

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
MARA W. ELLIOTT
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO THE CITY COUNCIL, AUDIT COMMITTEE, AND CITY AUDITOR
IMPLEMENTATION OF MEASURE A RELATED TO USE OF OUTSIDE LEGAL
COUNSEL BY THE CITY AUDITOR AND AUDIT COMMITTEE

INTRODUCTION

At the municipal election on March 5, 2024, City of San Diego (City) voters approved Measure A, which amended the San Diego City Charter (Charter) to add section 40.2, providing authority for the City Auditor and Audit Committee to hire outside legal counsel, independent of the elected City Attorney, in specified circumstances. The City Council (Council) accepted the certified election results from the San Diego County Registrar of Voters on April 9, 2024. The California Secretary of State must now chapter the Charter amendment, and it will then take effect. This Report addresses the implementation of Charter section 40.2, and identifies questions the Council should resolve before approving a contract or contracts for outside legal counsel for the Auditor and Audit Committee.¹

ELEMENTS OF THE NEW CHARTER SECTION

A. The City Attorney Continues to Represent All Other City Officers and Departments

Under Charter section 40, the City Attorney is the attorney for the City, a municipal corporation, and all of the City's departments and offices in matters relating to their official powers and duties, except the Ethics Commission, the Commission on Police Practices, and now the Auditor and Audit Committee.² The Ethics Commission and the Commission on Police Practices each

¹ At the February 14, 2024, Audit Committee meeting, City Attorney Elliott asked the Audit Committee to docket a discussion of the outside legal counsel hiring process at a future Audit Committee meeting, but this has not yet occurred. The more appropriate committee to consider the hiring of the outside legal counsel may be the Budget Review Committee or the Budget and Government Efficiency Committee because the Council must approve the expenditure before outside legal counsel for the Auditor and Audit Committee is retained.

² The City Attorney provides legal advice to the City, as an organization as client, within the meaning of Rule 1.13 of the California Rules of Professional Conduct, which provides in part:

A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

Cal. R. Prof. Conduct 1.13(a)(Nov. 2018).

has legal counsel independent of the City Attorney for all matters related to their powers and duties. This authority is distinct from the provisions of Charter section 40.2, which authorizes the Auditor and Audit Committee to use outside legal counsel when specified circumstances are met. Thus, under Charter section 40.2, the elected City Attorney remains the attorney for the Audit Committee and the Auditor unless the Council determines outside legal counsel can be used under this new Charter section. As this arrangement is novel for the City, it will require clarification and definition.

B. The Use of Outside Legal Counsel Must Relate to Activities Within the Purview of the Auditor and Audit Committee

Importantly, under Charter section 40.2, the work of the outside legal counsel for the Auditor and Audit Committee is limited to legal support and advice related to activities within their respective purviews. Accordingly, the Auditor may use outside legal counsel, instead of the elected City Attorney, for legal support and advice in audits, investigations, and related activities within the authority and duties of the Office of the City Auditor, subject to certain conditions. The Audit Committee may also use retained outside legal counsel for legal support and advice related to the Audit Committee's oversight responsibilities.³

C. The City's Competitive Procurement Processes Must Be Used When Hiring Outside Legal Counsel

Section 40.2 requires the City to follow established competitive procurement processes when contracting with outside legal counsel. The Council must approve the contract or contracts for an outside attorney and, in doing so, ensure that the scope of services is consistent with the Charter requirements (*i.e.*, that the work relates to activities within the authority of the Auditor or the Audit Committee). The Council has discretion to determine and appropriate funding for the use of outside legal counsel. It is unclear who will monitor resulting contracts to ensure that retained legal counsel stay within their scope of work.

This rule describes what a lawyer for an organizational client must do if a constituent of the organization is acting, intends to act, or refuses to act in a matter related to the representation that the lawyer knows or reasonably should know is a violation of a legal obligation to the organization or a violation of law and that is likely to result in substantial injury to the organization. In sum, the lawyer must "refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law." Cal. R. Prof. Conduct 1.13(b).

³ The Auditor and the Audit Committee serve different functions and should use different legal counsel. Currently, the City Attorney's Office provides one attorney to advise the Audit Committee, and different attorneys to advise the Auditor. The practice started over a decade ago at the request of then-Auditor Eduardo Luna, who believed it would be a conflict for one attorney to advise both, since the Audit Committee oversees the Auditor.

D. The Outside Legal Counsel May Only Be Used to Advance the Public Interest

Section 40.2 also requires the Audit Committee to determine that the Auditor’s proposed use of the outside legal counsel is in the “public interest,” as that term is defined by generally accepted government auditing standards promulgated by the United States Government Accountability Office or successor agency.⁴

It is presently unclear as to how the Auditor and the Audit Committee intend to hire outside legal counsel. Will they use the Independent Budget Analyst, which is a resource for the Audit Committee, for assistance with procurement? *See* SDMC § 26.1704(a). Procurement options include (1) soliciting and contracting with one or more lawyers or law firms that would be available to provide legal services on an as-needed basis, and (2) hiring legal counsel only when the need arises. Any resulting scope must specifically describe the work to be performed, including how the work meets the “public interest” standard approved by the voters. Before the contract is utilized, the Council must approve the expenditure.

E. Outside Legal Counsel Must Follow California Law and the Rules of Professional Conduct in Rendering Legal Advice

Under Charter section 40.2, any attorney-client relationship between outside legal counsel and the Auditor, the Auditor’s subordinates, or the Audit Committee must be formed in a manner consistent with California law and the Rules of Professional Conduct of the State Bar of California.

For example, the work of the outside attorney must comply with California law defining the duties of lawyers, including the law that defines the scope and parameters of the lawyer-client privilege (*see, e.g.*, California Evidence Code sections 950 through 962, and cases interpreting the sections) and the attorney work product doctrine (*see, e.g.*, California Code of Civil Procedure sections 2018.020 and 2018.030, and cases interpreting the sections). The outside attorney must also comply with California Business and Professions Code section 6068, which sets forth the legal duties of an attorney to clients, courts and judicial officers, and the public at large, and the Rules of Professional Conduct of the State Bar of California, which establish the standards for California lawyers for purposes of discipline. *See* Cal. R. Prof. Conduct, Comment to Rule 1.0. *See also Ames v. State Bar*, 8 Cal. 3d 910, 917 (1973).

It will be up to the outside attorney to determine their professional obligations. This could impact, for instance, whether the outside attorney hired by the Auditor may share confidential information with the Audit Committee, which oversees the Auditor.

⁴ Under these standards, the “public interest” is defined as “the collective well-being of the community of people and entities that the auditors serve.” GAO Yellow Book, GAO-24-106786, §3.07 (Feb. 2024).

QUESTIONS TO ADDRESS BEFORE IMPLEMENTATION

This Office encourages the Council to adopt an ordinance establishing additional rules and procedures to implement Charter section 40.2 so that the retention process is clear to stakeholders and to the public. In doing so, we suggest that the Council address the following questions:

1. Who is the outside legal counsel's client: the Auditor, the Audit Committee, the City as a municipal corporation, or the public? Is the Audit Committee privy to advice received by the Auditor from the outside attorney, and vice versa? If the outside attorney serves multiple clients on this list or others not identified here, how does the outside attorney resolve potential conflicts between various constituents (for example, between the Audit Committee and the Auditor, or between the elected City Attorney and the outside attorney)?
2. Who holds the lawyer-client privilege for communications between the Auditor and the outside attorney, or the Audit Committee and the outside attorney, and who is entitled to see that legal advice? Should the Mayor, Council, and City Attorney be afforded authority to review the legal advice provided by the outside attorney to the Auditor, especially if the City's elected officers rely on the advice in making their policy decisions and implementing those decisions? What if the legal advice is incorrect and could lead to a violation of law by the City? Should the City Attorney be entitled to see the outside attorney's legal advice and related privileged communications as a check on the recommendations derived from the advice?
3. How will the City resolve differing legal opinions between the City Attorney and outside legal counsel related to recommendations resulting from the Auditor's audits or investigations? If the City's elected officers rely on incorrect or flawed legal advice received from the Auditor's outside legal counsel, who defends the advice, especially if the advice results in legal action against the City?
4. Based on long-standing practice, it is anticipated that the Auditor and the Audit Committee will hire separate outside lawyers. How will disputes between their respective legal counsel be resolved? Can the Auditor or Audit Committee, without Council approval, file a court action, such as a writ of mandate, to compel action to resolve a legal dispute?
5. Should the Council, through an implementation ordinance, provide the City Attorney with a formal mechanism to respond to the advice of the Auditor's outside attorney if the City Attorney chooses to do so?
6. Who oversees the employment of the outside legal counsel? Who is responsible for monitoring their work product, reviewing and paying their bills, and ensuring that they are not straying from the parameters of the scope of work? Should the Council put in place a formal mechanism for the Auditor and Audit Committee to attest to the fact that the work of the outside counsel as documented in the bills has been performed and

received? Who should assist the Council in reviewing the outside attorney bills to ensure that work is being properly done and accounted for in accordance with the outside legal counsel contract or contracts? Should the Independent Budget Analyst provide this review assistance for the Council?

7. Should the Council adopt additional language that describes the process for the Auditor's or Audit Committee's hiring of outside legal counsel? See, for instance, San Diego Municipal Code section 26.1711, which describes the process for hiring an outside auditor.

These questions should be discussed and resolved, and the determinations should be incorporated into the scope of services for the outside legal counsel contract or contracts and an implementation ordinance if needed.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Joan F. Dawson
Joan F. Dawson
Senior Deputy City Attorney

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cc: Charles Modica, Independent Budget Analyst
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