Fw: CTO and Timeline

Rita Neal to: Dan Dow 01/04/2016 02:46 PM

History: This message has been replied to and forwarded.

Dan,

Bruce Gibson requested a timeline and all memos and e-mails between you and I regarding the CTO issue. I provided him the below information and have given the same to each Board member.

I don't know that any of it will come up, but I wanted to make sure you have the same information as everyone else.

Thanks and let me know if you have any questions.

Rita L. Neal
County Counsel
County Government Center, Room D320
San Luis Obispo, CA 93408
Tel: (805)781-5400 Fax: (805)781-4221
e-mail: rneal@co.slo.ca.us

The information contained in this e-mail may be protected by the attorney-client privilege and/or the attorney work product doctrine. Please do not forward this e-mail.

----- Forwarded by Rita Neal/Counsel/COSLO on 01/04/2016 02:44 PM -----

From: Rita Neal/Counsel/COSLO
To: Bruce Gibson/BOS/COSLO@Wings
Date: 12/31/2015
Subject: CTO and Timeline

Bruce,

Per your request, attached is the timeline which identifies my conversations and written communications with Dan Dan in regard to the issue of CTO

March 19, 2015: I sent an e-mail to DA Dow on somewhat similar topics. In that e-mail, I stated:

"This brings up another issue that I need to speak to you about. I was made aware that Gerry Shea provided "comp time" to attorneys who were "on call" for search warrant duty. That is, I understand that for every 24 hours they were "on-call", they were given a day of comp time. Again, this is not lawful and in violation of Civil Service rules. I do not know if this practice is still in place, but if it is, its very important that we discuss it and that it is not continued. "

March 24, 2015: Whistleblower Complaint submitted to Auditor

April 3, 2015: Meeting with DA Dow, Asst DA Cunningham, Dan Buckshi, Tami-Douglas Schatz, Jim Erb and me. During that meeting, I set out my legal opinion that the California Constitution prohibited paying employees extra compensation without authority of law (i.e. Board of Supervisors authority), County ordinances didn't allow CTO for exempt employees, and if CTO were to be granted, it was a mandatory subject of bargaining. My opinion was that the practice needed to stop immediately.

April 7, 2015: Closed session attended by DA Dow, Dan Buckshi, Jim Erb and me. Again, I laid out my legal opinion. Board was clear to DA Dow that practice had to cease immediately. DA Dow agreed

April 9, 2015: DA Dow sends memo to Jim Erb indicating that practice will stop immediately. (attached to

Board letter)

April 21-22, 2015: DA Dow sends me an e-mail indicating that he will be meeting with his deputies and asks me to put in writing some talking points for him. (e-mails attached)

e-mail from DDow 4-21-15.pdf

e-mail from RLN 4-22-15.pdf

June 30, 2015: Late in the afternoon, DA Dow sends a memorandum to Jim Erb, Dan Buckshi, Tami Douglas Schatz and me indicating that he will be reinstating CTO and stating that he previously "cooperated by temporarily suspending" CTO. This was the first time I was made aware that he had hired outside counsel. A number of e-mails were exchanged between DA Dow and I that afternoon. (memo and e-mails attached)

DDow memo to RLN 6-30-15.pdf

E-mail exchange 6-30-15.pdf

July 17, 2015: I prepared and sent a memorandum to DA Dow setting out in detail my legal opinion that the CTO time was unauthorized and illegal. I further set out my opinion as to why he had no legal authority to hire outside counsel. (memo attached)

RLN memo to DDow 7-17-15.pdf

July 21, 2015: DA Dow sent me a memorandum wherein he cited the Rules of Professional Conduct for attorneys and indicated that I had a conflict of interest in advising him on this matter. I responded to that memorandum via e-mail on July 22, 2015. (memo and e-mail attached)

DDow memo to RLN 7-21-15.pdf

RLN e-mail response to DDow 7-22-15.pdf

July 23, 2015: Meeting with DA Dow, Asst. DA Cunningham, Jim Erb, Dan Buckshi, Tim McNulty, Tami Douglas Schatz and me. It was a rather unproductive meeting wherein DA Dow was again advised that CTO had to stop and that "rearranging work hours" was not an option in order to allow the CTO practice to continue.

If you have further questions, please feel free to let me know.

Rita L. Neal
County Counsel
County Government Center, Room D320
San Luis Obispo, CA 93408
Tel: (805)781-5400 Fax: (805)781-4221
e-mail: rneal@co.slo.ca.us

The information contained in this e-mail may be protected by the attorney-client privilege and/or the attorney work product doctrine. Please do not forward this e-mail.

{In Archive} meeting with SLOGAU

Dan Dow to: Rita Neal 04/21/2015 06:16 PM

Archive: This message is being viewed in an archive.

Hi Rita,

I am wondering what my response should/could be if tomorrow SLOGAU takes the position that they refuse to do search warrant on-call duty from here on out. I don't expect that they will, but it's a possibility... in preparation, would I just listen and tell them that I will respond at a later time? That would allow me time to confer with you on a specific response.

Also, if you have a few basic points (outline) that you think I should make in terms of explaining the need for me to comply with Auditor/County Counsel/CAO directive to stop the compensatory time off, that would be welcome. I plan to keep it very high level and answer any concerns of their that I can.

Thank you again for your assistance,
Dan

Dan Dow
District Attorney
County of San Luis Obispo
1035 Palm Ave
San Luis Obispo, CA 93408
(805) 781-5800 main
(805) 781-4307 fax

DISCLAIMER:
This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s) and no privileges are waived by virtue of mistaken transmission of this email. Unauthorized reception, interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

{In Archive} Re: Talking Points
Dan Dow to: Rita Neal 04/22/2015 09:54 AM

Archive: This message is being viewed in an archive.

This is perfect and very helpful. Thank you!
Dan

Dan Dow
District Attorney
County of San Luis Obispo
1035 Palm Ave
San Luis Obispo, CA 93408
(805) 781-5800 main
(805) 781-4307 fax

DISCLAIMER:
This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s) and no privileges are waived by virtue of mistaken transmission of this email. Unauthorized reception, interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

Rita Neal Dan, A few talking points for your meeting today: 04/22/2015 09:52:31 AM

From: Rita Neal/Counsel/COSLO
To: Dan Dow/DA/COSLO@Wings
Date: 04/22/2015 09:52 AM
Subject: Talking Points

Dan,

A few talking points for your meeting today:

1. Whistleblower complaint was serious and needed to be acted upon immediately. Once the Auditor became aware of the practice, he had no choice but to investigate and require that it be stopped.

2. The practice was "off book", unknown to the County and not approved by the Board of Supervisors. Thus, the practice was illegal and could not be allowed to continue. Allowing it to continue put the County at risk, the Board at risk, the District Attorney at risk, and the Deputy District Attorneys at risk.

3. Risks included: tax payer lawsuit (still possible), request for repayment of time taken, state audit, whistleblower would go public.

4. Legal Issues:
A. Constitution provides exclusive authority to Board of Supervisors to authorize compensation and "extra compensation" to employees. No Board approval of comp time.
B. County ordinances allow comp. time only for those employees designated by the Board and/or through approved MOU's. DDA's neither designated nor comp time allowed and/or specified in the MOU with SLOGAU.

5. Even though the practice has been going on for a long time at the DA's office, it was not authorized by the Board and thus illegal. An illegal practice cannot be considered a valid "past practice", thus there is no requirement to meet and confer on it.

6. Search Warrant duty is a required job duty and must continue. Refusal to participate in a required job

duty may subject employees to discipline.

Please let me know if you have questions.

Rita

Rita L. Neal
County Counsel
County Government Center, Room D320
San Luis Obispo, CA 93408
Tel: (805)781-5400 Fax: (805)781-4221
e-mail: rneal@co.slo.ca.us

The information contained in this e-mail may be protected by the attorney-client privilege and/or the attorney work product doctrine. Please do not forward this e-mail.

OFFICE OF THE DISTRICT ATTORNEY
County of San Luis Obispo

MEMORANDUM

TO: James P. Erb, CPA, Auditor-Controller-Treasurer-Tax Collector
Dan Buckshi, County Administrative Officer
Rita Neal, County Counsel
Tami Douglas-Schatz, Human Resources Director

FROM: Dan Dow, District Attorney

DATE: June 30, 2015

SUBJ: Work Hours Adjustment for Deputy District Attorneys Who Serve On-Call for Law Enforcement Assistance

---

INTRODUCTION

The purpose of this memorandum is to provide you with an update regarding Whistleblower Complaint 121179945. The Auditor's report dated April 8, 2015 took exception to the long standing practice in my Office of adjusting the working hours of those deputy district attorneys (DDAs) who work outside of regular business hours in service to local law enforcement with search and arrest warrants.

In response to the report, I cooperated by temporarily suspending these adjustments. However, having given the matter long and careful consideration and research, including consultation with outside legal counsel, I have now determined that the findings were premature as the report was incomplete in its analysis. Specifically, the finding that this practice constituted unauthorized compensation was inaccurate. Therefore, I need to act immediately to reinstitute the work hours adjustments that had been in place for the past 30 years. Below, I will explain the basis for this conclusion and my course of action.

FACTS

For some 30+ years my predecessor District Attorneys have followed a practice whereby tenured deputy district attorneys (DDA) have been assigned on a rotating basis to be on call to provide off hours assistance to local law enforcement, principally pertaining to urgent search or arrest warrants and time sensitive criminal investigations.

This essential and long standing practice, codified in the Office Prosecutor Orientation Handbook is as follows:

> *COMPENSATORY TIME OFF*
> *Attorneys who have successfully completed probation shall be placed on the Search Warrant Duty list, a rotation consisting of a two (2) week period of 24 hour on-call availability to law enforcement for legal advice. In exchange for participating on Search Warrant Duty, the attorney shall receive a compensatory day off every 6 weeks.*

The County Auditor is understood to have received an anonymous "Whistle Blower Hotline" report of this practice. By memorandum dated April 8, 2015, the Auditor issued a report to the County Administrative Officer (CAO), County Counsel, and the County Human Resources Director, concluding that as this practice was not part of any compensation scheme approved by the Board of Supervisors (Board), it was unauthorized and should cease.

I understand and fully respect that the Board of Supervisors ". . . shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees."[1] It is in all likelihood this statute upon which the County Auditor relied for the legal conclusion expressed in the April 8, 2015, memorandum.

I appreciate and concede that if a district attorney were to have, for example, decided to provide without approval of the board of supervisors some bonus pay to certain DDAs over and above board provided compensation, this would be an act in excess of such a district attorney's authority.

But this is not what is happening in this County and in my Office. Rather, this longstanding practice has been an exercise of the elected District Attorneys' right and responsibility pursuant to County Code to arrange individual employee's workdays or workweeks so as to provide for the proper function of departments.

County Code § 2.44.110 provides that:

> *(a) Eight hours shall constitute a workday for all full-time employees.*
>
> *(b) Forty hours shall constitute a workweek for all full-time employees.*
>
> *(c) Nothing contained in this chapter shall be construed to prevent the board of supervisors or department heads from so arranging individual employee's workdays or workweeks so as to provide for the proper function of departments at such hours and times as may be deemed necessary; provided, that the provisions of subsections (a) and (b) of this section and Sections 2.44.030 and 2.48.050 are fully complied with, except as provided in subsections (d), (e), and (f) below.*
>
> *(d) Subsections (a) and (b) of this section shall not apply to employees who have been designated as salary basis employees within the meaning of the Fair Labor Standards Act to the extent that such employees are not subject to defined working hours.*
>
> *(e) Subsections (a) and (b) of this section shall not apply to employees who are fire personnel or to employees on approved flexible workweeks.*
>
> *(f) Those county employees in employee organizations with executed MOU's authorizing flexible workweeks, may request their department head to schedule them to work a flexible workweek. Such a request, and any department head approval, shall be made on such forms as may be provided by the county; and if approved, shall be forwarded to the personnel department and auditor's office. A flexible workweek shall be defined as any workweek other than as provided in subsections (a) and (b) of this section.*

---

[1]Govt. Code §25300

> *Nothing contained in this section shall be construed as granting a right to a flexible workweek. Department heads shall retain the discretionary authority to arrange an individual employee's workday and workweek, as authorized by this code, and to approve requests for flexible workweeks, as well as to terminate a flexible workweek schedule. Department heads shall also have the authority to schedule an employee to work a flexible workweek; provided, that any advance notice required by an MOU is first given.*

Subdivision (c) of Section 2.44.110 is of particular relevance in that it provides, in pertinent part, that "Nothing contained in this chapter shall be construed to prevent . . . department heads from so arranging individual employee's workdays or workweeks so as to provide for the proper function of departments at such hours and times as may be deemed necessary."

That is precisely what is occurring here; for 30 years, the District Attorneys have adjusted the working days and working weeks to have DDAs be available and respond to important public safety calls for assistance at all hours of the day and night "as necessary to provide for the proper function of" the Office of District Attorney and to ensure public safety.

This adjustment of the working days and weeks of the attorneys in my office does not result in any extra pay for the concerned DDAs; their salaried compensation remains unchanged. Nor does it detract from the objective, as set forth in §6.1 of their MOU, that as public servants they work at least 40 hours a week. Instead, because they work off hours and limit their activities so as to be ready and fit to provide this essential assistance to local law enforcement, their working hours are adjusted in an amount equivalent to one eight hour day for every six weeks. This is a ratio of one hour adjustment for every 3.55 hours of on-call service, which is much less than the actual hours for which these DDAs hold themselves in readiness.

CONCLUSION

The practice at issue supports an essential service to local law enforcement, thereby enhancing public safety; as it is a lawful exercise of authority delegated by the Board to all department heads; and, it is a lawful condition of employment of long standing. I therefore feel it incumbent upon me as the constitutionally elected District Attorney to reinstitute and maintain this program.

Additionally, I do not believe that this is a matter appropriate to the bargaining table in the current negotiations between the County and the association representing DDAs. The adjustment of working hours does not constitute a change in working conditions; it has been in place for over three decades. Furthermore, it does not impact DDA compensation; they earn nothing more or less as a consequence of this process than the compensation set for their classification by the Board.

With the start of the new fiscal year upon us and the duty to support public safety, I feel an imperative to act immediately and plan to do so. I look forward to future collaboration on personnel and human resource matters and welcome ongoing discussion on this issue and others as they come up in our joint endeavor as public servants.

{In Archive} Re: Fw: Memo from DA Dow re. Auditors Whistleblower report.

Dan Dow to: Rita Neal 06/30/2015 08:23 PM
Cc: Dan Buckshi, Jim Erb, Tami Douglas-Schatz, Timothy McNulty
Archive: This message is being viewed in an archive.

Rita,

It was never by design or objective to send this memo to you on the last day of the fiscal year in order to surprise you or anyone. I apologize for the coincidental timing, however this afternoon was the very soonest I could complete the memo and get it distributed. It has been a work in progress for several weeks. Due to the short notice to you, I did not intend on beginning the practice on July 1st. Furthermore, I have not yet informed the Deputy DA's of my decision / course of action. I will keep my implementation on hold for a short while so that you and I can meet in person and dialogue about this important matter early next week.

I look forward to an open dialogue with you to discuss and present our points of view and legal analysis.

Sincerely,
Dan

Dan Dow
District Attorney
County of San Luis Obispo
1035 Palm Ave
San Luis Obispo, CA 93408
(805) 781-5800 main
(805) 781-4307 fax

DISCLAIMER:
This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s) and no privileges are waived by virtue of mistaken transmission of this email. Unauthorized reception, interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

Rita Neal Dan, I believe it will be appropriate for us to hav... 06/30/2015 05:59:14 PM

From: Rita Neal/Counsel/COSLO
To: Dan Dow/DA/COSLO@Wings
Cc: Dan Buckshi/Admin/COSLO@Wings, Jim Erb/AC/COSLO@Wings, Tami Douglas-Schatz/Personnel/COSLO@Wings, Timothy McNulty/Counsel/COSLO@Wings
Date: 06/30/2015 05:59 PM
Subject: Fw: Memo from DA Dow re. Auditors Whistleblower report.

Dan,

I believe it will be appropriate for us to have a conversation directly instead of through e-mail. However, you sent a memorandum on the last day of the fiscal year informing the County that you will be allowing your deputies to engage in a practice that is unauthorized by the Board of Supervisors and not authorized under the law and that you will begin allowing this practice "immediately". I had no choice, as counsel for the County, to promptly notify you that the course of action you propose to take is not legally supportable.

Your memo cites a County ordinance and one Government Code section. Neither of these citations

provide legal support for you to take the action you propose. If you believe you have legal support for your actions, beyond what you cited in your memo, I will be happy to review and consider it.

Further, if you reinstitute the practice "immediately", your deputies may be put into a situation where they are misrepresenting and/or falsifying their time cards.
The issue of compensatory time off for search warrant duty is, without question, a subject of mandatory bargaining. Given that SLOGAU and the County are negotiating a successor MOU, it is appropriate to allow this issue to be addressed at the bargaining table.

It is also incumbent on me to advise you that if you have hired the law firm of Jones and Mayer to advise you on this issue, any funds used to pay that firm must not be County funds as the law does not allow you to hire your own counsel.

Dan, I cannot stress enough the severity of the action you propose to take. I am again requesting that you reconsider your position and not proceed forward.

Rita L. Neal
County Counsel
County Government Center, Room D320
San Luis Obispo, CA 93408
Tel: (805)781-5400 Fax: (805)781-4221e-mail: rneal@co.slo.ca.us

---

The information contained in this e-mail may be protected by the attorney-client privilege and/or the attorney work product doctrine. Please do not forward this e-mail.
----- Forwarded by Rita Neal/Counsel/COSLO on 06/30/2015 05:38 PM -----

From:	Dan Dow/DA/COSLO
To:	Rita Neal/Counsel/COSLO
Date:	06/30/2015 05:36 PM
Subject:	RE: Memo from DA Dow re. Auditors Whistleblower report.

Rita,

I am a bit surprised by your conclusive response without taking an opportunity to review and consider the authority I have cited.
In order to have conflict free counsel on this issue, I have obtained legal counsel from the law firm Jones & Mayer. I have a written legal opinion that I have relied upon for my memorandum and intended course of action.

I will be happy to discuss this as soon as is practical.

Sincerely,
Dan

Sent by iPhone with Good (www.good.com)

Dan Dow
District Attorney
County of San Luis Obispo
1035 Palm Ave
San Luis Obispo, CA 93408
(805) 781-5800 main
(805) 781-4307 fax

-------- Original Message --------

From : Rita Neal/Counsel/COSLO
To : Dan Dow/DA/COSLO@Wings
Cc : Dan Buckshi/Admin/COSLO@wings, Jim Erb/AC/COSLO@wings, Tami Douglas-Schatz/Personnel/COSLO@wings, Timothy McNulty/Counsel/COSLO@Wings, Guy Savage/Admin/COSLO@Wings
Sent on : 06/30 04:51:28 PM PDT
Subject : Re: Memo from DA Dow re. Auditors Whistleblower report.

Dan,

I received a copy of your memorandum dated June 30, 2015 at approximately 4:00 p.m. today. It is unfortunate that you are notifying that County at this late hour that you will be reinstituting the unauthorized practice of providing nine extra days of off-book time per year to the deputy district attorneys. Because your memorandum was received so late today, there is insufficient time to adequately respond to all of the points you raise.

You are operating under the pretense that you need to act now because of the new fiscal year. The issue of compensatory time off is a mandatory subject of bargaining and the San Luis Obispo Government Attorneys (SLOGAU) is currently in negotiations with the County over a successor MOU. There is nothing associated with the new fiscal year that requires you to act unilaterally while the County is at the bargaining table with SLOGAU.

Your conclusion that the additional nine days is not an element of compensation is incorrect. Like all other leave time, this off-book time represents a cost to the County that must be considered as part of employee compensation. At this time, the Board of Supervisors has not authorized the off-book time. Thus, you have no legal authority to authorize it.

Please warn all deputy district attorneys who choose to take this off-bock time moving forward that, at a minimum, they will be required to repay the County.

Dan, proceeding in this manner is ill advised, in conflict with the law, and not in the best interests of anyone involved. I strongly recommend that you reconsider your position and not proceed forward.

Please contact me so that we can discuss this.

Rita L. Neal
County Counsel
County Government Center, Room D320
San Luis Obispo, CA 93408
Tel: (805)781-5400 Fax: (805)781-4221
e-mail: rneal@co.slo.ca.us

The information contained in this e-mail may be protected by the attorney-client privilege and/or the attorney work product doctrine. Please do not forward this e-mail.

Dan Dow	Friends, Please find attached my memo of today...	06/30/2015 03:22:20 PM

From: Dan Dow/DA/COSLO
To: Jim Erb/AC/COSLO@Wings, Dan Buckshi/Admin/COSLO@Wings, Rita Neal/Counsel/COSLO@Wings, Tami Douglas-Schatz/Personnel/COSLO@Wings
Date: 06/30/2015 03:22 PM
Subject: Memo from DA Dow re. Auditors Whistleblower report.

Friends,
Please find attached my memo of today's date which is a follow up regarding the Auditor's Whistleblower report April 8, 2015.
This memo includes my legal analysis and future course of action.

I look forward to discussing this with you if you have any questions or concerns.

Sincerely,
Dan
[attachment "Memo to Auditor CAO County Counsel and HR June 30 2015.pdf" deleted by Rita Neal/Counsel/COSLO]

Dan Dow
District Attorney
County of San Luis Obispo
1035 Palm Ave
San Luis Obispo, CA 93408
(805) 781-5800 main
(805) 781-4307 fax

DISCLAIMER:
This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s) and no privileges are waived by virtue of mistaken transmission of this email. Unauthorized reception, interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

COUNTY OF SAN LUIS OBISPO
OFFICE MEMORANDUM

Confidential Attorney-Client Communication

TO: DAN DOW
District Attorney

DATE: July 17, 2015

FROM: Office of the County Counsel

SUBJECT: Unauthorized Compensatory Time Off

Per your request, below is a summary of the law regarding the unauthorized compensation in the form of nine days of extra paid time provided to deputy district attorneys in your office.

BACKGROUND

Although all involved are familiar with the background regarding the Whistleblower Complaint, a brief summary of some of the highlights will help to frame the context of this memorandum. In early April 2015, the Auditor's Office received a Whistleblower Hotline complaint alleging an informal time reporting system in the District Attorney's Office whereby Deputy District Attorneys received nine days of compensation time per year without legal authority for paid time off.[1] This time was all "off book" and the only recording was maintained on a handwritten spread sheet. As a result of the Auditor's investigation, his office provided you a report on April 8, 2015 and concluded that the practice was occurring, was not authorized and needed to be discontinued.

Prior to the Auditor's report being issued, a meeting was held with you, Lee Cunningham, Dan Buckshi, Tami Douglas-Schatz, Jim Erb and myself. We had an open and

[1] Of note, on March 19, 2015 I informed you via e-mail that I had become aware of this issue and that I needed to speak to you about it. I informed you at that time that the practice was "not lawful and in violation of Civil Service rules".

thorough discussion about the practice of compensatory time off (CTO) within your office. Lee Cunningham informed us that in the 30 years that he had been assigned to search warrant duty, the most he had ever been called after hours was three times during a two week period. During that meeting, I discussed the legal basis for the conclusion that the practice was illegal and why it must stop. We also agreed that we would take this matter to the Board of Supervisors in closed session.

The Board was informed of the matter in closed session April 7, 2015 and you were present. I laid out the issue to the Board and the legal basis for my conclusion that the practice was illegal. The Board was informed that this issue was a mandatory subject of bargaining, that we had a concern about falsified time cards, and that the County was at risk of litigation if the practice continued. You urged the Board to ratify the practice and it declined. In fact, they were clear that the practice needed to cease without delay. You then informed the Board that you would be stopping the practice immediately.

Subsequently, on April 9, 2015, you notified the deputy district attorneys that the practice was being discontinued. Further you sent a memorandum to Jim Erb informing him that the practice was "eliminated effective immediately." In that memorandum, you cite the California Constitution, Article XI, Section 10(a) which states that no compensation can be granted to public employees without authority of law. You went on to state: "…as District Attorney, I cannot continue the past practice without the approval of the County Administrative Officer and/or the Board of Supervisors."[2]

[2] It should be noted that the County Administrative Officer has no authority to grant the continuation of this practice.

On April 13, Steve Silver, attorney and labor negotiator for San Luis Obispo Government Attorney's Union (SLOGAU), sent a letter to the County's negotiator, Jeff Sloan, complaining that the practice had been stopped. In Mr. Silver's letter, he consistently referred to the CTO as "compensation." Mr. Sloan promptly responded on April 17, 2015 and succinctly set out the legal basis for why the practice needed to stop and also indicated that SLOGAU was not precluded from making a proposal at the negotiating table with regard to search warrant duty.[3] On June 30, 2015, late in the afternoon, you sent a memorandum to Jim Erb, Dan Buckshi, Tami Douglas-Schatz and me. In that memo, your stated that you had "cooperated by temporarily suspending"[4] the program. You further stated that you needed to "act immediately to reinstitute" the program. You asserted that the start of the new fiscal year made it "imperative to act immediately" and that you "planned to do so." For the first time, you expressed your disagreement with this office's legal analysis. You alleged that you had singular authority to reinstate the program, you claimed that the CTO was not compensation, you claimed that this matter was not subject to bargaining, and you stated that you had hired outside counsel to advise you on this issue.

This memorandum will address each of the issues you raised.

LEGAL ANALYSIS

A. Only The Board of Supervisors Can Authorize Compensation Of County Employees

Article XI, section 10(a) of the California Constitution prohibits local governments from paying a claim under an agreement made without authority of law. In particular, that provision

[3] It is assumed you have copies of this correspondence, but in the event that you do not, they are provided here for your reference.
[4] You had not previously indicated that your suspension of the program and cooperation to end it was "temporary."

provides: "A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

The payment of nine days of CTO to deputy district attorneys who carried search warrant duty runs afoul of this constitutional provision since the payments were never authorized by the Board of Supervisors.

Further, Article XI, section 1(b) of the California Constitution states that county boards of supervisors shall have exclusive, plenary authority to provide for the number, compensation, tenure and appointment of county employees. This constitutional provision makes clear that the county board of supervisors "not the state, not someone else, shall provide for the compensation of its employees" (See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285).

Government Code section 25300 also reiterates that only the board of supervisors may prescribe the compensation of all county officers and employees. Further, County Ordinance Code 2.44.030 specifically states that employees may receive compensatory time off only if provided by resolution of the board of supervisors or by memorandum of understanding. No Board resolution has ever been passed authorizing CTO for deputy district attorneys. County Ordinance Code section 2.48.170 authorizes stand-by pay for certain specified employees, and it does not include deputy district attorneys.

Likewise, the Memorandum of Understanding (MOU) with SLOGAU is completely silent on the issue of deputy district attorneys receiving additional compensation for performing search warrant duties. In fact, Article 6.1 states: "…public employees should not be paid for

time they do not work, unless it is time otherwise guaranteed to unit members such as vacation, administrative, or personal leave. " The MOU specifically defines vacation, administrative and personal leave. There is no reference to or definition of compensatory time off within the MOU. If compensatory time was authorized and allowed for the deputy district attorneys, such benefit would be stated within their MOU. It is not and therefore, not allowed.[5]

B. Compensatory Time Off Is A Form Of Compensation

In your memorandum of June 30, you cite County Ordinance Code section 2.44.110 for the proposition that the Board has delegated to you the authority to grant nine days of compensatory time off to each deputy who carries two weeks of search warrant duty. This ordinance is not applicable in that it only allows the board or a department head to rearrange work schedules, not provide extra compensation.

Based on Mr. Cunningham's recounting of the history of search warrant duty compensatory time, the practice may have been closer to a simple rearranging of work hours at its inception. Twenty years ago, a deputy assigned to search warrant duty would have been obligated to stay within reach of a land line. Without internet access, the deputy might also have been expected to have access to bound statutes and case law. These limitations would have significantly intruded into what would otherwise have been the deputy's non-work hours. Over time, the nature of search warrant duty has changed. Deputies assigned to the duty today are no longer tied to a land line. With smart phones and cellular internet access they should be able to

[5] Given the sophistication of SLOGAU, its members and its negotiator Steve Silver, it is fair to assume that the union would know and understand that they are only entitled to compensation and benefits that are expressly stated in their MOU.

work without books as well. Today's search warrant deputy is free to be on the soccer field or out enjoying a movie.

As you can recognize, the degree of intrusion into the off-work hours of the search warrant deputy has greatly diminished over the years. Years ago there may have been a colorable argument that providing nine days off merely rearranged the working hours of a deputy who, when on duty, was literally required to sit around like a Maytag repairman waiting for a particular phone to ring. If that argument existed then, it is gone now. A modern search warrant deputy might have her weekend disrupted by as few as three hours of calls. Yet for a possible three hour disruption to a sixty-three hour weekend (Friday at 5:00 p.m. until Monday at 8:00 a.m.) the deputy has been receiving over 17 hours of compensatory time off.[6] This example, which may or may not be a typical weekend, results in compensation for 14 hours of time that was not worked.

With such a large difference between time worked and time compensated it is impossible for the search warrant duty practice to fall within the rearranging of hours allowed by County Ordinance Code section 2.44.110. Instead, the practice has resulted in many hours of compensation each year for time that was never worked.

C. The Granting of Compensatory Time Off Is A Mandatory Subject Of Bargaining.

Government Code section 3504 identifies the scope of representation, and thus, the issues that must be bargained for as "wages, hours, and other terms and conditions of employment." Compensatory time off is clearly within the scope of bargaining and clearly required by the plain

[6] 1 CTO day per 6 weeks = 8.66 days or 69.3 hours of CTO per year. Each week of duty = 123 hours of non-work duty time.

language of the County ordinances that state that compensatory time off is only allowed if approved by the Board in an MOU and/or a Board resolution.

Further, the Board-approved County Employee Relations Policy (ERP) allows the Board to designate a Management Representative who is responsible for carrying out the employer-employee relations program and who is responsible for overseeing all labor negotiations.[7] The Board has delegated that duty to the Human Resource Director. Thus, department heads, elected or appointed, have no authority to negotiate on behalf of, or grant benefits to, an employee organization without it being properly negotiated and approved by the Board.

Additionally, the ERP specifically prohibits a management employee from representing an employee organization.[8] Thus, any attempt by a department head to do so is in violation of the Board policy and the law.

D. Reinstituting the CTO Program Puts The Deputy District Attorneys At Risk of Time Card Fraud

Because CTO is not an allowable form of compensation for the deputy district attorneys, there is no mechanism for them to code such time on their time cards. Every employee, when filling out their time card, or when someone else fills it out for them, is expected to accurately and honestly record their work time. During the Auditor's investigation, it was found that the CTO days were coded as regular time and thus, it appeared to the Auditor (and anyone else who might review the time cards) that the deputies were actually working when in fact they were not. In the past, the County has disciplined employees and required repayment when time card falsification has been identified. As Jim Erb indicated to you recently, if the CTO program is

[7] The ERP was approved by the Board of Supervisors pursuant to Government Code section 3507.
[8] See Government Code section 3507.5

reinstituted, you will be putting your employees at risk of the Auditor not approving their time cards and/or requiring them to declare under penalty of perjury that they are true and accurate.

E. There is No Legal Authority For A District Attorney To Employ Independent Attorneys At Public Expense Absent A Statutory Provision

In counties which have created the office of county counsel, the county counsel is the exclusive public officer vested with authority to advise and represent the county and it's officers in all legal matters and civil actions. (Gov. Code sections 26520, 26526, 26529, 27642; see also *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, 54-57).

In certain instances and as to particular officers, the Legislature has explicitly provided for the authority to retain independent counsel where the county has failed or refused to provide representation (see e.g., Gov. Code section 996.4) or where representation by county counsel would otherwise pose a conflict (see e.g., Gov. Code section 31000.6). The fact that a county counsel has taken a position adverse to the interests of a county official, however, does not necessarily mean that a conflict of interest exists.[9] And even where an actual conflict does exist, absent explicit statutory authority or board approval, a county officer has no authority to retain independent counsel because the discretion and authority to employ outside counsel for the county and its officers is vested exclusively in the county board of supervisors. In fact, case law is clear that where the legislature intends to allow county departments and officers to employ

[9] It should be noted that a conflict or apparent conflict does not exist by virtue of the fact that the county counsel acts as legal advisor to the various departments and officers whose interests may on occasion be adverse to the Board or other departments. This is because the county counsel's client is "the county," of which various departments are a part (*Ward v. Superior Court* (1977) 70 Cal.App.3d 23).

their own counsel, it has done so expressly.[10] *Harvey v. County of Butte* (1988) 203 Cal.App.3d 714.

The county is a single organization made up of numerous departments and agencies. Section 23005 of the Government Code provides that: "A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law. The powers vested in board of supervisors by this section include legislative, judicial and executive powers (*Bixler v. County of Sacramento* (1881) 59 Cal.698, 702).

The decision to employ independent counsel for a county officer or department is clearly within the realm of the board's executive power. Government Code section 23005 evidences that a county officer has no independent authority to exercise the duty and power conferred on the board of supervisors by statute, unless authorized to do so by the board of supervisors, or unless such authority has been conferred on the officer by law.

There is no statute that permits the district attorney to retain independent counsel, absent express authorization from the board of supervisors. Moreover, the board is vested with the duty of supervising the official conduct of all its officers and all officers of all districts and other subdivisions of the county (Gov. Code section 25303). This supervision encompasses an officers' ability to retain the special services of independent legal counsel.[11] The law is clear that as District Attorney, you had no authority to hire outside counsel to advise you on this issue at County expense.

---

[10] There is no statutory authority or other law which would permit a district attorney to retain outside counsel, at the expense of the county, for the purpose of obtaining legal advice. And significantly, county boards of supervisors, which are vested with authority to direct and control litigation in which their counties are involved and may retain independent counsel for the purpose of litigation (Gov. Code section 25203), may only retain independent counsel for the purpose of obtaining legal advice if the advice sought requires specialized expertise unavailable from the county counsel (*Harvey v. County of Butte* (1988) 203 Cal.App.3d 714)

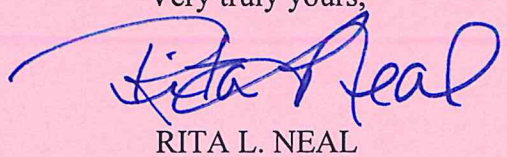
[11] Section 25303 explicitly provides that supervisorial powers over county officers conferred on board of supervisors "...shall not be construed to affect the independent and constitutionally and statutorily investigative functions of the...district attorney." Thus, the district attorney retains his right to prosecutorial discretion without interference by the board of supervisors, but there is no provision to retain independent counsel simply because the district attorney disagrees with the opinion of county counsel with regard to matters that are clearly within the purview of the board of supervisors.

CONCLUSION

1. The Board of Supervisors has not authorized CTO for deputy district attorneys and you, as District Attorney, have no authority to grant CTO.
2. CTO is a form of compensation.
3. The granting of CTO is a mandatory subject of bargaining.
4. Unilaterally reinstituting CTO for deputy district attorneys puts them at risk of time card fraud.
5. There is no legal authority for the District Attorney to employ independent counsel at public expense absent a statutory provision.

Please feel free to contact me should you have any questions and/or wish to discuss this further.

Very truly yours,



RITA L. NEAL
County Counsel

RLN:ds
Attachments

cc: Dan Buckshi, County Administrative Officer
Jim Erb, Auditor-Controller-Treasurer-Tax Collector-Public Administrator
Tami Douglas Schatz, Human Resource Director

152207
367dsmmo.docx

SILVER, HADDEN, SILVER & LEVINE
A PROFESSIONAL LAW CORPORATION

STEPHEN H. SILVER
WILLIAM J. HADDEN
SUSAN SILVER
RICHARD A. LEVINE
KEN YUWILER
ELIZABETH SILVER TOURGEMAN
HOWARD A. LIBERMAN
JACOB A. KALINSKI
SUSAN R. JERICH
BRIAN P. ROSS
STEVEN N. WELCH
LEROY C. WU

1428 SECOND STREET
SUITE 200
SANTA MONICA, CALIFORNIA 90401-2367

MAILING ADDRESS
POST OFFICE BOX 2161
SANTA MONICA, CALIFORNIA 90407-2161
TELEPHONE (310) 393-1486
FACSIMILE (310) 395-5801

April 13, 2015

Via email and U.S. mail

Tami Douglas-Schatz
Human Resources Director
New County Government Center
1055 Monterey Street
Suite D-250
San Luis Obispo, CA 93408

Re: Elimination of Paid Compensatory Time Off Days
for District Attorneys required to be on call

Dear Tami:

It has just come to my attention that the County of San Luis Obispo District Attorney's Office has unilaterally discontinued a valuable benefit enjoyed by employees represented by the San Luis Obispo Government Attorneys' Union (SLOGAU): nine (9) days of paid compensatory time off per annum. This compensation was provided in return for the requirement that they be on call for at least two weeks per annum. Even though this benefit was discontinued, the attorneys represented by SLOGAU still are being required to be on call for that two-week period.

As I am sure you can appreciate, this existing term and condition of employment cannot be altered without the County first satisfying its obligation under Section 3505 of the California Government Code to meet and confer in good faith with SLOGAU, including the exhaustion of all applicable impasse procedures. Even more importantly, in paragraph 15 of the County's current Memorandum of Understanding with SLOGAU, the County waived its right to compel SLOGAU to meet and confer in good faith regarding **any matter** within its scope of representation, which clearly would include the subject of paid compensatory time off benefits. Consequently, the unilateral removal of this benefit constituted a clear violation of that Agreement.

Accordingly, I urge that you immediately cause the District Attorney's office to reinstitute the compensatory time off compensation that was improperly rescinded by it. Otherwise, SLOGAU will have no alternative but to pursue all available legal remedies.

In that regard, I presently am unable to ascertain whether the concerns expressed in this letter would be the subject of a grievance under any applicable grievance procedure. Therefore, in the event that there is an applicable grievance procedure, please regard this letter as a formal grievance that would "jumpstart" that process. I would appreciate your providing me with a copy of any grievance procedure you believe would be applicable for this situation.

Your prompt attention to this matter will be sincerely appreciated by SLOGAU and the attorneys it represents.

Sincerely,

SILVER, HADDEN, SILVER & LEVINE

STEPHEN H. SILVER

cc: Jeffrey Sloan
San Luis Obispo Goverment Attorneys Union

Renne Sloan Holtzman Sakai
Public Law Group™
350 Sansome Street, Suite 300
San Francisco, CA 94104
t: 415.678.3800
f: 415.678.3838

JEFF SLOAN
415-867-5097
jsloan@publiclawgroup.com

April 17, 2015

Via E-mail & U.S. Mail

Stephen H. Silver
Silver, Hadden, Silver & Levine
1428 Second Street, Suite 200
Santa Monica, CA 90401-2387

Re: *Response to April 13, 2015 Letter – DDA Comp Time Issue*

Dear Mr. Silver:

I write in response to your April 13, 2015 letter, regarding the County's decision to cease providing Deputy District Attorneys with nine days of compensatory time off in exchange for two weeks of search warrant phone duties.

In your letter, you assert that the County's decision constitutes a violation of its meet-and-confer obligation under the Myers-Milias-Brown Act (MMBA) as well as paragraph 15 of its Memorandum of Understanding (MOU) with SLOGAU. We disagree.

As you are no doubt aware, Article XI, section 1(b) of the California Constitution states that county boards of supervisors shall have the exclusive, plenary authority to provide for the number, compensation, tenure, and appointment of county employees. This constitutional provision makes clear that the county board of supervisors "not the state, not someone else" shall provide for the compensation for all county employees. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285.)

The problem in this case is that the San Luis Obispo County Board of Supervisors never authorized or approved the conferral of any additional compensatory time to Deputy DAs for performing search warrant phone duties. For example, while County Ordinance Code section 2.48.170 authorizes "standby pay" (including compensation for being ready and able to respond to calls for service) for certain, specified employees, it does not do so for Deputy DAs.

Likewise, the County's collectively-bargained MOU with SLOGAU is completely silent on the issue of Deputy DAs receiving any additional compensation for performing search warrant phone duties. To the contrary, MOU Article 6.1 expressly recognizes that "Unit members are professional attorneys who, in the course of their duties, are not subject to defined working hours," and, as a result, "management may determine the days and hours during which Unit members shall be required to work. . . ."

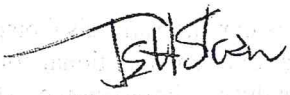
Because the practice of providing Deputy DAs with nine days of compensatory time off in exchange for two weeks of search warrant phone duties was never authorized or approved by the Board of Supervisors, continuation of the practice would violate Article XI, section 10(a) of the California Constitution, which prohibits local governments from providing public employees with extra compensation for services previously rendered, as well as payments on claims made under agreement without authority of law. Continuation of the practice would also constitute a gift of public funds, in violation of Article XVI, section 6 of the California Constitution.

Your letter asserts that the practice cannot be discontinued unilaterally. We disagree. Contrary to your claims, because the practice is illegal absent express authorization by the Board of Supervisors, the County's decision to cease the practice immediately was not only permissible, but legally required. And contrary to your claims, the "zipper" clause (Article 15) does not change our conclusion. By its terms, the "zipper" extends only to those matters "within the scope of representation," as defined by Government Code section 3504. The practice the County has discontinued is illegal, and therefore not within the scope of representation. (See *City of San Jose* (2013) PERB Decision No. 2341-M.) For this reason, it is not insulated by the zipper clause.

If SLOGAU wishes to pursue this matter further, it may file a grievance under Rule 4 of the County's Civil Service Rules. Please be advised that under Step 3 of that grievance procedure, the final decision-maker here would be the Board of Supervisors, not the Civil Service Commission.

Finally, as you know, the parties are scheduled to commence successor MOU negotiations in the immediate future. While the County had no choice but to discontinue immediately the unlawful practice, this will not preclude SLOGAU from making any lawful proposal it wishes to make in negotiations concerning members' search warrant phone duties.

Sincerely,



Jeff Sloan

JS/rr

OFFICE OF THE DISTRICT ATTORNEY
County of San Luis Obispo

MEMORANDUM

TO: Rita Neal, County Counsel

FROM: Dan Dow, District Attorney

DATE: July 21, 2015

SUBJ: Reply to your memorandum dated July 17, 2015

Dear Rita,

Thank you for sending your memorandum on Friday, 7/17. I have read it several times and have some concerns that I believe we need to discuss before our meeting on Thursday.

First, I want to preface this note by acknowledging that you and I are still at the very early stage of a (potentially) long career working together in our official capacities. I have enjoyed working with you over the past 8-1/2 months and I look forward to collaborating together on other issues in the future as we move forward. It is in the interest of establishing a professional sustaining relationship that I share with you my concerns in this memo. I am sure you would agree that the issues we are challenged with at present are very important -- fundamental -- as they lay the foundation for how we will interact and rely on one another in the future when new issues arise. One thing we can be certain of in our legal profession is that there will always be matters where conflicting positions and interests will surface. It is not a bad thing that a dispute or disagreement arises -- it is the very nature of our business -- but how we work through the issue to achieve resolution should be of paramount concern to each of us, our organizations, and the County as a whole.

With that in mind, and on this particular issue, I have a primary concern. I recognize that as county counsel, you have a challenging position and must navigate potentially conflicting interests of the various county entities and departments. As I understand it, at times various bodies of a particular county will find itself at conflict with one another and in such situations, county counsel generally declares that there is a conflict and ensures that the varying bodies have appropriate advice and counsel –often through outside counsel. In the present case, it has not been clear from the beginning whether you have been representing the interests of my department. To the contrary, our department was not made privy to your legal analysis or legal advice to other groups on this issue of importance until I received your memorandum this week.

Under the rules for professional conduct, I do not see how you can continue to represent and advise the District Attorney's Office on this matter while also advising the Auditor, the Human Resources Director, the CAO, and the Board of Supervisors—all of which have interests that are in conflict with the interest of the District Attorney’s Office. Your recent memo has an

"attorney client privilege" caveat implying that you are representing my office in this matter, yet your memo takes an adverse position to the District Attorney's Office. Very early on, I raised my concern that you had a legal conflict during a phone conversation. You should recall the fact that I told you I was concerned that we were in a very difficult, unfortunate, and uncomfortable situation because you were advising each department and the Board itself and the departments have varied interests, perspectives, positions, sets of information and facts on this particular issue. I told you that I was concerned I was not getting all of the details and legal analysis that you were providing to Jim Erb and the others. You acknowledged that it was an unfortunate and difficult position to be in and yet refused to provide written legal analysis until just last week. Looking back, I believe that you should have declared a conflict at that time. It was because of the inherent conflict in your attempting to advise and represent each party -- with different and distinct interests and constitutional mandates of independent authority -- that I was compelled to seek conflict-free legal advice.

I have attached two pertinent Attorney General Opinions for your review. They are on point with regard to several issues: 1) when an undeclared conflict of interest exists, the Sheriff (or District Attorney) is entitled to independent legal counsel; 2) when such a conflict exists, the Sheriff (or District Attorney) may select the counsel and the board of supervisors is responsible for payment of the attorney fees; and 3) a county board of supervisors (or other county officer such as Auditor) may not interfere with how a sheriff or district attorney spends the money allotted to them after the budget is passed. I do hope that you will read these opinions in their entirety, as they are quite helpful in analyzing our present situation.

I have reviewed the California Practice Guide on Professional Responsibility. Given our situation and circumstances, I have the following concerns about your continued representation on this issue: you may be tempted to favor the interests of one client over the other; your obligations to one client may be impaired because of your obligations to the other client(s); you could be restricted from advocating a client's position forcefully for fear of losing the confidence of your other client(s); and you may be required to limit your representation and not be able to give each client complete legal advice as a result of your obligations to other clients.

So that we can move forward constructively and so that I can appropriately serve the County and my department on this matter, please provide me with an analysis as to whether it is your legal opinion that a conflict exists and has existed in this circumstance. If not, please advise as to your reasoning so that I can consider your position.

Finally, if it is indeed your opinion that there is no conflict in this circumstance, I request that we meet constructively in the manner that a county department head would typically meet and work with the county counsel on issues when there is no such conflict and that we have a collaborative conversation on the legal matters on hand with myself and Lee Cunningham, prior to meeting with the CAO and Auditor.

I look forward to your response and analysis on this important issue.

77 Ops. Cal. Atty. Gen. 82 (Cal.A.G.), 1994 WL 162946

Office of the Attorney General

State of California
Opinion No. 93-903
May 3, 1994

***1** The Honorable Richard K. Rainey
Member of the California Assembly

The Honorable Gary T. Yancey
District Attorney
County of Contra Costa

THE HONORABLE RICHARD K. RAINEY, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following question:

Does a county board of supervisors have the legal authority to govern the actions of an elected sheriff concerning the manner in which the sheriff's budget allotment is to be spent, including the manner in which personnel will be assigned?

THE HONORABLE GARY T. YANCEY, DISTRICT ATTORNEY, COUNTY OF CONTRA COSTA, has requested an opinion on the following question:

Does a county board of supervisors have the legal authority to govern the actions of an elected district attorney concerning the manner in which the district attorney's budget allotment is to be spent, including the manner in which personnel will be assigned?

CONCLUSION

A county board of supervisors is not authorized to govern the actions of a sheriff or district attorney concerning the manner in which their respective budget allotments are expended or the manner in which personnel are assigned.

ANALYSIS

The present inquiry concerns whether a county board of supervisors [1] may govern the actions of a sheriff or district attorney with respect to the manner in which budget allotments for those offices are expended, including issues of personnel deployment. [2] Generally, a county possesses and can exercise only such powers as are granted to it by the Constitution or by statutes, together with those powers as arise by necessary implication from those expressly granted. (Gov. Code, s 23003; Byers v. Board of Supervisors (1968) 262 Cal.App.2d 148, 157; 70 Ops.Cal.Atty.Gen. 227, 228 (1987).) [3] Some county powers are exercised by the board of supervisors, while others are exercised by county officers and agents acting under "authority conferred by law." Section 23005 states: "A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law."

In examining the scope of a county's powers, we look first to the Constitution. Article XI, section 1, subdivision (b), of the Constitution states as follows:
"The Legislature shall provide for county powers, an elected sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. Except as provided in subdivision (b) of section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject

to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing board shall provide for the number, compensation, tenure, and appointment of employees." [4]

***2** In carrying out its constitutional mandate, the Legislature has provided for an elected governing board in each county and has prescribed its powers. (ss 25000-26400.) Section 25300 states specifically:
"The board of supervisors shall prescribe the compensation of all county officers and shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees. Except as otherwise required by Section 1 or 4 of Article XI of the California Constitution, such action may be taken by resolution of the board of supervisors as well as by ordinance."

Section 25207 more generally provides:
"The board may do and perform all other acts and things required by law not enumerated in this part, or which are necessary to the full discharge of the duties of the legislative authority of the county government."

Finally, of particular significance here regarding the powers of a board of supervisors, section 25303 states as follows:
"The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.

"This section shall not be construed to affect the independent and constitutionally and statutorily designed investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative prosecutorial function of the district attorney of a county.

"Nothing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff."

With respect to the authority and functions of a district attorney, the Legislature has defined various duties and responsibilities. (ss 26500-26543.) Section 26500 states:
"The district attorney is the public prosecutor, except as otherwise provided by law.

"The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses."

A district attorney is expressly authorized and directed to institute proceedings before magistrates for the arrest of persons charged or reasonably suspected of public offenses, to attend and advise the grand jury, and to draw all indictments and informations. (ss 26501, 26502.)

The Legislature has also enacted a statutory scheme defining the powers and duties of a sheriff. (ss 26600-26778.) Section 26600 generally provides:
***3** "The sheriff shall preserve peace, and to accomplish this object may sponsor, supervise, or participate in any project of crime prevention, rehabilitation of persons previously convicted of crime, or the suppression of delinquency."

A sheriff is expressly authorized and directed to investigate public offenses which have been committed and to arrest and take before a magistrate all persons who have committed a public offense. (ss 26601, 26602.)

Both a district attorney and a sheriff are county officers authorized to appoint as many deputies as are necessary for the prompt and faithful discharge of their respective duties. (ss 24000, 24101.)[5]

With these statutory duties in mind, we commence our analysis of the questions with a case which interpreted laws enacted under the original Constitution. In 1855, El Dorado County retained the services of a private law firm to prosecute certain parties accused of murder. The Eleventh Judicial District Court determined that the board of supervisors had no authority to make such a contract. (Newell & Williams v. El Dorado County (1856) 1 Labatt 102.) The court explained its decision in part as follows: ". . . [I]t is the duty of the County to see that the laws are executed and criminals punished; but in the exercise of this duty, it goes no farther and can go no farther, that to furnish the money, officers and agents, necessary to accomplish the object. In the performance of this duty each County is restricted and controlled within certain limits, and those are fixed by Statute. It, too, is created by Statutes, they are its charter and beyond their provisions it cannot go. It possesses no power except such as has been expressly delegated and such as may be necessary to carry into effect the delegated powers.

"In looking to the Statutes for the purpose of ascertaining the extent of these powers, and the manner in which they are exercised, we find that Counties, like other corporations, conduct their affairs by means of certain officers, and these have certain duties assigned them, covering the whole field of criminal prosecutions. . . .

". . . A District Attorney is paid a liberal salary to attend to the prosecution of all criminal cases . . . .

"The theory of the law is, that these officers and their deputies are able and competent to discharge, to the satisfaction of the public and in such a manner as to meet its demands, all of the various duties that have been imposed upon them. If the Legislature has made a mistake, it is not the fault of the County or of the Board of Supervisors, any more than it would be of an agent who had not been clothed with powers sufficiently ample to attend properly to the interests of his principal." (Id., at pp. 104-105.)

Nearly four decades later, a similar question arose concerning the authority of the Modoc County Board of Supervisors to employ counsel on behalf of the county to assist the district attorney in the prosecution of criminal cases. In County of Modoc v. Spencer (1894) 103 Cal. 498, 501, the Supreme Court analyzed the issues as follows:
***4** ". . . [I]t is strongly urged in effect that it was within the inherent general power of the board, in the absence of special provision, to provide for the proper prosecution of these cases. But we know of no such inherent or undefined power in the board of supervisors; their powers being purely statutory, their every act must find its warrant in the statute, either expressly or by necessary implication. [Citations.] The legislature having specified certain cases in which such power may be exercised, there is no implication that she intended it to be exercised in others; expressio unius est exclusio alterius. In fact, an examination of all the provisions of the statute bearing upon the subject leads to the conclusion that it never was intended that the board of supervisors should be permitted to control or interfere with criminal prosecutions or with the district attorney in their management. The district attorney in the discharge of the duties of his office performs two quite distinct functions. He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state."[6]

In the two cases set forth above, a county board of supervisors attempted to employ private attorneys to conduct prosecutorial functions; such employment relationship would place in the hands of the supervisors the attendant right to control the conduct and assignment of the attorneys under contract. The present inquiry focuses upon the extent of control retained by a board of supervisors over the manner in which funds allocated to the offices of the district attorney and sheriff are expended, including

the manner in which personnel are deployed. As in the foregoing cases, the primary issue here concerns the authority of a board of supervisors to assume the prerogative of an employer, thereby diminishing necessarily the control exercised by the district attorney and sheriff over the conduct and deployment of those who perform the duties of their respective offices.

In Hicks v. Board of Supervisors (1977) 69 Cal.App.3d 228, the Court of Appeal held that the Orange County Board of Supervisors was not authorized to transfer 22 investigative positions from the district attorney's office to the sheriff's office. The court stated as follows:
"The board of supervisors has no inherent powers; the counties are legal subdivisions of the state, and the county board of supervisors can exercise only those powers expressly granted it by Constitution or statutes and those necessarily implied therefrom. (Cal. Const., art. XI, s 1; People v. Langdon, 54 Cal.App.3d 384, 388-389; Byers v. Board of Supervisors, 262 Cal.App.2d 148, 155.) An examination of the provisions of the applicable statutes and of the Constitution reveals that the board of supervisors has been granted no power of control over the district attorney in the exercise of his discretionary duties. Although the board of supervisors has the power to prescribe the number, compensation, tenure, and appointment of county employees (Gov. Code, s 25300), the board has no power to itself appoint deputies or assistants to the district attorney (County of Modoc v. Spencer, supra, 103 Cal. at pp. 500-502); although the county board of supervisors has authority to supervise county officers in order to insure that they faithfully perform their duties (Gov. Code, s 25303), the board has no power to perform county officers' statutory duties for them or direct the manner in which duties are performed (People v. Langdon, supra, 54 Cal.App.3d 384, 390), and although the board of supervisors exercises control over the county budget (Gov. Code, ss 29021.1-29101), the board may not, by failing to appropriate funds, prevent the district attorney from incurring necessary expenses for crime detection as county charges (Gov. Code, s 29601); Cunning v. County of Humboldt, 204 Cal. 31, 33-35)." (Id., at p. 242.)

***5** Following the Hicks decision, the last two paragraphs of section 25303, supra, were added (Stats. 1977, ch. 599, s 1), essentially codifying the holding of the court. By the express terms of this amendatory language, section 25303 may not be construed to affect the constitutionally and statutorily granted powers of a sheriff or district attorney.

In our view, it is clear that control by a board of supervisors over the manner in which funds allocated to the sheriff and district attorney are to be expended, including the assignment of personnel, would impair the exercise by those officers of their constitutionally and statutorily defined powers. Such supervisory control would directly conflict with the admonition that "the board has no power to perform county officers' statutory duties for them or direct the manner in which duties are performed . . . ." (Hicks v. Board of Supervisors, supra, 69 Cal.App.3d at 242; see also People v. Langdon (1976) 54 Cal.App.3d 384, 388-390 [county clerk].) Consistent with the Hicks rationale, the Supreme Court has recently ruled that the supervisory authority of a board of supervisors over the county assessor is limited to ensuring the faithful performance of the duties of that office, and does not permit the board to control, directly or indirectly, the manner in which the duties are performed. (Connolly v. County of Orange (1992) 1 Cal.4th 1105, 1113, fn. 9.)

With specific regard to the office of sheriff, the court in Brandt v. Board of Supervisors (1978) 84 Cal.App.3d 598, 602, expressly found:
"We note the board not only had no duty but also had no right to control the operation of the jail; a board of supervisors has no legal authority to use its budgetary power to control employment in or operation of the sheriff's office . . . . Only the sheriff has control of and responsibility for distribution and training of personnel and the specific use of the funds allotted to him."

In sum, the distinction to be drawn is between the power of a board of supervisors to appropriate county funds and the power of a sheriff or district attorney to manage the expenditure of the funds so appropriated. The grant of authority given to a board of supervisors by the Legislature is unaffected by allowing the sheriff and district attorney to perform their constitutional and statutory duties. A board's specific responsibility to "provide for the number, compensation, tenure, appointment and conditions of employment of county employees" (s 25300) is simply an inherent aspect of the preparation and adoption of the county's budget, which in turn is an indispensable prerequisite to a valid tax levy, a clearly legislative function. (Ryan v. Byram (1935) 4 Cal.2d 596, 602; Hicks v. Board of Supervisors, supra, 69 Cal.App.3d at 235; Beck v. County of Santa Clara, supra, 204

Cal.App.3d at 800-801; County of Butte v. Superior Court (1985) 176 Cal.App.3d 693, 698-700; see also California State Employees' Assn. v. State of California (1973) 32 Cal.App.3d 103, 108, 110; California State Employees' Assn. v. Flournoy (1973) 32 Cal.App.3d 219, 234.) However, the budget process is integral and complete upon adoption of the budget; it does not encompass the management of budgetary resource allotments the responsibility for which is conferred by the Constitution or laws upon other county officers either expressly or by necessary implication. (Beck v. County of Santa Clara, supra, 204 Cal.App.3d at 800- 801; County of Butte v. Superior Court, supra, 176 Cal.App.3d at 698-700; Hicks v. Board of Supervisors, supra, 69 Cal.App.3d at 242-244; cf. State Board of Education v. Levit (1959) 52 Cal.App.2d 441, 461-462.) Consequently, a board's authority to provide "conditions of employment" (s 25300) cannot be interpreted to confer ongoing control over the actions to be taken by personnel previously assigned to the sheriff or district attorney.

***6** Accordingly, it is concluded that a county board of supervisors is not authorized to govern the actions of a sheriff or district attorney concerning the manner in which their respective budget allotments are expended or the manner in which personnel are assigned.

Daniel E. Lungren
Attorney General
Anthony S. Da Vigo
Deputy Attorney General

Footnotes

1 It will be assumed for purposes of this analysis that the county in question is a general law county.

2 The questions refer to an "elected" sheriff and to an "elected" district attorney. For purposes of this analysis, we find no talismanic significance respecting the manner of selection of these officers. (See People v. Kelsey (1868) 34 Cal. 470; Beck v. County of Santa Clara (1988) 204 Cal.App.3d 789, 794-795; 33 Ops.Cal.Atty.Gen. 180, 182 (1959).)

3 Unidentified section references herein are to the Government Code.

4 The Constitution also provides that charter counties are to provide in their charters for an elected sheriff, an elected district attorney, and an elected governing board, and for the compensation of such officers. (Cal. Const., art. XI, § 4; see Beck v. County of Santa Clara, supra, 204 Cal.App.3d at 796-799.)

5 However, "[a] county district attorney prosecuting a criminal action within a county, acts as a state officer, exercising ultimately powers which may not be abridged by a county board of supervisors." (Graham v. Municipal Court (1981) 123 Cal.App.3d 1018, 1022.)

6 The nature and extent of a board's control over the district attorney when he is acting in the capacity of the county "law officer" is defined in sections 25203 and 31001; virtually all counties now have these civil law functions preformed by the county counsel (§§ 17640-27648). We are concerned here, on the other hand, with a district attorney acting as public prosecutor.

77 Ops. Cal. Atty. Gen. 82 (Cal.A.G.), 1994 WL 162946

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

80 Ops. Cal. Atty. Gen. 127 (Cal.A.G.), 1997 WL 282457

Office of the Attorney General

State of California
Opinion No. 96-901
May 28, 1997

***1** THE HONORABLE RICHARD K. RAINEY
MEMBER OF THE CALIFORNIA STATE SENATE

THE HONORABLE RICHARD K. RAINEY, MEMBER OF THE CALIFORNIA STATE SENATE, has requested an opinion on the following questions:

1. When a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of the sheriff, does a conflict of interest thereafter exist without the county counsel's declaration of such conflict so as to entitle the sheriff to legal representation in that matter by independent counsel?

2. Assuming a conflict of interest thereafter exists and independent counsel is to be retained in such circumstances, may the sheriff select the counsel and who would be responsible for the payment of attorneys' fees?

CONCLUSIONS

1. When a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of the sheriff, a conflict of interest may, depending upon the individual circumstances, thereafter exist without the county counsel's declaration of such conflict so as to entitle the sheriff to legal representation in that matter by independent counsel.

2. Assuming a conflict of interest thereafter exists and independent counsel is to be retained in such circumstances, the sheriff may select the counsel and the county board of supervisors would be responsible for the payment of attorneys' fees.

ANALYSIS

The questions presented for resolution concern the ability of a county sheriff to retain independent counsel when the county counsel has taken a position adverse to the interests of the sheriff but has failed to acknowledge the existence of a conflict of interest. As an example, a dispute arises between a board of supervisors and the sheriff concerning the proper distribution of funds recovered from asset forfeiture proceedings involving convicted criminals. The dispute may result in litigation between the two after the county counsel has advised them of their respective rights. If the sheriff is entitled to independent counsel under these circumstances, we are further asked whether he may make the selection of his legal representation and whether the county would be obligated to pay for it.

In answering these questions we will examine the powers and duties of a sheriff, the relationship of the sheriff's office to county government as a whole, and the role and obligations of the county counsel. As the request concerns a sheriff's need for and right to counsel in advance of any litigation which he may initiate, we do not analyze herein statutes that pertain to the obligation of the county to provide for the defense of civil actions or proceedings brought against a county officer in his official or individual capacity for acts or omissions within the scope of employment. (See Gov. Code, §§ 825, 995, 995.2, 996.4.)[1]

1. Undeclared Conflict of Interest

First, with respect to the office of the sheriff, the Constitution provides: "The Legislature shall provide for county powers, an elected sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. . . ." (Cal. Const., art. XI, § 1, subd. (b).) In addition, the Constitution authorizes charter counties to have: "An elected sheriff, an elected district attorney, an elected assessor, other officers . . . ." (Cal. Const., art. XI, § 4, subd. (c).) For purposes of the issues presented herein, we may treat charter counties similarly to general law counties. (See *Dibb* v. *County of San Diego* (1994) 8 Cal.4th 1200, 1206-1208.)

***2** A county public officer, such as sheriff (§ 24000, subd. (b)), has only such powers as have been conferred by law, expressly or by implication. (77 Ops.Cal.Atty.Gen. 242, 243-244 (1994) [county recorder]; 72 Ops.Cal.Atty.Gen. 51, 52 (1989) [county auditor]; 68 Ops.Cal.Atty.Gen. 223, 224 (1985) [county tax collector]; 65 Ops.Cal.Atty.Gen. 321, 325 (1982) [county recorder]; 62 Ops.Cal.Atty.Gen. 504, 508 (1979) [county tax collector].) "Because the sheriff . . . is a constitutional officer, his duties are of state-wide importance, a fact further cemented by the existence of myriad statutes regulating his duties." (*Beck* v. *County of Santa Clara*, (1988) 204 Cal.App.3d 789, 800.) The basic statutory scheme defining the powers and duties of a sheriff (§§ 26600-26778) expressly authorizes him to investigate public offenses and arrest and take before a magistrate all persons who have committed an offense. (§§ 26601, 26602; see 77 Ops.Cal.Atty.Gen. 82, 85 (1994).) Also, the sheriff "shall take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it. . . ." (§ 26605; see *Board of Supervisors* v. *Superior Court* (1995) 33 Cal.App.4th 1724, 1738-1739.)

With respect to the statutory duties of a county board of supervisors, section 23005 states: "A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law." (See 77 Ops.Cal.Atty.Gen., *supra*, 83.) The board of supervisors has specific oversight and budgetary authority with respect to the operations of the sheriff's office, as long as it does not obstruct the sheriff's investigative function. Section 25303 states:

"The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.

"This section shall not be construed to affect the independent and constitutionally and statutorily designed investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

"Nothing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff.

In 77 Ops.Cal.Atty.Gen., *supra*, 82, we were asked whether a board of supervisors could determine the manner in which the sheriff's budget allotment could be spent, including the manner in which personnel would be assigned. We stated:

***3** "In our view, it is clear that control by a board of supervisors over the manner in which funds allocated to the sheriff and district attorney are to be expended, including the assignment of personnel, would impair the exercise by those officers of their constitutionally and statutorily defined powers. Such supervisory control would directly conflict with the admonition that 'the board has no power to perform county officers' statutory duties for them or direct the manner in which duties are performed . . . .' (*Hicks* v. *Board of Supervisors*, *supra*, 69 Cal.App.3d at 242; see also *People* v. *Langdon* (1976) 54 Cal.App.3d 384, 388-390 [county clerk].) Consistent with the *Hicks* rationale, the Supreme Court has recently ruled that the supervisory authority of a board of supervisors over the county assessor is limited to ensuring the faithful performance of the duties of that office, and does not permit the board to control, directly or indirectly, the manner in which the duties are performed. (*Connolly* v. *County of Orange* (1992) 1 Cal.4th 1105, 1113, fn.9.)

”. . . . . .

“In sum, the distinction to be drawn is between the power of a board of supervisors to appropriate county funds and the power of a sheriff or district attorney to manage the expenditure of the funds so appropriated. The grant of authority given to a board of supervisors by the Legislature is unaffected by allowing the sheriff and district attorney to perform their constitutional and statutory duties. A board's specific responsibility to ‘provide for the number, compensation, tenure, appointment and conditions of employment of county employees' (§ 25300) is simply an inherent aspect of the preparation and adoption of the county's budget, which in turn is an indispensable prerequisite to a valid tax levy, a clearly legislative function. [Citations.] However, the budget process is integral and complete upon adoption of the budget; it does not encompass the management of budgetary resource allotments the responsibility for which is conferred by the Constitution or laws upon other county officers either expressly or by necessary implication. [Citations.] Consequently, a board's authority to provide ‘conditions of employment’ (§ 25300) cannot be interpreted to confer ongoing control over the actions to be taken by personnel previously assigned to the sheriff or district attorney.” (*Id*., at pp. 88-89.).

Recently in *Dibb* v. *County of San Diego, supra*, 8 Cal.4th 1200, the Supreme Court examined whether the board of supervisors of a charter county could establish a citizens board (“CLERB”) to review public complaints filed against the county sheriff and probation departments. The court stated in part:
“Section 25303 requires a county board of supervisors to ‘supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and *particularly* insofar as the functions and duties of such county officers . . . relate to the assessing, collecting, safekeeping, management, or disbursement of public funds.’ (Italics added.) The statute specifies that the ‘independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney’ shall not be ‘affect[ed]’ or ‘obstruct[ed]’ by the board of supervisors' oversight.

***4** “Plaintiff asserts section 25303 gives the board of supervisors only the authority to monitor the *fiscal* conduct of county officers. Although the statute stresses the need for such supervision, it is plainly not so limited. Indeed, as one court has observed in a different context, the statute permits the board of supervisors to ‘supervise county officers in order to insure that they faithfully perform their duties . . . .” [Citation.] Indeed, the operations of the sheriff's and probation departments and the conduct of employees of those departments are a legitimate concern of the board of supervisors. As the Court of Appeal observed below: ‘Review of citizen complaints and peace officer-related deaths might suggest the need for new or different types of training for personnel in the two departments which the [board of supervisors] would have to fund. Politically the [board of supervisors] might be concerned about public distrust of investigations conducted by either the sheriff or district attorney and hopeful that investigations by a group not aligned with law enforcement would restore public confidence, particularly if that group reached conclusions consistent with the sheriff and district attorney.’

“Plaintiff next asserts the very existence of the CLERB is preempted by or otherwise in conflict with state law. He argues the CLERB will inevitably obstruct and infringe on the investigative functions of the sheriff (see Pen. Code, § 832.5, subd. (a) [mandating establishment by sheriff of ‘procedure to investigate citizens' complaints' against sheriff personnel]) and district attorney, and the constitutional oversight of the Attorney General over the sheriff (see Cal. Const., art. V, § 13 [Attorney General has ‘direct supervision over every district attorney and sheriff’]). We agree with the Court of Appeal that these concerns are answered by section 25303 and San Diego County Administrative Code article XVIII, section 340.15, under which the board operates. The cited statewide statute, as noted above, specifies that the board of supervisors' oversight responsibility ‘shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.’ (§ 25303.) The cited county code section requires CLERB to ‘cooperate and coordinate’ with the sheriff and district attorney so that all three may properly discharge the irresponsibilities. (San Diego County Admin. Code, art. XVIII, § 340.15.) Given these requirements, we assume the CLERB will not interfere with the proper functioning of the two other county officials, or with the Attorney General's constitutional responsibility to oversee the sheriff. [Citations.]

"We conclude that under section 25303, the board of supervisors has a statutory duty to supervise the conduct of all county officers. [Citation.] Moreover, section 31000.1 permits the board of supervisors to establish a commission of citizens to study and report on matters within the board's 'general or special interest.' It follows that the creation and existence of the CLERB is authorized by statute, and is thus a proper exercise of charter county authority under California Constitution, article XI, section 4, subdivision (h)." (*Id*., at pp. 1209-1210; fns. omitted.)

***5** With respect to the county counsel, section 26526 provides that "[t]he county counsel . . . is the legal advisor of the board of supervisors. . . ." The county counsel's other major function is to "defend or prosecute all civil actions or proceedings in which the county or any of its officers is concerned or is a party in his or her official capacity." (§ 26529.) In *Harvey* v. *County of Butte* (1988) 203 Cal.App.3d 714, the court summarized the duties of the county counsel in providing civil legal services to county officers:

"The statutes which govern the provision of civil legal services to counties are contained in the Government Code. Unless otherwise provided, the district attorney, an officer of the county (§ 24000, subd. (a)), is charged with providing civil legal services to county government, e.g. defending and prosecuting litigation (§ 26521), advising the board of supervisors (§ 26526), and providing written opinions to county and district officers on matters pertaining to their duties (§ 26520).

"The county may appoint a county counsel to perform such services pursuant to the authority of a county charter (Cal. Const., art. XI, § 4, subd. (c)) or statute (§ 27640). In either event, the county counsel supplants the district attorney in the provision of civil legal services. (§§ 27642, 26529.) If the board of supervisors appoints a county counsel pursuant to section 27640, it 'shall furnish the county counsel with such assistants as will enable him to perform properly the duties of his office.' (§ 27644.) Such an appointment is for a four- year term during which the county counsel may only be removed for cause. (§ 27641.) . . . .

"Notwithstanding these provisions a county is authorized to contract with private counsel for specified legal services.

"A board of supervisors, by a two-thirds majority vote, may employ counsel to assist the county counsel in the conduct of litigation. (§ 25203.) The board may also contract for special services, including legal services. (§ 31000.) Lastly, section 31001.4 provides that in a county where the charter does not create an office of county counsel the board of supervisors may contract with counsel to assist the district attorney in providing representation and advice to county officers . . . ." (*Id.*, a pp. 720-721; fns. omitted.)

Although the county counsel generally represents county government as a whole, on occasion two county public offices or officers may have adverse interests in the same matter. If each office or officer is considered a "client," the Rules of Professional Conduct of the State Bar of California ("Rules") may preclude representation of one or both of the parties by the county counsel. Rule 3-310 provides in part:

". . . . . .

"(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

***6** (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

". . . . . .

"(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

". . . . . ."

We recently applied Rule 3-310 in determining whether a county counsel may give legal advice to a board of retirement established under the County Employees Retirement Law of 1937 (§§ 31450-31898) with respect to a matter in which the county could benefit from an action taken pursuant to such advice. (80 Ops.Cal.Atty.Gen. 36 (1997).) We concluded that the county counsel could advise the board even if the board and the county had an actual or potential conflict of interest, if each gave its informed written consent as specified in Rule 3-310. We quoted from *Santa Clara County Counsel Attys. Assn.* v. *Woodside* (1994) 7 Cal.4th 525, 548, as follows:

"'This court's statement of an attorney's duty of loyalty to the client over 60 years ago is still generally valid: "It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent. . . . By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." (*Anderson* v. *Eaton* (1930) 211 Cal. 113, 116.)"' (*Id.*, at p. 38.)

In *Civil Service Com.* v. *Superior Court* (1984) 163 Cal.App.3d 70, the court considered whether a county counsel could represent the county in pending litigation between the county and the county's civil service commission where the county counsel had previously advised the commission regarding the matter. In analyzing the attorney-client relationships involved, the court stated:

"We are able to accept the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall governmental entity of which the agency is a part. Nonetheless we believe an exception must be recognized when the agency lawfully functions independently of the overall entity. Where an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the matter may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency is created." (*Id.*, at p. 78.)

***7** In explaining its decision to disqualify the county counsel from representing the county, the court stated:

"Our statement that there may be an independent basis to disqualify the county counsel is grounded on the general rule that an attorney may simply not undertake to represent an interest adverse to those of a current client without the client's approval. [Citations.] This record establishes the relationship between county counsel and the Commission is an ongoing one with respect to matters other than the one at issue here. The principle precluding representing an interest adverse to those of a current client is based not on any concern with the confidential relationship between attorney and client but rather on the need to assure the attorney's undivided loyalty and commitment to the client. [Citations.]

"The attorney who represents a client with interests adverse to another current client encounters the very real danger 'that he will be tempted, perhaps unconsciously, to favor the interests of a particularly important client over the adverse or potentially adverse interests of a less favored client.' [Citation.] Here there is every reason to believe that county counsel would be tempted to favor the interests of the County in giving advice to the Commission. The Commission's primary, if not sole function, is to pass judgment on the conduct of the County toward its employees. Every Commission decision has the potential of being adverse to one of the County's constituent agencies. Because county counsel is directly responsible to the board of supervisors, it is difficult to conceive how any member of the county counsel's office can render independent advice to the Commission. The structure of the system would appear necessarily to skew such advice in favor of the County and against the county employees.

And even in those circumstances where county counsel renders advice to the Commission favoring the employee, such advice places him in a position adverse to his client, the County." (*Id*., at pp. 78-79, fn. 1.)

The court, however, expressly limited its holding:
"While we have determined that county counsel must be disqualified from representing the County in this case, we wish to indicate the limits of our holding. First, it should again be emphasized that a conflict of this nature only arises in the case of and to the extent that a county agency is independent of the County such that litigation between them may ensue. Second, disqualification of county counsel is not necessarily mandated in future cases involving quasi-independent agencies. We have noted that a fundamental conflict arises whenever county counsel is asked to represent both the Commission and the County. Moreover, it is clear from the course of this case that county counsel, with good reason, views his primary responsibility as being to the board of supervisors. If the Commission is afforded access to independent legal advice, however, there is no reason county counsel may not continue to vigorously represent the County even when such representation results in litigation against the Commission. We need not and do not decide whether the Commission, appropriately informed and advised in a given case, could validly waive the conflict at the advisory stage." (*Id.*, at pp. 84-85; fn. omitted.)

***8** Returning to the respective roles of a sheriff and a board of supervisors in light of the principles stated above, we find that the sheriff possesses independent authority as to his investigative function, jail-keeping duties, personnel assignments, and allocation of budgeted funds. A dispute or disagreement involving any of these areas could result in litigation between the sheriff and the board of supervisors. When the sheriff asks the county counsel for legal advice pertaining to his actions or plans in one of these areas and such advice is rendered, an attorney-client relationship is created that is separate and distinct from the county counsel's relationship to the county as a whole. Depending upon the circumstances, the sheriff would be entitled to independent counsel for advice and representation.

We do not view the county counsel's declaration of a conflict as a necessary prerequisite to a sheriff's entitlement to independent counsel. Normally, of course, the county counsel would declare a conflict. However, if he does not, the sheriff may do so in appropriate circumstances. (See *Municipal Court* v. *Bloodgood* (1982) 137 Cal.App.3d 29 [judge entitled to representation due to a declared conflict of interest; judge as well as county counsel may make the declaration].)

We recognize that the sheriff's "outside" or "independent" counsel may come from *within* the county counsel's office when a conflict of interest is present. This would be accomplished through procedures establishing an "ethical wall." In *People* v. *Christian* (1996) 41 Cal.App.4th 986, 998, the court observed:
"As the Court of Appeal explained in *In re Lee G.*, *supra*, 1 Cal.App.4th at page 28, disqualification of public sector attorneys should proceed with caution since such disqualifications can result in increased public expenditures for legal representation. 'Where only speculative or minimal benefit would be obtained by disqualification of public counsel, the "dislocation and increased expense of government" is not justified. [Citation.]' (*Ibid*.; see also *Castro* v. *Los Angeles County Bd. of Supervisors*, *supra*, 232 Cal.App.3d at p. 1442.) . . . .

"Thus, in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or 'ethical walls' to avoid conflicts within government offices, such as those found acceptable in *Castro*, have been permitted. (See, e.g., *People* v. *Clark* (1993) 5 Cal.4th 950, 999-1000; *People* v. *Hernandez* (1991) 235 Cal.App.3d 674, 681; *People* v. *Lopez* (1984) 155 Cal.App.3d 813, 827; *Love* v. *Superior Court*, *supra*, 111 Cal.App.3d at p. 374.)" (Fn. omitted.)

The primary purpose of establishing an "ethical wall" is to prevent confidential information from being given to opposing counsel. (See *People* v. *Clark* (1993) 5 Cal.4th 950, 1000; *People* v. *Hernandez* (1991) 235 Cal.App.3d 674, 680-681; *People* v. *Lopez* (1984) 155 Cal.App.3d 813, 826-827.) This purpose may be served without having to establish separate units within an office (see *People* v. *Christian*, *supra*, 41 Cal.4th at 998-999; *Howitt* v. *Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587),

since the ethical duty not to have impermissible contacts with opposing counsel "is well known to all attorneys" (*Castro* v. *Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432, 1442). When an ethical wall is properly established, taxpayer funds need not be spent to hire counsel outside of the county counsel's office.

***9** We conclude in answer to the first question that when a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of the sheriff, a conflict of interest may, depending upon the individual circumstances, thereafter exist without the county counsel's declaration of such conflict so as to entitle the sheriff to legal representation in that matter by independent counsel.

2. Selection and Payment of Outside Counsel

We next consider the procedures to be followed when the county counsel has a conflict of interest and no "ethical wall" has been established. Section 31000 is the only statute that expressly provides for the county's employment of outside counsel other than in the defense of a civil action or proceeding brought against the officer on account of an act or omission in the scope of his employment. Section 31000 states:
"The board of supervisors may contract for special services on behalf of the following public entities: the county, *any county officer* or department, or any district or court in the county. Such contracts shall be with persons specially trained, experienced, *expert and competent to perform the special services*. The special services shall consist of services, *advice*, education or training for such public entities or the employees thereof. The special services shall be financial, economic, accounting (including the preparation and issuance of payroll checks or warrants), engineering, *legal*, medical, therapeutic, administrative, architectural, airport or building security matters, laundry services or linen services. They may include maintenance or custodial matters if the board finds that the site is remote from available county employee resources and that the county's economic interests are served by such a contract rather than by paying additional travel and subsistence expenses to existing county employees. *The board may pay from any available funds such compensation as it deems proper for these special services*. The board of supervisors may, by ordinance, direct the purchasing agent to enter into contracts authorized by this section within the monetary limit specified in Section 25502.5 of the Government Code." (Italics added.)

In *Jaynes* v. *Stockton* (1961) 193 Cal.App.2d 47, the court held that a school district was not authorized to employ outside counsel to obtain advice when the services of county counsel were available. In *Harvey* v. *County of Butte* (1988) 203 Cal.App.3d 714, 724, the court stated: "*Jaynes* holds that there is no authority to contract for outside legal services unless such authority is expressly conferred on the contracting agency or the services are unavailable 'in house' for reasons beyond the agency's control." Accordingly, "if the county counsel is assigned the duty to provide certain legal services, that allocation should not be undercut by contracts with outside counsel unless necessary." (*Ibid.*)

***10** We have already concluded that a conflict of interest on the part of the county counsel may make it "necessary" for the sheriff to receive outside counsel when his independent authority would be impaired by the position taken by the county counsel. If a request for the employment of such services at county expense is made by the sheriff, the board of supervisors has the statutory authority to comply with the request. (§ 31000; cf. § 29601 [expenses of the sheriff which constitute county charges].)

With respect to the sheriff's authority to select the outside counsel, if a public officer is charged by statute with carrying out a duty, he or she has the additional powers that may be fairly implied from the statute to accomplish the duties expressly delegated. (*Dickey* v. *Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810; *Stackler* v. *Department of Motor Vehicles* (1980) 105 Cal.App.3d 240, 245.) Thus a sheriff may be impliedly entitled to select outside counsel in order to perform his duties when a conflict of interest arises.

Moreover, because of the sheriff's direct responsibility to the voters and his need for authority commensurate with that responsibility, he may be deemed to possess an *inherent* power to select private counsel in order to protect his ability and right to carry out the organic functions and responsibilities of his office. (See *Barnett* v. *Hunt* (1963) 223 Cal.App.2d 251 [school

district, deprived of representation by district attorney's declaration of conflict of interest in proceeding to change the district's boundaries, entitled to private counsel to oppose the boundary change].)

The authority of the sheriff to select outside legal counsel on the basis of an implied or inherent power parallels the statutory power of a judge of a municipal or superior court "to obtain his own counsel" when a conflict of interest is declared. (§ 27648; see *Municipal Court* v. *County of Placer* (1988) 200 Cal.App.3d 1173, 1177-1179; *Municipal Court* v. *Bloodgood, supra*, 137 Cal.App.3d at 40-41.)

As for the county's responsibility to pay attorneys' fees, we note that the Supreme Court has recently held that a county clerk was entitled to the reimbursement of attorneys' fees under section 26259 when a conflict of interest prevented the county counsel from representing her in challenging a superior court's local rule transferring her duties as a superior court clerk to a superior court executive officer. (*Anderson* v. *Superior Court* (1995) 11 Cal.4th 1152.) The court explained:
"Under section 26529, county counsel must defend or prosecute all civil actions in which the county or any of its officers is a party 'in his or her official capacity.' County counsel declined to prosecute petitioner's suit because of a conflict: he had earlier advised the board of supervisors that the challenged transfer of duties would be legal. The Court of Appeal unanimously held that despite the outcome of the suit, petitioner was entitled to attorney fees under section 26529.

***11** ". . . When petitioner was elected county clerk, she was obligated to act as ex officio clerk of the superior court. In seeking to retain those duties, she sued in her official capacity, and is entitled to reimbursement under section 26529." (*Id*., at p. 1162.)

The circumstances in *Anderson* are similar to those in which a sheriff may require the assistance of outside counsel when the county counsel has a conflict of interest and the sheriff's independent authority would be impaired by the position taken by the county counsel. Where the county counsel is statutorily required but unable to provide the legal representation needed by the sheriff, the board of supervisors has an obligation and duty to pay the attorneys' fees of outside counsel selected by the sheriff.

As previously indicated, however, the board of supervisors has plenary authority over the county's budget, including expenses incurred by the sheriff. The board must be able to ensure that the sheriff hires competent counsel at a rate that is appropriate for the type of expertise required. (§§ 25303, 31000.) Therefore, with due regard for the criteria set forth in section 31000, the board may determine the appropriate hourly rate or other fee structure for the employment of outside counsel selected by the sheriff.

We conclude in answer to the second question that when a conflict of interest exists and independent counsel is to be retained for the sheriff, the sheriff may select the counsel and the board of supervisors would be responsible for the payment of attorneys' fees.

Daniel E. Lungren
Attorney General
Gregory L. Gonot
Deputy Attorney General

Footnotes
1 All undesignated section references hereafter are to the Government Code.

80 Ops. Cal. Atty. Gen. 127 (Cal.A.G.), 1997 WL 282457

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

To: Dan Dow/DA/COSLO,
Cc: Timothy McNulty/Counsel/COSLO, Nina Negranti/Counsel/COSLO,
Bcc: Dan Buckshi/Admin/COSLO, Jim Erb/AC/COSLO, Tami Douglas-Schatz/Personnel/COSLO,

Subject: Your memorandum dated July 21, 2015

Dan,

I am writing to respond to your conflict of interest memo sent last night. As you can probably understand, my County Counsel position requires my deputies and me to spend considerable time identifying and understanding potential conflicts of interest. We are government lawyers who advise and represent the County by advising and representing its various officials and departments. We are well versed in the California Rules of Professional Conduct and the decisions that must be made when elected officials within the same government organization have taken antagonistic positions. Let me assure you that we have researched your issue and have determined there is no conflict presented by it.

The County Counsel's office adheres to the highest ethical standards. We exercise confident caution before suggesting that other lawyers have suffered an ethical lapse and we expect nothing less from our colleagues inside and outside of County government.

See you tomorrow at 3:00 p.m.

Best,

Rita

Rita L. Neal
County Counsel
County Government Center, Room D320
San Luis Obispo, CA 93408
Tel: (805)781-5400 Fax: (805)781-4221
e-mail: rneal@co.slo.ca.us

The information contained in this e-mail may be protected by the attorney-client privilege and/or the attorney work product doctrine. Please do not forward this e-mail.