'd imagine), keeps the Department abreast of case law changes and serves as a resource toward developing best open meeting practices. The committee also updates *Open and Public* and the Brown Act section of *The Municipal Law Handbook.*

City attorney calls the city manager to get his take on how long the council meeting will likely last. The city manager tells her to go ahead and make an 8pm dinner reservation because he has talked to each of the councilmembers and gotten them to all agree to continue the public hearing item. Also, he knows from his conversations that the councilmembers have reached a "compromise" on the controversial marijuana ordinance. The three councilmembers that were previously supporting an out-right ban have been persuaded by the councilmember advocating for the ordinance to vote for it if it is limited to allow just medical marijuana. The city manager expresses relief that, in light of this compromise, the meeting will not be as lengthy and contentious as the last meeting where the marijuana ordinance was discussed but continued by the council advocate because he clearly did not have the votes to support his proposal.

This is not a good position in which to find one's self. Essentially, the city manager in this scenario has described an illegal serial meeting[5].When a city attorney learns that the conduct

[5]Note that in some cities the city manager is authorized to schedule items for the agenda. In that situation, the city manager might make the decision to add am item or address in a recommendation or staff report an aspect of an item that the city manager learned is of interest to one or more councilmembers from individual contacts. This is not per se in conflict with the

of a city official or employee is or may be a violation of law that may be "reasonably imputed to the organization" or is "likely to result in substantial injury to the organization," State Bar rules expressly authorize the city attorney to take the matter to the "highest internal authority within the organization." Rule 3-600(B) of the California Rules of Professional Conduct. While reporting such activity up the city's hierarchy, the city attorney must not disclose any confidential information beyond the organization itself. 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 Rule 3-700. (Again the dreadful last resort.)

R E S O U R C E
Municipal Law Handbook Committee

On a grueling annual production schedule, through a huge network of volunteer editors, this committee updates and improves *The California Municipal Law Handbook*, published by CEB. The comprehensive publication is the owner's manual that comes with our jobs.

FUN CITATION FACT: The *Municipal Law Handbook* is the most authoritative secondary source for municipal law in California and it is citable authority! In all your briefs and motions, why not cite the most reliable authority on municipal law? The official Blue Book format for handbook is **City Attorneys' Dep't, League of Cal. Cities, The California Municipal Law Handbook (Cont.Ed.Bar 2014 ed.) §x.xx, p.xxx**. And, because it is maintained by the members of this Department, when you cite *The Municipal Law Handbook*, you are really citing yourself! *Cite yourself!* You deserve it!

E X E R C I S E

During budget hearings the city council cautions the in-house city attorney not to exceed his outside counsel budget. Midway through the year, the council directs the city attorney to negotiate a ground lease of a surplus piece of city property with a private developer. The city attorney has no experience with complex real estate matters and insufficient funds in his budget to hire a real estate attorney. The city attorney proceeds to negotiate the ground lease on his own.

A lawyer must faithfully discharge the duties of an attorney at law to the best of his or her knowledge and ability. Cal. Bus & Prof. Code § 6067. Rule 3-110(A) of the California Rules of Professional Conduct states that "[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

(..continued)
Brown Act but the conduct crosses over the line if the city manager is soliciting council opinions in order to make decisions.

"Competence" is defined in paragraph (B) of Rule 3-110 to mean "to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." Paragraph (C) outlines the steps a lawyer can take if he or she does not possess the requisite competence when representation is undertaken:

> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Being a "generalist" – as city attorneys pride themselves on being – requires self-awareness and an honest appraisal of one's on "learning and skill" in order to abide the ethical obligation to competency.

Budget concerns aside, the city attorney in the scenario above has a professional obligation to educate himself to a level of proficiency in real estate transactions or to bite the bullet and engage counsel who is competent in the area of practice. Moreover, the duty of communication would require the lawyer to advise the client if he did not possess or could not obtain the requisite level of competence.

SCARY SIDE NOTE FOR TECHNOPHOBES: Competent lawyers are expected to have a working understanding of technologies in order to respond to Public Records Act requests and e-discovery demands appropriately. In other words "I didn't know text messages were saved on the phone" is no excuse. Absent a good understanding of the technology, a city attorney may end up in violation of Rule 3-110. On June 30, 2015, the Committee on Professional Responsibility and Conduct of the State Bar of California issued Formal Opinion 2015-193, which sets a standard for e-competence: "The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during litigation, including the likelihood that e-discovery will or should be sought by the other side." Under the rules, a city attorney must become sufficiently e-competent or associate with someone who is and become sufficiently e-competent to be able to supervise that expert.

R E S O U R C E
Municipal Law Institute Committee

The MLI is a project of the City Attorneys' Department and every year this committee presents a symposium, which takes a deep dive into an important subject affecting cities. The overarching goal of the committee is toward "integrating the study of municipal law in law schools with the practice of municipal law in order to encourage and train students to work in municipal law as a profession." (quote from Department bylaws).

E X E R C I S E

During a closed session at which the city attorney sought authority to bring a civil injunction case against a scofflaw who had built a deck without proper permits, a councilmember inquires about whether the violation of the Municipal Code is punishable as a criminal offense. When told yes, the Councilmember moves to authorize the civil injunction only if criminal prosecution is unsuccessful. The motion carries.

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. *See* Penal Code §1054.6. 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.

Criminal actions cannot be used to gain civil advantages. 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." *Salazar v. Upland Police Department* (2004) 116 Cal.App.3rd 294, 298.

ONE FINAL NOTE. If there were a City Attorneys' Department Credo, it would be this:

It is better to be right than to be City Attorney.[6]

The practice of public law requires a conscious understanding of the duty to the public and a purposeful decision to put the City's interests above all else. As a final observation, these public service jobs of ours have become more challenging as contempt for government is vogue and Twitter rules the airwaves.

As public officials, we all face the possibility of being the object of a cyberbully or the subject of a social media drubbing. But as lawyers, we owe our clients a duty of loyalty that requires us to face down reticence to do our jobs under such stress. That requires us to be conscious of the threat as a source of stress in our profession and develop tools for addressing the stress in order to perform our professional obligations competently (and be happier).

[6]Our gratitude to Natalie West, former city attorney for Novato and Brentwood and past President of the Department (1986-1987) for passing along this credo.