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REPORT TO REDEVELOPMENT AGENCY
OF THE CITY OF SAN DIEGO AD HOC COMMITTEE

ABSENCE OF CONFLICTS OF INTEREST PERTAINING TO THE RESPECTIVE ROLES OF THE CITY COUNCILMEMBERS, THE MAYOR, AND THE CITY ATTORNEY'S OFFICE IN REDEVELOPMENT MATTERS

INTRODUCTION

During a scheduled meeting on July 25, 2011, the Redevelopment Agency of the City of San Diego Ad Hoc Committee (Committee) discussed, among other things, agenda item no. 2, pertaining to the potential replacement of the Mayor as the Executive Director of the Redevelopment Agency of the City of San Diego (Agency) and the potential replacement of the City Attorney's Office as the Agency's General Counsel. At that time, Councilmember Marti Emerald stated that the Mayor and the City Attorney's Office should no longer serve in their current capacities on the Agency's behalf based largely on her perception that there is a conflict of interest inherent in their respective performance of dual roles on behalf of both the Agency and the City of San Diego (City). The City Attorney's Office provided a verbal response that there is no inherent conflict in the City Attorney's Office serving as the legal adviser to both the City and the Agency. The City Attorney's Office, however, did note that, in accordance with the California Rules of Professional Conduct governing all attorneys generally, this Office will evaluate any particular factual situations on a case-by-case basis to determine if there is a potential conflict of interest and, if necessary, this Office will recuse itself from legal representation of the Agency in those particular situations.

Later in the Committee meeting, Councilmember Kevin Faulconer asked the City Attorney's Office to identify how often and how recently the City Attorney's Office has determined the need to recuse itself from legal representation of the Agency in a legal matter. In response, City Attorney staff stated that recusal due to a conflict of interest is very rare, but identified one "discrete example" in which this Office had recently determined a conflict of interest existed with respect to our participation in one specific aspect of settlement negotiations with the County of San Diego arising from the adoption of Senate Bill 863, by which the California Legislature lifted the "cap" on collection of tax increment revenue in the Centre City Redevelopment Project Area. The verbal comments made by City Attorney staff in response to Councilmember Faulconer's question were not intended, and should not be construed, to suggest that there is a conflict of interest inherent in this Office's dual role as the chief legal adviser to both the City and the Agency. Rather, the comments pertained to a voluntary recusal arising from a personal conflict of interest of the City Attorney in that the City Attorney's personal residence is located in close proximity to a particular project in San Diego that may be involved in the settlement negotiations with the County of San Diego.

One purpose of this Report is to elaborate on those verbal comments and to provide the legal analysis explaining why the City Attorney's Office can serve as legal counsel to the City and the Agency in accordance with applicable California authority, such as the California Community Redevelopment Law, set forth at California Health and Safety Code sections 33000-33855 (Community Redevelopment Law), and the ethical standards governing the conduct of attorneys in California. At the outset, however, this Report will explain why it is legally permissible for the Councilmembers and the Mayor, respectively, to serve dual roles on behalf of the City and the Agency.

DISCUSSION

I. ROLE OF CITY COUNCIL IN REDEVELOPMENT MATTERS

Under California Health and Safety Code section 33200(a), the legislative body of the community may establish itself as the governing body of the redevelopment agency, in which case all of the rights, powers, duties, privileges, and immunities vested in the agency pursuant to the Community Redevelopment Law are vested in the legislative body, except as otherwise set forth in the Community Redevelopment Law. In this instance, the Council (i.e., the legislative body of the community) designated itself to serve as the Agency's Board of Directors (Agency Board) upon the formation of the Agency. Council Resolution No. 147378 (May 6, 1958). Accordingly, there is no impermissible conflict of interest under State law arising from the dual role of each Councilmember on the Council and the Agency Board. It is also noteworthy that the most common governance structure for redevelopment agencies throughout California involves the city council or the county board of supervisors serving as the board of directors of the redevelopment agency.

Each Councilmember, in his or her capacity as a member of the governing body of the City and the Agency, owes a fiduciary duty to act in the best interests of those two entities. Yet, from a practical perspective, each Councilmember's simultaneous fulfillment of the fiduciary duty to both entities does not give rise to an "inherent" conflict of interest. As discussed in Part III.B.2 below, the City and the Agency are clearly striving toward a common goal or purpose when they are mutually involved in a redevelopment matter. Given this close alignment, there is no legitimate risk of conflicting interests arising from the dual role of each Councilmember. Similarly, there is no legitimate risk of conflicting interests arising from the respective dual roles of the Mayor and the City Attorney's Office.

II. ROLE OF MAYOR IN REDEVELOPMENT MATTERS

The Mayor presently holds the dual positions of the City's Chief Executive Officer pursuant to the San Diego Charter and the Agency's Executive Director pursuant to a series of Agency resolutions designating the Mayor for that role over the past several years. There is no impermissible conflict of interest arising from the Mayor's dual role in that regard, for the reasons described below and in Part I above.

The Agency Board is permitted under California Health and Safety Code section 33126(a) to select, appoint, and employ permanent and temporary officers, agents, and employees of the Agency. There is no provision in the Community Redevelopment Law that prohibits the Agency Board from selecting the Mayor to serve as the Agency's Executive

Director on a permanent or temporary basis. Moreover, this Office has previously opined that the Mayor's dual role as the City's Chief Executive Officer and the Agency's Executive Director does not give rise to the holding of incompatible public offices. 2005 City Att'y Report 524, 530-31 (2005-22; Aug. 4, 2005).[1]

III. ROLE OF CITY ATTORNEY'S OFFICE IN REDEVELOPMENT MATTERS

A. Background of Dual Role of City Attorney's Office.

This Office presently serves as the City's chief legal adviser pursuant to San Diego Charter section 40. This Office also presently serves as the Agency's General Counsel pursuant to the documents described below. As explained below, there is no disqualifying conflict of interest arising from this Office's dual role as the chief legal adviser for the City and the Agency.

The Community Redevelopment Law does not prohibit a city attorney's office or a private law firm specializing in municipal law from providing legal representation to both a city and its counterpart redevelopment agency. In fact, California Health and Safety Code section 33126(a) permits a redevelopment agency's board of directors to select, appoint, and employ legal counsel for the redevelopment agency on a permanent or temporary basis. In this instance, the Agency Board adopted a resolution in 1969 stating, in pertinent part: "The City Attorney or his designated representative is hereby appointed as the General Counsel of the Redevelopment Agency of The City of San Diego." Redevelopment Agency Resolution No. 5 (Apr. 29, 1969). The Agency Board subsequently approved an amendment to Article II, Section 1 of the Agency's Bylaws that, among other things, confirmed the City Attorney's role as the Agency's General Counsel. Redevelopment Agency Resolution No. 121 (Apr. 1973). The City also has agreed to provide legal services and other administrative services to the Agency pursuant to the "First Amended Agreement" executed by the City and the Agency in 1991. City Clerk Document RR-278441 (July 30, 1991). Thus, the dual role of the City Attorney's Office as the chief legal adviser for the City and the Agency has been formalized for more than forty years and has continued without interruption during that period of time.[2]

B. There Is No Conflict of Interest Pertaining to the Dual Role of the City Attorney's Office as Legal Counsel to the City and the Agency.

1. There Is a Relaxed Standard for the Analysis of Conflict of Interest Applicable to Public Attorneys.

The standards for professional ethics governing attorneys in California are contained in the California Business and Professions Code and the Rules of Professional Conduct of the State Bar of California (Professional Rules).[3] These ethical standards apply to all attorneys who are

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[1] As identified by City Attorney staff during the Committee meeting on July 25, there is a separate issue as to whether the San Diego Charter might apply to the dual roles of the Mayor and the City Attorney's Office on behalf of the City and the Agency. A discussion of that issue is beyond the scope of this Report.

[2] We also believe that this Office served as the Agency's General Counsel commencing upon the formation of the Agency in 1958. Yet, this Office's role as the Agency's General Counsel was not formalized until 1969.

[3] All citations in this Report to specific "Rules" shall refer to Rules set forth in the Professional Rules.

admitted to practice law in California, including public attorneys.[4] Rule 1-100(A), (B)(1)(d). Under these ethical standards, attorneys owe three fundamental obligations to their clients. First, they owe a duty of loyalty to the existing client. *Flatt v. Superior Court*, 9 Cal. 4th 275, 288 (1994). Second, they owe a duty of confidentiality to both existing and former clients. *Id.* at 283-86; Cal. Bus. & Prof. Code § 6068(e). Third, they owe a duty to perform legal services with competence. Rule 3-110. The common theme among these ethical standards is to minimize the influence of any factors or incentives that may diminish the ability of an attorney to provide effective legal services in an ethical manner.

Rule 3-310(C), which addresses an attorney's simultaneous representation of more than one client, provides:

> 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.

The Discussion portion of Rule 3-310 confirms that Rule 3-310(C) is intended to apply to the simultaneous representation of multiple clients in litigation as well as transactional matters.

It is important to note, however, that California courts have long recognized that special considerations must be evaluated before public attorneys are determined to have a conflict of interest under Rule 3-310 that disqualifies them from representing a public entity client (referred to herein as a "disqualifying conflict of interest"). *Practicing Ethics: A Handbook for Municipal Lawyers* (Ethics Handbook) at 14 (League of Cal. Cities 2004). The Ethics Handbook states:

> Conflict of interest rules were drafted with private attorneys primarily in mind. In the public sector, the financial incentive to favor particular clients over others or to ignore conflicts is reduced if not eliminated. The disqualification of a public attorney can result in minimal benefits while causing dislocation and public expense. For these reasons courts should not assume the existence of a conflict of interest in the public sector and should attempt to limit the reach of disqualification in such cases.

Id. The Ethics Handbook further explains that, due to the reduced potential for conflicts of interest in the public sector and the cost to the public of disqualifying public attorneys, California courts have condoned the use of internal screening procedures or "ethical walls" to avoid

[4] For purposes of this Report, the phrase "public attorneys" shall refer to all attorneys who are members of the State Bar of California and work for a governmental entity or entities (e.g., city attorneys, county counsel, and attorneys in private law firms who represent municipalities on a contractual basis) or for a nonprofit legal corporation.

conflicts of interest. *Id.* These general principles are discussed in greater detail below in the context of specific opinions issued by California authorities.[5]

In *Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal. App. 3d 1432 (1991), the appellate court held that a nonprofit legal office representing both parents and children with potentially adverse interests in the same dependency proceedings in juvenile court did not give rise to a disqualifying conflict of interest among the attorneys in the legal office, even where the multiple clients apparently did not provide informed written consent to the dual representation. The court drew a sharp distinction between lawyers in private practice and those in the public sector with respect to simultaneous representation of multiple clients, as follows:

> In a private law firm, clients pay for legal services the firm renders on their behalf. [The nonprofit legal office], by contrast, represents clients who cannot and do not pay for services rendered on their behalf. A third party, the board, funds [the nonprofit legal office], and clients do not pay for the services the law firm renders. Hence no client becomes "more important" than some other client, and no . . . lawyer has any "obvious financial incentive" to favor one client over another. Quite the opposite is true; because a third party pays, the attorney has every incentive to devote his or her entire efforts on behalf of the client.

Id. at 1441. The court endorsed the opinion of a law school professor concerning the basic purpose of conflict of interest rules, as follows:

> "Rules that forbid lawyers to accept matters because of a 'conflict,' and rules that impute a lawyer's conflict to his or her associates, have one paramount object – to prevent lawyers from entering into situations in which they will be seriously tempted to violate a client's right to loyalty and secrecy. Conflict rules try to strike an appropriate balance between protecting against risks to loyalty and confidentiality, on the one hand, and fostering the availability of counsel on the other. Because conflict rules mainly deal with risk of unethical conduct, arguments about these rules often use words like 'may,' 'might,' and 'could,' usually followed by phrases like 'be tempted to.' Obviously, such words are highly elastic. They tell

[5] Different standards have been developed in California case law to evaluate whether public attorneys have a disqualifying conflict of interest in a particular situation, depending on whether the alleged conflict arises out of simultaneous representation or successive representation. Simultaneous representation is involved when an attorney seeks to represent multiple parties in a single matter, typically a lawsuit, with potentially adverse interests. Successive representation is involved when an attorney gains confidential information about a former client during previous legal representation and, in the present day, represents a current client adverse to the former client. The California courts have focused primarily on protecting the duty of loyalty in the context of simultaneous representation and protecting the duty of confidentiality in the context of successive representation. *See, e.g.*, *Flatt*, 9 Cal. 4th at 282-89. The discussion in this Report will rely mainly on the case law relating to simultaneous representation, which is more germane to the discussion of the dual role of the City Attorney's Office on behalf of the City and the Agency. As discussed herein, the case law generally has permitted the use of ethical walls or other screening procedures as a proper method to avoid a disqualifying conflict of interest when public attorneys are engaged in simultaneous representation of multiple clients, except in certain situations.

> us nothing about the appropriate tolerance for risk when measured against the social, professional, and monetary costs of disqualification or of forbidding a particular practice arrangement. We allow many arrangements that tolerate some risk because they also provide social or other benefits and because we are prepared to believe that lawyers take their ethical responsibilities seriously. The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically."

Id. at 1444 (citation omitted). The court's rationale in *Castro* has been echoed in other instances.[6]

In finding that there is a relaxed standard for analysis of conflict of interest applicable to public attorneys, the courts have often examined the screening procedures or other internal safeguards employed within the public office to avoid any conflict of interest.[7] In *Castro*, where the court held that a nonprofit legal office had no disqualifying conflict of interest in representing both parents and children in the same dependency proceedings, the court stressed that the nonprofit legal office did not solicit clients or accept referrals from the public, did not allow attorneys to communicate directly with the opposing party with respect to any dependency proceeding, and generally took precautions to safeguard against improper conduct of attorneys. 232 Cal. App. 3d at 1442. The court stated: "It is not to be assumed hypothetically, in the absence of facts, that [the nonprofit legal office's] attorneys will act to violate their client's confidence or to compromise their legal interests. The structures of the organization reinforce

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[6] In *Rhaburn v. Superior Court*, 140 Cal. App. 4th 1566 (2006), the court rejected a claim that a public defender whose office previously represented witnesses for the prosecution in two cases was subject to automatic disqualification due to a conflict of interest. The court stated: "'[P]ublic sector lawyers do not have a financial interest in the matters on which they work. As a result, they may have less, if any, incentive to breach client confidences.'" *Id.* at 1579 (citation omitted). The court also stated that frequent disqualifications of public attorneys would substantially increase the cost of legal services for public entities, often with only speculative or minimal benefit. *Id.* at 1580. In published opinions, the California Attorney General's Office and the State Bar of California also have recognized that there are relaxed standards for the analysis of conflict of interest applicable to public attorneys. 80 Op. Cal. Att'y Gen. 127 (1997); State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2001-156. In the State Bar opinion, the standing committee reasoned that "neither the mayor nor the city council, independent of the city itself, established an attorney-client relationship with the city attorney by seeking legal advice on the proposed ordinances, because neither had the potential to become the city attorney's client against the other." *Id.* The committee stated: "It is only this truly independent right of action that can give rise to a conflict of interest for a public attorney." *Id.* The committee also remarked that ethical rules developed in the private sector do not squarely fit the practical realities of the legal practice of public attorneys. *Id.*

[7] We briefly discuss the topic of screening procedures in this Report only for the sake of providing a complete picture of the legal authority governing the relaxed standard for analysis of conflict of interest in the public sector. By discussing screening procedures in this Report, we do not intend to suggest that the discussion is relevant in the present circumstance. Indeed, as discussed in Part III.B.2 below, we do not perceive any actual or potential conflict of interest arising from this Office's dual legal representation of the City and the Agency. As a result, there is no need for screening procedures in the present circumstance. Even if we assume in the absence of any facts that there might be a hypothetical situation in which a potential conflict of interest could arise, this Office, acting in an abundance of caution, has consistently implemented internal procedures designed to avoid any potential conflict of interest arising from the dual legal representation of the City and the Agency.

this ethical duty, which is well known to all attorneys." *Id.* The court's approach in *Castro* to examine internal safeguards within a public office has been followed in other situations.[8]

2. There Is No Conflict of Interest Involved in the Dual Representation Provided by the City Attorney's Office.

As discussed above, Rule 3-310(C) states that an attorney in California cannot simultaneously represent more than one client, without obtaining the informed written consent of each client, if there is an actual conflict or a potential conflict between the interests of those clients. The California courts and other authorities have long recognized, however, that there is a relaxed standard for analysis of conflict of interest applicable to public attorneys, especially where adequate screening procedures are implemented to avoid the risk that the public attorneys will be compromised in fulfilling their three fundamental duties of loyalty, confidentiality, and providing competent legal service. Based on the relevant circumstances, as discussed below, we are confident that no actual or potential conflict of interest for purposes of Rule 3-310(C) exists in the situation where this Office provides dual representation of the City and the Agency.

While the City and the Agency are separate legal entities, their organizational and governance structure, as well as their core activities and programs, are closely intertwined. As described in Part I above, the Councilmembers serve collectively as the governing body of both the City and the Agency and make any significant policy decisions on behalf of those two entities. The Agency serves as an agency of the State that performs local governmental functions within defined geographical boundaries in the City. *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666, 673 (1977); Cal. Health & Safety Code §§ 33122-33123. In situations where the City and the Agency are mutually involved in a redevelopment matter, they are clearly striving toward a common goal or purpose, such as the use of local property tax revenues to eliminate blight or provide affordable housing within designated redevelopment project areas throughout the City, in accordance with the requirements of the Community Redevelopment Law.[9] Given that these situations entail the collaborative efforts of the City and the Agency toward a common purpose in a manner required or envisioned by the Community Redevelopment Law, the interests of the two entities do not give rise to an actual or potential conflict for purposes of Rule 3-310(C).

This Office provides simultaneous representation of the City and the Agency in third party litigation, where both of those entities have been named as defendants (or respondents, in a

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[8] For example, in *People v. Christian*, 41 Cal. App. 4th 986 (1996), the appellate court rejected a claim that there was a disqualifying conflict of interest in a situation where one of the two defendants was represented by an attorney from the public defender's office and the other was represented by the alternate defender's office, even though both offices were under the supervision of one county public defender and the two defendants apparently did not provide informed written consent concerning this dual representation. The court approved the use of screening procedures between the two commonly-supervised offices as a suitable means to avoid a disqualifying conflict of interest. *Id.* at 1000. The court found "no evidence" that the use of screening procedures had been "ineffective in avoiding conflicts of interest between the [two offices]." *Id.* at 999. The court remarked that "'[s]peculative contentions of conflict of interest cannot justify disqualification of counsel.'" *Id.* at 1001-02 (citation omitted).

[9] Under the Community Redevelopment Law, the Council and the Agency Board are often required to jointly approve matters, such as: (i) actions necessary to amend an existing redevelopment plan; (ii) the disposition of publicly-owned real property to a private developer for monetary consideration that is not less than the fair market value or the fair reuse value of the property, in compliance with California Health and Safety Code section 33433; and (iii) the expenditure of redevelopment funds toward land acquisition costs or construction costs for publicly-owned buildings, facilities, or improvements, in compliance with California Health and Safety Code section 33445.

writ proceeding) and their interests in the litigation are closely aligned. It is common practice in the legal profession, whether in the public sector or private sector, for a single law office to represent multiple parties in the same legal proceeding where the interests of those parties are closely aligned. This approach enables the multiple clients to receive more efficient and less expensive legal services and to avoid unnecessary duplication of effort; it is often a significant cost-savings measure. There is plainly no conflict of interest under Rule 3-310(C) in this type of simultaneous legal representation because the interests of the City and the Agency remain closely aligned throughout the course of the legal proceeding.

As discussed in Part III.B.1 above, the courts have highlighted various special considerations as the basis for concluding that there is a relaxed standard for the analysis of conflict of interest applicable to public attorneys. Many of those special considerations are quite relevant in this instance. For example, the attorneys in this Office, unlike attorneys in the private sector, do not solicit work from clients and do not accept hourly fees or derive any personal financial benefit from the amount of hours billed to any particular client. Consequently, as in *Castro*, the attorneys in this Office have no obvious financial incentive to favor one client over another, and each attorney has every incentive to devote his or her entire efforts on behalf of the client. Moreover, the arrangement for dual representation of the City and the Agency enables this Office to provide more efficient and less expensive legal services on redevelopment matters compared to a situation in which all of the redevelopment legal work is outsourced to a private law firm.[10]

This Office has not been notified, and is not aware, of any specific situation in which the dual representation of the City and the Agency has caused any deficient, incompetent, or disloyal performance of legal services on behalf of either of those entities. The arrangement for dual representation of the City and the Agency is not only well-entrenched in San Diego (having been in place for at least forty years), but also is consistent with the common practice among public attorneys throughout California. In other words, it is typical for a single public law office, or a private law firm specializing in municipal law, to represent both a city or a county and its counterpart redevelopment agency. We are not aware of any ethical problems that have arisen as the result of this common practice in California. Moreover, we have not found any case law or other published opinions that question the ethical propriety of this common practice.

To paraphrase the court in *Castro*, the disqualification of this Office from performing legal work on behalf of the Agency would lead to only a speculative, unsubstantiated benefit to the City and the Agency, and the resulting significant increase in the cost of legal services being provided to the Agency would not be justified under the circumstances. To further paraphrase the opinion of the law school professor endorsed by the court in *Castro*, there is little to no reasonable likelihood of any ethical transgression stemming from the arrangement for dual representation, and therefore the arrangement should not be forbidden categorically. We are confident that this Office's established procedures in the arrangement for dual representation not only allow, but strongly encourage, attorneys in this Office to provide competent legal services

[10] The "fully-loaded" hourly rate attributable to the attorneys in this Office's redevelopment legal unit is substantially lower than the hourly rate charged to the Agency by outside special legal counsel on redevelopment matters. In addition, the attorneys in this Office are very familiar with the provisions of the San Diego Municipal Code, the City Charter, and other policies, regulations, and procedures of the City. This expertise often allows for a considerable savings of time and money in addressing legal issues on redevelopment matters that overlap into the policies, regulations, and procedures of the City.

to both the City and the Agency, free from personal bias or partiality. Consequently, we believe that it is neither proper, nor required under applicable ethical standards, for this Office to withdraw categorically from dual representation of the City and the Agency.

3. The Limited Situations in which the Courts Have Disqualified Public Attorneys from Representation of a Public Entity Client Are Not Applicable to the Present Situation.

There have been limited situations in which the courts have disqualified public attorneys from representation of a public entity client in a particular lawsuit, involving a successive representation scenario. For instance, in *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150 (1981), the Attorney General sued the State Personnel Board, the Governor and other state officers and agencies to compel them to ignore the employee relations statute because of its claimed conflict with the California Constitution. The California Supreme Court held that the Attorney General had a conflict of interest, enjoined him from proceeding and dismissed the case. The Court concluded that "the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients." *Id.* at 157.

In *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006), the city attorney, while in private practice, had previously represented the defendant company, which was being sued by the city in a matter substantially related to the city attorney's prior representation of the company. The California Supreme Court determined that there was a substantial relationship between the successive representations and that the city attorney had personally provided legal advice and services on a legal issue that was closely related to a legal issue in the litigation. On that basis, the Court disqualified the city attorney's office from representing the city in the litigation. *Id.* at 847. In a footnote, the Court reserved for later determination whether ethical screening might suffice to shield a senior supervisory attorney (as opposed to the head of the office) with a personal conflict. *Id.* at 850 n.2.

In *Civil Service Commission of the County of San Diego v. Superior Court*, 163 Cal. App. 3d 70 (1984), the County of San Diego (County) fired two employees, and the San Diego County Civil Service Commission (Commission) ordered their reinstatement. The County sued the Commission seeking to overturn the reinstatements. The county counsel's office had advised both the County and the Commission regarding the matter prior to litigation, and represented the County in the litigation. In response to a writ filed by the Commission, the appellate court disqualified the county counsel's office from representing the County in the litigation on the basis of a conflict of interest. *Id.* at 78. The court determined that an attorney-client relationship existed between the county counsel's office and the Commission (as a constituent sub-entity of the County) because the Commission possessed independent authority such that a dispute over the matter could result in litigation between the Commission and the County. *Id.* at 78. The court then determined that the county counsel's office faced a demonstrable conflict of interest because the office advised the Commission at an earlier stage and subsequently attempted to represent the County in litigation against the Commission. *Id.* at 80-81. The court was careful to limit its holding as follows: "[I]t 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." *Id.* at 83. The court also rejected the use of screening

procedures within the county counsel's office as a way to avoid conflicts of interest, particularly given the strong likelihood of a contentious dispute or litigation between the County and the Commission and the fact that the Commission had an ongoing relationship with the entire county counsel's office, including the office head. *Id.* at 81 n.5. In fact, the court questioned, in dicta (i.e., statements not essential to the outcome of the case), whether the county counsel's office should continue its practice of providing legal advisory services to both the County and the Commission in light of those same factors, as well as the fact that the office reported directly to the County's board of supervisors, not to the Commission. *Id.* at 78 n.1.

The situations in which the courts have disqualified public attorneys from representing clients in a particular matter due to a conflict of interest are factually distinguishable from the present situation. Those cases involved successive representation in a litigation context, rather than simultaneous representation in an advisory or transactional context (as is the circumstance with this Office's dual representation of the City and the Agency). Those cases also involved a very high potential of risk, due to a circumstance such as the contentious, litigious nature of the subject matter on which the public attorneys had provided legal advice (as in *Civil Service Commission*) or due to the fact that the public attorney in question was the head of the office and personally involved in the prior representation (as in *Deukmejian* and *Cobra Solutions*).

Unlike the above-cited cases, there is no legitimate risk that the City and the Agency will sue each other or become entangled in a hotly-contested dispute. Commencing with the formation of the Agency in 1958, we are not aware of any situation in which the City or the Agency have sued or even threatened to sue each other. It is very difficult to imagine a scenario in which such a lawsuit would occur, particularly because the filing of the lawsuit would need to be authorized by a majority vote of the Councilmembers, who serve collectively as the governing body for both the City and the Agency. Indeed, even if there might be a potential for conflicting interests in a given situation, the Councilmembers also would be subject to conflicting interests in light of their dual role on behalf of the City and the Agency. In any event, the advice that this Office routinely provides to the City and the Agency on redevelopment matters does not involve the type of inherently contentious situation at issue in *Civil Service Commission*. If that type of contentious situation or the threat of litigation arises at any point between the City and the Agency, then we will certainly evaluate whether our ethical obligations allow us to continue carrying out the dual representation of the two entities in that particular scenario. The court in *Castro*, however, emphasized that a hypothetical conflict scenario is irrelevant in the absence of actual facts demonstrating a conflict. No such facts exist here.

Additionally, this Office has not found any published opinion which disqualified public attorneys from providing simultaneous representation of multiple public entity clients in a particular situation, regardless of whether or not the situation involved a lawsuit. While the court in *Civil Service Commission* questioned (in dicta) whether the county counsel's office should continue its role as a legal adviser to both the County and the Commission, the court's rationale relied heavily on the key facts that the county counsel's office reported directly to the County's board of supervisors and that the office was providing legal advice on an inherently contentious subject matter with a strong likelihood of evolving into litigation between the County and the Commission.[11] As discussed above, the City and the Agency are governed by the same body

[11] Last year, this Office addressed *Civil Service Commission* in the context of recognizing that this Office "advises both the City's Civil Service Commission (the decision-maker) and the City Department imposing employee

(i.e., the Councilmembers), and there is not a contentious relationship between those two entities. To the contrary, the City and the Agency typically collaborate on many projects and activities toward the common objective of using local property tax revenue to facilitate their mutual efforts to achieve community revitalization.

It is also noteworthy that at least one out-of-state court, in Washington, has distinguished *Civil Service Commission* in refusing to disqualify a city attorney's office from providing simultaneous legal representation of both the city and multiple community councils that held the power to approve or disapprove certain city zoning ordinances. *Sammamish Community Municipal Corp. v. City of Bellevue*, 107 Wash. App. 686, 692-93 (2001). The court reasoned: "The community councils correctly point out that this case involves two independent governmental entities. However, in the context of this case and considering the interrelationship of the parties, this is a distinction without a difference." *Id.* at 693. The court also stated that "it is accepted practice for different attorneys within the same public office to represent different clients with conflicting or potentially conflicting interests so long as an effective screening mechanism exists within the office sufficient to keep the clients' interests separate." *Id.*

In summary, this Office's dual representation of the City and the Agency does not entail any of the risk factors that have prompted the courts, in limited situations, to disqualify a public attorney from providing legal representation to a public entity client in a particular matter due to an alleged conflict of interest.

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discipline (an advocate appearing before the decision-maker)." City Att'y MOL No. 2010-21 (Oct. 5, 2010), at 4 n.4. This Office observed: "Yet, the courts have also held that a single public law agency like the City Attorney's Office may advise both a Commission and an advocate department of the City, which have adverse legal interests, so long as the Office establishes appropriate ethical screening walls between advising attorneys." *Id.* (citing *Howitt v. Superior Court,* 3 Cal. App. 4th 1575, 1586 and n.4 (1992); *In re Charlisse C.,* 45 Cal. 4th 145, 162-166 (2008)). As explained in Part III.B.2 above, the implementation of ethical screening walls is not pertinent to the circumstance described in this Report.

CONCLUSION

For the reasons discussed above, there is no disqualifying conflict of interest associated with the respective dual roles of the Councilmembers, the Mayor, and the City Attorney's Office on behalf of the City and the Agency.

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