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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 83-103
of	:	OCTOBER 27, 1983
JOHN K. VAN DE KAMP Attorney General	:	
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THE HONORABLE STEPHEN W. HACKETT, COUNTY COUNSEL, NAPA COUNTY, has requested an opinion on the following questions:

1. Are the offices of trustee of a school district and city attorney of a city which is located within the school district incompatible under common law principles?

2. Under section 1128 of the Government Code, what circumstances, if any, would produce such incompatibility as between these offices so as to result in a forfeiture of the first office assumed? Is any such forfeiture automatic?

CONCLUSIONS

1. The offices of trustee of a school district and city attorney of a city located within the school district are incompatible under common law principles.

2. Under the provisions of section 1128 of the Government Code, no forfeiture of either office ensues under any circumstances. Actual conflicts which may arise between the two offices held are to be dealt with by the officer on a transactional basis through appropriate abstention.

ANALYSIS

The opinion of this office has been requested on the question whether the offices of school trustee and city attorney of a city which is located within the school district are incompatible under common law principles. On the assumption that they are, our opinion has further been requested as to whether section 1128 of the Government Code contemplates[1] any forfeiture of office and, if so, under what circumstances. That section, enacted in 1981, limits the applicability of the common law doctrine in the case of nonelective public attorneys.

1. The Question of Incompatibility of Offices

Under the common law the simultaneous holding of incompatible public offices[2] is prohibited. The common law doctrine itself and the important elements and consequences of the doctrine have been set forth by the courts and prior opinions of this office in the following manner:

> "Offices are incompatible, in the absence of statutes suggesting a contrary result, if there is any significant clash of duties or loyalties between the offices, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervising, auditory, or removal power over the other." (38 Ops.Cal.Atty.Gen. 113 (1961).)

(See also, generally, *People* ex rel. *Chapman* v. *Rapsey*, *supra*, 16 Cal.2d 636, 641-642, and e.g. 65 Ops.Cal.Atty.Gen. 606 (1982); 64 Ops.Cal.Atty.Gen. 288, 289 (1981); 64

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[1] All section references are to the Government Code unless otherwise indicated.

[2] The position of school trustee is clearly a public office as opposed to a mere employment. (See generally, 65 Ops.Cal.Atty.Gen. 606 (1982); 56 Ops.Cal.Atty.Gen. 556, 557 (1973); 27 Ops.Cal.Atty.Gen. 33, 34 (1956).)

Likewise, a city attorney holds a public office as distinguished from a mere public employment. (See §§ 36505, 41801-41805; *People* ex rel. *Chapman* v. *Rapsey* (1940) 16 Cal.2d 636, 639-640.) We do not attempt herein to address any issue concerning the status of so-called "contract" city attorneys. In this regard, however, see *Montgomery* v. *Superior Court* (1975) 46 Cal.App.3d 657, 670-671; 28 Ops.Cal.Atty.Gen. 362 (1956).

Ops.Cal.Atty.Gen. 137, 138-139 (1981); 63 Ops.Cal.Atty.Gen. 623 (1980); 63 Ops.Cal.Atty.Gen. 607, 608 (1980).)

The policy set forth in *People* ex rel. *Chapman* v. *Rapsey*, *supra*, 16 Cal.2d 636 comprehends prospective as well as present clashes of duties and loyalties. (See 63 Ops.Cal.Atty.Gen. 623, *supra*.)

> ". . . Neither is it pertinent to say that the conflict in duties may never arise, it is enough that it may, in the regular operation of the statutory plan. . . ." (3 *McQuillin*, *Municipal Corporations* (3d Ed. 1973) § 12.67, p. 297.)

"[O]nly one significant clash of duties and loyalties is required to make . . . offices incompatible. . . ." (37 Ops.Cal.Atty.Gen. 21, 22 (1961).) Furthermore, "[t]he existence of devices to avoid . . . [conflicts] neither changes the nature of the potential conflicts nor provides assurance that they would be employed. . . ." (38 Ops.Cal. Atty.Gen. 121, 125 (1961).) Accordingly, the ability to abstain when a conflict arises will not excuse the incompatibility, or obviate the effects of the doctrine. A public officer who enters upon the duties of a second office automatically vacates the first office if the two are incompatible. (*People* ex rel. *Chapman* v. *Rapsey*, *supra*, 16 Cal.2d 636, 644.) Both positions, however, must be offices. If one or both of the positions is a mere employment as opposed to a public office, the doctrine does not apply. (See 58 Ops.Cal.Atty.Gen. 109, 111 (1975).)

In 65 Ops.Cal.Atty.Gen. 606 (1982), this office concluded that the offices of city councilman and school trustee are incompatible at common law. In doing so we pointed out numerous situations where a school board and a city council may contract with each other or may engage in other direct relationships. Reference to the duties of a city attorney demonstrates that the same conclusion necessarily obtains as to the offices of city *attorney* and school trustee. Referring only to the mandatory duties of a city attorney, we see that "[t]he city attorney *shall* advise the city officials in all legal matters pertaining to city business" (§ 41801, emphasis added) and "*shall* frame all ordinances and resolutions required by the legislative body." (§ 41802, emphasis added.)[3] It is patent just from the duty to advise the city regarding city contracts that the same individual could not, without a significant clash of duties or loyalties arising, render such advice with respect to city-school district contracts and at the same time act as a member of the other contracting party, the school board.

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[3] Other duties are to "perform other legal services required from time to time by the legislative body" (§ 41803) and possibly "to prosecute any misdemeanor committed within the city arising out of the violation of state law." (§ 41803.5; see also *Montgomery* v. *Superior Court*, *supra*, 46 Cal.App.3d 657.)

Similarly, in 56 Ops.Cal.Atty.Gen. 488 (1973) this office concluded that the offices of county planning commissioner and school trustee are incompatible offices due to the clashes of duties and loyalties which could arise concerning planning functions of the county which could affect schools within unincorporated territory. The duties of a *city* planning commission and a county planning commission are essentially the same under the Planning and Zoning Law with respect to local planning (see § 65100 et seq.). Accordingly, a city attorney could not advise a *city* planning commission with respect to zoning matters which impacted upon schools without a significant clash of loyalties arising. Thus, this 1973 opinion as well as our 1982 opinion just discussed above demonstrates further interactions between a city and a school district which would dictate, under common law principles, that a city attorney should not simultaneously hold the office of school trustee where the agencies have common territory.[4]

As we stated in a somewhat similar situation in an unpublished opinion (I.L. 76-196), wherein we concluded that the statutory office of *attorney* for a metropolitan transit district and the office of Member, California Highway Commission, were incompatible offices:

> ". . . Though one might argue that the attorney merely renders legal advice and is not engaged in policy matters so as to render his duties incompatible with his State duties, this office believes that our conclusion is in accord with the concept that advisers are to be treated in the same manner as those whom they must advise, and are to be considered 'participants' in such matters when an analysis is made as to whether a potential conflict exists between various interests. *cf*: *Millbrae Assn. for Residential Survival* v. *City of Millbrae*, 262 Cal.App.2d 222, 236-237 (1968); *Schaefer* v. *Berinstein*, 140 Cal.App.2d 278, 291 (1956); Gov. Code, §§ 82004, 87100." (*Id.* at p. 12.)

Accordingly, we conclude that the office of city attorney and school trustee are incompatible under the common law where the city lies within the school district, and thus the two entities have territory in common.

[4] In fact, the county counsel has advised us of several instances where the city and the school district which gave rise to this request have had "interactions"—one involving a permit requested by the school district, and one involving the joint use of property for school and city recreational purposes.

2. Does Section 1128 of the Government Code Contemplate Forfeiture Of Either Office?

As noted, the common law doctrine which prohibits the holding of incompatible offices applies not only when there is an actual conflict in duties or loyalties as between the two offices, but when there is any *potential* conflict as well. Also as noted, under the common law doctrine, the acceptance of a second incompatible office constitutes an automatic vacation of the first office. Our opinion has been requested as to the scope and effect of section 1128, enacted in 1981 (Stats. 1981, ch. 391), to ameliorate the effect of the common law doctrine as to nonelective public attorneys. That section provides:

> "Service on an appointed or elected governmental board, commission, committee, or other body by an attorney employed by a local agency in a nonelective position shall not, *by itself*, be deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office. (Emphasis added.)

Although section 1128 was primarily intended to mitigate the effects of the *common law doctrine* for public attorneys, as will be demonstrated post, the statute was added to sections 1125 et seq., which essentially prohibit local agency officers and employees from engaging in outside activities for compensation which are "inconsistent, incompatible, in conflict with, or inimical to" the officer's or employee's duties "or with the duties, functions, or responsibilities of his appointing power or the agency by which he or she is employed." (§ 1126.)[5]

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[5] Prior to 1967 there was no statute which prohibited *non*contractual conflicts of interest with respect to local officials. In 1967 section 1120 was added to the Government Code requiring *disclosure* of noncontractual financial conflicts by local officials. (See Stats. 1967, ch. 1087, repealed by Stats. 1973, ch. 1166.) Accordingly, the only prohibition as to conflicts of interests by local officials was that provided by the common law rule except as modified by section 1120. In 1971 sections 1125 et seq. were added, which finally provided statutory relief for the void in the conflicts of interest legislation. Ultimately, the Political Reform Act of 1974 was enacted (§ 80000 et seq.), which contains detailed conflicts of interest provisions as to all government officials, both state *and local*. (See §§ 87100-87103.)

Thus, sections 1125 et seq. were added primarily to regulate the *private* outside activities of local officers and employees. We noted, however, in our opinions that the language of section 1126 was sufficiently broad to encompass outside *public* employment for compensation as well. (See discussion in 64 Ops.Cal.Atty.Gen. 795, 798-800 (1981).) Thus, it is not illogical for the Legislature to have included the provisions of section 1128 with sections 1125 et seq.

Our opinion has been requested as to the scope and effect of section 1128. In short, to what extent has it modified the common law rule on incompatibility as well as added to the statutory law?[6] Service by a nonelective public attorney on a governmental board or commission or other body "*by itself*" is no longer an incompatible activity. Nor will it cause an automatic vacation of the first office upon the assumption of the second office. Will it cause *any* forfeiture of office? If so, under what circumstances?

In construing a statute, the fundamental rule is to ascertain the intent of the Legislature in order to give effect to the purpose of the law. (*Landrum* v. *Superior Court* (1981) 30 Cal.3d 1, 12; *Select Base Materials* v. *Board of Equalization* (1959) 51 Cal.2d 640, 645.) "[T]he . . . historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose." (*California Mfrs. Assn.* v. *Public Utilities Commission* (1979) 24 Cal.3d 836, 844; see also, e.g., *People* v. *Black* (1982) 32 Cal.3d 1, 5.)

Legislative committee materials demonstrate unequivocally that it was Opinion No. 80-308 of this office, found at 63 Ops.Cal.Atty.Gen. 710 (1980), which gave rise to the enactment of section 1128.[7] Accordingly, the issuance of that opinion is "the historical circumstance[ ] of its enactment" and hence constitutes a "legitimate and valuable aid[ ] in divining the statutory purpose." (*California Mfrs. Assn.* v. *Public Utilities Commission*, *supra*, 24 Cal.3d at p. 844.) In that opinion we concluded that a *deputy* district attorney could not hold the additional office of either recreation and park district director or of school district trustee. We did so based upon the fact that the *principal office* of district attorney and the other two offices were incompatible under common law principles and that a *deputy* district attorney, having under the law all the power of his principal, suffered the same disabilities.

In our view the following points discussed in our 1980 opinion provide the best insight into the legislative intent behind section 1128. At 63 Ops.Cal.Atty.Gen. at pages 714-715, we stated:

> "The obvious argument against such conclusion [as to the prohibition against the dual office holding] is that in an office such as a district attorney's office, where the office is of medium or large size, the district attorney may

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[6] As a general proposition, "[t]he common law rule of incompatibility is supplemented but not displaced by constitutional or statutory provisions prohibiting certain types of dual office-holding." (See 19 Ops.Cal.Atty.Gen. 118, 120 (1952).)

[7] See Senate P.E.& R. Committee Consultant, dated 5/13/81, Hearing date: 5/18/81 to Senate Bill 1184; Assembly Committee On Governmental Organization, Staff Analysis of Senate Bill 1184. It is to be noted that the bill was enacted as introduced on April 9, 1981, without amendment.

> tailor the particular deputy's duties to avoid actual conflict. Or it may be that such a conflict may be more theoretical than real from the duties already assigned. Accordingly, or so goes the argument, a deputy district attorney could also be a recreational and park district director or a school trustee so long as he was assured that he would not be assigned conflicting duties."

Then, after discussing a number of reasons for not accepting such a solution to a deputy's dilemma, we stated at pages 715-716:

> "Despite all the foregoing, it still may be argued that the potential conflict in duties and loyalties which might arise is more theoretical than real, and if they did arise the deputy involved could abstain from any action with respect to the matter, and request the matter be reassigned. Abstention, however, has not been permitted under the common law prohibition as to holding incompatible offices. Nor has the fact that 'conflict' may never arise constitute an 'escape-hatch' from the rigors of the doctrine. As has been noted in the case law and our opinions, '[t]he policy as stated in . . . [*People ex rel. Chapman* v. *Rapsey*, 16 Cal.2d 636 (1940), the leading California case on the subject] comprehends prospective as well as present clashes of loyalty. In the past this office has found incompatibility to exist with respect to *potential* conflicts of duty. . . .' (56 Ops.Cal.Atty.Gen. 488, 489 (1973), emphasis added.) 'The existence of devices to avoid . . . [conflicts] neither changes the nature of the *potential* conflict nor provides assurance that they would be employed. . . .' (38 Ops.Cal.Atty. Gen. 121, 125 (1961), emphasis added.) 'The public is entitled to have the *full* undivided services of each public officer. . . .' (17 Ops.Cal.Atty.Gen. 129, 130 (1951), emphasis added.)"

Thus, it is apparent that the Legislature in enacting section 1128 has made a policy decision to abrogate the common law rule against holding incompatible offices in favor of public attorneys in nonelective positions. It is also apparent that this policy decision was made in the recognition that public attorneys have been disqualified from engaging in other public pursuits such as becoming members of school boards or other boards and commissions where there was only a *potential* or theoretical conflict between the actual duties of the offices. Section 1128, however, does not by its terms answer the question as to what happens if and when an actual conflict arises as between the duties or responsibilities of the two offices.

It can be argued that section 1128 was merely intended to constitute a partial abrogation of the common law doctrine and that if an actual conflict does arise after the assumption of both offices, then one of the offices should be forfeited. Such an argument

is compatible with the language of section 1128. The section states that the holding of both offices "*by itself*" is not to be considered incompatible or to cause the automatic vacation of either office. A possible inference is that *with something else* automatic vacation of one of the offices will ensue. That "something else" would logically be "actual conflict." We reject this argument for several reasons.

In the first place, section 1128 appears to be aimed primarily at permitting attorneys who are already earning all or part of their livelihood as public attorneys to engage in other civic pursuits. Accordingly, although section 1128 does not so require, the usual situation contemplated by the Legislature was that the second office assumed and held would be a nonattorney position such as a school board member or a member of some other board or commission. If an actual conflict did arise, and the common law doctrine were then applied, *the first position*, that of public attorney, would be forfeited. Such a result would defeat rather than promote the intent of the Legislature in enacting section 1128. In short, we do not believe the Legislature intended that a public attorney should put all or part of his livelihood in peril by accepting a second public position, which position would in most cases provide little or no compensation to the attorney.

Secondly, and in the same vein, the common law doctrine against holding incompatible offices requires that the first office be considered to have been automatically vacated upon the assumption of the second incompatible office. Accordingly, neither the common law rule nor the statutory law as set forth in section 1128 provides that the attorney may choose between the offices if one must be forfeited. Thus, the attorney could not choose to retain the office necessary for his livelihood if and when an actual conflict did arise. Yet such a choice would be a virtual necessity to foster and carry on the intent of the Legislature in enacting section 1128. Accordingly, forfeiture of neither office would appear to have been contemplated by the Legislature.

Thirdly, although our 1980 opinion which gave rise to the enactment of section 1128 dealt with *deputies*, section 1128 is not so restricted. Section 1128 permits a principal officer as well as deputies to hold a second incompatible office. In the case of deputies, actual conflict can be avoided by having the principal officer or another deputy handle the particular matter. This is not the case where there are no deputies. Thus, in enacting section 1128 it is evident that the Legislature must have contemplated that actual as well as theoretical conflict could arise from the holding of the two offices. Thus, the Legislature appears to have intended that actual conflict on occasion is to be tolerated in the operation of the statutory scheme.

Accordingly, we conclude that section 1128 was not intended to imply that one office is to be forfeited if actual conflict should arise. Since nothing in either the

statutory law[8] or the common law provides for forfeiture of either office when actual conflict arises, it would appear that when it does arise, the officer would be in the same position as when a "conflict of interest" arose if he held a single office. He should disqualify himself and abstain from either acting or influencing anyone else in the matter. If abstention would require the public agency to seek outside counsel, ample authority to do so is provided for in sections 31000 and 53060, which permit contracting for "special services" to avoid such conflict. (See generally *Montgomery* v. *Superior Court*, *supra*, 46 Cal.App.3d 657, 668; *California School Employees Assn.* v. *Sunnyvale Elementary School District* (1973) 36 Cal.App.3d 46, 60-62; *Barnett* v. *Hart* (1963) 223 Cal.App.2d 521, 524; *Jaynes* v. *Stockton* (1960) 193 Cal.App.2d 47, 54; 61 Ops.Cal.Atty.Gen. 227, 232 (1978).)

However, should the officer perform the duties of one office in a manner which conflicts with the duties of or the loyalties owed to the other office, the question of possible sanctions for such conduct arises. No specific statutory sanctions have been provided as is the case when an officer or employee engages in personal or private conflicts of interest. (See §§ 1090-1097; 1126; 87100-87103, 91000-91014.) Nevertheless, the public attorney engaging in such conduct could still be held accountable for misconduct in office (§ 3060 et seq.), violation of the rules of professional conduct for attorneys (see Rules 4-7), and also be subject to recall from elective office or discharge from office by his appointing authority.

For the foregoing reasons, we conclude that section 1128 does not contemplate or require the forfeiture of either office held. Actual conflicts between the duties and responsibilities of the office are to be dealt with by the officer concerned on a transactional basis through appropriate abstention.

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[8] In this regard we note that section 1126, the general provision prohibiting local agency officers and employees from engaging in conflicting incompatible outside activities for compensation (see text at note 5, ante), was amended to state "Except as provided in section 1128." Additionally, subdivision (b) thereof, with respect to a local agency's power to determine those activities which are conflicting or incompatible, was limited to provide that such must be "consistent with the provisions of 1128 where applicable," thus leaving section 1128 to operate independently of either section 1126 or the common law doctrine.