

February 23, 1995
REPORT TO THE CIVIL SERVICE COMMISSION

LEGAL REPRESENTATION BY THE CITY ATTORNEY

At the February 9, 1995 monthly meeting of the Civil Service Commission, Commissioner Robert P. Otilie asked that the issue of City Attorney representation be discussed at the next regular scheduled meeting of the Commission. He indicated that at least two (2) employee organizations had expressed to him their concern that it appeared to be a conflict of interest for attorneys from the Office of the City Attorney to represent both the Commission and the appointing authority during disciplinary hearings.

This issue is not a new one for the Civil Service Commission. Nearly nine (9) years ago, this office responded to a similar allegation of conflict of interest from an attorney representing a city employee in a disciplinary hearing before the Commission. At that time we opined that the law in California permitted separate deputy city attorneys to represent both the Civil Service Commission and the appointing authority during disciplinary appeals. However, each attorney must independently represent each entity in a fair and proper manner consistent with the general rules of ethical and professional behavior. That advice was recently ratified by the Fourth District Court of Appeal in *Howitt v. Superior Court*, 3 Cal. App. 4th 1575 (1992), where the court upheld a similar practice by the County Counsel of Imperial County.

The issue is, of course, a sensitive one. The court in *Howitt* firmly believed that it is incumbent upon the governmental agency providing the attorneys to ensure that the attorneys are screened properly to avoid any particular impropriety. As indicated in the attached Memorandum of Law, dated April 30, 1986, to Rich Snapper, Personnel Director, the Office of the City Attorney has had a screening policy in effect for many years to ensure that the attorney representing the Commission has no potential involvement in, or responsibility for, the preparation or presentation of the case before the Commission. In fact, under normal circumstances, the attorneys in disciplinary hearings before the Commission, are assigned to different divisions of the office and report to different supervising attorneys.

As you are aware, pursuant to San Diego City Charter section 40, the City Attorney of San Diego, an independently elected official, is charged with providing legal advice to the City Council and its Committees, the Manager, Boards and Commissions, and Directors of City

departments. The drafters of the 1931 City Charter ensured that the City Attorney ultimately reported, not to the Mayor and Council nor the City Manager, but to the voters. By making the office an elected one, its independence was ensured.

Under current law, only the City Council may authorize funds for additional counsel, and then only when it is necessary under the express provisions of Charter section 40. For example, there may arise occasions in the future when a specific legal conflict precludes the City Attorney from representing the Commission, such as when the City Attorney is the responding appointing authority before the Commission. Otherwise, as indicated in City Attorney Opinion 86-8, of December 22, 1986 (attached), as long as the City Attorney is ready, willing and qualified to represent the Civil Service Commission, the Charter requires him to do so, and the Council may only expend funds to pay for outside counsel when it becomes necessary because of the disqualification of the City Attorney's Office, or the inability or refusal of the Office to perform.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachments

cc Mayor and Council

City Manager

RC-95-7