[MS-0398.035.009.01T]

State of California

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Memorandum

To : Commissioners
California Coastal Commission

Date : December 9, 1993

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Subject: Determining Who the Client Is For Purposes of Obtaining Waivers of the Attorney-Client Privilege

Introduction

In May 1993 the Coastal Commission and staff received several subpoenas relating to the criminal prosecution of a former Coastal Commissioner. In responding to these subpoenas it was determined that on at least three occasions the former commissioner had sought and received advice from the Attorney General's Office concerning potential conflicts of interest in connection with his duties as a commissioner. The question that arose was whether the Coastal Commission could waive any attorney-client privilege that might apply to this advice. Concurrent with that question was the issue whether the former commissioner held the privilege as well. The answer to this question turned on whether the former commissioner or the Commission as a whole was the "client" for purposes of these consultations.

Ultimately, we did not have to resolve this question because both the Commission and the former commissioner agreed to waive any privilege that might apply to advice he received from the Attorney General's Office.[1] During the course of our

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1. We responded to the subpoena by noting there were three written documents that involved advice from our Office to the former commissioner and further observed that they might be subject to an attorney-client privilege claim by the former commissioner. We therefore declined to release the documents until we heard whether he wished to waive any potential privilege. Deputy Attorney General Jamee Patterson sent copies of the documents to the former commissioner's attorney and he agreed to waive the privilege. He also expressed his appreciation for the manner in which this matter was handled.

discussions, however, the Commission asked us to further research this matter and to develop an approach for handling such matters in the future.

What follows is a detailed discussion of the attorney-client relationship between public attorneys, public agencies and agency employees and officers.

Summary

As a general rule, public attorneys such as the Coastal Commission's legal staff and deputies of the Attorney General's Office represent their client agencies rather than the individual employees or officers of the agency. Public attorneys also may represent employees or officers of an agency as individual clients when they have been sued for actions taken in their official capacities if it has been determined that representation of both the agency and the employee or officer will not present a conflict of interest. If there is the potential for such a conflict, representation of the individual employee or officer can still be undertaken if the potential conflict is waived in writing by both the individual and the agency.

The significance of this general rule lies in the fact that because the Coastal Commission, like other public agencies, is the client in most cases, the Commission holds the privilege that controls the disclosure of attorney-client communications to the public. Individual employees or officers of the Commission who discuss legal matters with Commission attorneys or members of the Attorney General's Office do not hold the privilege unless a formal decision has been made to represent the employee or officer as a separate client in litigation.

It is important to note that application of this rule does not preclude the Commission's legal counsel, including deputies from the Attorney General's Office, from providing employees or officers of the Commission with legal advice. Nor does it require that these communications be reported to the entire Commission each and every time they occur. Legal counsel still may exercise discretion in determining which matters need to be brought to the attention of the Commission. Instead, application of this rule simply means that when legal advice is rendered, absent a formal decision to the contrary, the Commission is the sole client for purposes of these discussions and holds the ultimate right to decide whether to disclose publicly the substance of these communications.

Of course, the Commission also has considerable discretion in deciding when and how to disclose attorney-client communications to the public. It is anticipated that the Commission will give

all due consideration to the concerns of affected employees or officers before deciding to make public communications between these individuals and the Commission's legal counsel.

Discussion

A. As a general rule the agency is the client.

In recent years there has been a great deal of discussion concerning whether and when a public attorney also can represent an individual public official as a client in the sense that an "attorney-client" relationship is established and the official holds the attorney-client privilege as to any legal advice. The only case to touch directly on this question is Ward v. Superior Court of Los Angeles County, et al. (1970) 70 Cal.App.3d 23. In Ward the Court held that the county counsel was not disqualified from representing the County of Los Angeles in a case brought against the county by Watson, the former county assessor. The Court reasoned that although the county counsel had previously provided Watson with legal advice, "[t]he Los Angeles County Counsel has only one client, namely, the County of Los Angeles." (Id., at p. 32.)

The Court also responded to an argument by Watson alleging that his communications with the county counsel were privileged, and presumably not subject to disclosure to the county as a whole, by noting:

> Any communication between Watson and the county counsel, pursuant to the discharge of their respective duties, concerning the operation of the assessor's office could not be considered a secret confidential communication so as to bar the county, acting through the board of supervisors, from obtaining that information. The assessor is an agent of the county. (People v. Vallerga [1977] 167 Cal.App.3d 847, 876 [136 Cal.Rptr.429].) As such, the assessor has a duty of full disclosure to his principal, the county. Communications by the assessor with respect to the operations of his office made to the county counsel are not subject to a claim of privilege as between the assessor and members of the board of supervisors, who are charged by law with the duty of supervising the conduct of the assessor's office. (Ward v. Superior Court, supra, 70 Cal.App.3d at p. 35.)

To the extent that this decision in Ward indicates that officers or employees of public entities can never be individual clients of public attorneys, it seems to overstate the general rule. As will be discussed below, public officials or employees also may

become individual "clients" of a public attorney when they are sued in their official capacities.

Nonetheless, Ward does reflect a developing understanding that, unless it is otherwise specified, mere communication between a public entity attorney and a public official does not create an attorney-client relationship between the official and the attorney establishing the official as the "client". Instead, the client in these situations is and remains the public entity as a whole.[2]

This general understanding has recently been incorporated into the Rules of Professional Conduct of the State Bar of California. These rules govern the relationship of attorneys to an organizational client, like the Coastal Commission, as well as to individual members of the organization. New Rule 3-600(A), effective in May, 1989, states:

> In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself acting through the highest authorized officer, employee, body, or constituent overseeing the particular engagement.

Such a rule has been followed by corporate counsels for quite some time, and continues to be the controlling principle in their relationship with corporations and their employees. (See 1 Witkin, Cal. Procedure (3rd ed. 1985) Attorneys, § 110, p. 129; Miller and Ruiz, Multiple Representation in Corporate Criminal Cases (No. 3 Spring 1993) 6 California Litigation, pp. 22-24 (corporate counsels may refuse to represent individual corporate

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2. In the broadest sense, the "client" of all attorneys employed by the State of California is the State. The State also has authority, however, to decide the extent to which its constituent agencies and departments can act as separate legal entities for purposes of requesting and receiving legal advice or bringing and defending litigation. See 24 Op.Cal.Atty.Gen. 56, 58 (1954) ("It is axiomatic that the legislature, subject only to constitutional limitations, may create such boards, commissions or other bodies, constitute the membership thereof, and give them such powers and duties as it sees fit"); cf. Nevada v. United States (1982) 463 U.S. 110. But see People ex rel. Deukmejian v. Brown (1981) 29 Cal.3d 150. In the Coastal Act the Legislature specifically has authorized the Coastal Commission to engage in litigation or proceedings before courts, boards, or agencies of the state and federal government. Public Resources Code section 30334. Therefore the Coastal Commission is authorized to serve as a separate, public agency client.

employees because the corporation may want to take a position contrary to the interests of the employee).)

Moreover, according to a paper presented to the League of California Cities, the State Bar's adoption of this rule also has caused "many, if not most city attorneys [to] now explicitly advise their city councils of the exact nature of their understanding of the attorney/client relationship." (League of California Cities Papers, The Role and Responsibility of the City Attorney (Spring 1993), p. 18.) This paper goes on to offer the following excerpt as an example of the advice being provided by city attorneys as a result of this rule:

> The Office of the City Attorney, in accordance with both the City Charter and the State Bar Rules of Professional Conduct, represents as its client the City of Roseville, acting through the City Council as the City's highest administrative authority. That is, of course, why direction is taken from a majority of the council, rather than any individual council member. Looked at the other way, no individual council member (nor any other officer or employee of the city) is a client of the City Attorney's Office. As a result, no duty to represent such individuals exists (except as directed by the Council), nor is there any privilege of confidentiality in any conversation between individuals and the professional staff of the City [A]ttorney's office. That is, since there is no attorney-client relationship, there is no attorney-client privilege. (Id., at p. 18.)

Insofar as this advice states that it is the public entity and not the individual officer or employee that is the client when there are conversations between public entity officers and employees and their legal counsel, this correctly states the apparent effect of Rule 3-600. Thus, except in certain litigation settings described below, when a commissioner has a discussion with the Commission's legal counsel, including deputy attorneys general, the Commission is the sole client for purposes of this discussion. As the next section in this memorandum will explain, however, this excerpt from the League of Cities' paper goes too far when it implies that there is no attorney-client relationship, and therefore no attorney-client privilege, applicable to these discussions.

B. Discussions between commissioners and Commission legal counsel are subject to the Commission's assertion of the attorney-client privilege.

Simply because the Commission is the client, as opposed to an individual Commission officer or employee, does not mean that

discussions between legal counsel and these officers and employees are not protected by the attorney-client privilege. To the contrary, these discussions are subject to the Commission's assertion of the attorney-client privilege.

In the corporate context, the courts have stated that the attorney-client relationship between a corporate entity and its attorneys extends derivatively to the officers and employees of the entity. Thus, in Upjohn Co. v. United States (1981) 449 U.S. 383, the U.S. Supreme Court held that the attorney-client privilege applied to conversations between a corporation's legal counsel and employees at various levels of the corporation. The Court reasoned that a broadly-construed attorney-client privilege is necessary in institutional settings in order to ensure that all members of the organization are able to conform their conduct to the mandates of the law and avoid unnecessary litigation.

Similar considerations have been applied to discussions between public agency officials or employees and their legal counsel. For instance, the California Supreme Court recently confirmed that written communications between city attorneys and city council members are subject to the attorney-client privilege. (Roberts v. City of Palmdale, (1993) 5 Cal.4th 363, 380.) The Court reasoned that government officers also need authority to have confidential discussions with their attorneys:

> A city council needs freedom to confer with its lawyers confidentially in order to obtain adequate legal advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements. [Cites.] The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public. (Id. at pp. 380-381.)

Existing statutory provisions clearly contemplate that comparable discussions between state agency officers and employees and their legal counsel also are protected by the attorney-client privilege. (E.g., Gov. Code § 6254(k).)

Therefore, conversations between Commission officers and employees and their legal counsel are subject to the attorney-client privilege. However, the right to assert or waive the privilege applicable to these conversations will be held by the Commission as a whole.

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As the Commission has been advised in the past, any decision to waive the attorney-client privilege must be made by the Commission as a whole--by a majority vote. (44 Ops. Cal.Atty.Gen. 147 (1964); Memorandum to the California Coastal Commission from Supervising Deputy Attorney General Anthony Summers, March 17, 1987.) Without such a vote, an individual commissioner cannot legally disclose a privileged communication.

Other than this requirement for a majority vote, however, the Commission has broad discretion to determine the process and factors it will use in deciding to waive the attorney-client privilege. For instance, in considering whether to waive the privilege applicable to communications between individual Commission officers or employees and the Commission's legal counsel, including deputy attorneys general, the Commission may consider and, if it chooses, defer to the concerns of the affected officers or employees.

C. <u>An individual commissioner may be a client.</u>

While, as a general rule, the public agency is the client, Supervising Deputy Attorney General Richard Frank's memo of March 5, 1992, identified that a commissioner sued individually for an action taken in his or her official capacity also may become a separate client under state law. In such situations he or she is explicitly authorized by Government Code section 995 to request legal representation by the Commission. Under Government Code section 995.2, the Commission, after considering a number of factors, including the possibility that there may be a conflict between the interests of the commissioner and the Commission, may agree to provide legal representation in these cases. Usually, this representation will be provided by the Office of the Attorney General.[3] The Attorney General's Office should confirm this arrangement in writing and will, where appropriate, seek a written waiver of any potential conflicts of interest.

In these cases, if the Attorney General agrees to represent the commissioner, the commissioner becomes a separate "client" of the Attorney General and any communications between the commissioner and the assigned deputy attorney general will be subject to a

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3. Any action by the Commission or other state agency to employ outside counsel would require prior written approval of the Attorney General. See Government Code sections 11040, 11042. One of the factors that will be considered by the Attorney General in assessing a request for authorization to employ outside counsel is whether there would be a conflict of interest if the Attorney General's Office represented both the Commission and the individual commissioner.

distinct attorney-client privilege. Further, both the commissioner and the Commission will hold a right to claim the privilege as to any communications between the commissioner and the Attorney General's Office. (Evid. Code § 912(b); American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal.App.3d 579, 591.)

D. **There is an obligation to avoid conflicts.**

The rationale for a rule such as Rule 3-600, and the process set out in Government Code section 955.2, stems from the attorney's obligation to avoid conflicts of interest. Such conflicts may arise in several situations. First is the situation where the attorney is asked to represent multiple clients and there is the potential for the clients' interests to conflict. Examples of such potential conflicts include situations where a public agency and agency employee are sued, and there is an issue in the litigation relating to whether the employee acted outside the scope of his or her employment. (See Laws v. County of San Diego (1990) 219 Cal.App.3d 189, 199.) Similarly, a potential conflict exists when a public agency and agency employee are sued, and the agency is considering whether to bring a disciplinary action against the employee arising from the same acts at issue in the suit. (62 Ops.Cal.Atty.Gen 764, 767 (1979).)

Rule 3-600 and Government Code section 955.2[4] require public attorneys to consider the potential for such conflicts between the interests of prospective multiple clients before agreeing to provide representation. (Rule 3-600(D), Rules Prof. Conduct of State Bar.) If there is the potential for a conflict, then the attorney must obtain a written waiver of the potential conflict. (Civil Service Commission v. Superior Court (1984) 163 Cal.App.3d 70, 82; State Bar Rule 3-310, Rules Prof. Conduct of State Bar.) A general written policy adopted by an agency to deal with potential conflicts may not be sufficient to meet this requirement. Instead, an "informed" written waiver of any potential conflict is necessary, and a waiver will not be considered "informed" unless the attorney has made a "full disclosure of the facts and circumstances relevant to the conflict." (Ibid.)

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4. This section requires the agency to determine whether to defend an employee or official in a given situation. Government Code section 995.2(a)(3). As a general proposition, however, it also appears that views of the Attorney General's Office can and should be solicited concerning the question whether a conflict of interest would preclude the Attorney General from simultaneously representing both the agency and the individually-named employee or official.

Richard Frank's memo of March 5, 1992, and the attachments to that memo, present an illustration of how to consider whether a potential conflict of interest exists and how to obtain a waiver of the potential conflict. As the memo points out, the potential for a conflict may arise where both the Commission and individual commissioners are sued and the plaintiff seeks punitive damages. (Punitive or exemplary damages are those damages awarded to make an example of and punish a defendant, rather than to compensate the plaintiff. See Civil Code §3294(a).) In general, punitive damages are not available in suits against government entities, but may be awarded in rare cases against government officials.[5] This creates the potential for a conflict in punitive damage cases because, insofar as it does not have to pay such damages, the government entity may wish to settle the liability issues, while the government official is not so willing to admit wrongdoing because of the risk of punitive damages. Therefore, the letters sent out by the Attorney General's Office to government officials in cases involving punitive damages claims specifically address this potential conflict in representation.[6] They indicate that the Attorney General will represent the official, including defending the official on the punitive damages claim, but as a prerequisite the official needs to sign a waiver as to the potential conflict.[7]

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5. State law provides for indemnification of damage awards against state officers and employees, except for punitive damages. Government Code section 825. On the other hand, case law holds that where a public official is protected by the immunity conferred under Government Code section 820.2 for discretionary acts, no punitive or exemplary damages may be recovered against the official in a tort action brought under state law. Runyon v. Superior Court (1986) 187 Cal.App.3d 878, 882. Additionally, where punitive damages are awarded against a state officer or employee, he or she still may file a claim for indemnification with the State Board of Control.

6. Generally, the existence of a claim for punitive damages only gives rise to a potential conflict of interest between a public agency and an agency employee or officer. See Laws v. County of San Diego, supra, 219 Cal.App.3d 189, 199. Even this potential is considered to be quite remote. Ibid.

7. Even after a waiver of a potential conflict is signed by both the public agency and the agency officer or employee, the public attorney is required to continually consider whether an actual conflict of interest has or will arise. See State Bar Rule 3-310(C), Rules Prof. Conduct of State Bar (referring to

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For public attorneys there also is the possibility that a conflict may arise between the interests of a client and the attorney's own statutory obligations and duties. As an example, the Attorney General was asked whether a city attorney who advised a city council member on whether a proposed action would comply with the Political Reform Act could prosecute the council member for a violation of the Act if the council member refused to comply with the attorney's advice. (71 Ops.Cal.Atty.Gen. 256 (1988).) In a published opinion the Attorney General concluded that a city attorney that advised a council member on whether an official action would violate the Political Reform Act was disqualified from prosecuting the official for taking the action. The opinion reasoned that once the attorney agreed to undertake the role of advisor to the council member he could not thereafter prosecute the council member for the very action on which the advice was rendered.

Like city attorneys, the Office of the Attorney General also has responsibility for prosecuting violations of the Political Reform Act (the "Act"). (See Gov. Code § 91001(a).) However, given the size and functional divisions within the Attorney General's Office, it does not appear that the office would be prevented from filing an action based on a violation of the Act simply because a different member of the office had previously issued

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continued representation). An actual conflict of interest between jointly represented clients is said to arise whenever their common lawyer's representation of the one is rendered less effective by reason of his or her representation of the other. Spindle v. Chubb/Pacific Indem. Group (1979) 89 Cal.App.3d 706, 713. Put in other words, the attorney must ensure that in representing the interests of one client the interests of the other client will not be slighted or harmed. If such an actual conflict does occur, at a minimum, it may be necessary to secure separate representation for the officer or employee to guarantee that both the agency and agency officer or employee are effectively represented. See Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898 (dual representation of clients in litigation is prohibited if they have an actual conflict of interest); but see Nevada v. United States, supra, 463 U.S. 110, 135-138, fn. 15 (recognizing that government attorneys may represent government entities with conflicting interests) and State Bar Rule 3-310(C)(20, Rules Prof. Conduct of State Bar (impliedly allowing representation of clients with conflicting interests if there is written authorization by both clients).

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advice to a state officer concerning compliance with the Act.[8]

E. Attorneys may discuss the applicability of the Political Reform Act with commissioners.

Many requests from commissioners for legal advice concern the requirements of the Political Reform Act and related statutes (e.g., Gov. Code § 1090 (prohibition on conflicts in public contracts)). Such requests for advice raise additional issues not covered so far by this memorandum. As a threshold issue, there is the question whether attorneys from the Commission legal staff and Attorney General's Office are authorized to advise commissioners on matters relating to the Act. The answer to this question is yes for two reasons, but there are several significant caveats.

In the case of the Attorney General's Office, Government Code section 11157 states the Attorney General is the legal advisor to "each department in all matters relating to the department and to the powers and duties of its officers." Questions from commissioners concerning their ability to vote on matters before the Commission relate to their "powers and duties" and thus it is appropriate for the Attorney General's Office to answer questions on these matters. Second, if a commissioner violates the Act by voting on a matter on which he or she has a conflict of interest this can be grounds for voiding the Commission's decision. (See Gov. Code § 91003.) Therefore, in order to adequately represent the Commission and its decisions, the Commission legal staff and deputy attorneys general assigned to the Commission need to be apprised of and be able to offer advice on potential commissioner conflicts of interest.

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8. Given the number of agencies represented by state or federal attorneys, the possible conflicting interests of such agencies, and the multiple functions performed by such attorneys, the Courts have recognized different ethical standards may apply to government attorneys. See Nevada v. United States, supra, 463 U.S. 110. For instance, the Attorney General may be able to separate advisory and prosecutorial functions by placing lawyers in different functional groupings, essentially creating a "wall" to rebut any presumptions that might require imputed disqualification of the entire office. See Howitt v. Superior Court (1992) 3 Cal.App.4th 1575. But see People ex rel. Deukmejian v. Brown, supra, 29 Cal.3d 150, holding that the Attorney General could not sue the Governor and State Personnel Board when members of the Attorney General's office had advised the Board on the same subject prior to the initiation of the suit.

The first caveat is that while the Commission's attorneys may advise commissioners on the requirements of the Political Reform Act, they cannot provide commissioners with any immunities from criminal or civil prosecutions. Only good faith reliance upon written advice from the Fair Political Practices Commission (FPPC) on a particular situation can protect the official (Gov. Code § 83114; Okun v. Superior Court (1981) 29 Cal.3d 442,456.)

The second caveat is that generally there will not be any attorney-client relationship directly between the commissioner and the attorney in this situation; rather, for the reasons given above, the advice will be rendered in order to aid in the functioning of the Commission as a whole. The attorney will be giving advice to prevent a potential conflict of interest from affecting a Commission decision and to insulate the decision from a challenge under the Political Reform Act. Thus, the Commission will hold any privilege that attends the advice.

The final caveat is that much of this discussion of the Political Reform Act and who holds the privilege attendant to legal advice rendered on the Act is subject to considerable debate. The FPPC's Chairman has expressed the opinion that when city council members are given advice on the Act the city is the client for purposes of this advice, but that no attorney-client privilege extends even to the city as a whole. It seems that he would apply a similar line of reasoning to advice rendered to state officers.[9]

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9. The League of Cities' paper on this matter contained the following illustrative, blunt admonition from a city attorney's letter offering advice on the Political Reform Act:

> At the outset, it is important that you understand that the City Attorney has no statutory duty or authority under the Political Reform Act to provide Political Reform Act advice to any Council member or member of an advisory body. You may not rely upon the assistance provided by this office with immunity from FPPC enforcement or prosecution. Further, you enjoy no privilege of attorney/client confidentiality in reviewing these matters with the City Attorney. In the event that facts come to our attention which lead us to believe that you should disqualify yourself from participation in a decision, we will publicly advise the City Council of our belief that you should disqualify yourself. Finally, if, after receiving the assistance provided in this letter, you wish to participate in the decision-making process with

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Conclusion

Our research indicates that the following rules apply to communications between legal counsel and the staff or officers of the Coastal Commission:

- The client for purposes of the discussions is, in a non-litigation setting, the Commission as a whole.

- Legal counsel can provide confidential advice to Commission officers and employees although, in non-litigation settings, the attorney-client privilege is held by the Commission rather than the individual officer or employee.

- A separate attorney-client relationship between a Commission legal counsel, including a deputy attorney general, and a Commission employee or officer may be created when the employee or officer is individually named in litigation, but only where the question of whether such a relationship would raise a conflict with the interests of the Commission has been considered.

- Where there is a potential for conflict between the interests of a Commission employee or officer and the Commission, the potential conflict must be waived in writing by the Commission and the employee or officer before the employee or officer can be represented as an independent client.

- Commission employees and officers may seek advice from the commission's legal counsel on compliance with the Political Reform Act, but to the extent that any attorney-

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immunity from prosecution or enforcement, this office will assist you in making direct contact with the FPPC for informal or formal advice upon which you can rely. League of California Cities Papers, supra, at p. 21.

The mere quotation of this statement and the observation in the text of this memorandum concerning the position taken by the Chairman of the FPPC does not mean that the Attorney General's Office agrees with this position. Instead, this quotation and observation only are provided to identify the arguments that may be made if an attempt is made to assert the attorney-client privilege in any matter relating to implementation of the Political Reform Act.

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client privilege attaches to such advice, the Commission as a whole will hold the privilege.

- In the end, if a commissioner wants to avoid the risk of violating the Political Reform Act, the only way to obtain immunity under the Act is by obtaining and relying on an opinion from the FPPC.

Having arrived at these conclusions, it is important to emphasize that they do not signal any reluctance on the part of the Attorney General's Office to provide legal advice to commissioners. To the contrary, we will continue to be available to advise both Commission employees and officers on the myriad of legal issues that arise during the Commission's operations. In most cases this advice can be provided through individual discussions with commissioners or staff and will not necessitate reports to, or communications with, the entire Commission. Put another way, the Commission's legal counselors have some discretion in deciding which matters need to be raised with the entire Commission and which do not. The controlling concept in all these discussions will remain, however, that the Commission is the client.

In addition, we also are willing to provide advice to individual commissioners who are the subject of litigation, with the commissioner as an additional, distinct client, so long as this attorney-client relationship has been authorized by the Commission and the potential for conflicts of interests has been considered and resolved. Where the possibility of a conflict exists, the conflict must be waived in writing by both the Commission and the individual commissioners.

We would be happy to answer any questions you may have in connection with the topics discussed in this memorandum.

cc: Peter Douglas
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