California
Fair Political
Practices Commission

March 5, 1993

David R. McEwen
Law Offices of Stradling, Yocca, Carlson & Rauth
660 Newport Center Drive
Suite 1600
Newport Beach, CA 92660-6441

Kathryn Reimann
Law Offices of Kane, Ballmer & Berkman
354 South Spring Street
Suite 420
Los Angeles, CA 90013

Stan Wolcott, President
California Association of Bond Lawyers
611 Anton Boulevard
Suite 1400
Costa Mesa, CA 92628-1950

Re: Your Requests for Informal Assistance
Our File Nos. I-92-481, I-92-523, and I-92-614

Dear Messrs. McEwen and Wolcott and Ms. Reimann:

This is in response to your letters requesting clarification of advice issued previously in the Boehm Advice Letter, No. I-92-049, and the Rodriquez Advice Letter, No. I-90-686, on behalf of yourselves, your respective law firms, and the California Association of Bond Lawyers regarding contract attorneys' responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").[1] In your letters, each of you raised nearly identical issues, differing only in your analysis.[2] To provide clarification regarding these complex issues, the Commission has chosen to consolidate its reply into this single letter.

---

[1] Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

[2] The fourth requestor, Lewis G. Feldman of Cox, Castle & Nicholson, formally withdrew his request for advice.

Although some of you have requested formal advice, pursuant to the provisions of Regulation 18329(b), we are treating this letter as a request for general guidance because of the general nature of the inquiry presented for our consideration.[3] We note that none of you have named a specific governmental decision or public official on whose behalf you have requested advice. In addition, our advice is to be interpreted as prospective in nature and we make no comment regarding any past conduct.

INTRODUCTION

In the Boehm Advice Letter No. I-92-049, the Commission advised the city attorney of Chico that, under the facts presented in his letter, a person who contracts with the City of Chico to perform legal services as a bond counsel is a "consultant" within the meaning of the Act and, as such, is subject to the disclosure and disqualification provisions of the Act.

In the Rodriguez Advice Letter No. I-90-686, the Commission advised the City of Orange that an attorney retained as special counsel by the redevelopment agency to provide general advice and assistance to the agency on an ongoing basis is a "consultant" within the meaning of the Act. For this reason, the Commission concluded that any member of that attorney's law firm who on occasion performs the functions of the special counsel is precluded from participating in any agency decision which would foreseeably and materially affect the member's economic interests. These economic interests, in pertinent part, consist of sources of income to the special counsel, including the member's employer (the law firm) and, where applicable, clients of the law firm.

Your letters request clarification of the Boehm and Rodriguez Advice Letters, supra. You ask us to clarify any uncertainty regarding when a member of a law firm, who qualifies as a "consultant" under the Act by virtue of a contract between the member's law firm and a governmental agency, has a financial interest in a governmental decision. Specifically, you are uncertain when the "consultant" attorney may participate in making agency decisions that will have a foreseeable and material financial effect upon the attorney's law firm.

---

[3] Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c).)

QUESTION 1.

May an attorney who is a "consultant" under the Act by virtue of a contract between the attorney's law firm and a governmental agency participate in an agency decision if, as a result of such participation, the law firm will receive a fee for the attorney's legal services? Would the Commission's conclusion be different if, as a result of such participation, the attorney's law firm will be asked, directed, or required to perform additional legal services for which the firm will receive additional fees?

CONCLUSION 1.

An attorney who is a member of a law firm and who qualifies as a "consultant" within the meaning of the Act may not participate in making agency decisions that will result in a payment to the attorney's law firm, including additional fees, unless the contract with the agency under which the attorney participates in making the agency decision(s) expressly provides for payment for the legal services.

ANALYSIS 1.

SUMMARY OF APPLICABLE LAW

Public Official

The conflict-of-interest provisions of the Act prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest. (Section 87100.)

The proscription in the Act only applies to public officials. The term "public official" is defined, in part, as "every natural person who is a member, officer, employee, or consultant of a local or state governmental agency." (Section 82048; Regulation 18700(a); emphasis added.)

According to the Commission's clarification of the definition of the term "consultant," the law firm itself cannot be a consultant, because a consultant must be a natural person.[4]

---

[4] The rationale behind limiting the term "consultant" to natural persons is that the actual decisionmaker, as in the case of a public official, will be an individual. Thus, disclosure of the interests of a firm does not reflect the policy goals of the Act. The Act is intended to ensure that a public official will not be biased by financial interests in performing the official's duties. (Section 81001(b).)

(Regulation 18700(a)(2); Moe Advice Letter, No. A-89-454; Russell Advice Letter, No. A-88-484.).) It is the employees of the firm who actually perform the work who are the consultants, rather than the firm itself. (Workman Advice Letter, No. I-87-078.) Thus, if a member of the law firm provides information, advice, recommendation or counsel to the governmental agency pursuant to the terms of the contract, the member is considered a consultant under the Act, unless such person: (1) is independent of control and direction of authority, other than normal contract monitoring; and (2) possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel. (Regulation 18700(a)(2).)

The term "consultant" has been broadly interpreted to prevent a person from evading the Act's conflict-of-interest safeguards by delegating decisionmaking authority to private parties such as outside consultants or independent contractors. (See e.g., In re Maloney (1977) 3 FPPC Ops. 69.) We have previously advised that a contract attorney providing advice and counsel to a governmental agency on an on-going basis is "participating" in decisions within the meaning of Section 87100. (Rodriquez Advice Letter, supra; Moe Advice Letter, No. 89-454.) This is true even if the attorney's advice is limited to a specific area of the law. (Boehm Advice Letter, supra; Gifford Advice Letter, No. A-85-201.)

For purposes of our analysis, therefore, we will assume that any member of a law firm who performs work pursuant to a contractual relationship between the member's law firm and a governmental agency, such as a contract city attorney, redevelopment agency counsel or bond counsel, is considered a "consultant" within the meaning of the Act.

Making, Participating in Making, or Attempting to Influence a Governmental Decision

A public official makes a governmental decision or participates in the making of a governmental decision whenever the public official votes on a matter, commits the agency to a course of action, or enters into any contractual agreement on behalf of the agency. (Regulation 18700(b).) Additionally, per Regulation 18700(c), a public official participates in a governmental decision when, acting within the authority of the official's position, the public official:

> (1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or
>
> (2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

> (A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or
>
> (B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of the official's agency, an official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee, or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer. (Regulation 18700.1.)

Accordingly, if it is reasonably foreseeable that the economic interests of contract attorneys who qualify as public officials will be materially affected by a governmental decision, they must not only disqualify themselves from participating in formal decisions which may affect such interests, but they must also abstain from attempting to influence such decisions through communicating with each other or with the staff regarding those decisions.

Thus, the law firm's employees who qualify as consultants under the Act by virtue of the duties they perform pursuant to the professional services contract are "participating" in governmental decisions within the meaning of Section 87100.[5] (Regulation 18700(c).)

---

[5] While we do not have sufficient information to identify exactly which employees of Stradling, Yocca, Carlson & Rauth qualify as "consultants" under their various retainer agreements with the City of Lancaster and the Redevelopment Agency of Lancaster (McEwen Letter, Exhibit A), it appears that David McEwen currently serves as the city attorney, redevelopment agency special counsel, and bond counsel. Various other attorneys in his firm also appear to serve as "consultants" in the capacity of either redevelopment agency special counsel or bond counsel. (Exhibit A 000169, Thomas P. Clark Jr., John J. Murphy, E. Kurt Yeager; Exhibit A 000166, Dawn Honeywell, Mark Huebsch and Kurt Yeager.)

Economic Interests

As indicated above, a public official may not participate in a governmental decision in which the official knows or has reason to know the official has a financial interest. (Section 87100.) Whether a public official has a financial interest in a decision is governed by Section 87103, which provides in pertinent part:

> An official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, or on a member of the official's immediate family,[6] or on:
>
> (a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.
>
> * * *
>
> (c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.
>
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
>
> Section 87103.

Thus, the law firm is either a source of income or an investment interest (or both) to attorneys of the law firm who qualify as consultants under the Act by virtue of the contract between their law firm and the governmental agency. (Section

---

[6] An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

87103(a) and (c); Section 82030; Section 82034.) These attorneys are also employees of the firm. (Section 87103(d).) Therefore, they must disqualify themselves from participating in any decision which will have a material financial effect on any of their economic interests, including, of course, the law firm.[7] (Sections 87100 and 87103.) This is especially true with respect to contracts made with the firm. (Regulation 18702.1.)[8]

The common issue in the hypothetical questions you offer for our consideration, discussed below, is when may the "consultant" attorney participate in making governmental decisions that will have a foreseeable material financial effect on the attorney's law firm. Since your questions assume that the "consultant" attorney's law firm is the only potentially disqualifying economic interest, we limit our analysis to those assumed facts.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198.) The Act seeks to prevent more than just actual conflicts of interest; it also seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

You have not presented specific decisions for our consideration. However, in each of the hypotheticals presented you have asked us to assume that the governmental decision will have a foreseeable financial effect on the law firm.

---

[7] If an employee is also a partner in the law firm with a 10-percent ownership interest or greater, sources of income to the firm, such as clients of the firm, are also considered sources of income to the partner. Thus, for the firm partner who holds such an interest and whose pro-rata share of the income from the client is $250 or more, it is also necessary to examine the financial effect of any decision on the clients of the law firm. (Moe and Dean Advice Letter, No. A-89-454.)

[8] See In re Maloney, supra, at 73; see generally 66 Ops. Calif. Atty. Gen. 156 (1983). This agency does not advise regarding issues which may be raised under Section 1090. You should consult the Attorney General for assistance with issues raised by that section.

If a law firm stands to gain or lose business or receive additional fees depending upon its employee's recommendations to the governmental agency, then it is certainly foreseeable that those recommendations will result in a financial effect upon the law firm. To determine whether the employee can participate in making an agency decision in such an event, it must be ascertained whether the financial effect will be "material."

Materiality

Even if a decision will have a financial effect on an economic interest of a public official, the official is not disqualified from participating unless the effect is material. Whether the effect is material in any given case depends upon whether the effect is direct or indirect, and if it is indirect, it will depend on the magnitude of the effect.

If the economic interest is "directly involved" in the decision, then Regulation 18702.1 applies to determine materiality. Regulation 18702.1(b) states:

> A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:
>
> (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
>
> (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.
>
> (3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

An economic interest is also considered "directly involved" in a governmental decision if a nexus exists. A nexus situation exists if the official receives income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by his or her decision. (Regulation 18702.1(d).) For example, we have advised that if a consultant who qualifies as a public official works on a project for a firm and that project comes before the consultant's agency for some type of action, the consultant cannot participate in making the decision concerning the project. In other words, the attorney who qualifies as a

consultant under the Act may not, in the attorney's official capacity, evaluate his or her own work. (Nelson Advice Letter, No. I-91-443.)[9]

If the economic interest is only "indirectly involved" in a decision, the determination of materiality is measured differently. Regulation 18702.2 sets forth the criteria for determining whether a financial effect on a business entity is material. Materiality is related to the size of the business entity.

In each of the hypothetical questions you proffered, the law firm is either directly or indirectly involved in a government decision.[10]

B. APPLICATION OF THE LAW TO QUESTION 1.

We now turn to your initial inquiry: May an attorney who is a "consultant" under the Act by virtue of a contract between the attorney's law firm and a governmental agency participate in an agency decision if, as a result of such participation, the law firm will receive a fee for the attorney's legal services? Would our conclusion be different if, as a result of such participation, the attorney's law firm will be required to perform additional legal services for which the firm will receive additional fees?

The threshold question that must be addressed is whether the "consultant" attorney is receiving governmental "salary" by virtue of the work the attorney performs pursuant to the contract. Section 82030(b)(2) states that governmental "salary" is not "income" for purposes of the Act. Therefore, if the "consultant" attorney is receiving governmental "salary" as a result of the attorney's work under the contract, it is argued by two of the requestors that the fees received by the law firm pursuant to the contract are not "income" for purposes of the Act and thus cannot create a financial interest in a decision to which a conflict of

---

[9] Previously, we advised in the Silver Advice Letter, No. I-90-644 and Rodriquez Advice Letter, supra, that a public official may have a nexus in decisions regarding the projects of other employees of their employer. In December, 1991, this advice was changed by our letter to Dennis Nelson, supra, to apply nexus only to the projects of the public officials. (To the extent that the Silver or Rodriquez Advice Letters conflict with this advice, they are disapproved.) Of course, a public official's disqualification may still be required if there is an indirect material financial effect on the official's employer.

[10] Under the situations you pose, it does not seem likely that a law firm will constitute a "significant segment of the public." For this reason, an analysis of the public generally exception is not included in this letter.

interest applies. Put another way, the requestors' contention is essentially that governmental "salary" creates no legally recognized "source of income" and, therefore, an official can never have a conflict of interest in making decisions that affect this income or the recipient of this income (the law firm).

We disagree with this analysis. As discussed in the Ritchie Advice Letter, No. 79-045 and the Lyon Advice Letter, No. A-88-391, if governmental salary was considered "income" under the Act, the governmental agency for which the official works would become a "source of income" under Section 87103, and the official would be disqualified from participating in any decision which would have a material financial effect on the agency. Clearly, the policy of the Act is to avoid such a result with respect to all government employees.

However, in the hypothetical questions you posit, the professional services contract is between the governmental agency and the law firm, not the governmental agency and the "consultant" attorney. This means that the attorney, a "consultant" under the Act by virtue of the contract, receives income from the attorney's law firm and not the governmental agency. Therefore, the income received by the attorney is not "salary" from a governmental agency, but rather compensation from the law firm itself. The law firm remains a source of income to its employees, here the "consultant" attorney, for purposes of the conflict-of-interest provisions of the Act.

The next issue presented is whether the law firm remains a potentially disqualifying economic interest for the "consultant" attorney when the attorney participates in agency decisions that will foreseeably result in a payment, including additional fees, to the attorney's law firm from the agency.

Our answer to this question depends upon the contract under which the "consultant" attorney provides legal services to the governmental agency. If the contract, as it exists at the time the attorney participates in the agency's decision, expressly provides for payment for the additional services required from the law firm, then we do not believe that the attorney would be participating in making any agency decisions that would have a foreseeable financial effect on the attorney's law firm.[11] This is because the governmental decision to pay the law firm for the legal services specifically enumerated in the contract has already been made by disinterested agency officials and the attorney's participation merely constitutes the implementation of that preexisting decision.

---

[11] If an agency decision foreseeably affects any economic interests of the "consultant" attorney other than the law firm, the attorney nevertheless will be disqualified from participating in such a decision, if the financial effect on any of the attorney's economic interests is material.

However, where the basis for the payment to the law firm, including additional fees, is not established in the contract under which the "consultant" attorney advises the governmental agency, the attorney cannot participate in any agency decision which would result in such a payment to the attorney's law firm. Our answer assumes that the payment to the law firm is a foreseeable result of the decision and that the payment will have a material financial effect on the law firm. Thus, a "consultant" attorney would be precluded from making any decision, or in any way attempting to use the attorney's official position to influence, any agency decision that would affect payment to the attorney's law firm pursuant to a separate contract or for services beyond the scope of the existing professional services contract.

We now turn to your specific hypothetical questions:

Hypothetical 1.

May a contract redevelopment agency counsel who qualifies as a "consultant" under the Act render advice regarding the adoption of a proposed redevelopment project area, if it is reasonably foreseeable that counsel's law firm will then be asked to provide additional legal services in connection with the implementation of the redevelopment plan?

Conclusion: Hypothetical 1.

Yes, a contract redevelopment agency counsel may render advice regarding the adoption of a proposed redevelopment project, despite the fact that counsel's advice will generate additional work and fees for counsel's law firm in the implementation of that same redevelopment project, provided the contract under which redevelopment agency counsel is making these decisions expressly provides for payment for these additional services.

Analysis: Hypothetical 1.

Our answer assumes that agency counsel does not have any economic interests, other than the law firm, that would be foreseeably and materially financially affected by any of the decisions involved in the adoption or implementation of the proposed redevelopment project. Such additional interests may necessitate counsel's disqualification.[12]

---

[12] For example, in the Moe Advice Letter, No. A-89-454, a partner with a 10-percent or greater ownership interest in the law firm was advised to refrain from participating in all governmental decisions that would have a foreseeable material financial effect on one of the firm's clients.

Hypothetical 2.

May a contract city attorney who qualifies as a "consultant" under the Act render legal advice regarding pending or threatened litigation, if it is reasonably foreseeable that the city attorney's law firm will then be asked to provide additional legal services in connection with such litigation?

Conclusion: Hypothetical 2.

Yes, a contract city attorney may make recommendations to a city council concerning existing or future legal actions, provided the contract under which the city attorney participates in making these decisions expressly provides for payment for the litigation work which is discussed. However, if the payment for the additional services is not specifically contained within the scope of the contract, the contract city attorney may make recommendations only if the city attorney's law firm is not intending to bid on the additional work or contract.

Analysis: Hypothetical 2.

Our answer assumes that the law firm has already agreed to perform work on the type of litigation that is pending or threatened against the city and that this fact is reflected in their contract. (Martin Advice Letter, No. A-83-260.) However, the Commission recognizes that there may be instances where the nature of the litigation is so specialized that such legal services are not customarily performed by a city attorney and, thus, are not contained within the scope of the contract.[13]

In the event the professional services contract is silent on the specific litigation at issue, the contract city attorney may make recommendations only if the city attorney's law firm is not intending to bid on the contract to handle the litigation.[14] And, the city attorney's law firm may bid on work and materials so long as none of the law firm's attorneys who qualify as "consultants" under the Act by virtue of the contract participate in any way in the preparation of the criteria for the bid or in the evaluation of the bid responses. (Workman Advice Letter, No. I-87-078.)

---

[13] It may be the city's normal practice to contract with an attorney other than the city attorney for the sole purpose of handling a specific piece of litigation. (Gifford Advice Letter, No. A-85-134; Hill Advice Letter, No. A-87-304.)

[14] This would be similar to the situation in the Rose Advice Letter, No. A-84-306, where the professional services contract only contemplated payment for the contract city engineer's advice and counsel, not his product.

This is because it is reasonably foreseeable that when the "consultant" attorney's law firm is bidding or expects to bid on a particular contract, the decision arising from the bidding process will have a material financial effect upon the firm. (See, In re Thorner, 1 FPPC Ops. 198.)[15]

Hypothetical 3.

May a contract redevelopment agency counsel participate in making redevelopment decisions regarding the method of financing, or the size, of a bond issuance, if as a result of the decision, counsel's law firm will accrue increased fees in its capacity as bond counsel?

Conclusion: Hypothetical 3.

Yes, generally, a contract redevelopment agency counsel may participate in making redevelopment decisions regarding the method of financing, or the size, of a bond issuance. However, if the law firm intends to bid on the bond counsel contract or has a separate contract to perform the duties of bond counsel (other than the contract to render legal services as redevelopment agency counsel), agency counsel may not participate in these agency decisions. This is because such agency decisions will have a financial effect on the law firm beyond the scope of the redevelopment agency contract.

Analysis: Hypothetical 3.

A similar issue was presented to the Commission in In re Maloney, 3 FPPC Ops. 69, No. 76-082. The Commission considered whether the county surveyor-engineer could make decisions on land levelling and drainage permits for jobs where his private firm had contracted with the county to provide surveying services. The Commission concluded that he could not:

---

[15] The general rule set forth in In re Thorner, supra, is that where the business entity in which the official has an economic interest makes a bid on a contract or is preparing to make a bid, a financial effect on the business entity is reasonably foreseeably even if there is substantial competition. In addition, this same rule of foreseeability applies to decisions that lead up to the contract, such as the decision that sets the foundation for the contractual relationship.

> In deciding upon applications for permits, the county surveyor has discretion ... to determine what information must accompany the application. The information he may require includes topographical plats and maps which would require the employment of a surveying crew for preparation. Thus, the decision the county surveyor makes in his official capacity could have a direct and immediate effect on the amount of work his private firm performs in connection with this permit application, and therefore, the amount of income it receives. The obvious potential for bias in this situation impels us to conclude that it is reasonably foreseeable that the effect of this decision will be material to the county surveyor's firm, and that disqualification is required. (Emphasis added; In re Maloney, at 73.)

Thus, if the redevelopment agency counsel's law firm expects to bid on the bond counsel contract or has a separate contract with the redevelopment agency to perform the duties of bond counsel, as noted above, the only way to eliminate the possibility of a conflict of interest, short of disqualification, is for an outside consultant to be brought in as suggested in the Rose Advice Letter, supra, and In re Maloney, supra, at 79-80.[16] Assuming that the law firm's "consultants" are not involved in the preparation of the bid criteria, a competitive bidding procedure will decrease any likelihood of improper influence over the selection process.

Moreover, as indicated above, our answer assumes the redevelopment agency counsel does not have any economic interests, other than counsel's law firm, that would be foreseeably and materially financially affected by any of the decisions involved in selecting the method of financing or in establishing the total amount of the bond financing. This would require disqualification from participating in making such decisions.

---

[16] In this context, an outside consultant may serve to provide what the Act refers to as "significant intervening review." Per Regulation 18700(c), if there is "significant intervening review," a "public official" is not deemed to have participated in any governmental decision, and thus, there would be no violation of Section 87100. However, it is our interpretation that a "consultant" participates in a decision, even if it is "reviewed" by several of the "consultant's" superiors, if those superiors rely on the data or analysis prepared by the consultant without checking it independently, if they rely on the professional judgment of the consultant, or if the consultant in some other way actually may have influence over the final decision. (Kaplan Advice Letter, No. A-82-108; Fishburn Advice Letter, No. A-90-386.)

QUESTION 2.

May a consultant attorney who qualifies as a public official under the Act negotiate, in the attorney's private capacity, a modification or amendment to an existing professional services contract between a public agency and the attorney's law firm?

CONCLUSION 2.

An attorney who qualifies as a public official under the Act by virtue of a contract between the attorney's law firm and a public agency generally may not participate (in either the attorney's official or private capacity) in any contract negotiations involving the attorney's law firm. However, if the contract expressly provides for modification or amendment of the contract, the attorney may participate in agency decisions regarding the modification or amendment, because these decisions will not have a financial effect on the law firm beyond the scope of the original contract.

ANALYSIS 2.

As discussed supra, the law firm is either a source of income or an investment interest (or both) to members of the law firm who qualify as consultants under the Act by virtue of the contract between their law firm and the governmental agency. The conflict-of-interest provisions of the Act preclude public officials from participating in governmental decisions or in any way attempting to use their official positions to influence governmental decisions in which they have a financial interest. (Section 87100; Section 87103.) Clearly, amendment or modification of a contract between the official's law firm and a governmental agency will foreseeably have a material financial effect on an economic interest of the official (the law firm). (Regulation 18702.1.)

However, the Commission has adopted regulations that create some limited exceptions. For example, Regulations 18700(d)(3) and 18700.1(c) create an exception which permits public officials or government employees to negotiate their compensation or the terms and conditions of their employment or contract. In these instances, the official is considered not to be "making or participating in the making" or "attempting to use his or her official position to influence" an agency decision.

In addition, further exceptions are set forth in Regulation 18700(d)(2) and Regulation 18700.1(b)(1), both of which allow a public official to appear, as any member of the general public, before an agency in the course of its prescribed governmental function, to represent himself or herself on matters related

solely to the official's personal interests. A "personal interest" includes, in part, a business entity wholly owned by the official or members of the official's immediate family, or a business entity over which the official exercises sole direction and control, or over which the official and the official's spouse jointly exercise sole direction and control. (Regulation 18700.1(b)(1).)

However, none of the above-referenced regulatory exclusions appear to be applicable to your situation, unless the contracting attorney exercises sole direction and control over the attorney's law firm.[17] Our conclusion does not preclude a member of the law firm, other than the members who qualify as "consultants" under the Act by virtue of the contract, from negotiating a modification or amendment to the original contract on behalf of the law firm. We understand political and business realities whereby members in a law firm discuss business matters affecting their law firm. However, the members of the law firm who are deemed to be "consultants" under the contract must not in any way participate in making, or attempt to use their official position to influence, the agency's decisionmaking process involving the law firm.

QUESTION 3.

Is a conflict of interest created when a law firm contracts with a city or redevelopment agency to serve in multiple capacities, specifically, to provide professional services as city attorney, special agency counsel, and bond counsel?

CONCLUSION 3.

The Commission has no jurisdiction to render advice on the propriety of holding multiple public offices with overlapping jurisdictions. We strongly recommend you contact the Attorney General's office for the purpose of obtaining a written opinion with respect to other provisions of the law such as Government Code 1090 and the laws governing incompatible offices and activities.

---

17 Previously we advised in the Workman Advice Letter, No. I-87-078, and in the Leidigh Advice Letter, No. A-89-320, that the Act did not prohibit the firm's employees from negotiating the firm's contract with the public agency, so long as they did so while acting solely in their private capacity and all the contracting decisions on behalf of the county were made by disinterested agency officials. To the extent that the Workman Advice Letter conflicts with the advice contained in this letter, it is disapproved.

ANALYSIS 3.

The Commission has previously considered this question in the Ritchie Advice Letter, supra. In that letter, the Commission concluded that under the provisions of the Act, the same attorney was not prohibited from representing both the city and the city's redevelopment agency on the rezoning and redevelopment bond matter. However, as the Commission was not authorized to render advice on the propriety of holding multiple public offices with overlapping jurisdictions,[18] our advice in that letter was necessarily limited to the provisions of the Political Reform Act.

For this reason, we recommend that you present this issue to the Attorney General's office. In addition, you should inform the Attorney General of the pending litigation[19] which raises this conflict of interest issue as an affirmative defense. It is my understanding that the lawsuit is on appeal. It may be that the Attorney General has an interest in filing an amicus brief on this issue.

QUESTION 4.

May a bond counsel be compensated by a city on a contingent fee basis if the bond counsel's compensation is partially determined by the size or success of the bond issuance? Would the Commission's conclusion be different if the bond counsel participates in the determination of the size of the bond issue?

CONCLUSION 4.

A bond counsel may be compensated by a city on a contingent fee basis. Bond counsel may participate in the determination of the size of the bond issue, provided the contract under which the bond counsel is making this governmental decision includes payment in this form for the legal services rendered by the bond counsel.

---

18 See generally, 46 Ops. Calif. Atty. Gen. 74 (1965.)

19 Lancaster Redevelopment Agency v. All Persons Interested in the Matter of the Issuance of Housing Tax Allocation Notes of Lancaster Redevelopment Agency, Los Angeles County Superior Court Case No. HC002351.

ANALYSIS 4.

This question was presented to the Commission in the Ritchie Advice Letter, supra and the Pardee Advice Letter, I-91-506. In both these letters, the Commission recognized that alternative forms of compensation, other than salary, which is paid for services rendered to a governmental agency should also be treated as "salary" under Section 82030(b)(2). Otherwise, the Commission believed it would be interjecting itself into the process of how governmental agencies pay individuals for services rendered.

For that reason, the Commission stated that "payments to a retained City Attorney on an hourly basis, i.e., tied to the amount of work performed for the city, are clearly analogous to the salary received by public employees." Likewise, in the case of bond issues, attorneys are often paid a fixed percentage of a maximum bond issue amount. Because the amount to be paid is fixed, and since this is the customary payment arrangement reflected in professional services contracts, it is sufficiently similar in nature to hourly payments to be considered "salary."

QUESTION 5.

If outside legal counsel, who qualifies as a "consultant" under the Act, has a financial interest in a government decision that would require counsel's disqualification, may the "rule of necessity" be invoked to permit outside legal counsel to continue to fulfill counsel's duties under the professional services contract?

CONCLUSION 5.

The application of the "rule of necessity" is limited to those situations where no alternative source of decisionmaking exists and where a failure to make a decision will result in a failure of justice. Therefore, excluding those situations, the rule may not be invoked to permit an otherwise disqualified public official from participating in making a decision in which the official has a financial interest.

ANALYSIS 5.

The Commission has previously considered this issue in the Maloney Opinion which discusses extensively the limited exception to the disqualification requirement contained in Section 87101. (In re Maloney, supra.) Section 87101 allows a public official to act in cases in which the official has a financial interest if the official's participation is "legally required for the ... decision to be made." This section provides a means of avoiding a paralysis of government in situations where conflicts of interest would otherwise disqualify the public official from acting.

Regulation 18702 clarifies what constitutes legally required participation" as follows:

> (a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

Thus, where an alternative source of decision is available, the Commission has held that the rule of necessity is not applicable:

> Admittedly, use of this alternative works some hardship on the county. We do not think, however, that the concept of legally required participation was included in the Political Reform Act merely to alleviate the additional costs and inconvenience associated with seeking an available alternative source of decision. We think Section 87101's application is limited to those situations where no alternative source of decision exists and a failure to make a decision will result in "a failure of justice" (cites)...." (Emphasis added; In re Maloney, supra at 74-76.)

Likewise, reliance on the Code of Professional Responsibility to permit an otherwise disqualified public official to participate in making a decision in which the official has a financial interest is also unavailing. (See Section 81013.)

CONCLUSION

This letter provides a general discussion of the law. You may wish to contact the Commission for formal written advice regarding a specific decision for a specified public official. (Section 83113(b); Regulation 18329(b).)

We trust this letter provides you with adequate guidance. If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.[20]

Sincerely,

Jeff Marschner
General Counsel

Deanne Stone

By: Deanne Stone
Senior Counsel, Legal Division

---

[20] Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.