


# **ETHICS ISSUES FOR PUBLIC LAWYERS**

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# MICHAEL G. COLANTUONO

Colantuono & Levin, P.C.  
11406 Pleasant Valley Road  
Penn Valley, CA 95946-9001  
(530) 432-7359 (voice)  
(530) 432-7356 (fax)  
[mcolantuono@cllaw.us](mailto:mcolantuono@cllaw.us)  
[www.cllaw.us](http://www.cllaw.us)

# Topics for Discussion

- Representation of Conflict Interests – Concurrent and Successive Representations
- Complying with Non-Discrimination Mandates
- Management of Outside Counsel
- Q&A

# Representing conflicting interests

- Rule 3-310
- Who is the client?
- Indemnity of or by the entity?
- Multiple clients for one engagement
- Concurrent or successive representation of adverse interests

# Rule 3-310(C)

- (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.

# Who is the client?

- The agency itself.
- Rule 3-600 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.”
- Thus, generally, multiple-client conflicts do not arise in service to a single agency.

# Indemnity By the Agency

- Agency indemnity of its employees
  - Gov't Code 995, general duty to indemnify
  - Gov't Code 995.2, exceptions for:
    - Outside scope of employment
    - Fraud, corruption, malice
    - Conflict between agency and employee
  - Agency may choose counsel, control defense and determine if conflict exists
  - Reservation of rights permitted
  - Indemnity as to punitives permissible in some circumstances

# Indemnity of the Agency

- Contract Counsel often defend, indemnify and insure the client
  - Commercial general
  - Auto
  - E&O
- Rule 3-400(A): “A member shall not:  
(A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice



# Multiple Clients

- Defense of agency and employee defendant
- Defense of employee subject to reservation of rights requires separate counsel
- Quasi-Independent Bodies and Officials
  - Civil Service Commissions
  - Rent Control Boards
  - Clerks & Treasurers
  - Litigation Between Agency and Manager

# Simultaneous Representation of Adverse Interests

- Simultaneous Representation of Clients w/ actually adverse interests in a given matter is prohibited because duties of loyalty and confidentiality cannot be fulfilled (both sides of a lawsuit)
- Simultaneous Representation of Clients w/ potentially adverse interests in one matter or adverse interests in an unrelated matter requires informed, written consent

# Successive Representation of Adverse Interests

- Prohibited if there is a substantial relationship between the current matter and the prior representation because of unacceptable risk a client's confidences will be used to his or her detriment
- Vicariously applies to all members of a law firm or office
- Applied less vigorously to public in-house lawyers and ethical walls permitted in some circumstances
- Useful to make clear that advice is given for, and shared with, the institutional client

# Joint Powers Agreements

- JPA and its “parent” agencies often share counsel
- Best to address potential conflicts up front (although consent may need to be renewed subsequently)
- Beware 1090 and PRA issues when forming a JPA you expect to represent

# General Counsel / Special Counsel Relations

- Selection of special counsel
- Billing and other practices
- Management and oversight
- Favoritism and conflicts of interest

# Selection of Special Counsel

- 1090 & PRA Issues for Contract General Counsel
- Discrimination laws
  - Client pressure to diversify panel of special counsel
  - Client preference for counsel of a particular race or gender in a civil rights, employment or discrimination case

# Rule 2-400(B)

In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

# Strategies to avoid discrimination

- Maintain diverse list of outside counsel
- Resist client pressure to use particular counsel in a given case and focus client on diversity of the list
- Include non-discrimination obligation in special counsel contracts
- Develop Standard Procedures for retaining special counsel which might include criteria for hiring
- Legal remedial preferences?



# Billing & Other Practices

- General Counsel should review all bills
- Require Status Reports and Consultation for Major Strategy Choices
- Discourage Gifts or Comply with Disclosure Requirements (Gifts to the Agency / Office)
- Require Compliance with Conflict Laws

# Conclusion

- Be alert to conflicts
- Document, document, document
- Be creative and thoughtful about how to accomplish the spirit and the letter of nondiscrimination laws