

DATE: June 8, 1987

TO: Mike Stepner, Acting Planning Director
FROM: City Attorney
SUBJECT: Potential Conflict of Interest Posed by
Marriage of Staff Member and Private
Practitioner

By memorandum of March 28, 1986, the Planning Department sought our guidance on potential conflict problems presented by the dating situation between Allen Jones of the Planning Department and Rebecca Michael, a private practitioner in the law firm of Peterson, Thelan and Price. We responded on May 27, 1986 that conflict of interest laws were designed to regulate conduct related to finance rather than romance.

Now that Mr. Jones and Ms. Michael have married, you ask if this poses any additional constraints on their professional conduct. You indicate that Ms. Michael limits her contact with the Planning Department to divisions that are separate from Mr. Jones' area of responsibility. She has limited her contact to the divisions of regulatory, strategic and development within the department while, by your direction, Mr. Jones confines himself to community planning. Further Ms. Michael's law firm, as detailed by its senior partner, is organized and structured such that the activities of the other lawyers neither financially benefit nor impact Ms. Michael. Lastly, we understand Mr. Jones and Ms. Michael are in the process of executing a marital agreement which provides inter alia, that each spouse's income is to remain the separate property of the earning spouse. California Civil Code section 5110.

Based on the facts presented to us and relying on the execution of appropriate documents as represented, we have no hesitancy in advising that no conflict of interest is presented by virtue of their marital status. Our analysis follows.

The Political Reform Act (California Government Code section 81000 et seq.) was designed to insure impartiality in government

free from financial interests. California Government Code section 81001(b). To accomplish this, disclosure of assets and disqualification in specified circumstances are required.

. 87100. Public officials; state and local;
financial interest

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental

decision in which he knows or has reason to know he has a financial interest.

California Govt. Code section 87100

Disqualification, then, only arises when he/she is in a position to influence a decision in which there is a financial interest as defined.

. 87103. Financial interest in decision by official.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

....

For purposes of this section, indirect investment or interest means any investment or

interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

California Govt. Code section 87103

Emphasis added.

Since it is academic that Mr. Jones is a public official by virtue of his position in the Planning Department, we must determine whether Mr. Jones has a financial interest as defined

above by virtue of his community property interest in either Ms. Michael's salary or law firm.

"Income" is defined expansively in the Political Reform Act to include "any community property interest in the income of a spouse" as well as "a pro rata share of any income of any business ... in which the individual or spouse owns ... a 10-percent interest or greater." California Government Code section 82030(a).

However, from the marital agreement, Mr. Jones has disclaimed any community interest in Ms. Michael's salary. In view of this disclaimer, Mr. Jones has no financial interest in her salary and ergo no conflict of interest arising from his wife's activities. California Government Code sections 87100 and 87103. We note that this analysis parallels and conforms to Fair Political Practices Commission Private Advice Letter A-86-201 which passed on the potential conflict of interest of Darlene E. Ruiz, a State Water Resources Control Board member, where her husband was a lobbyist and owner of a lobbying firm.

As to the second aspect of a potential financial interest, "investment" is defined in California Government Code section 82034 to include any financial interest in a business entity or partnership or other ownership interest owned by the public official or his immediate family. Since immediate family includes spouses (Section 82029), we must analyze the nature of what interest, if any, Mr. Jones has in the law firm of Peterson, Thelan and Price independent of any marital agreement. As explained by the senior partner of that firm, Ms. Michael does not have any interest in the firm. Rather she participates in an expense sharing arrangement whereby a proportionate share of costs attributable to her are paid and she retains the remainder of her earned fees as compensation. She has no equity or fee sharing interest in the firm or its fixed assets. In such a situation, then, it follows that since she lacks any direct or indirect ownership interest, Mr. Jones as her husband likewise has no "investment" interest.

Lastly, we review Council Policy 000-4 and the Planning Department's Conflict of Interest Code which go beyond "financial interests" and counsel against any "personal interest" or conduct which would tend to impair independence. These directives are both observed since Mr. Jones abstains from any participation in projects concerning his wife.

For those concerned that this abstention is observed in public but may be mixed in marital conversation and intimacy, we renew our caution of May 27, 1986. Avoidance of conflicts and complete confidence in government are paramount concerns of a

free society. But similarly our society is founded upon the institution of marriage and is dedicated to the preservation of marital privacy.

Even the most vigilant of government regulators must stop at the marital door. Mr. Justice Douglas concluded that marriage and its privacy are constitutionally protected rights when he posed and answered the question of governmental intrusion:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut,
381 US 479, 14 L.Ed.2d 510, 516 (1965)

We conclude, then, that Mr. Jones has no financial interest within the meaning of California Government Code section 87103 that would pose a conflict of interest in that income has been designated separate property and that no investment interest exists by virtue of Ms. Michael's arrangement at Peterson, Thelan and Price. Further, we find that Council Policy 000-4 is observed in public and should not be probed in private.

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By

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Chief Deputy City Attorney

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