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MEMORANDUM OF LAW

DATE: October 5, 2010

TO: Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Advising the Mayor and City Council: The City Attorney's Client

INTRODUCTION

During the City of San Diego's trial period of a Mayor-Council ("Strong Mayor") form of governance, some officials suggested that the Office of the City Attorney may have a conflict of interest in advising both the Mayor and the City Council in the new City structure. Voters approved this as the City's form of governance in June, 2010. We take this opportunity to explain why this Office is not conflicted when it meets its Charter-required duties to provide legal advice to the City Council and the Office of the Mayor, even though those officials may have conflicting policy views. In addition, we address whether City Offices or Departments may retain attorneys to provide advice, or to accept advice from attorneys serving in other staff positions, separately from the advice provided by the City Attorney.

QUESTIONS PRESENTED

1. Does the City Attorney have a conflict of interest in advising both the Mayor and the City Council?
2. May the Mayor and City Council retain, or employ as staff, attorneys to provide them with legal advice independent of the City Attorney?

SHORT ANSWERS

1. No. The City Attorney's client is the City of San Diego. The City Attorney has no conflict of interest in advising both the Office of the Mayor and City Council. Those offices are constituents of the municipal corporation.

2.No. The San Diego Charter does not permit City Offices or Departments to retain, or to employ as staff, attorneys to provide them with legal advice independent of the City Attorney.

ANALYSIS

I. THE CITY OF SAN DIEGO IS THE CITY ATTORNEY'S CLIENT.

The conduct of public lawyers in California, like the conduct of all other attorneys licensed to practice in the state, is governed by a combination of laws, court opinions, the California Rules of Professional Conduct (CRPC), and California state and local bar opinions. The City Attorney and his or her legal staff is no exception, and their conduct is also generally governed by the CRPC. *Ward v. Superior Court*, 70 Cal. App. 3d 23, 30 (1977). It is to their clients that all attorneys owe certain duties: a duty of confidentiality, requiring the attorney to maintain client confidences; and a separate duty of "undivided loyalty." Cal. Bus. & Prof. Code § 6068(e); *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 846 (2006); *Flatt v. Superior Court*, 9 Cal. 4th 275, 282 (1994). Ethical conflict of interest laws and court opinions seek to protect these duties and to prohibit attorneys from representing separate *clients* who have legally adverse interests. *See e.g.* CRPC, Rule 3-310(C), (E).¹ However, as we shall see, these ethical rules acknowledge that the Mayor and City Council (and most other City officials) are not separate clients of the City's attorney. Accordingly, the City Attorney has no conflict of interest in providing legal advice to these City officials.

The City of San Diego is a municipal corporation. San Diego Charter § 1. The City Attorney, as the title of the Office suggests, is the corporate city's attorney. The Charter requires the City Attorney and his or her deputies to "devote their full time to the duties of the office," which means the City is the sole client of the City Attorney.

The Charter specifically requires the Office of City Attorney to perform multiple functions for the City, including providing legal advice. "The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties . . ." San Diego Charter § 40.² The Attorney and office legal staff must "perform all services incident to the legal department; . . . give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department . . . ; [and] prosecute or defend, as the case may be, all suits or cases to which the

¹ CRPC, Rule 3-310(C) 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." CRPC, Rule 3-310(E) provides: "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

² The only City department given express authority to hire separate counsel to advise it is the City's Ethics Commission, "which shall have its own legal counsel independent of the City Attorney." *Id.*

City may be a party” *Id.* In addition, they must “prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness . . . ;” and “perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State.” *Id.* The advisory function is provided though the Civil Division of the Office.³

The duties and functions required of the City Attorney are like those performed by corporate counsel. They are imposed upon the City Attorney by law — the Charter. The City’s structure is corporate in nature, with the City Council and its members acting as the corporate board of directors, and the Mayor serving as the organization’s “chief executive officer.” San Diego Charter § 265(b)(1). Case authority and the CRPC establish that the City Attorney’s client is the entity of the City of San Diego, just as corporate counsel’s client is the corporation. *Ward*, 79 Cal. App. 3d at 32. The CRPC require California attorneys who represent such organizations to “conform [their] representation to the concept that the client is the organization itself.” CRPC, Rule 3-600(A). Accordingly, and in almost all circumstances, the City of San Diego is the client of the City Attorney and the entity to which the Attorney owes the duties of loyalty and confidentiality.

II. THE CITY ATTORNEY HAS NO CONFLICT OF INTEREST IN ADVISING BOTH THE MAYOR AND THE CITY COUNCIL.

The City Attorney’s relationship with City officers is analogous to the relationship between officers of a corporation and corporate counsel. *Ward*, 70 Cal. App. 3d at 32. As explained in more detail by the California State Bar Association in a formal opinion issued in 2001, the Office of the Mayor and the City Council represent component parts of a City’s corporate entity. That relationship does not make these City Officers the City Attorney’s separate clients. Accordingly, rules prohibiting an attorney from representing clients with adverse interests do not apply. Op. Cal. State Bar 2001-156 (attached).

The State Bar Opinion addressed the not-uncommon situation occurring when different City constituents have differing views on policy matters requiring legal advice. In the situation reviewed, the City Attorney had provided advice to the City Council that it would be lawful to enact an ordinance to borrow certain funds. The Mayor, who had veto authority over the ordinance, asked for and received the same advice from the City Attorney. The Mayor disagreed with the advice provided, asserting that the City Attorney was conflicted in advising both the City Council and the Mayor.

³ Charter Section 40 also places criminal prosecution responsibilities upon the Office. *See also* San Diego Charter § 40.1. Those responsibilities, and the responsibility to represent the City in civil litigation, are not the subject of this memorandum.

The State Bar held:

The charter . . . requires the city attorney to provide advice on legal questions to the mayor and city council. It therefore contemplates no conflict in these roles. The charter is a legislative enactment which reflects a policy determination that a single city attorney is responsible for all legal matters involving the city and that the city is a single municipal corporation with responsibility for its operations divided among various officers, none of whom is given the power to act independently of the city. As a result, 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 proposed ordinances, because neither had the potential to become the city attorney's client against the other. The city attorney does not represent the city council or the mayor; in advising the council and the mayor, the city attorney represents the municipal corporation as an indivisible unit. There is no attorney-client relationship formed with the component parts, because the component parts cannot function as independent entities under the City . . . charter. Op. Cal. State Bar 2001-156.⁴

The situation is the same in San Diego. Charter section 40 tasks the City Attorney with providing advice to *all* City Departments and officials, perceiving no conflict in those roles. The City's new Mayor-Council form of government expressly contemplates no change to the "powers conferred upon the City Attorney in Charter section 40" San Diego Charter § 265(b)(2). The Charter does not give the City Council or the Mayor the independent right to sue the City. Nor should it. They are each component parts of an indivisible municipal corporation. Neither are they separate clients of the City Attorney. Accordingly, the Office of the City Attorney does not have an ethical conflict of interest in fulfilling its Charter-required duties to provide legal advice to both the Mayor and the City Council on any and all City matters.

⁴ The State Bar also opined that a separate attorney-client relationship *could* develop between a government attorney and a constituent sub-entity or official, if that constituent had the legal authority to act independently of the main entity. We see this in San Diego, for example, in the City Attorney's relationship with the City's Civil Service Commission. The City Attorney's Office advises both the City's Civil Service Commission (the decision-maker) and the City Department imposing employee discipline (an advocate appearing before the decision-maker). The Commission is a separate entity which can sue or be sued. Courts have found these Commissions to have an attorney-client relationship with their public lawyers. *Civil Service Comm'n v. Superior Court*, 163 Cal. App. 3d 70, 81 n.5 (1984); also *People ex. rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 156 (1981) (State Personnel Board was client of Attorney General). 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. *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 1586 and n.4 (1992); see also *In re Charlissee C.*, 45 Cal. 4th 145, 162-166 (2008).

III. THE CONFIDENTIALITY OF ATTORNEY COMMUNICATIONS WITH CITY CONSTITUENTS.

California attorneys are generally required to maintain their client confidences and to keep client secrets from external sources in the absence of client authorization. Cal. Bus. & Prof. Code § 6068(e); *also* CRPC, Rule 3-600(B). However, attorneys representing municipal corporations, such as the City Attorney, must necessarily present some of their advice in a public forum, in response to other laws governing public agencies. For example, if the City Council or one of its Committees publicly requests the City Attorney's legal analysis of a matter before it, the analysis will generally be provided in a public forum, and available to the public and other City constituents as required by the Ralph M. Brown Act. Cal. Gov't Code §§54950-54963. There are exceptions to the Brown Act, which permit the legal advice to be provided during a closed session of the Council, when the matter may involve litigation. Cal. Gov't Code §54956.9(b). The Mayor, who may attend and preside over such closed sessions, would also be privy to such advice, but the public would not have access to that advice.

In addition, it is not always necessary for the City Attorney to share with all members of the organization, or the public, the advice provided to individual City officers or departments, who are not governed by the Brown Act. For example, this Office may initially provide confidential legal advice to individual Councilmembers, the Mayor or other City officials, on the operation of their various departments, or policy ventures they are considering, without sharing that information with others who may have differing policy views, or with the public. However, if the constituent receiving the advice chooses to pursue the matter, this Office would necessarily provide consistent advice to others who play a role in the final decision-making process, including any advice pointing out potential legal flaws. We do so because the City Attorney's ethical duties are to the client—the City entity as a whole.

IV. RETENTION OF SEPARATE COUNSEL: ADVICE FROM LAWYERS IN NON-LAWYER STAFF POSITIONS.

This Office has previously opined that the Mayor and City Council have no lawful authority to retain outside attorneys to provide them with legal advice independent of the City Attorney, except as permitted by the Charter, or when the City Attorney has a conflict of interest. City Att'y MOL No. 2009-11(Nov. 4, 2009); 1977 City Att'y MOL 283 (Nov. 10, 1977). We incorporate those opinions here.

A separate question may arise whether an attorney hired in a staff position *other than as an attorney* may nonetheless provide legal advice to that office or department. We think not.

The Charter permits persons to be employed in *temporary* positions to provide “expert professional” services when the Civil Service Commission orders such employment “for a specified period of temporary service.” San Diego Charter § 117(a)(15). But that authority does

not permit a contract or agreement for permanent employment by a City department that is outside the framework of City structure and that may conflict with other Charter requirements. *See Hubbard v. City of San Diego*, 55 Cal. App. 3d 380, 390 (1976). In addition, the section may not be interpreted to permit City employees employed in *other* capacities to provide *legal* advice or services to a City Office or Department independent of the City Attorney. Such actions would conflict with the express responsibility given to the City Attorney to provide legal advice to “all” City offices and Departments, except the City Ethics Commission. San Diego Charter § 40. The word “all” is not ambiguous. If the City Attorney must provide legal advice to *all* City Departments, there is no room for others to provide legal advice independent of the City Attorney to any City Department or Office. *See Dadmun v. City of San Diego*, 9 Cal. App. 549, 550-551(1908) (Charter officer given responsibility to perform “all” of a task, leaves nothing of that task for others to perform).⁵

When a City Office or Department requires expert legal assistance which this Office cannot provide, we do not hesitate to seek that expertise to assist us in our duties. *See City Att’y MOL No. 2009-11*(Nov. 4, 2009). But such attorneys must necessarily work under the supervision of the City Attorney and in the best interests of the City, not the interest of any individual City Department or Office.

The role of the City Attorney within the City structure is designed and authorized by the Charter. It permits the City to speak with a single voice on legal issues, and avoids the extraordinary taxpayer expense which would occur if every City Department could hire attorneys to represent their own view of the City’s interest. In addition, the courts recognize that a single public law office handling all or most legal matters for an agency reduces the potential that litigation decisions may be governed by financial rather than public interest concerns, and avoids the increased public costs that can be incurred in hiring multiple private attorneys to handle public functions. *See In re Charlisse C.*, 45 Cal. 4th at 162-166, citing *City of Santa Barbara v. Superior Court*, 122 Cal. App. 4th 14, 24-25 (2004) and *People v. Christian*, 41 Cal. App. 4th 986, 998 (1996).

CONCLUSION

The Office of the City Attorney has no ethical conflict in fulfilling its Charter-required duties to provide legal advice to the City Council and the Office of the Mayor. The City Attorney’s client is the City of San Diego. City officials may have conflicting policy views, but that does not create a conflict of interest for the City Attorney, or his or her deputies, in providing advice to

⁵ In addition, any employee providing such legal advice might be acting unlawfully under the City Charter. No employment description or contract term could lawfully encompass such services under the Charter. And the City’s Chief Financial Officer may not issue payroll checks which are not “legally due and payable.” San Diego Charter § 82, *also* § 39. Any willful and continued payment or receipt of such salary to anyone for unauthorized services might be considered an unlawful appropriation of public moneys without authority of law. *See* Cal. Penal Code § 424(a)(1).

Mayor and
City Councilmembers

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these constituents of the City of San Diego.

Various City Offices and Departments may not retain attorneys to provide advice, nor may they seek or accept advice from attorneys who may be serving in other City staff positions, independent from advice provided by the City Attorney.

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By _____

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