

Public Agency Attorney Ethics

<http://www.ca-ilg.org/post/public-agency-attorney-ethics>

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Question: *Ethics is very important to our organization. For example, when we hire the chief executive, one of the criteria is being a member of the International City/County Management Association (ICMA), since we know that that organization requires its members to adhere to a code of ethics.*

Is there something similar for public agency attorneys? If so, what kinds of standards does it set?

Answer: Attorneys must meet a number of requirements (including ethics requirements) to be able to practice law and to continue practicing law in California. Some of those requirements are creatures of state law; others are rules adopted by the State Bar. In addition, the City Attorneys Department of the League of California Cities has adopted aspirational standards for those involved in the practice of municipal law.

The Business and Professions Code and the State Bar Act

Some background information about attorney licensure requirements may be helpful. In California, attorneys must be licensed to practice law.¹ The licensing organization is The State Bar of California.² California attorneys must take and pass two tests (commonly referred to as the Bar Exam) to be able to practice law.³ One of these tests is focused on the rules relating to professional ethics.⁴ In addition to taking a test, prospective attorneys must be found to be of “good moral character.”⁵

To maintain their status, they must take continuing legal education courses, including courses relating to legal ethics.⁶ In addition, on an ongoing basis, attorneys, including those who represent governmental agencies, must adhere to the Rules of Professional

This column is a service of the Institute for Local Government (ILG), whose mission is to promote good government at the local level. For more information and to access ILG’s resources on public service ethics, visit www.ca-ilg.org/trust.

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Conduct set by the California Bar and approved by the California Supreme Court.⁷ These requirements are in addition to ethics law requirements imposed on public officials

Like all rules relating to ethics, these are minimum standards. However, failure to meet these and other standards can subject an attorney to discipline and even loss of license (a process called “disbarment”⁸).

Attorneys’ Professional Responsibilities to Advise Compliance with the Law

California’s Business and Professions Code details these various requirements for attorney licensure, education and discipline. It also imposes on attorneys certain duties,⁹ which are further fleshed out in the State Bar’s Rules for Professional Conduct.¹⁰ (Note that a proposal to significantly reorganize these rules is currently pending before the California Supreme Court.¹¹)

Taken together, these rules impose a professional obligation for attorneys to counsel compliance with the law,¹² unless the attorney believes in good faith that a law is invalid.¹³

Similarly, attorneys are not allowed to seek, accept, or continue employment if the member knows or should know that the goal is to present a litigation claim or defense that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.¹⁴ Attorneys may only pursue clients’ causes in ways that are consistent with the truth.¹⁵

Attorneys’ Department Principles Offer Guidance

The aspirational ethical principles adopted by the League of California Cities’ city attorneys department¹⁶ (“principles”) take these concepts further and encourage municipal lawyers to promote the rule of law by approaching their roles in a way that helps create a culture of compliance with the law.¹⁷ This includes promoting and exemplifying the underlying purpose of legal requirements.¹⁸

The principles encourage municipal lawyers to rely on sound legal analysis in providing advice.¹⁹ Common practice (“everyone else does it that way”) or a past practice (“we have always done it that way”) should not move an attorney away from that analysis, nor should it matter that the risk of suit or other consequence for action is considered low.²⁰

In addition, the principles recognize that attorneys may be pressured to justify a course of action that is clearly unlawful. When this occurs, the principles encourage the attorney to resist pressure to be “creative” to provide cover for the elected or appointed public officials who want to act in ways that are unlikely to be legal.²¹

The principles also recognize that those who are intent on proceeding unlawfully will sometimes keep the attorney out of the loop. If, in spite of such efforts, a problem becomes evident to the attorney, the principles encourage the agency's attorney to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought.²²

In short, these concepts are why people sometimes refer to attorneys as "counsel" or "counselor." However, beyond encouraging (counseling) compliance with the law, public agency attorneys generally have no inherent policing or enforcement powers when it comes to client decisions to act unlawfully.

Who Gets to Decide?

Ultimately, the attorney's client decides on whether to follow the attorney's advice. This is one of the contexts in which it is important for public agencies to understand who the "client" is. The client is the organization itself, acting through its highest authorized body, officer or employee that is authorized to act on a matter.²⁵

So what happens if the attorney gives advice and it is not followed? Strictly speaking, the current Rules of Professional Conduct do not require that the attorney take the issue up the chain of command; they merely allow it.²⁶ Doing so, however, is consistent with attorneys' obligation to keep clients reasonably informed of significant developments related to representation.²⁷ (The pending proposed rules *do* require going up the chain of command, unless the attorney believes it is not necessary to protect the organization's interests.²⁸)

What Happens If the Organization Persists?

Attorneys in such situations face unique constraints compared to others who work for public agencies. State law requires attorneys to maintain their clients' confidences.²⁹ The only exception (not typically relevant to the public agency context) is when death or substantial bodily harm can be avoided by disclosure.³⁰

Thus, if an attorney has given advice that is not being followed, the attorney has few options. The easiest situation is when the law is not clear and the clients' course of action is not demonstrably unlawful.

Other Things for Agency Officials to Know

As indicated in the article, the holder of the attorney-client privilege is the agency. The Rules of Professional Conduct allow the client to waive that privilege, as long as such consent is "informed."²³ Thus, a majority of the governing body can waive the privilege and allow an attorney to alert enforcement authorities to unlawful conduct.

Such waiver can be on a case-by-case basis. Alternatively, an issue the Institute is pondering is whether the waiver can occur for violations of ethics laws, for example as part of an agency's adoption of its ethics policies.²⁴

Also, majorities on a governing body can change. If an inquiry is made into why the agency or individual officials pursued an unlawful course of action, subsequent majorities may elect to waive the privilege and disclose what advice the attorney did and did not give.

However, if indeed it is clear that the agency is taking an unlawful action and the attorney's efforts to encourage corrective action have been unavailing,³¹ the only recourse the attorney has is to resign.³²

What about state-law protections for whistle-blowers? The Attorney General has concluded that Business and Professions Code sections relating to attorney-client confidentiality trump those protections.³³ The comment section to the California Bar's Proposed Rules of Professional Conduct also takes this position.³⁴ Efforts to create an exception have been vetoed by two different Governors.³⁵

Back to the Question: Attorney Ethics

One of the strategies the Institute recommends for organizations concerned about maintaining a culture of ethics is to include questions relating to ethics in the interview process (see August 2006 article on this topic available at <http://www.ca-ilg.org/post/promoting-culture-ethics-your-agency>). In addition to asking candidates for agency executive positions about their membership in ICMA, asking a candidate for the agency attorney about their views of the agency's attorneys department's ethical principles is a first step.

However, (remembering that Bell's disgraced city manager, Robert Rizzo, was a member of ICMA), mere membership in an organization or familiarity with a code, is helpful but not sufficient. The next step in the "hiring-for-ethics" process is to probe how an individual would handle certain situations, including a situation in which advice has been given but not followed (or not sought). Would the candidate leave it there or try to prevent harm to the agency by communicating up the chain of authority?

Not only does this allow those involved in the hiring process to determine how a prospective attorney says he or she will handle a given situation,³⁷ it also signals to the candidate that decision-makers support ethical decision-making within the organization.

In short, promoting a culture of ethics and fidelity to the law is *everyone's* responsibility in the organization. In California, every elected official and high level employee takes an oath of office to support and defend the federal and state constitutions,³⁸ from which all laws derive. While determining what the law requires in any given situation is the attorney's responsibility, following that law is everyone's responsibility in public service.

Agency Counsel Supervises Attorneys Providing Advice to Agency

For cities and counties, state law provides some guidance on the roles public agency counsel is to play within an agency.³⁶ In charter cities, this guidance is typically provided in the charter.

From time to time, the agency may find it necessary or useful to hire additional legal assistance. Typically, such counsel will work under the supervision and direction of the city attorney or county counsel.

In organizations with a strong ethical culture, leaders understand and support the attorney's advice-giving role, even when that advice is unpopular or may be politically difficult. Conversely, in organizations lacking such a strong culture, the attorney receives signals that negative advice isn't welcome and even if the attorney were to work up the chain of command to the highest decision-making authority, the decision would be to ignore the unwelcome advice.

If You Are the Attorney in This Situation

For any public servant, including attorneys, asking someone to put one's job and financial security (and that of his or her family) on the line is huge. This is the essence of a "moral courage" ethical dilemma—when someone knows the right thing to do but understands that doing it will involve a personal cost.

The decision is a difficult one. However, experience has shown that, when agencies violate the law (and in public agencies, odds are that transparency requirements and changes in leadership will ultimately bring bad behavior to light), people will scrutinize the role of the local agency attorney.

For attorneys, documenting that one has given good advice on what the law requires in a given situation (or situations) can be a wise strategy. So is documenting efforts to bring issues to the attention of the highest decision-making level. A confidential memo is a tool to do this.⁴⁰

Another situation that can occur is that decision-makers will pressure attorneys to modify their advice. Courts have recognized this phenomenon—in the context of public service ethics legal advice—and found that advice of counsel is not a defense.⁴¹

What if one fears that providing such advice in writing—so there is no question that it was given—will in itself put one's job on the line? That's an indication that those in a position to act on that advice want to retain the option, if caught, to claim ignorance. It's a short next step (and one that has been taken many times) to blame the attorney for not giving the advice.⁴²

To be sure, it's a no-win situation. In this situation, however, it may well be longer-term career insurance to give the advice and put one's job on the line if necessary.

Annual Memo

The Rules of Professional Conduct require attorneys to be clear on when there is and is not a confidential relationship.³⁹

One way to do this is with an annual memo that explains that the agency is the client and offers other important information (for example, about how to satisfy state-required ethics training) and ethics law information. The Institute offers a [sample of such a memo on its website](#).

About ILG

ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties. For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/trust. If you would like to access this resource directly, go to www.ca-ilg.org/overview/everyday-ethics.

The Institute welcomes feedback on this resource:

- *Email:* jspeers@ca-ilg.org Subject: *Public Agency Attorney Ethics*
- *Mail:* 1400 K Street, Suite 205 ▪ Sacramento, CA ▪ 95814

References and Resources

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration).

¹ See Cal. Const. art. VI, § 9:

The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record.

See also Cal. Bus. & Prof. Code § 6060 (relating to the licensure requirement).

² See Cal. Bus. & Prof. Code § 6001 and following (creating the State Bar of California and specifying its powers and duties). The Bar's website is www.calbar.ca.gov.

³ See Cal. Bus. & Prof. Code § 6046 (the test is administered by the State Bar's Committee of Bar Examiners). For more information on the admission to practice law requirements, see <http://rules.calbar.ca.gov/Rules/Title4AdmissionsandEducationalStandards.aspx>.

⁴ See Cal. Bus. & Prof. Code § 6060(f)(authorizing Committee of Bar Examiners to require testing in Professional Responsibility); <http://admissions.calbar.ca.gov/Examinations/MultistateProfessionalResponsibilityExamination.aspx> (Bar's requirement that applicants for admission take the national examination on professional responsibility requirements).

⁵ See Cal. Bus. & Prof. Code § 6060(b) (note that attorneys must also meet certain educational requirements)

⁶ See Cal. Bus. & Prof. Code § 6070; California Rules of Court, Rule 9.31 (available at http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_31), and State Bar of California, MCLE Rules (<http://mcle.calbar.ca.gov/MCLE/Rules.aspx>).

⁷ See Cal. Bus. & Prof. Code § 6100.

⁸ See Cal. Bus. & Prof. Code § 6117.

⁹ See Cal. Bus. & Prof. Code § 6068.

¹⁰ These are available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx>. Note that revisions to these rules have been approved by the State Bar and are pending approval before the California

Supreme Court:

<http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Proposed%20Rules%20of%20Professional%20Conduct%20v.14%20%2806-26-12%29.pdf> .

¹¹ These can be found at

<http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Proposed%20Rules%20of%20Professional%20Conduct%20v.14%20%2806-26-12%29.pdf>

¹² See Cal. Bus. & Prof. Code § 6068(c) (“To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.”)

¹³ State Bar Rule of Professional Conduct Rule 3-210 Advising the Violation of Law, available at

<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3210.aspx>

¹⁴ State Bar Rule of Professional Conduct Rule 3-200 Prohibited Objectives of Employment, available at

<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3200.aspx>

¹⁵ See Cal. Bus. & Prof. Code § 6068(d) (“To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”).

¹⁶ Ethical Principles for City Attorneys, *Adopted October 6, 2005, City Attorneys Department Business Session*. Available at www.cacities.org/attorneys, specifically

<http://www.cacities.org/UploadedFiles/LeagueInternet/d6/d60445e6-7918-459b-9780-00a714616297.pdf>.

¹⁷ City Attorneys Ethical Principles, Principle 1, Rule of Law.

¹⁸ City Attorneys Ethical Principles, Principle 1, Rule of Law.

¹⁹ City Attorneys Ethical Principles, Principle 1, Rule of Law, Example 3.

²⁰ City Attorneys Ethical Principles, Principle 1, Rule of Law, Example 3.

²¹ City Attorneys Ethical Principles, Principle 1, Rule of Law, Example 2.

²² City Attorneys Ethical Principles, Principle 1, Rule of Law, Example 6.

²³ See State Bar Rule of Professional Conduct Rule 3-100, Confidential Information of a Client, available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3100.aspx>

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) *without the informed consent of the client* . . .

(emphasis added).

²⁴ This approach is contemplated by the California Bar’s Proposed Rules of Professional Responsibility, comment 15 to Rule 1.13:

[15] Although this Rule does not authorize a governmental organization’s lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e) or Rule 1.6, a governmental organization has the option of establishing 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.

²⁵ State Bar Rule of Professional Conduct Rule 3-600, Organization as Client:

(A) 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) If, despite the member's actions in accordance with paragraph (B), *the highest authority that can act on behalf of the organization* insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(emphasis added). Note that the applicable section in the Proposed Rules of Professional Conduct is Rule 1.13. The proposed rules are available at

<http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Proposed%20Rules%20of%20Professional%20Conduct%20v.14%20%2806-26-12%29.pdf>

²⁶ State Bar Rule of Professional Conduct Rule 3-600, Organization as Client:

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

- (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
- (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

²⁷ State Bar Rule of Professional Conduct 3-500 Communication, available at

<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3500.aspx>

²⁸ Proposed Rule of Professional Conduct Rule 1.13:

Rule 1.13 Organization as Client

(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 constituents overseeing the particular engagement.

(b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization 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.*

(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code section 6068(e).

(d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

²⁹ See Cal. Bus. & Prof. Code § 6068 (e) (1) (“To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”).

³⁰ State Bar Rule of Professional Conduct 3-100 Confidential Information of Client, available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3100.aspx>

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

³¹ City Attorneys Ethical Principles, Principle 1, Rule of Law, Example 5:

If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city's interests.

³² State Bar Rule of Professional Conduct Rule 3-100 Termination of Employment, available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3700.aspx>:

B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; . . .

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

- (b) seeks to pursue an illegal course of conduct, or
- (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
- (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
- (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
- (f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; . . .

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

³⁴ See also Proposed Rules of Professional Conduct, Rules 1.6 & 1.13: Confidentiality & Organization as Client, specifically comment 15 to Rule 1.13:

[15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e) or Rule 1.6, a governmental organization has the option of establishing 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.

³⁵ See, for example, See AB 2713 (2003-2004 Reg Sess.), which would have authorized public agency attorneys to disclose confidential information when:

1. If they learn that their client is engaging in a crime or fraud and they have tried to remonstrate up the organization's hierarchy; or
2. The very head of the organization is engaged in the crime or fraud; or
3. Reporting up the hierarchy would not be reasonable under the circumstances.

Governor Schwarzenegger vetoed AB 2713. See also AB 363 (2001-2002 Reg. Session), vetoed by Governor Davis.

³⁶ See Cal. Gov't Code §§ 36505 (in general law cities, city council appoints city attorneys); 41801-41803.5 (city attorney shall advise city officials in all legal matters pertaining to city business); §§ 27642, 26520 (authorizing appointment of county counsel to provide legal services to the county); § 26526 (county counsel is the legal adviser of the board of supervisors)..

³⁷ As discussed in the December column, research indicates that saying one will do the right thing and actually doing the right thing are different matters. See Max H. Bazerman and Ann E. Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press: 2011), chapter 4 (a process they call "ethical fading").

³⁸ See Cal. Const. art. XX, §3, which says

Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

_____ (If no affiliations, write in the words "No Exceptions") and that during such time as I hold the office of _____ (name of office) I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

And no other oath, declaration, or test, shall be required as qualification for any public office or employment.

"Public officer and employee" includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing. (emphasis added).

³⁹ See State Bar Rule of Professional Conduct Rule 3-600(D), Organization as Client

(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.* (emphasis added).

⁴⁰ See *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (1993) (finding attorney memo to governing body is protected by attorney-client privilege; memo is not subject to disclosure under the Public Records Act and does not violate open meetings law).

⁴¹ See *People v. Chacon*, 40 Cal. 4th 558 (2007).

⁴² This can conceivably give rise to a complaint that the attorney violated State Bar Rule of Professional Conduct Rule 3-110 Failing to Act Competently:

Attorneys must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. For purposes of this rule, "competence" in any legal service means applying the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

Available at

<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3110.aspx>