



CITY OF LODI
COUNCIL COMMUNICATION

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AGENDA TITLE: Approve Waiver of Conflict of Interest for Folger Levin & Kahn in Representation of the State of California Department of Water Resources

MEETING DATE: November 7, 2007

PREPARED BY: City Attorney's Office

RECOMMENDED ACTION: Approve Waiver of Conflict of Interest for Folger Levin & Kahn in their representation of the State of California Department of Water Resources.

BACKGROUND INFORMATION: The City retained the law firm of Folger Levin & Kahn ("FLK") in 2004 to serve as outside counsel for the Environmental Abatement Program litigation. Folger Levin & Kahn has now been retained by the California Department of Water Resources (DWR) to represent them in relation to the DWR power portfolio, including the development of "peakers" (power plants) in San Francisco, and the Department's role as purchaser of electricity for private utilities, and dams on the Klamath River. The City Attorney's office, Public Works Department and Electric Utility Department have all reviewed the request and can find no actual conflict between the City of Lodi and DWR in connection with the proposed representation. However the City is adverse to other Departments within the State of California on unrelated issues.

Rule 3-310 of the Rules of Professional Conduct for attorney's, provides that "A member shall not, without the informed written consent of each client . . . 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." Accordingly, Folger Levin & Kahn has asked that the City of Lodi confirm that it consents to any potential conflict, and waives any actual conflict that may arise out of this situation.

It is my recommendation that the Council formally waive the potential conflict and authorize the City Manager to execute the waiver. If that is acceptable to the Council, such waiver of conflict should be communicated to Folger Levin & Kahn.

FISCAL IMPACT: N/A

Stephen Schwabauer
 City Attorney

APPROVED: _____
 Blair King, City Manager

FOLGER LEVIN & KAHN LLP

October 30, 2007

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VIA MAIL AND E-MAIL

D. Stephen Schwabauer
City Attorney
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Re: Potential Conflict of Interest – FLK’s Representation of State of California, Department of Water Resources

Dear Steve:

As part of the firm’s growing energy practice, the California Department of Water Resources (“DWR”) has asked Folger Levin & Kahn LLP to represent it with respect to issues related to the DWR power portfolio, including the development of “peakers” (power plants) in San Francisco, the Department’s role as purchaser of electricity for private utilities, and dams on the Klamath River. DWR is a department of the State of California.

Because the DWR is a department of the State of California, we have disclosed to the DWR all matters in which the firm’s existing clients are currently involved where a State agency (other than the DWR) has interests that are or potentially could be adverse to the interests of the firm’s clients. This letter addresses actual or potential conflicts of interest between the City of Lodi and the State, and requests that the City of Lodi waive any conflicts and potential conflicts of interest and consent to Folger Levin & Kahn LLP representing DWR with respect to the matters noted above.

As you know, we represent the City of Lodi with respect to several matters in which the State of California (primarily the Department of Toxic Substances Control and Regional Water Quality Control Board) has interests that are adverse or potentially may be adverse to the City of Lodi regarding the Lodi Groundwater site. Our representation of the City of Lodi includes serving as counsel and providing advice on specific legal matters and aspects of State law when we are asked to do so. In addition, we have represented the City of Lodi with respect to several matters and consent decrees in which the City of Lodi and the State of California have interests that may be or potentially may become adverse. Specific matters in which the interests of the State are or may be adverse to the interests of the City of Lodi include:

- *People of the State of California v. M & P Investments, et al.*
USDC ED Cal. Action No. CIV-S-00-2441 FCD KJM
- *Hartford Accident and Indemnity Co., et al. v. City of Lodi, et al.*
San Francisco Superior Court Case No. 323658
- *Unigard Insurance Co. et al. v. The City of Lodi, California*
USDC ED Cal. Action No. CIV-S-98-1712 FCD JFM
- *The City of Lodi, California, a California municipal corporation v. Unigard Insurance Company, a Washington corporation*
USDC ED Cal. Action No. CIV-S-01-1718 FCD JFM
- *City Of Lodi v. Donovan, et al.*
San Francisco Superior Court Case No. 441976.

We are pleased to serve as your counsel and, in that capacity, to represent your interests with respect to the environmental investigation and remediation at the Lodi Groundwater site. The subject matter, facts, and issues pertinent to the matters noted above are completely different from the subject matter of our proposed representation of DWR with respect to development of "peakers" (power plants) in San Francisco, the Department's role as purchaser of electricity for private utilities, and dams on the Klamath River. Accordingly, we do not anticipate obtaining any specific confidential information in representing DWR that would be material in the matters on which we represent the City of Lodi, nor do we anticipate that we will be impaired in any way from exercising our independent judgment in representing the City of Lodi.

Attached is a copy of Rule 3-310 of the Rules of Professional Conduct of the State Bar of California. Rule 3-310(C) provides that "A member shall not, without the informed written consent of each client . . . 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." Accordingly, we ask you to confirm that you consent on behalf of the City of Lodi to any potential conflict, and waive any actual conflict, that may arise out of this situation.

Should a conflict arise during the course of our engagement, we will endeavor to apprise you promptly. If you should become aware of any actual or potential conflict, we ask that you also advise us promptly so that we can assure a proper course of action.

Please review this letter carefully, and call me if you have any questions. You may want to seek independent counsel regarding this request, and of course you remain free to seek independent counsel at any time in the future

If you consent to our representation as described above, please have an officer or other authorized representative sign below and return the letter to me. Enclosed is an additional copy of the letter which you should retain for your records.

Very truly yours,


Margaret R. Dollbaum

MRD/es
Enclosure

City of Lodi

By: _____

Title: _____

cc: Gregory D. Call
M. Kay Martin

Printed from The State Bar of California website (www.calbar.ca.gov) on Tuesday, September 18, 2007

Location:

Rules of Professional Conduct

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

- (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
- (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;
- (3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- (2) The member knows or reasonably should know that:
 - (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (b) the previous relationship would substantially affect the member's representation; or
- (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(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
- (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.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(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.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

- (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
- (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court; operative September 14, 1992; operative March 3, 2003.)