The Latest in Legal Ethics for Municipal Lawyers

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EVERYDAY ETHICS FOR CITY ATTORNEYS

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1. Introduction

While all California attorneys are subject to the State Bar's Rules of Professional Conduct, government lawyers navigate unique legal and ethical issues, shaped by the role we play in serving the public interest and maintaining the integrity of the legal system.

An indispensable reference for city attorneys is Cal Cities' *Practicing Ethics: A Handbook for Municipal Lawyers* (3rd Edition) which was comprehensively updated in 2023 by the City Attorneys' Ad Hoc Practicing Ethics Committee.[1]

In addition, the City Attorneys Department of the League of California Cities has adopted Ethical Principles for City Attorneys (the Ethical Principles).[2] The Ethical Principles were published in 2005 and presented at Spring League Conferences in 2011 and 2019. The 2019 paper,[3] authored by Joseph Montes, City Attorney of Alhambra and Santa Clarita, includes a detailed discussion of the Ethical Principles and how they intersect with the State Bar's 2018 revisions to the Rules of Professional Conduct.[4] The Ethical Principles and the 2019 Montes paper are essential reading for all practitioners of municipal law.

Drawing on the Ethical Principles, the Rules of Professional Conduct (the Professional Rules), and Business and Professions Code 6068, this paper will shine a spotlight on some common ethical issues and traps for the unwary that city attorneys (and other public attorneys) may encounter in everyday practice.

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[1] League of California Cities, *Practicing Ethics: A Handbook for Municipal Lawyers* (3rd ed., 2023) https://www.calcities.org/resource/practicing-ethics

[2] League of California Cities, City Attorneys' Dept. Business Section, "Ethical Principles for City Attorneys" (Oct. 6, 2005), https://www.cacities.org/UploadedFiles/LeagueInternet/d6/d60445e6-7918-459b-9780-00a714616297.pdf

[3] Joseph Montes, "Ethical Principles for City Attorneys" (May 10, 2019) https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring;-Montes-Ethical-Principles-for-City

[4] California State Bar, Rules of Professional Conduct, https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules

2. City Attorneys as Public Officials

City attorneys, like all attorneys, have a duty to be competent, diligent, and zealous advocates for our client's interests. As officers of the court, we are held to a high standard of candor, fairness, civility, and integrity.[5] In addition to our professional ethics, city attorneys are also public officials and stewards of a broader public interest. As stated in the Preamble to the City Attorneys' Department Ethical Principles:[6]

> "A city attorney occupies an important position of trust and responsibility within city government. Central to that trust is an expectation and commitment that city attorneys will hold themselves to the highest ethical standards."

To be clear, the "public" is not the city attorney's client under Professional Rule 1.13. Rather, the city attorney's client is the city as an organization, acting through its duly authorized officers and employees.[7] The city exists to serve the public, but the public itself is not a part of the city's organizational hierarchy. (The public duties of the city attorney as a prosecutor are discussed in the next section of this paper.)

Nevertheless, city attorneys are frequently called upon to ensure that the city complies with laws that protect the rights and interests of the public. Ethical Principle 1 of the City Attorneys' Department, "Rule of Law," instructs city attorneys to "promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations."[8] The explanatory note to Ethical Principle 1 provides:

> "The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society."

To achieve this goal, city attorneys must constantly and zealously educate city staff and officials about the law, model ethical behavior, and give sound, accurate legal advice even when it is not wanted. As stated in Ethical Principle 1, Example 6:

> "The city attorney should be willing to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought but the legal problem is evident to the attorney."

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[5] See Professional Rule 3.3 (Candor), Rule 3.4 (Fairness); Calif. Rule of Court 9.7 ("the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.")

[6] Ethical Principals, *supra,* fn. 2.

[7] But see Professional Rule 1.13, Comment 6: "It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole."

[8] Ethical Principals, s*upra,* fn. 2.

For comparison, Professional Rule 2.1, Comment 1, states that "a lawyer ordinarily has no duty to initiate investigation of a client's affairs or give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest." It is the second half of this comment that has the most relevance to city attorneys. An important part of a city attorney's job is to proactively spot legal issues, and bring them to the attention of city officials and staff without being asked.

HYPOTHETICAL: The Waste Management Consultant

A newly hired city attorney learns that the city's waste management consultant is deeply involved in the city's contracting decisions, some of which financially benefit the consultant. The city attorney informs the city manager that the contracts violated Government Code § 1090, but the city manager declines to take any action. The city attorney then sends a confidential email to the mayor and city council. In response, the mayor calls the city attorney and tells her: "We didn't hire you to upset the apple cart. You should back off if you want to keep this job." No other councilmembers respond to the email. What should the city attorney do next?

A city attorney must ordinary accept staff decisions concerning policy and operations, even if the attorney questions their utility or prudence, and the decisions entail serious risk.[9] However, if the city attorney becomes aware of unlawful conduct that is likely to cause substantial harm to the city, the city attorney has a duty to refer the matter to higher authority in the organization, if warranted by the circumstances (Professional Rule 1.13(b)).

At the same time, Professional Rule 1.13(c) prohibits the city attorney from publicly revealing confidential information protected by Business and Professions Code section 6068(e). Section 6068(e) requires California attorneys to "maintain inviolate" the client's confidences and secrets, which is broader than the evidentiary attorney-client privilege[10] and applies equally to ancillary, non-legal business services.[11]

Thus, the city attorney's duty of confidentiality precludes public whistleblowing.[12] If the highest authority in the city insists on actions that violate the law or will substantially injure the organization, resignation may be the city attorney's only option.[13]

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[9] Professional Rule 1.13, Comment 2.

[10] *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621.

[11] Cal. State Bar Formal Opinion 1995-141.

[12] 84 Ops. Cal. Atty. Gen. 71 (2001); see also Rule 1.13, Comment 6: "a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with [Bus. & Prof. Code 6068(e)] and rule 1.6."

[13] See Professional Rules 1.13(d), 1.16, 1.2.1.

Even if a city attorney is terminated for raising objections to wrongful conduct, the duty of confidentiality will bar a lawsuit for wrongful termination if the evidence is privileged, and the city council refuses to consent to its disclosure.[14]

3. City Attorneys as Prosecutors

HYPOTHETICAL: A Politically Sensitive Case

A particularly vocal resident repeatedly calls the mayor with complaints about a poorly-maintained neighboring property. The mayor tells the city attorney, "I don't want any more calls about this property. You need to do something immediately!" Although the city's normal practice is to start with administrative citations, the city attorney directs a deputy city attorney to file a misdemeanor complaint because "this case is extra sensitive." Is this ethical?

California courts recognize that government attorneys have a special obligation to serve the public interest, especially when there is a power imbalance between governmental authority and individual rights. Neutrality and objectivity are paramount when city attorneys prosecute criminal and quasi-criminal cases such as infractions and misdemeanors, administrative citations, and civil nuisance abatements. As a prosecutor, the city attorney cannot be influenced by political pressure or other concerns outside the interests of justice and probable cause.[15]

The special ethical responsibilities of prosecutors are outlined in Professional Rule 3.8. The first comment to Rule 3.8 states that "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

When filing a criminal action in the name of the People of California, the city attorney represents the People and cannot meet in closed session or take direction from the city council. A city attorney <u>can</u> meet in closed session to receive direction prior to filing a civil nuisance abatement action in the name of the city, but the city attorney must still comply with the obligation to file such actions with impartiality and neutrality, and to pursue fairness and the interests of justice.[16]

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[14] *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164; see *Olivo v. City of Vernon* (2010) 2010 WL 2958398 (unpublished) [terminated city attorney unable to bring wrongful termination action required disclosure of an attorney-client privileged report]; but see *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2012) 200 Cal.App.4th 1267, 1272 fn. 3 [attorney's whistleblower cause of action was non-suited, but she prevailed on a retaliatory discharge claim where privileged information was excluded at trial].

[15] *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746.

[16] *Practicing Ethics, supra,* p.33.

Courts have referenced the heightened ethical duties of prosecutors even in certain civil matters handled by government attorneys. Fifty years ago, in *City of Los Angeles v. Decker*,[17] the California Supreme Court held that an attorney for the city committed prejudicial misconduct in an eminent domain trial by misleading the jury about a critical issue: whether the property was needed for airport parking. In closing argument, the attorney stated that the property was unlikely to be developed as parking, which led the jury to accept the city's valuation. Only three weeks after the judgment, the Board of Airport Commissioners approved a final environmental impact report recommending that a parking facility be built in the area covered by the city's eminent domain action, including the defendants' parcel.

Holding that the trial court should have granted the defendants' motion for new trial, the Supreme Court quoted former Professional Rule 7-105 (now contained in Bus. & Prof. Code § 6068(d)) that an attorney should never "seek to mislead a judge, judicial officer, or jury by an artifice or false statement of fact or law."

Beyond the general duty of candor, the Supreme Court also cited the American Bar Association's former Canon 7, Ethical Consideration 7-14,[18] that "a government lawyer in a civil action 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." When "occupying a position analogous to a public prosecutor," a government attorney "is possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." [19]

Seven years after *Decker,* in *People ex rel. Clancy v. Superior Court,*[20] the Supreme Court held that the City of Corona improperly hired a private attorney to prosecute a nuisance abatement action against an adult bookstore on a contingency fee basis, finding that the attorney's financial stake violated the duty of neutrality essential to a fair proceeding. In a later case, *County of Santa Clara v. Superior Court,*[21] the Supreme Court reexamined *Clancy,* and explained that the outcome in that case stemmed from the "profound imbalance between the institutional power and resources of the government and the limited means and influence of the defendants".

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[17] *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860.

[18] The ABA Ethical Canons were superseded in 1983 by the Model Rules of Professional Conduct.

[19] *Decker, supra,* 18 Cal.3d at 869 (cleaned up), quoting "Professional Responsibility: Report of the Joint Conference" (1958) 44 A.B.A.J. 1159, 1218.

[20] *Clancy, supra,* 39 Cal.3d 740.

[21] *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35.

Although the Supreme Court declined to impose an absolute prohibition on use of contingent fee contracts in public nuisance actions,[22] the court reiterated the principle that a city attorney serves the public interest when prosecuting a civil case:

> "[A] civil attorney acting on behalf of a public entity, in prosecuting a civil case such as a public-nuisance abatement action, is entrusted with the unique power of the government and therefore must refrain from abusing that power by failing to act in an evenhanded manner. . . . Indeed, it is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done.[23]

Even when city attorneys serve as advisors rather than prosecutors, a key part of the job is to educate city officials and employees about the requirements of the law, and try to ensure that they follow it, rather than bowing to pressure, even at risk of the city attorney's own job. See the City Attorney's Department Ethical Principal 1, Example 6, "The city attorney should be willing to give unpopular legal advice," and Example 7, "The city attorney should not only explain and advise the city on the law, but should encourage the city to comply with the law's purpose and intent."

This responsibility has implications for the city attorney's professional duties of competence and diligence (Professional Rules 1.1 and 1.3). City attorneys may be blamed for illegal conduct that occurs on their watch due to their lack of diligence or inattention. Contract city attorneys have been sued for malpractice in such situations.[24] In 2013, for example, the City of Bell sued its former contract city attorney after a financial scandal was brought to light involving excessive salaries and other malfeasance by the former city manager, mayor, and four former councilmembers. These officials had apparently hidden some illegal conduct from the city attorney, but the case still resulted in a significant settlement.[25] The disgraced councilmembers later sued the former city attorney for failing to tell them that their conduct was illegal.[26]

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[22] *County of Santa Clara* was a public nuisance action against lead paint manufacturers, which the court concluded did not involve the same power imbalance and constitutional issues as *Clancy*. See also *Priceline.com Inc. v. City of Anaheim* (2010) 180 Cal.App.4th 1130 [contingency fees not prohibited in ordinary civil litigation].

[23] *County of Santa Clara v. Superior Court, supra,* 50 Cal.4th at 57.

[24] In-house city attorneys are rarely sued for professional malpractice, but there is scant legal authority on the issue. One unpublished case, *1538 Cahuenga Partners, LLC v. Fabe* (2012) 2012 WL 19519, suggests in dicta that Calif. Labor Code § 2802 might bar a malpractice against an in-house attorney, as it requires the employer to indemnify the employee. See also Gov't Code §§ 825, 995 (defense and indemnification of public employees) and § 995.2(a)(1),(2) (exceptions for fraud, corruption, malice, and actions outside course and scope of employment).

[25] "Corruption-scarred Bell finds itself on better financial footing," *Los Angeles Times,* Dec. 22, 2013.

[26] "Five ex-Bell council members blame city attorney, file suit," *Los Angeles Times,* Mar. 7, 2014.

4. Interactions with the Public

City attorneys are often involved in matters that have various options for civil, administrative, and criminal enforcement. For example, a code violation could potentially result in enforcement through administrative penalties, a nuisance lawsuit, or a misdemeanor prosecution under the city's municipal code. In working to gain compliance or settle a case, city attorneys must be careful not to violate Rule 3.10(a), which prohibits lawyers from threatening criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

> ***HYPOTHETICAL: Be Warned***
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> *Staff ask the city attorney for help with a hotel that has failed to pay transient occupancy tax for several months. The city attorney prepares and signs a demand letter that includes the statement at the bottom, "Be warned that failure to pay TOT is a felony misuse of public funds (Penal Code § 424). This matter will be referred to law enforcement and the District Attorney for prosecution if payment is not received." Was this appropriate?*

It is not *per se* improper for an attorney to warn that "all available legal remedies will be pursued" as long as no threat of criminal prosecution is made. Nor does it prohibit the actual filing of criminal or administrative charges.[27] An attorney should not, however, send a demand for payment of a debt which indicates the letter will be shared with regulatory agencies or law enforcement.[28] Similarly, a public prosecutor must not offer to dismiss a criminal prosecution in return for a release of civil liability.[29] This does not prohibit a civil compromise under Penal Code § 1378, or a government lawyer's offer of a global settlement or release-dismissal of related criminal, civil, or administrative matters.[30]

In one State Bar case, an attorney who was representing himself in a civil dispute sent a letter that said, "I will be filing a lawsuit for fraud and conversion, reporting your theft to the Anaheim police department and the California Department of Insurance and sending a copy of the same to your landlord on Monday morning. Further I will set up a website where all of these documents will be available for public viewing. Once I do this there is no taking it back." The State Bar concluded that this letter was an improper threat to bring criminal charges for the purpose of recovering money owed.[31] Hopefully a city attorney would never be so intemperate in a demand letter, but frustration sometimes leads to hasty words and lasting regrets.

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[27] California State Bar Formal Opinion No. 1991-124.

[28] *Crane v. State Bar* (1981) 30 Cal.3d 117.

[29] California State Bar Formal Opinion No. 1989-106.

[30] Prof. Rule 3.10, Comments 3 and 4.

[31] *Matter of Erwin* (Cal. Bar Ct., Aug. 10, 2022, No. SBC-20-O-30279) 2022 WL 3681261, at *7

HYPOTHETICAL: Just Trying to Help

The city is being sued by a small business. Although the plaintiff has an attorney, he regularly comes to city hall alone and asks to speak to the mayor or city manager. One afternoon, the plaintiff becomes argumentative with staff and they call the city attorney for help. The city attorney comes to the counter and ends up talking to the plaintiff for about 10 minutes, mostly defensively as the plaintiff peppers him with questions about the case. A week later, the city attorney is notified that the plaintiff's attorney has filed a complaint with the State Bar. Is the city attorney in trouble?

Another trap for unwary city attorneys is Professional Rule 4.2, which prohibits communications with represented persons without the consent of that person's lawyer. Members of the public who have pending litigation or other disputes sometimes call the city attorney's office to talk about their case. Represented parties have also been known to show up at City Hall to meet with staff without their lawyer, which they have the right to do under the First Amendment.

The city attorney must resist the urge to rush in and help staff when they are confronted by a represented party at the permit counter or city manager's office. If the city attorney, or city attorney staff, are unable to avoid an interaction with the person, they must not discuss anything within the scope of the represented matter. It is a good practice for the city attorney to email the party's attorney immediately after the interaction to document what occurred.

5. Joint Representation of City and Employees

As discussed at the beginning of this paper, Professional Rule 1.13 establishes that city attorney's client is the city as an organization, not individual officers and employees. Because the city is the client under Rule 1.13, in house attorneys typically have no ethical conflict advising staff who have opposing interests. There is an exception, however, when the city attorney's office represents employees in litigation.

HYPOTHETICAL: I'm Your Lawyer

The city and a police officer are being sued in an excessive force case. At the beginning of the case, the city attorney sends a standard representation letter to the officer advising him of the city's duty to defend and indemnify the officer under Government Code § 825. The city attorney retains outside litigation counsel, but he also meets with the officer and tells him, "I'm your lawyer." While the litigation is pending, the officer is terminated as a result of a separate excessive force incident, and sues the city for wrongful termination. The officer's attorney moves to disqualify the city attorney's office from involvement in the wrongful termination case. Does this motion have merit?

Public entities in California have a statutory duty to defend employees civil actions that arise from acts and omissions in the course and scope of employment.[32] The same attorney can represent both the employee and the city in litigation as long as there is no conflict of interest.[33]

If the employee is facing discipline, the city should retain separate outside counsel for the employee, or use an "ethical wall" to separate the attorneys handling the litigation from those handling the disciplinary matter (if feasible). An ethical wall is inadequate when the conflict involves the city attorney, because of the city attorney's power over subordinate attorneys.[34] Outside counsel is also required if the employee's conduct may have been outside the course and scope of employment and the city defends the employee under a reservation of rights.[35]

These rules are familiar to most litigation counsel when individual employees are sued as co-defendants. Sometimes overlooked, however, are the potential conflicts between the city and employees who are merely witnesses. If the witness employee's interests are adverse to the city's, under Professional Rule 1.13(f) the attorney must make it clear, when interacting with the employee, that the attorney does not represent them. Failure to do so can lead to the type of ethical breach that occurred in the case *Yanez v. Plummer.*[36]

Plummer was an in-house corporate attorney who attended a deposition with Yanez, an employee who was a witness in a lawsuit against the corporation. Prior to the deposition, Plummer told Yanez that he was his attorney. He reassured Yanez that his job would not be affected if he told the truth. At the deposition, Yanez denied witnessing the incident, which conflicted with his previous written statement. Plummer then questioned Yanez on the record and had him acknowledge that he made the previous statement.

The employer subsequently terminated Yanez for dishonesty, leading Yanez to sue his employer for wrongful termination and Plummer for legal malpractice, breach of fiduciary duty and fraud. In reversing a grant of summary judgment for Plummer, the appellate court expressed criticism of Plummer's failure to comply with "well-recognized rules of professional conduct" related to a conflict of interest between Yanez and his employer.[37]

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[32] Gov't. Code §§ 825, 995 – 996.6. See Rule 1.13, Comment 6: "It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. … Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations."

[33] See Rules 1.7 (conflicts involving current clients), 1.8(2) (use of client's confidential information), 1.9 (duties to former clients), and 1.13(g)) (representation of an organization's constituents).

[34] *City & County of San Francisco v. Cobra Solutions* (2006) 38 Cal.4th 839, 847.

[35] See Practicing Ethics, *supra*, fn. 1, p.13.

[36] *Yanez v. Plummer* (2013) 221 Cal.App.4th 180.

[37] *Id.* at 190.

6. Use of Ethical Walls

In-house city attorney offices commonly put ethical walls between the advocacy and advisory sides of administrative hearings to protect the third party's due process right to a fair hearing.[38] City attorneys familiar with "due process walls" from code enforcement matters may confuse them with ethical screening walls under the Rules of Professional Conduct; but they are not the same. Ethical screens to avoid conflicts of interest must be implemented with great care because they "are fraught with danger in cases of simultaneous adverse representation as to the same matter."[39]

Prior to 2018, the State Bar did not have rules on the use of ethical screens, but this subject is now addressed in Professional Rules 1.0.1 (definition of screening), 1.10 (imputation of conflicts in private firms), and 1.11 (conflicts involving former government officials and employees).

When a government lawyer moves from government to private practice, Rule 1.11 allows screening without limitation. However, when lawyers move the other direction, from private practice to government, Rule 1.11, Comment 10, states that caselaw governs the extent to which conflicts will be imputed to other lawyers in the agency. Caselaw has upheld the use of ethical walls within government law offices, noting that disqualification of an entire government law office poses unique burdens on public agencies.[40]

However, as noted in the discussion of the previous hypothetical, an ethical wall is not available when the conflict arises from the city attorney's representation of a former client. This is because "individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants."[41]

Conclusion

City attorneys navigate a complex ethical landscape, balancing obligations to our cities with a broader duty to uphold the rule of law and public trust. The challenges we face as advisors, prosecutors, and litigators, underscore the need for unwavering integrity and sound legal judgment. By adhering to high ethical standards, city attorneys protect our clients and reinforce public trust in local government and the legal profession.

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[38] See *Howitt v. Superior Court (County of Imperial)* (1992) 3 Cal.App.4th, 1575, 1586-87. Note that an ethical wall between private law firm partners will not prevent a due process violation due to the partners' financial interest in the success of the firm. *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489.

[39] Practicing Ethics, *supra*, fn. 1, p.14.

[40] *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27.

[41] *San Francisco v. Cobra Solutions, supra,* 38 Cal.4th at 853.

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CITY ATTORNEY ETHICS

USE OF ARTIFICIAL INTELLIEGENCE IN THE PRACTICE OF LAW[1]

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I. Introduction

Artificial intelligence ("AI") tools are increasingly being used by attorneys and law offices. If you are not already using AI tools, for many, the question is not whether you will use an AI tool but when you will begin to use the tools. Lawyers in California are utilizing AI in areas ranging from legal research and document automation to predictive analytics and client interactions. AI offers the potential to streamline operations and improve client services. However, the use of AI involves new challenges and raises new ethical concerns.

The use of AI in the practice of law implicates several of California's Rules of Professional Conduct[2] including the:

1. Duty of Competence and Diligence (Rule 1.1 and Rule 1.3);
2. Confidentiality and Data Security (Bus. & Prof. Code, §6068, subd. (e), Rule 1.6, and Rule 1.8.2)

[1] Much of the information in this paper is derived from the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law, The State Bar of California Standing Committee on Professional Responsibility and Conduct (the "State Bar Practical Guidance")
[2] Unless otherwise provided, all citations are to the California Professional Rules of Conduct.

3. Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers (Rule 5.1, Rule 5.2, and Rule 5.3);
4. Prohibition of Discrimination, Harassment, and Retaliation (Rule 8.4.1);
5. Scope of Representation and Communication with Clients (Rule 1.4, Rule 1.2)
6. Fees for Services (in the AI world) (Rule 1.5, Bus. & Prof. Code, § 6147, Bus. & Prof. Code, § 6148);
7. Meritorious Claims and Contentions and Candor to the Tribunal; (Rule 3.1 Rule 3.3); and
8. Professional Responsibilities Owed to Other Jurisdictions (Rule 8.5).

This memo provides an overview of how attorneys and law offices are using AI. After understanding some of AI's uses, this memo also discusses the benefits, risks, ethical considerations, and regulatory guidelines that lawyers must navigate.

II. The Growing Role of AI in Legal Practice

AI is being used in a number of different areas by attorneys and law offices. In the past year, it seems that AI is increasingly being used as technology advances. The following are some key applications:

1. Legal Research and Document Review

AI tools, powered by machine learning, can analyze and categorize large volumes of case law, statutes, and regulations in a fraction of the time it would take a human lawyer. For example, AI can help identify key precedents, summarize case outcomes, and highlight legal issues relevant to a specific matter. These tools generally provide faster research results compared to traditional methods. AI is also being used to conduct document review, identifying relevant contracts, clauses, and provisions that might be crucial in litigation, mergers, or negotiations.

2. Contract Review and Analysis

AI can assist lawyers and law offices with contract review and drafting. AI can assist with identifying risks, anomalies, and compliance issues in legal documents. For example, AI tools can flag unusual clauses or terms that deviate from standard industry practices. Additionally, AI can help draft standard contract language, offering templates and suggesting modifications to tailor documents to the specific needs of a case or client.

3. Predictive Analytics

The use of predictive analysis in law offices continues to evolve. "Predictive analytics involves using AI and machine learning algorithms to analyze large datasets, including past case rulings, legal filings, judicial decisions, and even jury behavior. The goal is to predict future legal outcomes and guide strategy by identifying patterns and trends."[3]

[3] Ashley Hallene and Jeffrey Allen, Using Predictive Analytics in Litigation, October 16, 2024.

These datasets can include both structured (e.g., case records) and unstructured data (e.g., written opinions). The use of predictive analysis can allow the attorney to provide more accurate advice on case strategy, settlement negotiations, and litigation risk management. As predictive analytics improve and evolve, integrating their use can increase efficiency, reduce costs, and provide better service to your clients.

4. Document Automation and Billing

AI is increasingly used to automate document drafting and billing processes. AI tools can generate routine legal documents quickly and accurately and reduce the time necessary for performing the task resulting in faster responses to inquiries. AI can also assist with automated time-tracking, billing, and invoicing by automatically categorizing work and providing automated reporting.

III. Ethical Considerations and Risks

AI potentially offers significant benefits to attorneys and law offices. However, the use of AI brings with it ethical concerns and challenges with integrating the use of AI into your legal practice.

1. Competence and Due Diligence

Under Rule 1.1, attorneys are required to provide competent representation to clients. This includes ensuring the competent use of technology and the associated risks and benefits. An attorney using AI must make sure the information is not false, inaccurate, or biased. Lawyers are advised to maintain control over decision-making processes, ensuring that AI tools are viewed as assistants rather than replacements for human judgment. Regular testing and evaluation of AI tools should be conducted to assess their effectiveness and accuracy.

Under Rule 1.3, attorneys are required to act with reasonable diligence in representing a client. When using AI, attorneys should have some understanding of how the technology works. Attorneys should also understand the products and the applicable terms of use and other policies governing the use and exploitation of client data by the product. The California State Bar has issued guidance on the use of AI which provides that overreliance on the use of AI is inconsistent with the practice of law and the application of judgment of a trained lawyer.

AI can be used as a starting point but needs to be scrutinized, reviewed, and validated to ensure the information being used is accurate and supports the interests of your client.

Applicable Authority

Rule 1.1
Rule 1.3

2. Confidentiality and Data Security

The use of AI in the legal profession often means giving access to confidential information. Rule 1.6 mandates that attorneys protect the privacy and confidentiality of client information. You must take steps to ensure that any AI product you use will protect the privacy and confidentiality of your client and, in some cases, other individuals. It is essential that AI tools comply with privacy regulations such as the California Consumer Privacy Act (CCPA) and industry standards for data security.

Law offices must ensure that AI platforms utilize secure encryption protocols and that data storage and processing practices are compliant with confidentiality obligations. Attorneys should also scrutinize third-party AI vendors for compliance with privacy laws and confidentiality requirements.

Applicable Authority

Bus. & Prof. Code, §6068, subd. (e)
Rule 1.6
Rule 1.8.2

3. Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers

Attorneys who supervise other attorneys or staff must make reasonable efforts to ensure that subordinate attorneys or staff comply with their ethical obligations in the use of AI. These efforts should include adopting policies for the use of AI and providing training in its use. The training should address the ethical and practical aspects and pitfalls of the use of AI. Subordinate lawyers are responsible for using AI in a manner that does not violate their ethical obligations.

It is critical that lawyers do not abdicate their professional responsibilities to AI. The use of AI tools should be seen as augmenting human judgment, not replacing it. Lawyers should retain full oversight over all decisions influenced by AI outputs and remain prepared to intervene when necessary. In instances where AI-generated suggestions or analyses lead to negative outcomes, lawyers must be prepared to accept accountability for those decisions, as per Rule 5.1 on professional responsibility.

Applicable Authority

Rule 5.1
Rule 5.2
Rule 5.3

4. Prohibition of Discrimination, Harassment, and Retaliation

Because of the way that some AI tools operate and learn, including learning from past data, the information generated may contain biases reflecting social inequalities or past injustices. For example, predictive analytics systems used to estimate case outcomes could perpetuate existing biases, leading to unjust results. Lawyers must take proactive steps to assess and mitigate any potential biases embedded in AI tools. Attorneys using AI engage in continuous learning about AI biases and their implications in legal practice.

Under Rule 8.4.1, attorneys have an obligation not to unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic. AI systems that perpetuate bias may violate these ethical standards. Lawyers should conduct regular audits of the AI tools they use and be transparent with clients about any limitations or potential biases inherent in the technology.

Applicable Authority

Rule 8.4.1

5. Communication Regarding Generative AI Use

Attorneys should consider whether the use of AI is appropriate in any particular representation based on the facts and circumstances of the representation and consider whether they need to communicate to the client the risks and benefits of the use of AI, including the novelty of the AI technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.

Applicable Authority

Rule 1.4
Rule 1.2

6. Charging for Work Produced by Generative AI and Generative AI Costs

Attorneys may charge for the actual time spent using AI to create the work product. For example, attorneys may charge for the time crafting the inputs or refining the inputs to generate the information and then charge the time spent reviewing and validating the results. Attorneys must not charge hourly fees for the time saved by using generative AI. Costs associated with the AI product may be charged in compliance with applicable law. Fee agreements should explain the basis for all fees and costs associated with the use of generative AI.

Applicable Authority

Rule 1.5
Bus. & Prof. Code, § 6147
Bus. & Prof. Code, § 6148

7. **Candor to the Tribunal; and Meritorious Claims and Contentions**

Attorneys must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court. Attorneys should also check for any local rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.

Example: Standing Order for Civil Cases before Northern California District Judge Araceli Martinez-Olguin (revised November 22, 2023) provides, in part, that:

(a) Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any content generated by these tools.
(b) At all times, counsel—and specifically designated lead trial counsel—bears responsibility for any submission made by the party that the attorney represents.
(c) Any submission containing AI-generated content must include a certification that the lead trial counsel has personally verified the content's accuracy. Failure to include this certification or comply with this verification requirement will be grounds for sanctions.
(d) Counsel is responsible for maintaining records of all prompts or inquiries submitted to any generative AI tools in the event those records become relevant at any point.

Applicable Authority

Rule 3.1
Rule 3.3

8. **Professional Responsibilities Owed to Other Jurisdictions**

Attorneys should also analyze the laws, regulations and Court rules in each jurisdiction in which they are licensed to practice to determine their responsibilities regarding the use of AI.

Applicable Authority

Rule 8.5

It is important to monitor legislative enactments that might affect your use of AI in the practice of law. Currently, there are approximately thirty bills being considered by the California legislature that impact AI.

Best Practices for Lawyers Using AI

To ensure that AI is used effectively and ethically in legal practice, lawyers should adopt the following best practices:

1. **Stay Informed and Educated**: Lawyers should make efforts to understand how the AI tools they use operate. This involves understanding how AI models are trained, what data is used, and any potential biases or limitations. Regular training on the latest AI tools and technologies is essential.

2. **Ensure Transparency**: When AI tools significantly influence legal outcomes or decisions, attorneys should fully disclose this to clients and explain the potential benefits and risks associated with the use of AI.

3. **Exercise Judgment and Oversight**: AI should never replace a lawyer's professional judgment. Lawyers must review AI-generated outputs carefully, particularly in high-stakes matters, and retain final decision-making authority.

4. **Ensure Security and Compliance**: Attorneys must take steps to ensure that AI tools they use comply with data security and privacy laws. This includes reviewing vendor contracts, ensuring encryption standards, and adhering to confidentiality regulations. Consider consulting an information technology expert regarding security and confidentiality of an AI product before using it.
5. **Monitor AI Outputs for Bias and Accuracy**: Regular audits of AI tools are necessary to ensure that they do not introduce biases or inaccuracies into legal decision-making. Tools should be recalibrated and evaluated periodically to ensure continued reliability.

Conclusion

The integration of AI in legal practice presents both opportunities and challenges. By carefully managing AI tools and adhering to established ethical principles, AI can help to improve efficiency, reduce costs, and provide better service to their clients. At the same time, lawyers must be diligent in complying with their professional obligations, ensuring that AI is used responsibly and transparently. Adhering to best practices and staying updated on evolving regulatory frameworks is essential for lawyers seeking to integrate AI into their practice.

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ATTORNEY-CLIENT PRIVILEGE (AND ATTORNEY WORK PRODUCT): WAIVER AND POTENTIAL PITFALLS

The following paper addresses attorney-client privilege and attorney work product, with a focus on the disclosure of communications or materials that would otherwise be protected under either doctrine and whether such disclosure results in waiver.

In short, disclosure of such communications or materials is not as fatal as many attorneys fear. In the practice of law, especially local government law, the analysis of whether disclosure equates to waiver is more nuanced and often requires a risk assessment that involves analysis of the pros and cons of disclosure.

After providing a summary of the general principles governing attorney-client privilege, attorney work product, and waiver, this presentation focuses on these issues through the lens of common scenarios:

- materials developed through investigations, such as recordings of witness interviews and witness lists;
- potential public disclosure of investigative findings (such as through press releases); and
- inadvertent disclosure of privileged communications through public records requests.

I. <u>Attorney-Client Privilege</u>

California law closely guards attorney-client privilege, and attorneys soon learn its importance when they begin the practice of law. But attorneys should keep in mind that the attorney-client privilege exists to benefit the *client*, rather than any attorney's concerns.

The attorney-client privilege confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code, § 954.) Where it applies, "the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.)

In any adjudication of attorney-client privilege, a party seeking to protect communications from disclosure based upon the attorney-client privilege must establish the preliminary facts necessary to support its exercise—i.e., a communication made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*).) "Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Ibid*.)

II. Attorney Work Product

Unlike attorney-client privilege, attorney work product protection exists for the benefit of the attorney rather than the client. Also, unlike attorney-client privilege, there are two categories of attorney work product – absolute and qualified – with different levels of protection.

"'The work product privilege is held by the attorney, not the client.'" [Citation.] An attorney seeking to invoke work product protection has the burden to show that materials are either absolute or qualified work product." (*Southern California Edison Co. v. Superior Court* (2024) 102 Cal.App.5th 573, 585.)

Absolute work product "reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (CCP § 2018.030(a).) Any attorney work product that does not reflect counsel's impressions, conclusions, opinions, or legal research or theories – referred to as "qualified" work product – "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (CCP § 2018.030(b).)

While "absolute" work product seeks to establish a zone of privacy around an attorney's thoughts and shields them from opposing counsel or parties, the protection of "qualified" work product is motivated by general fairness concerns. In particular, "qualified" work product seeks to prevent attorneys from "stealing" other attorneys' work, especially where those other attorneys had an equal opportunity to pursue their own case development. With respect to potential disclosure of qualified work product, "[u]nfair prejudice results where the party seeking discovery establishes that there exists 'no adequate substitute' for the material[]. [Citation.] Conversely, when the party has equivalent opportunity to generate comparable evidence in its own case presentation, there is no unfair prejudice. [Citation.]" (*Armenta v. Superior Court* (2002) 101 Cal.App.4th 525, 535; see also *Coito v. Superior Court* (2012), 54 Cal.4th 480, 496 [qualified work product seeks to prevent an attorney from free riding on the industry and efforts of opposing counsel].)

III. Waiver

Waiver of attorney-client privilege and attorney work product is often an attorney's worst nightmare. But one should bear in mind that waiver is more complicated in practice, especially with respect to "implied" waiver. And of course, attorney-client communications that occur in public – such as advice provided in open session at a public meeting – are not privileged at all due to their lack of confidentiality in the first instance.

a. General Principles

While attorneys often have concerns about "subject matter" waiver – where the disclosure of a handful of privileged communications results in the disclosure of an entire category of such communications – California law does not support such a broad conception of waiver as a general matter. If waiver occurs, it generally impacts privileged communications on a communication-by-communication basis.[1]

California case law holds "[t]he scope of the waiver 'is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver.'" (*Ross v. Superior Court* (2022), 77 Cal.App.5th 667, 683; see also *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1147 ["[i]n light of the important public policies underlying privileges, moreover, the scope of the waiver of a privilege is generally construed narrowly"].)

Waiver under Evidence Code section 912 occurs on a communication-by-communication basis, not topic-by-topic. (See Evid. Code, § 912 ["the right of any person to claim a privilege provided [by statute] is waived with respect to *a communication* protected by the privilege"], italics added; Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (Rutter Group 2023) 8:1907 ["Disclosure of a significant part of a privileged communication waives the privilege only with respect to *that* communication. Other privileged communications in the same relationship are unaffected even if they relate to the same subject matter."].)

California law recognizes two types of waiver: express and implied.

i. Express Waiver

Evidence Code section 912 provides that an express waiver of the attorney-client privilege occurs when any holder of the privilege "has disclosed a significant part of the communication or has consented to such disclosure made by anyone . . . ." A "significant part" means disclosure of enough substantive information as to "reveal the *specific content*" of the alleged confidential communication. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 46 [emphasis added].)

Importantly, "a client does not waive the privilege by testifying about facts which might have been discussed in confidential conversations with his or her lawyer, as such testimony is not equivalent to disclosure of the actual content of those attorney-client conversations." (*Maas v. Municipal Court* (1985) 175 Cal.App.3d 601, 606.)

[1] Waiver of work product protection is generally found under the same set of circumstances as waiver of the attorney-client privilege. (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239.)

Likewise, disclosure of the facts that establish the existence of attorney-client privilege – the identities of the attorney and client, and the fact that the client is consulting with an attorney – should not result in express waiver.

ii. <u>Implied Waiver</u>

Implied waiver of attorney-client privilege is more treacherous ground because it may be inadvertent. For example, implied waiver may unwittingly occur when the attorney relies on certain defenses or legal theories. Also, implied waiver can be complicated in the day-to-day operation of government agencies, where there is an emphasis on public transparency and often a motivation to respond to public concerns.

Implied waiver occurs where one party relies on a document "to establish key facts while simultaneously shielding that same document from the other side" to create an "unfair adversarial advantage." (*People v. Superior Court (Jones)* (2021) 12 Cal.5th 348, 363.) "[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action." (*Southern Cal. Gas Co.*, *supra*, 50 Cal.3d at p. 40.)

"[The] theory of implied waiver is premised on the need to protect the integrity of the judicial proceeding. The cases recognize that allowing one party to rely on a document to establish key facts while simultaneously shielding that same document from the other side works an unfair adversarial advantage. Considerations of basic fairness accordingly 'may require disclosure of otherwise privileged information or communications where [a party] has placed in issue a communication which goes to the heart of the claim in controversy.'" (*Jones, supra,* 12 Cal.5th at p. 363.) But "[p]rivileged communications do not become discoverable simply because they are related to issues raised in the litigation." (*Southern Cal. Gas Co.*, *supra*, 50 Cal.3d at p. 45.)

An implied waiver may occur when the *party asserting the privilege*, rather than the opposing party, places a confidential communication at issue. (See, e.g., *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110*,* 116 [defendant may have waived privilege by raising adequacy of investigation in its answer and discovery responses]; *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730 [plaintiff waived privilege by placing at issue the state of mind of his attorney].)

A classic implied waiver scenario arises when a client relies on "defense of counsel" to excuse its actions. Of course, when a prior attorney's advice is relied upon for such a reason, that advice must be disclosed in the course of the related litigation. Similarly, implied waiver also arises in attorney fee or malpractice disputes where an attorney's alleged activities, errors or oversights are at issue.

b. __Investigations – Work Product__

In 2012, the California Supreme Court provided clarity regarding attorney work product protection in investigations conduct by attorneys. The *Coito* decision is an important decision for the attorneys who perform such investigations and provides helpful guidance.

In *Coito v. Superior Court* (2012) 54 Cal.4th 480, the Supreme Court addressed the extent of work product protection for recorded witness interviews and lists of witnesses who provided statements. The court of appeal had held that such materials did *not* qualify as work product. In the underlying case, the plaintiff filed a complaint for wrongful death naming several defendants, including the State Department of Water Resources and the City of Modesto. In the course of discovery, the plaintiff's counsel sought recordings of four witness interviews.

The *Coito* court held that disclosing a list of witnesses interviewed by attorney investigators may reveal the attorney's impressions of the case and, in some instances, qualify as "absolute" work product. But the court held that witness statements procured by an attorney are not automatically entitled to absolute work product status, and that this determination must be made on a case-by-case basis. Such a determination must be made based upon a showing that disclosure would reveal his or her "impressions, conclusions, opinions, or legal research or theories" – such as if the questions that the attorney has chosen to ask (or not ask) provide a window into the attorney's legal theories or evaluation of the merits. But importantly, the court held that not at all witness statements reveal an attorney's thoughts and would qualify as absolute work product.

A list of the witnesses interviewed by an attorney may constitute either absolute or qualified work product, but neither should be assumed. The court provided this example:

> Take, for example, a bus accident involving 50 surviving passengers and an allegation that the driver fell asleep at the wheel. If an attorney for one of the passengers took recorded statements from only 10 individuals, disclosure of the list may well indicate the attorney's evaluation or conclusion as to which witnesses were in the best position to see the cause of the accident.

Ibid.

In the court's view, in the situation, the attorney may have – but it should not be assumed – devoted significant effort to tracking down individual passengers and then decided to take recorded statements from ten of them (perhaps selecting those sitting closest to the driver). In this hypothetical, even without obtaining the witness statements themselves, opposing counsel would gain valuable information by "free riding" on the attorney's identification of ten particularly relevant witnesses. But not at all lists of witnesses interviewed are necessarily work product – if an attorney simply interviewed every known witness to an incident, the court held opined that it was unlikely that any work product protection would apply at all.

Implied waiver may also result in employment discrimination matters where the defendant relies on the adequacy of an investigation. For example, in *Wellpoint Health Networks, supra,* 59 Cal.App.4th at 128, the court recognized:

> If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived.

c. <u>Press Releases (Regarding Investigations)</u>

Related to investigations, it is not uncommon for public agencies to consider press releases – or similar type of public communication – after an investigation has concluded, in order to address public interest or concerns. As with other work product determinations, whether such press releases result in waiver is a fact-based determination and there are few "bright lines" about how much may be disclosed.

In *In re Banc of California Securities Litigation* (C.D. Cal., June 21, 2018) 2018 WL 11350297, a defendant sought discovery from a third-party law firm based on the argument that the defendant bank waived the attorney-client privilege by selectively disclosing findings made by the law firm in two press releases. The court declined to find a waiver of privilege, however, reasoning that the press releases only summarized the law firm's findings in broad terms, and "merely releasing those general findings does not constitute a broad waiver." (*Id.* at *1-2.)

In *In re Vecco Instruments, Inc. Securities Litigation* (S.D.N.Y., Jan. 25, 2007) 2007 WL 210110, the plaintiffs argued that the defendants waived work product protection through the disclosure of a press release and a letter from the defendant's outside counsel to the SEC. (*Id*. at *2.) The press release announced to investors that the defendant had completed its internal investigation and concluded that "the improper accounting entries were made by a single individual." (*Ibid*.) The SEC letter stated that "there were not sufficient facts to come to a conclusion on whether the improper accounting entries were made intentionally." (*Ibid*.) The court held that these disclosures did not constitute waiver of the work product privilege because it "merely summarized the findings and conclusions of the internal investigation and did not quote, paraphrase or reference any of the specific documents at issue in support of its conclusions." (*Ibid*.)

In *In re Dayco Corp. Derivative Securities Litigation* (S.D. Ohio 1983) 99 F.R.D. 616, 619, the defendant issued a two-page press release which summarized the establishment of a special review committee, the retention of the law firm to conduct an investigation, and the investigations findings and conclusions. Neither the facts which led to those conclusions, nor the Report itself, were released. (*Ibid.*) The court held there was no waiver, since the defendant merely released the findings and did not summarize the evidence relied upon. (*Ibid.*)

d. Public Records Requests (Inadvertent Disclosure)

Steering away from investigations, public records requests are another area in which waiver issues may be encountered – especially with respect to the risk of mistaken or "inadvertent" disclosure. But thankfully, the Supreme Court has provided a clear answer in response to these concerns. In *Ardon v. City of Los Angeles*, 62 Cal.4th 1176 (2016), the California Supreme Court held that the inadvertent release of privileged documents does *not* result in waiver.

In *Ardon*, the City had inadvertently disclosed three privileged documents in response to the plaintiff's public records act request. The City informed the plaintiff's attorney that the three documents were privileged and inadvertently produced and requested that they be returned.

Ardon focused on Government Code Section 6254.5[2], which provided:

> Notwithstanding any other provisions of law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter [the Public Records Act], to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Section 6254, 6254.7, or other similar provisions of law.

In light of this provision's purpose and legislative history, the Court held:

> . . . it is doubtful the Legislature intended to enact a statutory scheme that would prevent government agencies from minimizing the damage caused by the inadvertent disclosure of private and confidential information. Nor is it likely the Legislature intended to adopt a rule that inadvertent disclosure requires confidential information to be made generally available to the public. Much more plausible is that the Legislature intended to permit state agencies to waive the exemptions by making *a voluntary and knowing disclosure*, while prohibiting them from selectively disclosing the records to one member of the public but not others.

(*Ibid.* at 1183 [emphasis added].)

[2] A similar provision is now codified in Government Code Section 7921.505.

In reaching this conclusion, the Court also relied on *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, two cases in which the courts have held that inadvertent disclosure of privileged materials does not result in waiver in the context of discovery. The *Ardon* court opined that similar principles apply to public records requests and in "considering the language of section 6254.5 in its proper context. . . it does not apply to inadvertent disclosures." (*Ibid.* at 1189.)

CONCLUSION

The confidentiality of attorney-client communications and work product is of paramount importance to practicing attorneys. While practicing attorneys are well-aware of its importance, and their ethical duty to protect this confidentiality, attorneys – particularly those practicing local government law – should bear the nuances of these doctrines in mind. For example, while many attorneys are likely more concerned about express waiver of attorney-client privilege through disclosure, it is quite possible that attorney-client privilege is more often waived – and inadvertently so – through implied waivers. Likewise, regarding attorney work product protection, it is possible that many attorneys make broad assumptions about work product, especially in the context of investigations. Attorneys should carefully consider such issues, with a full awareness of the limits of these doctrines.