

October 12, 1994
REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

CONTRACTING OUT MISDEMEANOR PROSECUTION

At your meeting on August 3, 1994 Cynthia Vicknair, Legislative Specialist, presented Legislative Specialist Analysis PS&S 94-8 regarding Implementation of the Streamlining and Efficiency Program (STEP) and Change2 recommendations.

Under the subject of BUDGET (paragraph 6. on page 5 of the Report) appeared the following:

6. McCarty Proposal: "Issue an RFP to contract out the Misdemeanor Prosecution Unit and have the City Attorney's office submit its own proposal." (6/22/94 memo, page 4)

Recommended Committee Action: Direct the City Manager to prepare an RFP for Misdemeanor Prosecution and return it to the Committee for discussion on October 19, 1994.

Senior Chief Deputy City Attorney Stuart H. Swett indicated to the Committee that he believed the Charter of The City of San Diego required the City Attorney to prosecute misdemeanors committed in The City of San Diego that are not prosecuted by the District Attorney. The Committee requested a report from the City Attorney on Charter constraints on contracting out misdemeanor cases.

QUESTION PRESENTED

May the City Council authorize and direct the contracting out of misdemeanor prosecution services to private attorneys in The City of San Diego?

SHORT ANSWER

The City Council may not authorize the contracting out of misdemeanor prosecution services to private attorneys in The City of San Diego. Misdemeanor prosecution services must be provided by the City Attorney or the District Attorney under state law and the Charter of The City of San Diego.

I

STATE LAW AND THE CITY CHARTER AUTHORIZE THE
CONCURRENT JURISDICTION OF THE DISTRICT
ATTORNEY AND THE CITY ATTORNEY TO PROSECUTE
MISDEMEANORS OCCURRING WITHIN THE CITY OF SAN
DIEGO.

The California Government Code provides the statutory framework for

the delegation of prosecutorial duties:

The district attorney is the public prosecutor,
except as otherwise provided by law.

The public prosecutor shall attend the courts, and within
his or her discretion shall initiate and conduct on behalf of the
people all prosecutions for public offenses (emphasis added).
Gov. Code Section 26500.

California statutes provide for city attorneys to act in
conjunction with district attorneys in the prosecution of misdemeanors
committed within municipal boundaries:

With the consent of the district
attorney of the county, the city attorney of
any general law or chartered city within the
county may prosecute any misdemeanor
committed within the city arising out of
violation of state law (emphasis added)

. . . .

Gov. Code Section 41803.5

Section 41803.5 clearly satisfies the "except as otherwise provided by
law" language of section 26500. See Gov. Code Sections 26500 & 41803.5.
Consequently, in counties where the district attorney has proffered his
or her consent, city attorneys and their deputies have statutory
authority to prosecute misdemeanors committed within their
jurisdictions.

The District Attorney for the County of San Diego has consented to
prosecution of misdemeanors occurring within The City of San Diego by
the City Attorney. However, no statutory authority exists for private
attorneys to conduct criminal prosecutions and the District Attorney has
made no such authorization.

The California Government Code delineates the scope of authority to
be exercised by city prosecutors once the district attorney consents to
concurrent jurisdiction:

Whenever the charter of any city
situated within a district for which a
municipal court has been established . . .
provides that a deputy city attorney shall
act as city prosecutor, and charges such
prosecutor with the duty, when authorized by
law, of prosecuting misdemeanor offenses
arising out of violations of state laws, he
may exercise the following powers:

(a) He shall prosecute all such
misdemeanors committed within the city which
are within the jurisdiction of the municipal
court of the district in which such city is
located (emphasis added). . . .

Gov. Code Section 72193.

This section is illuminating for three reasons. First, section 72193 reaffirms that the actions of all public prosecutors must be authorized by state law. Second, section 72193 proclaims the mandatory duty of the city attorney, when so authorized, to prosecute all misdemeanors committed within the city limits. Third, section 72193 establishes the final procedural prerequisite to the concurrent prosecutorial jurisdiction of the district attorney and the city attorney; viz., the existence of a city charter provision so authorizing such concurrent exercise of jurisdiction.

The Charter of The City of San Diego does provide the basis for the delegation of prosecutorial authority to the City Attorney:

It shall be the City Attorney's duty, . . .
by such assistants as he or she may
designate, to perform all services incident
to the legal department; . . . to prosecute
for all offenses against the ordinances of
the City and for such offenses against the
laws of the State as may be required of the
City Attorney by law (emphasis added). . . .

Charter Section 40.

Charter Section 40.1 then provides:

The City Attorney shall have concurrent
jurisdiction with the District Attorney of
the County of San Diego to prosecute persons
charged with or guilty of the violation of
the state laws occurring within the city
limits of the City of San Diego for offenses
constituting misdemeanors.

Clearly, the combined application of Charter sections 40 and 40.1 satisfy the Government Code requirement that the City Charter authorize the concurrent jurisdiction of the District Attorney and the City Attorney to prosecute misdemeanor offenses. See Gov. Code Section 72193. Tellingly, neither the Charter of The City of San Diego nor the San Diego Municipal Code provide for the execution of prosecutorial authority by private attorneys. See generally Charter; San Diego Municipal Code.

II

CALIFORNIA STATUTES AND CASE LAW PRECLUDE THE DELEGATION OF PROSECUTORIAL DUTIES TO PRIVATE ATTORNEYS.

Nowhere in California statutes is provision made for the delegation of day-to-day prosecutorial duties to private attorneys. As such, the "except as otherwise provided by law" language of section 26500 precludes the delegation of misdemeanor prosecutorial duties to private attorneys.

In *People v. Municipal Court*, 27 Cal. App. 3d 193 (1972), the court addressed the danger of authorizing private attorneys to institute criminal proceedings:

Since all criminal proceedings must be brought in the name of the People of the State of California (Cal. Const., art. VI, Section 20), such procedure . . . has the potential for permitting any person in the name of the People of the State of California to redress a personal grievance by way of a criminal prosecution against his adversary.

Id. at 201.

The court went on to discuss the peculiar nature of a prosecutor's function and duties:

As concerns the enforcement of the criminal law the office of the district attorney is charged with grave responsibilities to the public. These responsibilities demand integrity, zeal and conscientious effort in the administration of justice under the criminal law. . . . *Taliaferro v. Locke*, 182 Cal.App.2d 752, 755-56 (1960).

The theme which runs throughout the criminal procedure in this state is that all persons should be protected from having to defend against frivolous prosecutions and that one major safeguard against such prosecutions is the function of the district attorney in screening criminal cases prior to instituting a prosecution.

People v. Municipal Court, 27 Cal. App. 3d at 206.

The court also cited with approval the American Bar Association hereinafter "ABA" Project on Standards for Criminal Justice, noting that the ABA recommended that the "prosecution authority should be vested in a public official." *Id.* at 207, n. 4. The court then quoted the ABA's rationale for such a recommendation:

The idea that criminal law, unlike other branches of the law such as contract and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of the charge gives greater assurance that the rights of the accused will be respected

....
Id., quoting ABA Project on Standards for Criminal Justice, Section 2.1 (commentary) (1971).

Finally, the court noted that the only legitimate avenues of infringement on the authority of a public prosecutor are (1) the removal of that prosecutor by the electorate, and (2) the constitutional authority of the Attorney General to supervise the public prosecutor. *People v. Municipal Court*, 27 Cal. App. 3d at 208. As such, held the court, by negative implication, not even the courts have the authority to modify the grant of authority to the public prosecutor by appointment of private attorneys to handle the prosecution of criminal matters. If a court does not have the power, absent the authorization of the State Legislature, to extend the prosecutorial power to private attorneys then, a fortiori, neither does the San Diego City Council.

CONCLUSION

For the foregoing reasons, without major changes to state law and the Charter of The City of San Diego, the contracting out of prosecutorial services to private attorneys would be illegal.

Respectfully submitted,
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City Attorney

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