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**MEMORANDUM OF LAW**

**DATE:** August 12, 2011  
**TO:** Honorable Mayor and City Council  
**FROM:** City Attorney  
**SUBJECT:** Retention of Outside Legal Counsel

**INTRODUCTION**

On November 4, 2009, the City Attorney issued Memorandum of Law No. ML-2009-11 which set forth the standards and procedures regarding outside legal counsel. Since then, questions have arisen necessitating clarification to the procedural aspects of retaining outside counsel. This memorandum supplements Memorandum of Law No. ML-2009-11.

**QUESTION PRESENTED**

If the City Council authorizes the retention of outside counsel, must the Council approve the legal services contract?

**SHORT ANSWER**

No, if the payment for legal services under the contract does not exceed \$250,000 in a given fiscal year.

**DISCUSSION**

**I. SAN DIEGO CHARTER RESPONSIBILITIES OF THE CITY COUNCIL, MAYOR, AND CITY ATTORNEY**

Subject to the terms of the Charter of the City of San Diego (Charter) and the Constitution of the State of California, the City Council is vested with all legislative powers. Charter § 11. Legislative acts include enacting ordinances or local laws, adopting resolutions, fixing of officers' and employees' compensation, and determining the value of land to be exchanged. 4 McQuillan, Mun. Corp. § 13.4, pp 1089-1090 (3rd ed. rev. 2011). The City Council

may not delegate its legislative power. Charter § 11.1. It may, however, delegate specific administrative powers. *AB Cellular LA, LLC, et al. v. City of Los Angeles*, 150 Cal. App. 4th 747, 765 - 765 (2007).

Conversely, the Mayor is recognized as the chief executive officer to provide the administrative, executive, ministerial or proprietary municipal functions. Charter § 265; *see also* Charter § 28. Such functions include executing and enforcing all laws, ordinances, and policies of the City and employing experts or consultants to perform work or give advice when such work or advice is necessary.<sup>1</sup>

Additionally, the Charter requires the City Attorney to be the chief legal advisor and attorney for the City and all its departments and offices. As previously explained, the City Council does not have the power to retain its own attorney but has limited authority to retain outside counsel “when the City Attorney’s office does not have the expertise or needed personnel to handle the matter.” 1977 City Att’y MOL 283, 284 (Nov. 10, 1977). To deem the City Council as having this sole power to retain outside counsel or to delegate sole authority to the Mayor would “displace[] the City Attorney from his [Charter mandated] function as Chief Legal Officer of the City.” *Id.*

## **II. RETENTION OF AND CONTRACTING FOR LEGAL SERVICES OF OUTSIDE COUNSEL**

Under Charter section 40, therefore, the City Attorney would determine whether his Office has the expertise or needed personnel to handle a certain legal matter. Upon determination by the City Attorney that his Office does not have the expertise or personnel required, the City Council’s limited authority arises. City Att’y MOL No. 09-11 (Nov. 4, 2009); 1977 City Att’y MOL 283, 284 (Nov. 10, 1977). Based on a determination by the City Attorney, the City Council would decide<sup>2</sup> whether to authorize retention of outside council.<sup>3</sup>

Once the City Council has authorized the retention of outside counsel,<sup>4</sup> the City Attorney would draft the legal services contract. Charter section 40 (“It shall be the City Attorney’s duty . . . to prepare . . . contracts . . .”). Once drafted, in accordance with his administrative role, the Mayor or his designee would execute the contract on behalf of the City so long as the

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<sup>1</sup> The Mayor has authority to retain consultants under contracts which may not exceed \$250,000. Contracts over \$250,000 in a fiscal year must receive City Council approval. San Diego Municipal Code § 22.3223.

<sup>2</sup> Such action is consistent with California Rule of Professional Responsibility 3-700 which requires that “[a] member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client . . . [and] allowing time for employment of other counsel . . . .”

<sup>3</sup> This is distinguished from the circumstance where the Office of the City Attorney would contract with another attorney as an expert. In this instance, the City Attorney would continue to serve as the Chief Legal Officer; the “contracting attorney” is merely serving as a consultant to the Office of the City Attorney. Thus, no Council action to authorize retention of outside legal counsel under Charter section 40 would be required. *See also*, City Att’y MOL No. ML-08-1 (Feb. 11, 2008).

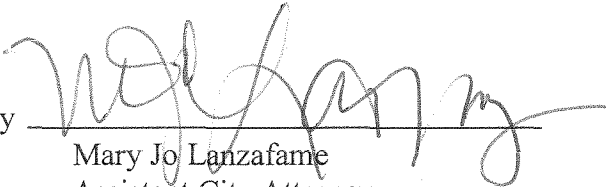
<sup>4</sup> The City Council can delegate, by ordinance, the decision to retain outside counsel so long as the City Attorney is not displaced from the process of initially determining the need for outside legal counsel.

contract amount does not exceed \$250,000. San Diego Municipal Code § 22.3223. Otherwise, the City Council would authorize retention of outside counsel *and* approve the contract, similar to other contracts that have come before the Council in excess of \$250,000. The City Attorney would continue to manage and control outside counsel.<sup>5</sup>

### CONCLUSION

Retention of outside counsel under the Charter contemplates a two step process. The City Attorney must first determine whether his Office has the expertise or needed personnel. If not, the City Council would authorize retention of outside counsel. Depending on the price term of the legal services contract, the Mayor or City Council would approve the contract. In most cases, the outside counsel would work through and with the Office of the City Attorney.

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<sup>5</sup> A similar two step process would occur where the City Attorney determines his Office has an actual conflict of interest, except that the Mayor's Office would play a greater role in overseeing the contract. *See* 1977 City Att'y MOL 283, 284 (Nov. 10, 1977).