Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: August 8, 2016

TO: Sharmaine Moseley, Executive Director, Citizens' Review Board on Police Practices

FROM: City Attorney

SUBJECT: Response to San Diego County Grand Jury Report Entitled "Citizen Oversight Boards of Police Behavior"

In Finding 02 of the Grand Jury Report filed May 25, 2016, as it relates to the City of San Diego's Citizen Review Board on Police Practices (CRB), the Grand Jury states that "[u]sing the City Attorney as legal counsel to CRB while also defending SDPD represents a potential conflict of interest." This finding is apparently based on the fact that the Office of the San Diego City Attorney (City Attorney) legally advises the CRB and defends the San Diego Police Department (SDPD) (Grand Jury report at page 6). As a consequence, the Grand Jury recommended that independent counsel be provided by the City of San Diego (City) to legally advise the CRB.

The Grand Jury's recommendation to retain independent counsel is not necessary under California law. Providing legal advice to multiple departments and boards that are components of a public entity such as the City, does not constitute a conflict of interest under either the City's Charter or California law.

The San Diego Charter (Charter) is the governing law of the City. The Charter is the City's constitution, and the City, acting through its officers and employees, must comply with it. *Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977); *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (1988).

Charter section 40 provides in pertinent part that:

> 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' except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney.

It also provides that:

> It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the City Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party . . . .

This Charter language is clear and unambiguous in, amongst other duties, requiring the City Attorney to be the chief legal advisor to the City and all departments and offices thereof, except the Ethics Commission. It also requires the City Attorney to provide written legal advice, when requested, to the City Council, its Committees, the Manager, the Commissions, or the Directors of any department. This includes the CRB as a City Board. Further, it requires the City Attorney to defend all suits in which the City is a party. In compliance with the Charter, the City Attorney's Office has always provided legal representation to the CRB, and both advised SDPD and defended the City in civil litigation alleging wrongdoing by SDPD.

The exception to this requirement under the Charter that the City Attorney provide legal representation to the CRB (or any other City department or Board) would be wherein the City Attorney determines there is an actual conflict of interest in doing so. The City Attorney's Office has previously advised in public memoranda that "[t]he only exception to the rule that the City Attorney shall serve as the lawyer for the City, its departments, officers and employees would occur when some kind of conflict of interest exist[s] to incapacitate the City Attorney." 2009 City Att'y MOL 255 (2009-11; Nov. 4, 2009); *see also* 1977 City Att'y MOL 283 (Nov. 10, 1977) (attached hereto).

The mere fact that the City Attorney advises both the CRB and both advises and defends SDPD does not equate to an actual or potential conflict of interest. The City Attorney's Office in public memoranda has advised that a public entity like the City is necessarily made up of constituents or components such as the Mayor, Council, Committees, City departments, boards and commissions, and the provision of legal services to each and all do not equate to a conflict. 2010 City Att'y MOL 392 (2010-21; Oct. 5, 2010); 2009 City Att'y MOL 255 (2009-11; Nov. 4, 2009) (attached hereto).

The California State Bar, in addressing a case involving a charter city with a similar charter provision to section 40 of the City's Charter that requires its City Attorney to legally advise differing city officials, held:

> The charter . . . requires the City Attorney to provide legal 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 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 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.

CA Eth. Op. 2001-156 (Cal. St. Bar. Comm. Prof. Resp.).

Likewise, the City is a Municipal Corporation made of many components, including the CRB and the SDPD. The provision of legal advice and services to one or several of these components does not equate to conflict of interest. If it did, the City would have to retain independent or different attorneys for every Councilmember, the Mayor, each City committee and each of the various boards and commissions of the City.

This conclusion is not altered by the type of legal services provided, whether advisory or litigation defense. Charter section 40 requires the City Attorney to do both. It recognizes no inherent conflict in doing so. In analyzing whether a conflict of interest exists, the types of legal services provided to one client is not relevant. Rather, whether a conflict exists is dependent upon the existence of competing or adverse interests in representing multiple clients. The Charter recognizes (as the State Bar does) that the City of San Diego as a public entity is the client, not the constituent departments, boards or officials. While the City Attorney provides legal services (including the provision of legal advice and defense of litigation) to all City departments, boards and officials, he or she is doing so in representing the City as the client made up of constituent parts. As City departments, boards and officials cannot function as independent entities under the Charter, there can be no dual, competing or adverse interests of multiple clients. It is the City of San Diego that is the client of the City Attorney. The CRB and SDPD are not the clients, but rather components of the client the City of San Diego.

Even though there is not an inherent conflict of interest in providing legal services to various subsets or components of the City, to avoid the appearances of a conflict and to prevent any actual conflict of interest from arising, the City Attorney insures that the attorneys who advise the SDPD do not advise the CRB and further, are walled off from those attorneys who advise the CRB. Further, those attorneys who advise the SDPD and those that advise the CRB do not defend lawsuits against the City premised upon allegations of police misconduct.

The City Attorney's Office has been providing legal services to the CRB since it was created 28 years ago without the existence of an actual conflict of interest. In the unlikely event in the future that an actual conflict of interest arises under governing law as determined by the City Attorney, at that time the City Attorney will seek the retention of outside counsel.[1]

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ William Gersten
William Gersten
Deputy City Attorney

WG:ccm:jdf
MS-2016-26
Doc. No.: 1304406_3
cc: David Graham, Deputy Chief Operating Officer

[1] The City has recently budgeted a sum for this purpose.

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MEMORANDUM OF LAW

DATE: November 4, 2009

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Standards and Procedures Regarding Outside Legal Counsel

INTRODUCTION

In recent years, the City of San Diego has increasingly relied upon outside legal counsel in both advisory and litigation roles. Although there is a need for outside counsel in certain circumstances, policy makers have also expressed a strong desire to limit the use of outside counsel as much as possible.

This Memorandum of Law reaffirms and updates an opinion rendered by former City Attorney John Witt dated November 10, 1977, and sets forth the standards and procedures regarding the use of outside legal counsel.

QUESTIONS PRESENTED

1. May the City Council or Mayor retain outside counsel to provide legal opinions or other legal services beyond those provided by the City Attorney?

2. What is the procedure for retaining and supervising outside counsel?

SHORT ANSWERS

1. The City Council may retain outside counsel subject to the limitations set forth in San Diego Charter section 40. There is no corresponding Charter authorization for the Mayor.

2. The City Council is authorized to hire outside counsel when the City Attorney determines that his office does not have the expertise or needed personnel to handle the matter or is conflicted. The private outside attorneys would work through and with the City Attorney's Office except where the office is conflicted.

DISCUSSION

I. Standards for Retaining Outside Legal Counsel

A. City Council Authority

The Charter of the City of San Diego [Charter] section 40 states that the City Attorney is the chief legal advisor and attorney for the City and all its departments and offices. The City Attorney's duties may be performed either personally "or by such assistants as he or she may delegate." The City Council has limited authority "to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith." Charter section 40.

In a Memorandum of Law dated November 10, 1977, City Attorney John Witt addressed the question of general standards and procedures regarding outside legal counsel. 1977 City Att'y MOL 283. Attached as Exhibit A. City Attorney Witt opined that the "Council does not have the power to retain its own attorney" but has limited authority to hire outside legal counsel "when [the City Attorney's] office does not have the expertise or needed personnel to handle the matter." *Id.* at 284. In those limited circumstances where outside legal counsel is retained, the City Attorney emphasized that they must "work through and with this office." *Id.* at 284. The City Attorney's 1977 opinion remains an accurate statement of the law.

In explaining his reasoning, City Attorney Witt relied on the plain meaning of the Charter and the policy behind it:

> One of the important checks and balances, established by the original draftsman of our Charter, was establishment of an elected City Attorney, an independent officer, not subject to direct control by the City Council, except in the traditional budgetary sense. *Id.*

"The only exception to the rule that the City Attorney shall serve as the lawyer for the City, its departments, officers and employees would occur when some kind of conflict of interest exist[s] to incapacitate the City Attorney." *Id.* at 285. Mr. Witt emphasized, however, that the "contingency of a conflict of interest" is not a sufficient basis for hiring outside counsel. In other words, there must be an actual conflict of interest in the matter before the City. *Id.*

B. Mayoral Authority

Although Charter section 40 authorizes the City Council to hire outside counsel in limited circumstances, the Charter does not expressly authorize the Mayor to do the

same. It has been suggested that the Mayor may retain outside legal counsel given his authority under San Diego Municipal Code section 22.3223. This section states in relevant part, that *"[e]xcept as otherwise provided by Charter* . . . the City Manager[1] may enter into a contract with a Consultant to perform work or give advice without first seeking Council approval provided that . . . the contract and any subsequent amendments do in does not exceed $250,000 any given fiscal year." SDMC section 22.3223 (emphasis added). "Consultant" is broadly defined so that it could include professional legal services.

Notwithstanding the seemingly broad authority granted by Municipal Code section 22.3223, we must determine whether the Mayor's authority extends to legal services contracts in light Charter section 40. "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs". *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949). In applying this principle, we next employ the rules of charter construction, to ascertain and effectuate intent. *City of Huntington Beach v. Board of Administration*, 4 Cal. 4th 462, 468 (1992). Thus, "[w]e first look to the language of the charter, giving effect to its plain meaning." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 172 (1995) (citations omitted). Where the words of the charter are clear, courts will not condone adding or altering them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. *Id.*

In this instance, the language of Charter section 40 is clear—the Council alone has the authority to enter into contracts for certain legal services. To construe Municipal Code section 22.3223 and its associated defined terms to include legal service contracts would alter the plain meaning of Charter section 40 and effectuate a purpose that does not appear on its face. Charter section 40 was intended to limit and restrict the City's overall ability to contract for outside legal services.

Municipal code provisions that conflict with charter provisions are void. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1995) (citations omitted). The Council cannot change the effect of the Charter. *Marculescu v. City Planning Commission*, 7 Cal. App. 2d 371, 374 (1935). Similarly, the Council may not delegate its legislative powers or responsibility which it was elected to exercise. Charter section 11.1. *See also* 4 McQuillan, Mun. Corp. section 13.03 (3rd ed. revised 2002), Powers of Council (a local legislative body cannot extend its powers by ordinance beyond the limits prescribed by the Charter).

To interpret Municipal Code section 22.3223 as Mayoral authority to retain outside attorneys without Council authorization would change the effect of the Charter

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[1] All executive authority, power and responsibilities conferred upon the City Manager shall be transferred to, assumed and carried out by the Mayor. Charter section 260(b). All Charter references to the City Manager hereafter will be to the Mayor.

and cause section 22.3223 to be void. It would also constitute an improper delegation of legislative authority.

The Council intended to *limit* the City Manager's authority under Municipal Code section 22.3223. In harmony with Charter section 40, it authorized the City Manager to enter into a contract with a consultant, *except as otherwise provided by Charter*. The language in Charter section 40 restricting contractual authority to the City Council is one such exception.

Finally, the Charter provision creating the "Strong Mayor" form of government states that "[n]othing in this section shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1." Charter section 265(b)(2). Charter section 265(b)(2) further confirms voter intent not to expand the powers conferred under Charter section 40.

II. Procedure for Retaining and Supervising Outside Counsel

As the City's chief legal advisor, the City Attorney has an obligation under rules of professional responsibility governing the conduct of attorneys to identify circumstances under which the City Attorney's Office has inadequate expertise or personnel to handle a legal matter. California Rule of Professional Responsibility 3-110 [Rule 3-110] states:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
>
> (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
>
> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

As noted in the official comments to Rule 3-110, the Rule imposes the duty to supervise the work of subordinate attorney and non-attorney employees or agents. *See, e.g.*, *Waysman v. State Bar*, 41 Cal. 3d 452 (1986); *Trousil v. State Bar*, 38 Cal. 3d 337, 342 (1985); *Palomo v. State Bar*, 36 Cal. 3d 785 (1984); *Crane v. State Bar*, 30 Cal. 3d 117, 122-123 (1981); and *Black v. State Bar*, 7 Cal. 3d 676, 692 (1972)

In determining whether the office has inadequate expertise or personnel to handle a particular legal matter, the City Attorney should evaluate all the circumstances of the legal matter, review the manner in which comparable legal matters were handled, consult with

attorneys in the office, and receive input from City personnel. The City Attorney's obligation to make this determination is a professional responsibility under the Charter and Rule 3-110 and may not be delegated to others. *See*, Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties, 70 Notre Dame L. Rev. 259 (1994).

As set forth above, the City Attorney has the obligation under Rule 3-110 to identify circumstances under which the City Attorney's Office has inadequate expertise or personnel to handle a legal matter. Accordingly, the City Attorney *must* initiate the retention of outside legal services once he concludes that the office has inadequate expertise or personnel to handle a legal matter. This is not only consistent with the Charter, but the City Attorney's obligation under Rule 3-110.

Conversely, under Charter section 40, absent an *actual* conflict of interest by the City Attorney's Office, outside legal services may not be retained without a determination that the City Attorney's Office has inadequate expertise or personnel to handle a particular matter. Accordingly, the City Attorney *may not* initiate or approve a request to retain outside legal services absent that determination. Consistent with this obligation, the City Attorney may not approve any contract for outside legal counsel absent this determination. *See* Charter section 94 ("All contracts before execution shall be approved as to form and legality by the City Attorney.")

Assuming the City Attorney determines that the office has inadequate expertise or personnel to handle a legal matter, the City Attorney is obligated to advise the Mayor and City Council consistent with Rule 3-110(c), which provides:

> If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Accordingly, the Mayor and City Council have two options to consider. First, the City could retain outside legal counsel to handle the matter in association with the City Attorney's Office. Second, the City Attorney's Office could acquire the necessary expertise or personnel to handle the mater.

Upon retention of outside legal counsel, the City Attorney continues to have a professional responsibility under Rule 3-110 to ensure the competent delivery of legal services. This obligation does not end with retention of outside counsel. *See Moore v. State Bar*, 62 Cal. 2d 74 (1964). Outside legal counsel must work through and with the Office of the City Attorney. 1977 City Att'y MOL at 284. The City Attorney should manage and control outside counsel. *The Use and Control of Outside Counsel* at *26-29*. Accordingly, contracts retaining outside legal counsel must make that stipulation clear except in cases where the City Attorney's Office is conflicted.

CONCLUSION

Charter section 40 allows the City Council to retain outside counsel upon the City Attorney's determination that the office does not have adequate expertise or personnel to handle the particular matter. Where the City Attorney has an actual conflict of interest, the City Attorney's Office should not be involved other than to advise the City of the conflict of interest and the need to retain outside counsel.

JAN I. GOLDSMITH, City Attorney

JIG:MJL:jab:lkj
ML-2009-11
Attachment

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MEMORANDUM OF LAW

DATE: November 10, 1977

TO: Councilman Leon Williams

FROM: City Attorney

SUBJECT: Special Attorney Ordinance

You have asked us to process for Council action an ordinance which would estabish a procedure by which the Council could retain a special attorney when the Council deems such services are necessary for the purpose of providing legal advice in conducting investigation of City Departments. We understand that this ordinance will be considered by the Rules Committee in the near future.

The ordinance recites that the Council has an inherent right to make inquiries of City operations and says such power is unlimited by virtue of the doctrine that a Charter City has plenary authority with respect to matters that are municipal affairs. As authority for the Council to hire such a special attorney, the ordinance cites a sentence from Charter Section 40 which deals with the duties and powers of the City Attorney's Office. That sentence is the first of a paragraph that reads as follows:

> . . . .
>
> The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments. . . .

ATTACHMENT

Whatever may be the inherent powers of the Council, it is obvious that the Council cannot exercise any that contravene the provisions of its Charter. An ordinance cannot change or limit the effect of the Charter. Marculescu v. City Planning Commission, 7 Cal.App.2d 371 (1935). To be valid, an ordinance must harmonize with the Charter. South Pasadena v. Terminal Ry. Co., 109 Cal. 315 (1895).

The ordinance is invalid because it does not harmonize with Section 40 of the Charter which places in the City Attorney the duty and responsibility of advising the City Council on all matters before it. One of the important checks and balances, established by the original draftsmen of our Charter, was establishment of an elected City Attorney, an independent officer, not subject to direct control by the City Council, except in the traditional budgetary sense. The proposed ordinance would weaken that check and balance seriously by downgrading the independence of the legal advice which may be given the Council at times of critical importance to the City.

It cannot be more obvious that Section 40 makes the City Attorney the Chief Legal Advisor of the City and all its departments and offices. The Council does not have the power to retain its own attorney. The portion of Section 40 recited in the ordinance cannot be construed to give the Council such power. So construed, it displaces the City Attorney from his function as Chief Legal Officer of the City.

It is a fundamental rule of construction of charters that effect should be given to all the language thereof and all provisions upon a subject are to be construed harmoniously. Gallagher v. Forest, 128 Cal.App. 466 (1932). The only proper construction to be placed on the portion of Section 40 relied on by the ordinance is that it gives the Council authority to hire special attorneys when this office does not have the expertise or needed personnel to handle the matter. Such attorneys, of course, work through and with this office.

Furthermore, the other sentence in the cited paragraph from Section 40 requires the Council to include in the budget of departments involved the cost of retaining needed attorneys. From this it is clear the intent was that investigations and prosecutions were for City departments, not of them.

The only exception to the rule that the City Attorney shall serve as the lawyer for the City, its departments, officers and employees would occur when some kind of conflict of interest existed to incapacitate the City Attorney. Generally, in such cases, other governmental attorneys such as the District Attorney or Attorney General, because of concurrent responsibility, have and can be expected in the future to undertake the particular legal assignments required.

In summary, we do not believe that the contingency of a conflict of interest gives the Council the power to adopt an ordinance which would in effect transfer the duties and responsibilities of this office to another attorney whenever the Council deems it desirable. That is what the ordinance attempts to do and for that reason, it is illegal because it cannot be harmonized with the position of the City Attorney as the Chief Legal Officer of the City.

John W. Witt
City Attorney

JWW:RST:rb 016

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MEMORANDUM OF LAW

DATE: November 10, 1977

TO: Councilman Leon Williams

FROM: City Attorney

SUBJECT: Special Attorney Ordinance

You have asked us to process for Council action an ordinance which would estabish a procedure by which the Council could retain a special attorney when the Council deems such services are necessary for the purpose of providing legal advice in conducting investigation of City Departments. We understand that this ordinance will be considered by the Rules Committee in the near future.

The ordinance recites that the Council has an inherent right to make inquiries of City operations and says such power is unlimited by virtue of the doctrine that a Charter City has plenary authority with respect to matters that are municipal affairs. As authority for the Council to hire such a special attorney, the ordinance cites a sentence from Charter Section 40 which deals with the duties and powers of the City Attorney's Office. That sentence is the first of a paragraph that reads as follows:

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> The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments. . . .

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The ordinance is invalid because it does not harmonize with Section 40 of the Charter which places in the City Attorney the duty and responsibility of advising the City Council on all matters before it. One of the important checks and balances, established by the original draftsmen of our Charter, was establishment of an elected City Attorney, an independent officer, not subject to direct control by the City Council, except in the traditional budgetary sense. The proposed ordinance would weaken that check and balance seriously by downgrading the independence of the legal advice which may be given the Council at times of critical importance to the City.

It cannot be more obvious that Section 40 makes the City Attorney the Chief Legal Advisor of the City and all its departments and offices. The Council does not have the power to retain its own attorney. The portion of Section 40 recited in the ordinance cannot be construed to give the Council such power. So construed, it displaces the City Attorney from his function as Chief Legal Officer of the City.

It is a fundamental rule of construction of charters that effect should be given to all the language thereof and all provisions upon a subject are to be construed harmoniously. Gallagher v. Forest, 128 Cal.App. 466 (1932). The only proper construction to be placed on the portion of Section 40 relied on by the ordinance is that it gives the Council authority to hire special attorneys when this office does not have the expertise or needed personnel to handle the matter. Such attorneys, of course, work through and with this office.

Furthermore, the other sentence in the cited paragraph from Section 40 requires the Council to include in the budget of departments involved the cost of retaining needed attorneys. From this it is clear the intent was that investigations and prosecutions were for City departments, not of them.

The only exception to the rule that the City Attorney shall serve as the lawyer for the City, its departments, officers and employees would occur when some kind of conflict of interest existed to incapacitate the City Attorney. Generally, in such cases, other governmental attorneys such as the District Attorney or Attorney General, because of concurrent responsibility, have and can be expected in the future to undertake the particular legal assignments required.

In summary, we do not believe that the contingency of a conflict of interest gives the Council the power to adopt an ordinance which would in effect transfer the duties and responsibilities of this office to another attorney whenever the Council deems it desirable. That is what the ordinance attempts to do and for that reason, it is illegal because it cannot be harmonized with the position of the City Attorney as the Chief Legal Officer of the City.

John W. Witt
City Attorney

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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

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[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.*

Directors of any department . . . ; [and] prosecute or defend, as the case may be, all suits or cases to which the 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.

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[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.

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[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 Charlisse 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

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[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).

that does not create a conflict of interest for the City Attorney, or his or her deputies, in providing advice to 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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