Walking the Line: Holding Agency Counsel to Professional Standards

*by Robert C. Fellmeth**

The phrase "client control"—as in "what kind of client control do you have to settle this?"—is familiar to litigators. Although the expression sounds patronizing, there are times when a client insists on doing what is stupid, wrong, or unlawful. At these times, counsel's ability to influence the client becomes important. When a client does not listen, counsel must often choose whether to help pilot the wayward ship to lessen anticipated damage, or row ashore and leave the vessel to its perilous fate.

Sometimes, lack of client control requires counsel to leave the boat forthwith, *e.g.*, plans to commit criminal acts, demands that spurious lawsuits be filed, positions taken, courts misled, or the legal process otherwise abused. California's Rules of Professional Conduct command the withdrawal of counsel where a client is litigating without probable cause, or where continued employment will result in a violation of the rules or the State Bar Act.[1]

In turn, the State Bar Act's "duties of an attorney" include "to counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just (except in defense of accused criminals)."[2] And another enumerated duty is "to employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge...by an artifice or false statement of fact or law."[3]

Beyond mandatory withdrawal, counsel may withdraw where a client seeks to pursue an unlawful course of action, insists upon making a claim or argument that is "not warranted," or even acts contrary to the advice of counsel (even if not prohibited by the rules or the Act).[4]

Arguably, an attorney advising an agency has a heightened obligation. First, agency counsel has duties flowing from Rule of Professional Conduct 3-600 governing representation of an "organization." The organization itself—not factions of it—is the client. Where the organization seeks to violate the law, the rule spells out duties to seek reconsideration, to appeal the matter to higher authority within the entity, and finally to resign "in accordance with rule 3-700."

There are other reasons why an agency's counsel may have special obligations. Groups do not necessarily exercise more prudent judgment than do individuals. Far from moderating excesses, group dynamics can often stimulate excesses—whether a gang, nation, political party, trade association, or other assemblage. Our species is particularly dangerous in groups.

The danger of abuse by an agency exceeds other human groupings because it wields state police powers. Most agencies have the authority to determine who may practice, or continue to practice, the trade or profession which may be the life goal of an individual.

Adding further to the obligation is the nature of the agency-advising counsel. They generally are not private attorneys who depend upon the attraction and retention of clients, but are public employees paid a salary, usually from an office of county counsel or city attorney for major local jurisdictions. At the state level, the 37 agencies within the Department of Consumer Affairs are advised by the Department's hired attorneys, and these agencies (and most others) are also advised by attorneys from the Attorney's General's Office.

The Attorney General's Office is certainly the repository of the highest obligation to comply with the standards of the Rules of Professional Conduct and the State Bar Act. Deputy attorneys general do not solely represent public agencies; they advise them on behalf of the People of the State, as officers of the State.

However, in the past twenty years, the Attorney General's Office has publicly withdrawn as an agency's counsel in only four known situations, most of which involved a political or policy-related objection of the Attorney General personally.

Critics of state and local agencies are often bewildered by the failure of counsel to "just say no" to agencies insisting on violations of law. Critics contend that violative behavior, while not prevalent, is also not rare.

Since 1987, the Office of Administrative Law has reviewed 104 complaints of alleged "underground rulemaking," allegations that a state agency unlawfully adopted a "rule" without legally required due process, including notice, an opportunity for public comment, hearing, review for necessity, clarity, authority, etc., or even publication in the California Code of Regulations. It has determined that 87 were unlawfully created.[5] Where was counsel?

Certainly a substantial number of agency decisions are close questions. But where the agency is moving against clear legislative intent and/or common decency, what should counsel do? How often has agency counsel advised against the commission of an unlawful or improper act? How often has counsel resigned from further representation of an agency under Rule 3-700 as a result of a failure to follow proper advice?

In 1986, the Center for Public Interest Law was approached by 32 Vietnamese physicians who had emigrated to California and had been denied licenses by the Medical Board, although they had passed all examinations and completed all postgraduate training requirements. An investigation disclosed that the agency had met unlawfully in private, and decided to suspend the licensing of Vietnamese physicians without explaining why and without justification. Two years of devastating career interruption, deceit from agency officials, and bureaucratic stonewalling ensued before licenses were finally issued.[6] Where was agency counsel during the process?

For years, the Board of Accountancy has been permitting a committee of private practitioners to decide disciplinary cases against colleagues and competitors. A challenge to this practice, which is obviously unlawful,[7] yielded defensiveness from the Board and indifference from its counsel. Why have counsel from both the Department of Consumer Affairs and the Attorney General's Office been advising the agency consistent with its ambitions, but contrary to basic legal principles?

Some state boards decided that the Bagley-Keene Open Meeting Act should have a loophole allowing committees to meet privately so long as they consist of

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"less than a quorum" of the board. In fact, the Act very clearly states and intends that a board committee of more than two members must meet in public. However, the Attorney General wrote informal opinion letters supporting the boards' position at the urging of agency clients, managed to get part of one such letter into a court's *dicta* (in an inapplicable case interpreting a different statute), and then cited that *dicta* as a holding in subsequent litigation.[8] Here, deputy attorneys general self-created a basis to undermine one of California's "sunshine" statutes—until an appellate court called them on it and noted that it would "decline...to join this circle of error."[9]

In these cases, and in others, there has been a failure to comply with the Rules of Professional Conduct and a failure of accountability. Few if any attorneys have ever been fined, sanctioned, demoted, or even publicly criticized for advising an agency to go ahead with an unlawful or unfair act. Needless to say, none has ever been sanctioned for failing to resign under the obligation of Rule 3-700(B).

One dynamic that may be at the heart of the failure to understand the proper role of public counsel to an agency is the "hired gun," "adversarial process" training received by attorneys in law school and replicated to excess in civil litigation. Schooled in the relativism of the Socratic method (there is no perfect answer; all have flaws), attorneys are taught that law is a game of one flawed argument juxtaposed against another flawed argument, and that both sides advocate to a neutral third party—who alone has the responsibility to find the correct answer.

Add to this mentality a desire to win the approval of the group one is advising, and you have a recipe for the classic "enabler"—decried by critics as the current norm in public agency representation. The "enabler" does not look with neutrality at the statutes which may be implicated in an agency action, does not attempt to ascertain the legislative intent at issue, is rarely tuned to concepts of fairness for outsiders. Instead, he or she views the agency client as seeking an end the agency determines; counsel's role is to use legal skills to help the agency achieve that end. Such a goal involves reading statutes contrary to legislative intent, finding loopholes, making supportive arguments—in essence, serving the agency by helping it do whatever it wants to do. Where advice is not followed, counsel nevertheless remains loyal, attempts to mitigate harm, and publicly defends the agency's position, using every argument and artifice available.

Many attorneys who advise agencies have a problem walking the line between a properly subsidiary role to serve a client and informing the agency when its plans breach larger obligations the agency must follow. Counsel must attempt to consider the agency's plans apart from the agency, its territory, and its ambitions, and look at what it is doing in light of legitimate competing policies and laws.

One way to do this is to make the argument from the opposite side. If, looking at the situation from the viewpoint of another legitimate interest, the direction undertaken is unlawful or simply abusive of higher values, the agency should be so advised. If the actions are unlawful and the advice is ignored, counsel must withdraw. This can be done politely, deferentially, or regretfully, but—regardless of its historical rarity—counsel is obligated to withdraw. If the action is lawful and not subject to mandatory withdrawal, but abusive of other higher values, counsel should consider withdrawal under the permissive provision of the rules.

Once a decision has been made to withdraw, there is a duty to mitigate harm that may occur from counsel's departure. Turning over files to alternate counsel, meeting approaching deadlines, and maintaining client confidences may be involved. Even here there may be limitations on assistance when the agency is pursuing an unlawful path. And it is proper to notify substitute counsel of the reason for withdrawal, enabling him or her to make a similar conscientious decision.

The Rules of Professional Conduct and the State Bar Act do not define lawyers as a profession of hired guns. The adversary process serves the higher end of truth-seeking; it is not the end itself. And the adversary process is—in particular—not an absolute shelter for public counsel who represent interests beyond the agency client.

Members of the State Bar are understandably defensive about the negative public image of attorneys. We do not understand how we are so condemned when all we are doing is professionally serving our clients. Critics argue, with some persuasive force, that we will be thought of more positively when we internalize a more sophisticated hierarchy of values, one placing compliance with the law, civility, and human kindness on a footing a step above the adversary game we have exaggerated into a self-caricature. Certainly the attorneys in a position to begin such a renaissance are those advising agencies: Their clients are capable of much damage if operating outside the law's *bona fide* intent. These attorneys are in a position to take a stand without serious individual sacrifice, and they have clear obligations even as counsel beyond their facial client—to the taxpayers and the body politic who create their position, pay them, and trust them to represent more than the territorial proclivities of an agency.

ENDNOTES

1. Rule of Professional Conduct 3-700(B).

2. CAL. BUS. & PROF. CODE § 6068(c).

3. *Id.* at § 6068(d).

4. Rule of Professional Conduct 3-700(C).

5. These figures come from a survey of OAL Regulatory Determinations published in the *California Regulatory Notice Register* between 1987 and December 1995.

6. *See* SB 1358 (Royce) (Chapter 1382, Statutes of 1987), resolving Le Bup Thi Dao v. Board of Medical Quality Assurance, No. 876321 (San Francisco Superior Court).

7. *See* Bayside Timber Company, Inc. v. Board of Supervisors of San Mateo County, 20 Cal. App. 3d 1 (1971), *quoting* Carter v. Carter Coal Co., 298 U.S. 238 (1935) ("[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business..."). *See infra* agency report on the Board of Accountancy; *see also* Julianne B. D'Angelo and Robert C. Fellmeth, *A Perspective on California's Regulation of Tax Preparers, Certified Public Accountants, Architects, and Landscape Architects*, 13:4 CAL. REG. L. REP. (Fall 1993) at 5.

8. *See* Funeral Security Plans v. State Board of Funeral Directors and Embalmers, 28 Cal. App. 4th 1470 (1994) (depublished Jan. 5, 1995). *See also* 15:1 CAL. REG. L. REP. (Winter 1995) at 56; 13:4 CAL. REG. L. REP. (Fall 1993) at 49; 13:2&3 CAL. REG. L. REP. (Spring/Summer 1993) at 70.

9. Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors, 9 Cal. App. 4th 134, 147 (1992), *rev'd on other grounds*, 6 Cal. 4th 821 (1993). For a complete history of the intellectually dishonest legerdemain involved, *see* Robert C. Fellmeth and Julianne B. D'Angelo, *The Attorney General's "Circle of Error" Casts a Shadow Over California's Sunshine Laws*, 13:1 CAL. REG. L. REP. (Winter 1993) at 1.