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OPINION NUMBER LO-2020-1

DATE: September 8, 2020 (revised September 9, 2020)[1]

SUBJECT: Authority to Hire Outside Counsel

PREPARED FOR: Kyle Elser, Interim City Auditor

PREPARED BY: City Attorney

INTRODUCTION

The Interim City Auditor has asked this Office to respond to a memorandum he requested from the law firm, Colantuono Highsmith Whatley (Colantuono Firm or Firm), which is dated July 29, 2020 (Colantuono Memo or Memo), in which the Firm concludes that the San Diego City Council (Council) can hire outside counsel, independent of the City Attorney of the City of San Diego (City), subject only to two limitations set forth in San Diego Charter (Charter) section 40: first, the "outside advice must be necessary in connection with City departments" and, second, "funds must be included in the annual budget." Contrary to decades of written, public legal opinions from this Office, the Firm argues that "the City Charter gives the City Attorney's Office no role in determining whether and when the City Council can hire outside legal counsel. Rather, the Charter places that authority solely with the Council."[2]

[1] The opinion number was added to this page and one page was added to the attachment to this memo. The substance of the memo did not change.

[2] Although the Colantuono Memo was prepared as a confidential memo to the Interim City Auditor, the Interim City Auditor has publicly released it, apparently following City Council waiver of any privilege related to the Colantuono Memo. We, therefore, are presenting our analysis in a public memo, which is consistent with this Office's long-standing practice, under Charter section 40, of making our written legal advice publicly available when the subject matter relates to forthcoming public discussions of concern to City constituents. The Interim City Auditor makes a number of specific, factual allegations in protest of this Office's prior legal advice. We discuss those factual allegations in a separate memorandum released in conjunction with this one.

In an August 27, 2020 memorandum to the Council, the Interim City Auditor relies on the Colantuono Memo to request "that the City Council authorize the Office of the City Auditor to obtain independent legal counsel when the City Auditor or the Audit Committee determine it is in the best interests of the City, using budgeted resources of the Office [the Office of the City Auditor] and after meeting and conferring with affected bargaining units."[3]

As explained in this Legal Opinion, this Office is unpersuaded by the legal arguments and conclusions presented in the Colantuono Memo. The Colantuono Firm ignores well-settled, relevant California law, including California cases interpreting this City's Charter, and disregards decades of legal opinions issued by this Office; relevant history; and the well-documented, long-standing public understanding of the role of the City Attorney in this City's government dating back to 1888.

We note at the onset that charter interpretation is a pure legal issue, not a policy determination. Any act of the Council that violates the Charter, such as employment of outside legal counsel in conflict with and usurping the elected City Attorney's mandated duties under the Charter, is void. *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys*., 206 Cal. App. 4th 594, 608 (2012) (stating the provisions of the city's charter supersede all municipal laws, ordinances, rules or regulations that are inconsistent with the charter). A Charter violation is ultimately resolved through the court by a writ of mandamus or a petition for declaratory and injunctive relief, resulting in a court order directing the Council to act lawfully and to set aside any legislative action that violates the Charter. *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 442 (1989) ("Mandamus will lie to compel a public official to perform an official act required by law. . . . Mandamus may issue . . . to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law."). Enforcement of the Charter may be compelled through litigation filed by a party with standing, including a member of the public or an aggrieved elective officer.

In response to the Interim City Auditor, we affirm all prior opinions of this Office on the authority and duties of the City Attorney, which conclude that the City Attorney is the independent, elected chief legal adviser for the City, including all offices and departments, whose duties may not be abrogated without her consent. As we have repeatedly advised, in certain circumstances, outside counsel may be utilized, but then only following a determination by the City Attorney that the assistance is necessary. We have described in multiple prior legal opinions the legal standard that applies. We are attaching, for ease of reference, a sample of the numerous memoranda of this Office on this issue dating back more than 80 years. *See, attached*, 1940 Op. City Atty 262 (Aug. 8, 1940); 1943 Op. City Atty. 178 (July 25, 1943); 1977 Op. City Atty 283 (Nov. 10, 1977); City Atty Legal Opinion LO-86-8 (Dec. 22, 1986); City Atty MOL

[3] According to Deputy City Attorneys assigned to advise this department, the Auditor has been requesting its own attorney since at least 2009.

ML-93-11 (Jan. 20, 1993); ML-2007-10 (July 20, 2007); ML-2007-24 (Feb. 13, 2007); City Atty Legal Opinion LO-2008-1 (Apr. 10, 2008); ML 2009-11 (Nov. 4, 2009); ML-2010-21 (Oct. 5, 2010); ML 2011-13 (Aug. 12, 2011); RC-2011-32 (Aug. 15, 2011); and MS-2016-26 (Aug. 8, 2016).

QUESTION PRESENTED

Does Charter section 40 authorize the Council to employ outside legal counsel without the consent of the City Attorney?

SHORT ANSWER

No. Charter section 40 provides, in part, that "[t]he 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." However, this sentence may not be isolated from the 14 paragraphs that comprise Charter section 40, and must be read in conjunction with all provisions of the Charter section, which establish that the City Attorney is "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." To read the Charter to authorize the Council to hire outside counsel without a determination of necessity by the City Attorney disregards long-standing rules of charter interpretation, ignores voter intent and participation, and may nullify the need to have a City Attorney at all. The proposed workaround suggested by the Colantuono Firm violates the Charter and such an act would be void.

DISCUSSION

I. UNDER WELL-ESTABLISHED CALIFORNIA LAW, CHARTER INTERPRETATION IS A LEGAL ISSUE THAT PLACES GREAT EMPHASIS ON THE INTENT OF THE VOTERS IN ADOPTING THE CHARTER LANGUAGE.

Interpreting charter language is a legal issue, not a factual matter or a policy consideration. The fundamental task of a court reviewing charter language is to ascertain the intent of the voters who adopted the provisions. *Lungren v Deukmejian,* 45 Cal.3d 727, 735 (1988). If required to interpret charter language, the court would conduct a review "de novo," meaning anew. Black's Law Dictionary (11th ed. 2019, at 548); *Westsiders Opposed to Overdevelopment v. City of Los Angeles*, 27 Cal. App. 5th 1079, 1087 (2018). A reviewing court will use established principles of interpretation to determine voter intent. *See Don't Cell Our Parks v. City of San Diego*, 21 Cal. App. 5th 338, 349 (2018).

A reviewing court will "start with the plain meaning, and construe the words in context." *Westsiders Opposed to Overdevelopment*, 27 Cal. App. 5th at 1087. However, a court will not read charter passages in isolation or engage in interpretation that renders related provisions nugatory. *San Diegans for Open Gov't v. City of San Diego*, 31 Cal. App. 5th 349, 376 (2018). Rather, a court will read each sentence and provision "in the light of [the charter's overall]

scheme." *Id.* (citation omitted). *See also Lungren,* 45 Cal. 3d at 735 (stating the meaning of Charter provisions "may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible").

It is important to note, however, that the plain meaning rule "does not prohibit a court from determining whether the literal meaning of a charter provision comports with its purpose, or whether construction of one charter provision is consistent with the charter's other provisions. Literal construction should not prevail if it is contrary to the voters' intent apparent in the provision." *White v. City of Stockton*, 244 Cal. App. 4th 754, 759 (2016) (citation omitted).

If the intent of voters can be ascertained from the plain language, a court will *not* consider "extrinsic aids," defined as "the ostensible objects to be achieved, the evils to be remedied, the legislative history including ballot pamphlets, public policy, contemporaneous administrative construction and the overall statutory scheme." *White*, 244 Cal. App. 4th at 759; *Don't Cell Our Parks,* 21 Cal. App. 5th at 350-51. Further, a court will not consider the language of other charters to interpret this City's charter because the task of a reviewing court is to determine what this City's voters intended, not the intent of voters in another jurisdiction. *See, e.g., Rafael v. Boyle*, 31 Cal. App. 623, 625 (1916) (stating "[t]here is much variety in the charters and statutes of different jurisdictions relating to law officers of municipal corporations").

As explained by the California Supreme Court, "[w]here the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history." *Domar Elec., Inc.*, 9 Cal. 4th at 172 (citations and quotations omitted); *White*, 244 Cal. App. 4th at 759 ("If the language is clear and unambiguous there is no need for construction and courts should not indulge in it." (citing *Delaney v. Superior Court*, 50 Cal.3d 785, 800 (1990)).

Where charter language is ambiguous, however, and a reviewing court must look to other sources, the court will give deference to the agency's interpretation of it own authorities, and in this case, the City Attorney's long-standing interpretation. *Don't Cell Our Parks*, 21 Cal. App. 5th at 356. "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts." *Id.* 349, 356 (citing and quoting *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 8 (1998)). *See also San Diegans for Open Gov't*, 31 Cal. App. 5th at 375-376 ("An interpretation of a Charter provision by an administrative agency charged with its implementation is entitled to great weight and respect unless shown to be clearly erroneous"). Ultimately, the interpretation of charter language, "that leads to the more reasonable result will be followed." *White*, 244 Cal. App. 4th at 759-760.

II. CHARTER SECTION 40 ESTABLISHES THE CITY'S LEGAL DEPARTMENT AND ITS "CHIEF LEGAL ADVISER."

As a reviewing court would do, we will apply the rules of interpretation used by California courts to detail our interpretation of Charter section 40, which is titled "City Attorney."[4] It is 14 paragraphs in length, and establishes the elective public office of the City Attorney and the City's "legal department." The City Attorney is elected by voters Citywide to serve a four-year term and may be reelected for a second four-term term. San Diego Charter § 40. *See also* San Diego Charter § 10.

The City Attorney's Charter-mandated, voter-mandated duties include:

- serving as 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"

- devoting "full time to the duties of the office"

- performing "all services incident to the legal department"

- giving "advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department . . . 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"

- "to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law"

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[4] The Colantuono Memo inexplicably does not rely on the well-settled principles of charter interpretation established by California courts, which focus on a determination of voter intent. California courts do use principles of statutory interpretation in interpreting charter provisions. *White*, 244 Cal. App. 4th at 759. But the Colantuono Memo does not fully and dutifully track these California law principles including the key task of charter interpretation to determine voter intent. The Memo makes a number of conclusory statements about the "authors" of Charter section 40 and what they intended. But the Memo does not actually explore the intent of City voters. Rather, the Memo relies on what it calls "the canons of construction – the rules of law governing how writings are interpreted." It defines these more general, broad "canons of construction," as "Plain Meaning," "Harmonization," "Surplusage," "Predicate Act," "Consistent Usage," "Expressio Unuis," and "General vs. Specific." It appears that the memo's authors looked to (and cited) a general treatise on statutory interpretation (written and published in 2012 by the late United States Supreme Court Justice Antonin Scalia and attorney and author Bryan Garner) without applying controlling California law on charter interpretation in their analysis. We note that the City litigated many of the relevant California cases on the principles of charter interpretation and the resulting decisions are binding on this City.

- "to 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 and correctness thereof"

- "to preserve in the City Attorney's office a docket of all cases in which the City is interested in any courts and keep a record of all proceedings of said cases"

- "to preserve in the City Attorney's office copies of all written opinion he or she has furnished to the Council, Manager, Commission, or any officer"

- "to have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and upon a receipt therefor, may demand and receive from any officer of the City any book, paper, documents, or evidence necessary to be used in any suit, or required for the purpose of the office."

San Diego Charter § 40.

The Charter also requires the City Attorney to "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," and authorizes the City Attorney to appoint "such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council." *Id.*[5]

Applying the "plain meaning rule," a reviewing court in California would find these duties to be mandatory and absolute. Further, there is nothing in this language that allows the Council to modify or abrogate these duties. *See, e.g., Buck v. City of Eureka*, 109 Cal. 504, 519 (1895) (stating a city attorney or district attorney is bound to perform all services connected with his office, as required by law).

The only express exception to the City Attorney's Charter-mandated duties is that the City Attorney does not serve as the legal adviser for "the Ethics Commission, which shall have its own legal counsel independent of the City Attorney." San Diego Charter § 40. This carve-out of an independent counsel for the Ethics Commission was approved by City voters on November 2, 2004, and this Charter amendment took effect January 21, 2005. This measure also amended

[5] We read the language "as may be provided by ordinance of the Council" in this sentence about the Council's role in the City Attorney's appointment process to refer to the City's budget process. Under the Charter, the Council adopts the City's budget and appropriates funds through the appropriation ordinance. San Diego Charter §§ 11.1, 69. The number of deputies, assistants, and employees in the Office of the City Attorney – the City's "legal department" – is, in part, a budgetary matter under the purview of the Council. However, the Council cannot use the budgetary process (and more specifically budget cuts) to prevent the City Attorney from carrying out her mandated duties. *Scott v. Common Council*, 44 Cal. App. 4th 684, 688-689 (1996).

Charter section 41(d), to add: "The Ethics Commission shall be authorized to retain its own legal counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties." *See* https://www.sandiego.gov/sites/default/files/legacy/city-clerk/pdf/pamphlet041102.pdf.[6]

The Colantuono Memo bases its conclusion that the Charter provides the Council with authority to hire an outside attorney, independent of any determination of necessity by the City Attorney, on one paragraph of Charter section 40 – the 12th paragraph -- of 14 in total. This paragraph reads:

> 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.

San Diego Charter § 40 [7]

Again, a reviewing court will look first to the plain meaning of the language in this paragraph, and will read it in the context of all of the provisions of Charter section 40.

We first define the specific words. "Additional" means "more than is usual or expected." Merriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/additional. *Jaynes v. Stockton*, 193 Cal. App. 2d 47, 51 (1961) ("in addition" is "most frequently employed as denoting something particular or limited, in contradistinction to general or permanent"). "Competent technical legal" will be read together to describe the attributes of "additional . . .attorneys." They must be competent and "technical," which means "marked by or characteristic of specialization." Merriam-Webster Dictionary, at https://www.merriam-

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[6] City voters were told:

> This ballot measure would affect a transfer of appropriations from the City Attorney Office's budget to the Ethics Commission's budget. The Ethics Commission is currently reliant upon the City Attorney's Office for legal counsel; this funding would enable the Commission to retain independent counsel. It is anticipated that the passage of this measure would not result in any additional expense to the City of San Diego." They were also advised in the argument in support of Proposition E that the Charter "mandates that the City Attorney serve as legal counsel for all of the City's departments and offices."

Prop. E., Ballot and Voter Information Pamphlet, General Election, November 2, 2004, at https://www.sandiego.gov/sites/default/files/legacy/city-clerk/pdf/pamphlet041102.pdf.

[7] This language is similar to language in Charter section 28, which authorizes the former City Manager, now Strong Mayor, "to employ experts, or consultants to perform work or give advice connected with the Departments of the City when such work or advice is necessary in connection therewith." San Diego Charter § 28.

webster.com/dictionary/technical. (As we discuss in more detail in section III below, Shelley Higgins, the attorney who participated in drafting this language in 1930 and 1931, wanted to ensure that the City had access to attorneys who specialized in water rights, which was a concern for the City in the 1930s.)

The employment of these "additional competent technical legal attorneys" is "to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith." The word "investigate" means "to observe or study by close examination and systematic inquiry" or "to make a systematic examination *especially* to conduct an official inquiry." Merriam-Webster, at https://www.merriam-webster.com/dictionary/investigate#legalDictionary. *See also* Black's Law Dictionary (11th ed. 2019), at 989 ("investigate" means "to inquire into (a matter) systematically," "to make an official inquiry").

To "prosecute" means "to institute and carry forward legal action against for redress or especially punishment of a crime." Merriam-Webster, at https://www.merriam-webster.com/dictionary/prosecute#legalDictionary *See also* Black's Law Dictionary (11th ed. 2019), at 1476 (:prosecute" means "[t]o commence and carry out (a legal action)").

These attorneys may only be employed "when such assistance or advice is necessary." San Diego Charter § 40. "Necessary" means "absolutely needed," "required," "logically unavoidable" or "compulsory." Merriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/necessary. *See also* Black's Law Dictionary (11th ed. 2019). at 1241 ("necessary" means '[t'hat is needed for some purpose or reason," "essential," "that must exist or happen and cannot be avoided," "inevitable").

In addition, Charter section 40 mandates that the Council "provide sufficient funds in the annual appropriation ordinance" when the assistance or advice of "additional competent technical legal attorneys" is necessary.

This paragraph, which is the focus of the Colantuono Memo contains a drafting ambiguity, which the Colantuono Firm does not sufficiently address.[8] The paragraph states that the Council has authority to employ these additional attorneys and must make sufficient funds available for their employment, charging these additional legal services to individual City departments. The

[8] The Colantuono Memo concludes, without much consideration, that "the Charter is best interpreted to empower the City Council to decide whether outside counsel is 'necessary,'" relying on what it calls the "predicate act" canon, explaining that "express authority to do a thing implies authority to do all acts necessary to accomplish the thing expressly authorized." The Memo cites no California law to support this conclusion. In fact, a recent California appellate court explained how general canons of construction are to be applied: "We are mindful that [m]axims of statutory construction . . . are not immutable rules but instead are guidelines subject to exceptions. As such, if application of [maxims of statutory construction] would frustrate the statute's underlying intent, the doctrine must be overridden by our fundamental objective of ascertaining and effectuating the statute's underlying intent." *In re Marriage of Mullonkal & Kodiyamplakkil*, 51 Cal. App. 5th 604, 616 (2020) (internal quotations and citation omitted).

clause in the first sentence of the paragraph, "when such assistance or advice is necessary in connection therewith," limits the Council's authority to employ additional attorneys, and it is written in passive voice. The language does not definitively state who makes the determination that "such assistance or advice is necessary."

The Colantuono Memo reads this language to mean the Council makes the determination of necessity, without input from or consent of the City Attorney.[9] However, this conclusion does not give effect to all provisions of Charter section 40, as a reviewing court would do. In fact, this conclusion renders other key language in Charter section 40 "nugatory," which is contrary to the rules of charter interpretation.

If we follow the reasoning of the Colantuono Memo and the Council could determine, independently, that it could hire outside attorneys so long as the Council finds that the assistance or advice is necessary and there is sufficient funding, the Council would have authority to abrogate the express duties of the City Attorney to serve as the City's "chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties" and "to perform all services incident to the legal department." San Diego Charter § 40. This is not what City voters intended in adopting Charter section 40.[10] Further, as we explain, the reasoning of the Colantuono Memo would lead to absurd results, which is contrary to well-established law. *See Don't Cell Our Parks*, 21 Cal. App. 5th at 351 (stating charter language must "be given a reasonable and commonsense interpretation [that] 'when applied, will result in wise policy rather than mischief or absurdity' "(citing and quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1392 (1987)).

[9]The Colantuono Memo, at page 1, states: "The Charter does not limit the Council's authority to circumstances in which the City Attorney's Office lacks capacity or technical expertise or has a disqualifying conflict of interest. Rather, the City Council may determine when outside legal assistance is necessary."

[10] A court would not rely on language from the charters of other cities as an interpretive tool, as the Colantuono Memo does, because this comparison is not relevant. What is relevant is the intent of this City's voters in adopting the Charter.

III. IN 1931, CITY VOTERS ADOPTED A NEW CHARTER, REJECTING AN APPOINTED CITY ATTORNEY IN FAVOR OF AN INDEPENDENT, ELECTED CITY ATTORNEY ACCOUNTABLE TO CITY VOTERS.

On April 7, 1931, City voters approved the Charter that the City operates under today.[11] The history of the drafting and approval of the Charter are documented in the April 26, 2005 report of this Office, titled "Report on the Role of the City Attorney as independent Representative of the People of San Diego" (April 26, 2005) (2005 City Attorney Report).[12] The supporters of the 1931 Charter endorsed an independent elected City Attorney so that the people would have "the power to govern themselves." *Id.* at Ex. 8.

Prior to voter approval of the 1931 Charter, the City operated under a charter approved in 1888. *See* https://www.sandiego.gov/sites/default/files/sd-charter-1888.pdf. This charter provided that the City Attorney was "elected" by the City's "Common Council," and held office for two years unless removed earlier. 1888 San Diego City Charter, art. III, ch. V, § 1, at https://www.sandiego.gov/sites/default/files/sd-charter-1888.pdf.

The duties of the City Attorney, as set forth in the 1888 Charter, which pre-dated the 1931 Charter, were similar to the duties established by the 1931 Charter, [13] with an important distinction: the "Common Council" controlled "all litigation of the City" and could "employ other attorneys to take charge of any such litigation, or to assist the City Attorney therein." 1888 Charter, art. III, ch. V, § 2.

The 1931 Charter included section 40, entitled "City Attorney." This section created the City's "legal department." San Diego Charter§ 40. This department was considered a "main administrative department" by the Charter's drafters. 2005 City Attorney Report, at Ex. 10.

In adopting this language, City voters changed the public office of the City Attorney from a Council-appointed office to one elected by voters, and established the City Attorney as "the chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters

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[11] The Charter may be found on the City's website, under the Office of the City Clerk, at the following location: https://www.sandiego.gov/city-clerk/officialdocs/city-charter. The City Clerk provides this summary description:
"The original version of the current City Charter was approved by voters on April 7, 1931, adopted by the State Legislature on April 15, 1931 and filed with the Secretary of State April 24, 1931. The edition below includes articles of amendment through the municipal election of November 2018."

[12] The report may be found on the City's website at:
https://www.sandiego.gov/sites/default/files/legacy/cityattorney/pdf/role050426.pdf.

[13] Under the 1888 Charter, the City Attorney's duties were "to prosecute in behalf of the people all criminal cases arising upon violations of the provisions of this Charter and City Ordinances, and to attend to all suits, matters and things in which the City may be legally interested." The City Attorney also was required to "give his advice or opinion in writing, whenever required by the Common Council, Mayor or other City officers; and . . . [to] do and perform all such things touching his office as by the Common Council may be required of him. He shall approve by endorsement in writing the form of all official or other bonds required by this Charter, or by ordinance of the Common Council . . . [and] . . . [h]e shall approve in writing the drafts of all contracts before the same are entered into on behalf of the City." 1888 Charter, art. III, ch. V, § 2, at https://www.sandiego.gov/sites/default/files/sd-charter-1888.pdf.

relating to their official powers and duties." San Diego Charter § 40 (1931 language, found at https://docs.sandiego.gov/citycharter/charter_amendments/articleV/sec40.pdf). Thus, City voters, not the City Council, choose the City Attorney, the head of the City's legal department.

The 1931 language of Charter section 40 also stated, in part: "It shall be [the City Attorney's] duty, either personally or by such assistants as he may designate, to perform all services incident to the legal department." *Id.* This language has remained unchanged, since 1931, except for a spelling modification in 1943 from chief legal "advisor" to "adviser." The section has been amended by City voters 11 times since 1931, most recently in 2018, without change to the legally-required duties of the office, which we discussed in section II above.

The 1931 Charter was written by a Board of Freeholders, who vigorously debated whether the City Attorney should be appointed by the Council or elected by the people, before determining to present to City voters a proposed Charter with an elected City Attorney. The freeholders' debate was documented in local newspaper coverage, and those historical reference materials were described and attached to the 2005 City Attorney Report. Freeholder Ray Mathewson described the power and duties of the City Attorney in the proposed Charter as follows:

> The duty of the city attorney is to give legal advice to every department and official of the city government on municipal matters. He also must act as the representative of the various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. If elected, the city attorney is in a position of complete independence and may exercise such upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

2005 City Attorney Report, at Ex. 10.

By letter dated September 12, 1930, Attorney James Pfanstrel described to Freeholder Nicholas Martin the role of the City Attorney under the newly drafted Charter as follows:

> Some advocated with considerable degree of force that the city attorney should be elected by the people. The argument is that the city attorney is the attorney for the entire city and each and every elective and appointive officer thereof upon all questions pertaining to the municipality, and he should occupy an independent position so that his opinions may be uninfluenced by any appointive power. It would seem that if the city attorney is elected by the people, he should have the power to appoint his deputies without civil service regulations, subject, of course, to budget control.

2005 City Attorney Report, at Ex. 9.

The description of the debate between a Council-appointed and publicly elected City Attorney was also documented by local newspapers. Shelley Higgins, who performed legal work for the Board of Freeholders and who was an appointed City Attorney before voter adoption of the 1931 Charter, favored the appointment of the City Attorney by the Council:

> He based his opinion upon the necessity for San Diego to have an attorney who is qualified to understand the city's water situation and who is sufficiently competent with special water laws. The council, he said, would be able to choose that kind of an attorney, whereas the voting public might elect a man who might be incompetent.

Id. at Exs. 20, 22.

Of further note, a fact sheet about the proposed 1931 Charter explained the intent of the "Independent City Attorney," as follows:

> The city attorney is to be elected by the people. This is a guarantee that the legal head of the government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager.

Id. at Ex. 35.

This description was repeated in an editorial in "The Hillcrest News," a community newspaper that urged voter support of the 1931 Charter, calling it "A New Deal" for the City. *Id.* at Ex. 34.

Ultimately, the Board of Freeholders rejected the idea of an appointed City Attorney and instead proposed that the City Attorney be elected by the people. Freeholder Mathewson wrote in a newspaper before the April 1931 election:

> The city attorney is elected by the people. At the present time he is appointed by the council. It was felt that if the attorney were elected by the people, he would be in a much more independent position than if he were appointed by the council. The council may employ special water counsel to aid the city attorney.

Id. at Ex. 33.

This contemporaneous description by one of the drafters of the 1931 Charter is relevant. Mr. Mathewson explained that the Charter was intended to establish an elected City Attorney, but the Council could employ "special" counsel "to aid the city attorney."

This Office has historically interpreted the language in Charter section 40 authorizing employment of "additional competent technical legal attorneys" to mean that the City Council may fund outside attorneys to assist the City Attorney, on a temporary basis, "to aid the city attorney" when she has a conflict of interest, as defined by California law, or she determines that

there is a lack of capacity or technical expertise in the Office to complete a legal assignment. This interpretation is consistent with and harmonizes all provisions of Charter section 40. It is also consistent with the documented intent of City voters who approved the 1931 Charter.

As we have explained in the past and affirm here, the independent City Attorney is the head of the City's legal department, with mandatory legal duties under the Charter, and is "a hallmark of the City's municipal government structure." City Attorney MOL MS-2016-20 (July 8, 2016).

> Since 1931, San Diego voters have chosen a form of government that provides for an elected City Attorney, who is an officer of and "chief legal advisor" to the City. This separation of powers and the broad authority afforded the City Attorney under San Diego's Charter contrast with the City Attorney's status in general law cities. Under the state law governing general law cities, the city attorney is appointed by the city council, is a "subordinate" city officer, and performs legal services only as directed by the council. By contrast, San Diego voters have granted different and broader authority to its elected City Attorney, as allowed under a Charter city government.

City Att'y Legal Opinion 645 (LO-2008-1 Apr. 10, 2008).

IV. UNDER CONTROLLING CALIFORNIA LAW, THE COUNCIL CANNOT ABROGATE THE CHARTER POWERS AND DUTIES OF THE ELECTED, INDEPENDENT CITY ATTORNEY.

As a charter city established under the California Constitution, the City's "charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law." *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). "The charter of a city is not only the organic law of the city, but it is also a law of the state within the constitutional limitations." *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380, 385 (1976). Cal. Const. art. XI, § 5(a) ("It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters."); *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 36 (1979).

Thus, all officers and employees of the City, including the elected Councilmembers, must act in accordance with the City's Charter. "[A] chartered city may not act in conflict with its charter. Any act that is violative of or not in compliance with the charter is void." *Domar Elec., Inc.,* 9 Cal. 4th at 171 (citations omitted).

The Charter establishes the City Attorney as a public officer, elected by voters Citywide, for a four-year term, who may be reelected to a second four-year term. San Diego Charter § 40. A public office, as that of the City Attorney, has two requirements: "first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of

incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial." *City Council v. McKinley*, 80 Cal. App. 3d 204, 210 (1978).

Thus, the elected City Attorney has express powers and duties, which we described above. The Council cannot relieve the City Attorney of these required duties and designate another to perform them. *Dadmun v. City of San Diego*, 9 Cal. App. 549, 551 (1908). The *Dadmun* court analyzed the City's Charter, as it read in 1908, and determined that it did not authorize the Council to appoint a special prosecutor and the Council's attempt to appoint one was "unauthorized and void, either as an attempt to create an office, or a liability by employment." *Dadmun*, 9 Cal. App. at 551.

As this Office has explained in legal opinions dating back decades, the Councilmembers may not infringe upon, control, or confer upon another the specific powers and duties assigned by the Charter to a Charter-created officer, including the City Attorney. *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380, 388 (1976). For example, the Council may not independently authorize an outside contractor to provide administrative services that "invade or duplicate duties of the Manager and his employees." *Id.* at 392. In the *Hubbard* case, a citizen taxpayer sued this City over alleged Charter violations after the Council approved a contract with a legislative analyst. The appellate court concluded that the Council violated the Charter by infringing on the then-City Manager's duties:

> If the citizens of San Diego find it necessary to have an independent agency of government standing between the Manager and the Council, screening budget information and other informational material and reports submitted to the Council by the Manager, reviewing the performance of the various departments of city government, and initiating its own proposals for legislative action, it may be done only by amendment to the charter. . . . An ordinance can no more change or limit the effect of a charter than a statute can modify a provision of the State Constitution

Id.

Similarly, in a case involving the City and County of San Francisco (San Francisco), an appellate court concluded that the San Francisco auditor lawfully refused to audit a payment to a private attorney for work performed for San Francisco's civil service commission even though the board of supervisors had approved the payment. *Rafael,* 31 Cal. App. at 624, 626. The civil service commission sought outside legal advice because it disagreed with the San Francisco city attorney's legal opinions:

> At the time of such employment the commission had received from the city attorney certain written opinions contrary in tenor to its views as to the legality of certain matters then before it. In each of these matters the commission, disregarding the city attorney's

> opinion, acted in accordance with its own judgment; and thereafter legal proceedings were commenced in the superior court against said commission to determine the legality of its action.

Id. at 623-624.

The appellate court was charged with determining "whether or not under these facts the civil service commission had the power to retain an attorney at the expense of the city when the city attorney was ready and willing to perform the necessary legal services." *Id.* at 624.

The appellate court concluded that San Francisco's charter did not authorize the civil service commission to employ private legal counsel even though the charter gave the commission power to institute and prosecute legal proceedings because the charter provided for a legal department headed by a city attorney with set duties. *Id.* at 625. The court wrote:

> This express [charter] provision clearly indicates an intention that the city attorney should handle all the legal work of the various departments of the city government, except where special provision is made for additional counsel. The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business, and to limit the power of the authorities to incur expenditures for this character of service; and the mere power given the commission to institute and prosecute legal proceedings does not imply that this above-quoted provision of the charter should be inoperative with regard to the civil service commission so as to empower it to employ another attorney to perform the duties belonging to the law officer of the municipality. The charter having provided a city attorney upon whom the board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the board to avail itself of his services, and it cannot ignore this provision and employ some other attorney to render those services which it is the duty of the city attorney to perform.

Id. at 625-626.

Again, an appellate court found the board of trustees of a school district in Kern County was not authorized to employ a private attorney on a specific school problem when the services of the county counsel were available to the board for that purpose. *Jaynes v. Stockton*, 193 Cal. App. 2d 47 (1961). The court determined that the California Government Code, which was controlling law in this case, did not "empower a school district to contract for special services obtainable from and which the law requires to be performed by a designated public official; that the services for which the appellant school district has drawn its warrant were services obtainable from and required to be performed by the county counsel of Kern County; and that the conclusion of the trial court that the school district had no authority to contract for these services was proper." *Jaynes*, 193 Cal. App. 2d at 57.

The appellate court relied on an established rule:

> [A] public agency created by statute may not contract and pay for services which the law requires a designated public official to perform without charge, unless the authority to do so clearly appears from the powers expressly conferred upon it or unless the services required are unavailable for reasons beyond the agency's control, such as inability, refusal or disqualification of the public official to act.
>
> This rule is based on sound principles. The law will not indulge an implication that a public agency has authority to spend public funds which it does not need to spend; that it has authority to pay for services which it may obtain without payment; or that it may duplicate an expenditure for services which the taxpayers already have provided.

Id. at 54 (citations omitted).

See also Scott v. Common Council, 44 Cal. App. 4th 684, 695 (1996) (stating that the city council cannot relieve a charter officer of the city of the duties devolving upon him by the charter); *Hicks v. Board of Supervisors*, 69 Cal. App. 3d 228, 240-242 (1977) ("the board has no power to perform county officer's statutory duties for them or direct the manner in which duties are performed"); *Modoc Cty. v. Spencer*, 103 Cal. 498, 500-502 (1894) (a county board of supervisors does not have authority to hire or employ special counsel, who may or may not be acceptable to the district attorney, who has the legal duty to prosecute); *Harvey v. County of Butte*, 203 Cal. App. 3d 714, 721 (1988) (stating that in a county where the charter *does not* create an office of county counsel the board of supervisors may contract with counsel to assist the district attorney in providing representation and advice to county officers); *Montgomery v. Superior Court*, 46 Cal. App. 3d 657, 668-669 (1975) (discussing the legal distinction between a general law city with an appointed city attorney controlled by its city council, from a chartered city "whose charter imposes upon one of its regular city officers the duty to perform the services in question").

As discussed, there are no express limitations on the City Attorney's Charter-mandated, voter-mandated duties. The only legal circumstance where the City Attorney is absolved of her duty to serve as the City's chief legal adviser, responsible for all aspects of legal services, is where there is an actual conflict of interest as defined by state law, and, even then, the City Attorney must be consulted in that determination. *See, e.g.*, 2010 City Att'y MOL 392 (2010-21; Oct. 5, 2010; 2009 City Att'y MOL 255 (2009-11; Nov. 4, 2009; 1977 City Att'y MOL 283 (Nov. 10, 1977); City Att'y RC-2006-25 (discussing limitations on Council's ability to change Charter mandated department responsibilities); City Att'y MOL ML-2014-5 (July 9, 2014).

An attempt to hire outside counsel without the City Attorney's consent violates the Charter and is void. *San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Employees Ret. Sys*., 206 Cal. App. 4th 594, 608 (2012). Such would be the case if the Council attempted to replace any other Charter officer, like the City's Auditor, whose role is defined in Charter sections 39.1 and 39.2.

V. THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT DO NOT NEGATE THE CITY ATTORNEY'S CHARTER-MANDATED DUTIES.

The State of California's Rules of Professional Conduct are intended to establish the ethical standards for all members of the California bar and are also designed to protect the public. *Ames v. State Bar*, 8 Cal. 3d 910, 917 (1973). In accordance with California Business and Professions Code,

> [T]he rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all licensees of the State Bar. For a willful breach of any of these rules, the State Bar Court has power to discipline attorneys by reproval, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of licensees of the State Bar.

Cal. Bus. & Prof. Code § 6077. *See also* Cal. Bus. & Prof. Code § 6076.

Thus, the City Attorney and her subordinate assistants and deputies must perform the Charter-mandated duties of the City's legal department in a manner that is consistent with the ethical standards of the legal profession. The extent to which these ethical standards serve as a limitation on the City Attorney's duties to fulfill her Charter-mandated duties is a decision for her and her alone to make. It is not a decision of the Council or anyone else.

In light of these ethical standards that govern all California attorneys, the Colantuono Memo makes an astonishing argument supporting its conclusion that the City Attorney's Charter-mandated duties are dissolved when outside lawyers are hired. As we explained above, Charter interpretation is a purely legal matter and does not involve policy considerations. Yet, under the heading of "Policy Considerations," the Colantuono Memo suggests that the City Attorney's ethical obligations, including her duty of competency, do not attach when the City employs outside counsel. The Memo concludes that the duty of supervision is a "question of fact," meaning presumably that the City Attorney does not have to supervise outside counsel. The memo alleges that this Office views its "ethical obligations too broadly." It states: "An attorney is ethically responsible to his or her client for the advice the client retains him to provide, not for advice the client seeks elsewhere. Thus, work performed by outside counsel selected by the Council triggers the ethical duties of those lawyers to provide competent, ethical representation." Under such an argument, the City Attorney would have no obligation to oversee or even review the work of outside counsel employed to assist the City with complex matters like, for instance, the Mission Valley Stadium negotiations, leaving Council with an oversight responsibility that they are likely not qualified to undertake.

As the Charter makes clear, the City Attorney's obligations to the electorate, as described in the Charter, do not cease merely because the City has hired outside legal counsel. Charter section 40 is abundantly clear in that regard. It states: "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." San Diego Charter § 40. The City Attorney is not empowered to delegate her responsibility as the City's chief legal adviser to outside counsel. Unless a conflict of interest exists that would prohibit the City Attorney's involvement – a determination made under the California Rules of Professional Conduct – the City Attorney is responsible for providing the City with legal advice, even when outside counsel is utilized.

Further, the City is a municipal corporation that acts through its elected and appointed officers. San Diego Charter § 1. The City, as a municipal corporation and not the Councilmembers, Mayor, or individual department directors, is the City Attorney's client, No one department director or elected official may act alone in securing its own attorney. *See* City Atty MOL ML-2010-21 (Oct. 10, 2010).

In addition, compliance with the Rules of Professional Conduct is a responsibility specific to each attorney licensed in the State of California. Attorneys who fail to comply with the rules may lose their license and their livelihood. The Colantuono Firm's flippant suggestion that any attorney in this Office may, without any legal authority whatsoever, delegate their responsibilities to a private law firm and assume no responsibility thereafter is a recipe for disbarment.

Further, as a purely practical matter, if the Council had authority to employ various outside attorneys without the City Attorney's approval or oversight, the City could find itself awash in conflicting legal opinions, creating uncertainty and chaos for City taxpayers, whose funds are ultimately on the line when the City is named in litigation.

VI. THE CITY ATTORNEY MAY DETERMINE THAT THERE IS AN ACTUAL CONFLICT OF INTEREST UNDER CONTROLLING CALIFORNIA LAW REQUIRING HER OFFICE TO REFER MATTERS TO OUTSIDE COUNSEL, AND SHE MAY SEEK ASSISTANCE WHERE THERE IS A LACK OF CAPACITY OR A NEED FOR TECHNICAL EXPERTISE IN HER OFFICE.

As we have explained above and in decades of prior legal opinions, Charter section 40 authorizes the Council "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."

This language authorizes the Council to expend public money on attorneys outside of the City Attorney's Office as "additional competent technical legal attorneys" in limited circumstances, which we have defined as where there is a conflict of interest under controlling state law or where the Office has a lack of resources or competency to investigate or prosecute a matter. 1977 City Att'y MOL 283, 284 (Nov. 10, 1977); ML 2009-11 (Nov. 4, 2009). As the City's "chief legal adviser," the City Attorney determines when the assistance or advice is necessary in order to fulfill her Charter-mandated duties as the City's "chief legal adviser." San Diego Charter

§ 40.[14] At the City Attorney's request, the Council has authorized the expenditure of funds to hire outside counsel to perform specialized work, such as the review of the City's Comprehensive Annual Financial Report. Similarly, the Council approved as needed legal services providers in ten practice areas of law so that panel counsel could be retained quickly and at a predetermined cost.

CONCLUSION

For over 130 years the City's electorate has made clear that they desire an elected City Attorney who is independent and accountable to the voters. The Charter includes specific job duties that the City Attorney is charged with fulfilling. The voters have not given the Council the power to remove the City Attorney's duties and delegate them to legal counsel of their choosing. If the Council had authority to work around the City Attorney and hire outside counsel when it wished, the language stating that the City Attorney is the chief legal adviser for the City and all of its offices and departments, with the duty to perform all services incident to the legal department, would be meaningless and contrary to voter intent.

The only legal basis for the City Attorney to recuse herself from her Charter-mandated duties is when she determines that she has a conflict of interest under controlling state law that prohibits her and her subordinate attorneys from working on a matter, or when she and her team lack capacity or the expertise to perform specialized work. This is a decision she alone must make. If she concludes that she does indeed need outside assistance, she requests that Council "employ" and "fund" outside counsel to "investigate" or "prosecute" matters. Even in those circumstances, the City Attorney is obligated to oversee the legal work to ensure compliance with her Charter-mandated duties.

The Colantuono Memo disregards controlling law in a manner that recklessly exposes the City to litigation by a plaintiff or petitioner seeking to enforce the Charter. In addition, if the City were to follow the Firm's advice, the attorneys in this Office would subject themselves to disciplinary action up to and including disbarment by the State Bar of California.

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[14] In making the determination, the City Attorney is mindful of the collective bargaining rights under the Meyers-Milias-Brown Act, afforded to deputy city attorneys, as well as their rights to be free from politically-motivated removal from their positions, under Charter section 40, stating:

> No Deputy City Attorney, who has served continuously as a Deputy City Attorney in the Office of the City Attorney for one year or more shall be terminated or suspended without good cause, except that any Deputy City Attorney may be subject to layoff due to lack of work or insufficient appropriation to meet the salary requirements necessary to maintain existing personnel in the Office of the City Attorney.

San Diego Charter § 40.

Consistent with the advice rendered by this Office for decades, if the Council wishes to modify or abrogate the City Attorney's legally-mandated duties and scope of authority, it must do so by Charter amendment presented to City voters. In the meantime, and as the Interim City Auditor is aware, this Office has supported the retention of outside counsel in the past when the Interim City Auditor wishes to obtain a second opinion, and this Office remains open to considering such requests in the future.

MARA W. ELLIOTT, CITY ATTORNEY

By *__/s/ Joan F. Dawson__*
Joan F. Dawson
Senior Deputy City Attorney

JFD:jvg:cm
LO-2020-1 (REV. 09/09/2020)
Doc. No. 2471355
Attachment
cc: Honorable Mayor and Councilmembers

August 8, 1940.

Mr. G. F. Waterbury,
City Auditor,
San Diego, Calif.

Attn: Mr. J. S. Barber, Chief Deputy

Dear Sir:

Your request for an opinion whether the copy of an ordinance filed in the Auditor's office has to have "approved as to form" by the City Attorney thereon, is before me for attention.

Section 40 of the City Charter provides in part as follows:

> "(The City Attorney) to prepare in writing all ordinances, resolutions, contracts, bonds or other instruments in which the City is concerned, and to endorse on each his approval of the form or correctness thereof."

The original of all ordinances bears the "approved as to form" endorsement, and therefore it is not necessary that the copy be endorsed.

Said request likewise calls for an opinion as to the sufficiency of legislative act or acts to permit your office to transfer funds from the Street Improvement Fund to the Revolving Fund for the purposes indicated by Ordinance No. 9282, Ordinance No. 1902 (New Series) and the California Vehicle Act. It is my opinion there is ample authority for your office to comply with the provisions of Ordinance

No. 509 (New Series), as discussed by us the other day.

Yours very truly,

D. L. Ault,
City Attorney.

DLA/M

July 25, 1943.

Mr. Walter W. Cooper,
City Manager,
San Diego, California.

My dear Mr. Cooper:

I am returning the contract made by and between The City of San Diego and Mr. Phil D. Swing without having approved the same, for the reason that it is my opinion that the contract, in its present form, is faulty, both as to form and legality.

You will note that in paragraph numbered 1, the contract purports to employ Mr. Swing as Special Water Counsel, as provided in Section 53 of the City Charter, and provides for the payment in the case of The City of Coronado vs. City of San Diego and "for representing the City before any other tribunal or official in any matter in which the City may be interested when authorized so to do by the City Manager."

It is my opinion that the terms of Mr. Swing's employment are too general, and that it might lead to considerable confusion were this contract permitted to stand in its present form, in that Mr. Swing would probably encroach upon the duties of the City Attorney's Office.

It has been held that a City Attorney cannot relieve himself of his duty to conduct municipal litigation. See Walters v. Dock Commissioner of Portland, 126 Ore. 487, And it has also been held that he cannot be deprived of his functions by employment of special attorney by the City Council. See Thwing v. International Falls, 148 Minn. 37.

You will recall that the Charter of The City of San Diego of 1889, as amended, read in Section 2, Chapter V, Article III, as follows:

> "Sec. 2. It shall be the duty of the City Attorney * * * to attend to all suits, matters, and things in which the city may be legally interested; provided, that the Common Council shall have control of all litigation of the city, and may employ other

attorneys to take charge of any such litigation, or to assist the City Attorney therein. He shall give his advice or opinion in writing whenever required by the Common Council, Mayor, or other city officers, * * *."

When the freeholders submitted our present charter, they made the City Attorney's Office an elective office, and passed the following provisions in Section 40:

"He 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.

"It shall be his duty, either personally or by such assistants as he may designate, to perform all services incident to the legal department; to give advice in writing, when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any Department.

"To prosecute or defend, as the case may be, all suits or cases to which the City may be a party.

"To prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each his approval of the form or correctness thereof.

"He shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office."

Comparing the provisions of the new charter with those of the old, it would appear that it was the intent of the framers of the new charter that the City Attorney should have control of all the litigation of the City at all times. It is true that subdivision (f) of Section 53 of the Charter provides:

"The Council shall have power to employ special counsel for the purpose of advising and representing the City in all matters, proceedings and things relating to or concerning the development, impounding and distribution of water."

It is also true that Section 40 of the Charter, in part, provides:

"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."

These provisions must be read and construed with the provisions of Section 40 which specifically sets forth the rights, duties and obligations of the City Attorney.

I do not here question the right of the Council to engage the services of special counsel. This has been done for many years. The City has, ever since the adoption of the new charter and before, employed special water counsel, but this special water counsel has always been considered to be working with and through the City Attorney's Office. It is my opinion that Section 40 of the Charter places the ultimate responsibility upon the City Attorney of all litigation and legal matters, including the preparation and approval of all contracts affecting the City. A study of the file and correspondence in the City Clerk's office will demonstrate that heretofore Mr. Cosgrove, Mr. Lee and until recently Mr. Swing have recognized the obligation of special counsel to work with and through the City Attorney. It is my opinion that the general language contained in subdivision (f), Section 53, of the Charter giving the Council the right to employ special water counsel cannot be construed to delegate to or to invest such special counsel with the duties and responsibilities specifically imposed by Section 40 of the Charter upon the City Attorney. Either the City Attorney is, as stated in the Charter, the chief legal adviser of the City, or he is not. It is my opinion that the framers of the Charter did not intend to authorize or to make possible a division of authority in legal matters affecting the City as could easily and probably would result in a state of chaotic confusion.

The aid and assistance of a special water counsel experienced and skilled in water matters is, of course, welcome, but I see no escape from the necessity of placing the ultimate responsibility, control and direction of his activities with the City Attorney.

I would, therefore, suggest that the contract submitted be amended to define the duties of special water counsel, by inserting therein a provision to this effect immediately following paragraph 1:

"That the representation hereinbefore referred to in paragraph 1 of this contract shall not be such representation as is entrusted by the Charter of The City of San Diego to the control and supervision of the City Attorney; and that in the event said second

party is directed to represent said City in any matter or before any court or tribunal, or in the preparation of any contract or ordinance or resolution, which by the Charter are made the duties of the City Attorney, then said second party shall be under the control and direction of said City Attorney."

Very truly yours,

J. F. DuPaul
City Attorney.

JFDu/P/S

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

BERT S. TEAZE
ASSISTANT CITY ATTORNEY
RTIS M. FITZPATRICK
SENIOR CHIEF DEPUTY CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101
(714) 236-6220

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. . . .

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

DATE: December 22, 1986

SUBJECT: Outside Counsel for the Civil Service Commission

REQUESTED BY: Rich Snapper, Personnel Director

PREPARED BY: John M. Kaheny, Deputy City Attorney

QUESTION PRESENTED

By memorandum dated December 3, 1986, you asked this office for a written opinion concerning our previous oral advice to the Civil Service Commission regarding its ability to retain outside counsel for its current Charter Sec. 128 investigation. That advice was rendered by Assistant City Attorney Curtis Fitzpatrick on November 19, 1986.

CONCLUSION

The City Attorney, as the chief legal advisor of The City of San Diego and all of its departments pursuant to Charter Sec. 40, is willing, able and qualified to provide the Civil Service Commission with legal advice in the matter being investigated. Under the present facts, there is no necessity for the City Council to employ an additional attorney to represent the Civil Service Commission.

BACKGROUND

During a recent hearing before the Civil Service Commission, Mr. Patrick Thistle, attorney at law, requested that the office of the City Attorney be recused from advising the Commission during the current Charter Sec. 128 investigation and that outside counsel be retained by the Commission. Mr. Thistle based his request on his interpretation of Civil Service Comm. v. Superior Court, 163 Cal.App.3d 70, 209 Cal.Rptr. 159 (1984). He stated that because he had filed with the Commission formal written charges of misconduct against an unclassified member of the City Attorney's office as part of this investigation, that the entire City Attorney's office should be removed from advising the Commission. He also indicated that because the Commission was requested to investigate how City departments implement certain civil service rules, the office of the City Attorney must be removed because it also advises these departments. In response, Curtis Fitzpatrick, Assistant City Attorney, indicated to the Commission that the City Charter does not authorize the Civil Service Commission to retain outside counsel and that the City Council only may retain additional counsel when it is necessary under the express provisions of Charter Sec. 40. He also indicated that under the present facts, such expenditure of funds was not necessary because the City Attorney's office is

ready, willing and able to represent the Civil Service Commission in this investigation. He informed the Commission that the investigation of charges of misconduct against an unclassified member of the City Attorney's office was not within the Civil Service Commission's jurisdiction and that the City Attorney is charged under the Charter to represent the City and all of its departments and commissions. The Commission then publicly voted to request that the City Council authorize the expenditure of funds to retain outside counsel for the Commission for the purpose of this Charter Sec. 128 investigation.

ANALYSIS

The City Attorney of The City of San Diego, is an independent elected official of the government of The City of San Diego, whose duties, powers and responsibilities are set forth in section 40 of the Charter of The City of San Diego. That section reads in part:

> ... A City Attorney shall thereafter be elected for a term of four (4) years in the manner prescribed by Section 10 of this Charter. 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.
>
> The City Attorney shall appoint such deputies, assistants, and employees to serve him, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter. It shall be his duty, either personally or by such assistants as he may designate, to perform all services incident to the legal
>
> department; to give advice in writing when so requested, to the 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; ...
>
> 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. (Emphasis added.)

It should be noted initially that the authority of the City Council to employ additional attorneys exists only when it is necessary to do so. The case law in California is very helpful in determining when such action is necessary. Seventy years ago the Civil Service Commission of San Francisco retained outside counsel to defend itself against a lawsuit which arose when it disregarded the advice of the city attorney and took action in accordance with its own judgement. Legal proceedings were commenced by a third party in the superior court against the commission to determine the legality of the commission's actions. Although the commission had not followed the advice of the city attorney, he was ready, willing and able to defend the commission in the lawsuit. The commission, however, refused his offer. When the commission sent the bill for the retained attorney to the city auditor, the auditor refused to pay the bill. Eventually, a writ of mandamus was issued by a trial court commanding the auditor to pay the amount. However, upon appeal, the appellate court in Rafael v. Boyle, 31 Cal.App. 623 (1916), analyzed a provision of the San Francisco Charter similar to that of section 40 of the Charter of The City of San Diego and stated:

> This express provision clearly indicates an intention that the City Attorney should handle all the legal work of the various departments of the city government, except
>
> where a special provision is made for additional counsel. The manifest intention of the framers of the Charter in the adoption of this provision was to systematize the conduct of the City's legal business and to limit the power of the authorities to incur expenditures for this character of service. ... The Charter having provided a City Attorney upon whom the Board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the Board to avail itself of his services, and it cannot ignore this provision and employ some other attorney to

> render those services which is the duty of the City Attorney to perform. Denman v. Webster, 139 Cal. 452, 73 P. 159; Merrian v. Barnum, 116 Cal. 619, 48 P. 727.

More recently, another court in Jaynes v. Stockton, 193 Cal.App.2d 47, 54, 14 Cal.Rptr. 49 (1971) explained this same principle in greater detail.

> In many cases, the courts of the state have expressly stated or impliedly recognized the rule that a public agency created by statute may not contract and pay for services which the law requires a designated public official to perform without charge, unless the authority to do so clearly appears in the powers expressly conferred upon it (citations omitted) or unless the services required are unavailable for reasons beyond the agency's control such as inability, refusal or disqualification of the public official to act. (Citations omitted.) This rule is based upon sound principles. The law will not indulge in implications that a public agency has the authority to expend public funds which it does not need to spend; that it has authority to pay for services which may be obtained without payment; or that it may duplicate an expenditure for service which the taxpayers have already provided. (Citations omitted, emphasis added.)

This office firmly believes that the retention of outside counsel is not necessary under the present facts because the City Attorney's office is able, willing and qualified to represent the Civil Service Commission.

We must state our disagreement with Mr. Thistle's argument that the Civil Service Com. v. Superior Court case holds that a deputy city attorney cannot represent the Civil Service Commission in an advisory capacity under any circumstance. We need only state at this time that Mr. Thistle has made this argument on numerous previous occasions before the Civil Service Commission. This office has responded in writing and has stated what we believed to be the proper holding of that case. Memorandum of Law dated April 30, 1986 to Rich Snapper, Personnel Director from City Attorney, Legal Representation Before the Civil Service Commission provided by the office of the City Attorney. If Mr. Thistle believes his view of that case to be

true and correct he may seek an available and appropriate remedy from the superior court.

We believe that the filing of written charges with the Civil Service Commission against a deputy city attorney, a "member of the unclassified service," does not disqualify the City Attorney's office from representing the Civil Service Commission, because the Commission clearly has no authority under Charter Sec. 128 to investigate written charges of misconduct against a member of the unclassified service. Therefore, no conflict of interest exists.

The argument that a conflict of interest exists because the City Attorney's office advises other departments of The City of San Diego is clearly frivolous. Mr. Thistle gives no facts and cites no authority for this proposition which, if taken seriously, would render the City Attorney's office unable to carry out its duties under the Charter of The City of San Diego. Extending his theory to its illogical conclusion, the City Attorney's office would only be left with the power and duty to represent itself, the Council, and each of the departments of the City, leaving all the various commissions and boards with the requirement to hire its own independent counsel.

This is not to state, however, that there may never be a time when this office may not be available to advise the Civil Service Commission in a specific situation. Certainly the facts in Civil Service Com. v. Superior Court, where a deputy county counsel advised the county's civil service commission on a particular matter and then the same deputy county counsel represented the county in a lawsuit arising out of his advice to the commission, warrants disqualification of counsel. Nor do we doubt that whenever a conflict of interest question arises, that it must be

resolved by thoughtful judgment on a case by case basis. If, after a thorough analysis of the issue, this office believes that legal cause exists for disqualification, we will advise the City Council to take appropriate action. However, absent a self-recusal or a writ of mandamus issued by the superior court, this office stands ready, willing and able to give legal advice to The City of San Diego in accordance with Charter Sec. 40.

SUMMARY

Based on the above facts and analyses, we believe that there is no legal necessity for the City Attorney's office to be recused from representing the Civil Service Commission of The City of San Diego in the current Charter Sec. 128 investigation. As long as the office of the City Attorney is ready, willing and qualified to represent the Civil Service Commission, we believe that the Charter requires us to do so and that the Council may

only expend funds to pay for outside counsel when it becomes necessary because of the inability, refusal or disqualification of the City Attorney.

Respectfully submitted,
JOHN W. WITT, City Attorney
By
John M. Kaheny
Deputy City Attorney

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LO-86-8
APPROVED:
JOHN W. WITT
City Attorney

MEMORANDUM OF LAW

DATE: January 20, 1993

TO: Christiann Klein, Executive Director, Human Relations Commission

FROM: City Attorney

SUBJECT: Duties of City Attorney

By memorandum dated November 24, 1992, you asked this office for a legal opinion on two questions relative to enforcement of the Human Relations Commission Ordinance ("Ordinance") and the Human Dignity Ordinance ("HDO"). Specifically, you have asked if the City of San Diego's Charter, or any other legal rule, prohibits the City Attorney from initiating enforcement action under section 52.9609, subdivision (b)(2) of the Human Dignity Ordinance, upon proper referral by the Human Relations Commission, without prior direction from the City Council? You have also asked what is the appropriate application of Charter section 40, which provides that "It shall be his duty, either personally or by such assistants as he may designate, . . . to prosecute for all offenses against the ordinances of the City . . . ?"

BACKGROUND

In August 1992, Officer Chuck Merino was expelled from his Eagle Scout Advisor position by the Boy Scouts of America ("BSA") based upon his sexual orientation. Subsequently, the Human Relations Commission voted to, and did, send a resolution to the City Council asking the Council to enforce the compliance with laws clause of the BSA leases on Fiesta Island and in Balboa Park. The request was predicated on the BSA's alleged violation of the HDO. Additionally, the Human Relations Commission sent a letter to City Attorney John Witt, asking him to seek injunctive relief pursuant to the enforcement provisions of both the HDO and the Ordinance. Your questions arose as a result of these requests by the HRC. At this time, the City of San Diego is a defendant in a lawsuit filed by Officer Merino and the Office of the City Attorney is defending the City. Therefore, it would be inappropriate for this office to comment on the merits of a matter that is the subject of pending litigation. Nevertheless,

the following analysis answers your questions concerning the responsibilities of the Office of the City Attorney under the Charter in general terms.

ANALYSIS

The San Diego City Charter ("Charter") outlines the duties of the City Attorney. Specifically, Charter section 40 states: "It shall be his duty . . . the City Attorney to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of him by law . . . ." (Emphasis added.)

Charter section 40.1 grants the City Attorney concurrent jurisdiction with the District Attorney to prosecute persons charged with violation of the state laws within the City limits for offenses constituting misdemeanors.

Under these sections, if the City Attorney is prosecuting a criminal action, he acts on behalf of the people of the State of California. If the City Attorney is prosecuting an administrative action, he acts on behalf of the City of San Diego. In most civil actions the City Attorney represents the City, however, depending upon the nature of the cause of action and the underlying statutory authority, he may represent the people of the State of California.

Irrespective of the nature of the underlying authority for the City Attorney to act, he is vested with certain discretionary powers. For example, the language of the Charter indicates the City Attorney shall prosecute all offenses against the ordinances of the City. Use of the word shall usually indicates that these duties are mandatory and that the City Attorney has no choice but to act in such instances. However, the courts have repeatedly stated: "The district attorney here City Attorney must be vested with discretionary power in investigation and prosecution of . . . such charges." Taliaferro v. City of San Pablo, 187 Cal. App. 2d 153, 154 (1960).

Although prosecution is generally associated with criminal matters, civil prosecutions of certain ordinances do occur, such as in the areas of noise or nuisance abatement and the HDO. As in criminal cases, prosecutorial discretion in civil prosecutions is permitted. The discretion is, in fact, greater than in criminal prosecutions because a party to a civil wrong may always choose to forego legal action on the alleged wrong. In discussing the parameters of a prosecutor's discretion in Taliaferro v. Locke, 182 Cal. App. 2d 752 (1960), a case involving a citizen who attempted to force a district attorney to prosecute a case through a court ordered writ of mandamus, the

court clearly stated that a prosecutor is vested with broad discretionary powers and the court will not second guess a district attorney's decision not to prosecute by compelling prosecution through a writ of mandamus.

Both the HDO and the Ordinance recognize that the City Attorney is vested with discretion in enforcement proceedings. The remedies provided in both the Ordinance and the HDO are civil in nature, no criminal sanctions are provided. Specifically, the Ordinance at section 26.0908(e) provides: "The City Attorney or other appropriate prosecutorial or regulatory entity, in its discretion, may proceed to secure from an appropriate court an order enjoining the defendant(s) from continuing or repeating such practice." (Emphasis added.)

The HDO enforcement section similarly provides in pertinent part at section 52.9609(2): "An action for injunction under this section may be brought by any aggrieved person, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class." (Emphasis added.)

The language of the enforcement provisions of the Ordinance and the HDO indicate that the duty of the City Attorney to civilly prosecute violations of the Ordinance is discretionary. No mandatory language is employed. In cases where mandatory language is evident, the courts have said: "Of course, when a statute clearly makes prosecution mandatory, as upon direction of the board of supervisors to proceed under the Red Light Abatement Act, the district attorney can be compelled to act." Taliaferro v. City of San Pablo, 187 Cal. App. 2d 153, 154-155 (1960). Such is not the case in this instance, the plain language of the Charter indicates that although the City Attorney may seek injunctive relief on a contract, whether pursuant to a violation of an ordinance or as a result of a breach of contract, he is not compelled to do so.

The City Attorney, as an independently elected official, has broad discretionary power. He is not, however, empowered to act as a policymaker on behalf of the City. In matters similar to the one you present, where a decision to proceed with a legal action is not mandated by law but turns on a question of policy, it is in the best interest of the City for the City Attorney to act in concurrence with the guidance of the City Council. This does not mean that the City Attorney is without the power to act on his own, rather, it is an indication that in certain instances he may choose to confer with the policy-making body and receive direction on priorities. This is especially true when the City of San Diego is already a party to a civil lawsuit arising out of the same set of circumstances.

The Human Relations Commission is an advisory commission to the City Council and City Manager pursuant to SDMC section 26.0902. Thus, in matters of City policy, the appropriate action for this Commission would be to recommend to the City Council that the City of San Diego act in conformance with the views of the Commission.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

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TOP

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

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MEMORANDUM

DATE: February 13, 2007

TO: The Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Retention of Outside Counsel by a City Department

INTRODUCTION

On February 7, 2007, the City's Real Estate Assets Department [READ] presented the findings and recommendations of Grubb & Ellis' "Best Practices Methodology for Real Estate Assets Department" report to the Land Use & Housing Committee. At that meeting, Mr. Jim Waring, the Mayor's Deputy Chief of Land Use and Economic Development, announced to the Committee that in response to Grubb & Ellis' finding that READ had "no definitive library of legal forms" and "multiple standard forms for leases," he intends to outsource the development of "standardized legal documents" to private law firms who will do the work on a *pro bono* basis.

QUESTION PRESENTED

Can a City Department unilaterally retain outside legal counsel on a *pro bono* basis for the preparation of standardized legal documents?

SHORT ANSWER

No. No authority exists that would allow any City Department to unilaterally retain outside legal counsel for any purpose, regardless of whether or not compensation is paid.

ANALYSIS

The San Diego City Charter section 40 clearly delineates the authority of the City Attorney:

> "The City Attorney shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereofin matters relating to their official powers and duties

> "It shall be the City Attorney's duty…to perform all services incident to the legal department; …to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned…"

Such authority is absolute. The preparation of "standardized legal documents" clearly falls within the exclusive purview of the City Attorney.

CONCLUSION

The City Charter delegates to the City Attorney all authority for the provision of legal services to the City and all of its Departments, including without limitation the preparation of contracts. Only the City Attorney may retain outside counsel. Therefore, the Mayor's retention of outside legal counsel, on a *pro bono* basis or not, for the purpose of preparing standardized legal documents for the City's Real Estate Assets Department, or for any other purpose, would be illegal.

MICHAEL J. AGUIRRE, City Attorney

By
The City Attorney

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MEMORANDUM OF LAW

DATE: July 20, 2007

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Legality of Proposal to Require the City Attorney to Obtain City Council Approval Before Filing Cases

INTRODUCTION

On Monday, July 23, 2007, the City Council will consider the Fiscal Year 2008 Appropriation Ordinance (Item 205). The item includes a recommendation that the City Council adopt the FY 2008 Appropriation Ordinance, with certain changes considered at the Budget and Finance Committee's meeting on July 11, 2007. In particular:

> 3) Incorporate language of the July 10, 2007, Council President Peters' and Councilmember Hueso's memorandum regarding litigation expenses, deleting the title. (Councilmembers Atkins, Peters, and Madaffer voted yea. Councilmembers Frye and Faulconer voted nay.)

The language in the July 10, 2007 memorandum seeks to limit the City Attorney's authority to file cases by requiring pre-approval by the Council, except in limited situations. It also would require the City Attorney to dismiss actions not approved by the Council. (See, July 10, 2007 memorandum from Councilmembers Peters and Hueso).

The proposed language is flawed in several ways. First, the Council may not limit the City Attorney's authority, obligations, and duties as set forth in state law and Charter section 40. Second, the Appropriation Ordinance is intended as a vehicle to enact the budget and should not contain policy matters. Third, the proposed language infringes on the City Attorney's ability to protect the public interest. Therefore, if this proposal is adopted, it will have no legal force or effect.

The proposal attempts to usurp the people's right to have an independent City Attorney that will make decisions that are in the people's best interests and without interference by the legislative body. The people elected the City Attorney to prosecute cases, not the City Council. Further, the people have decided the duties of the City Attorney as reflected in the Charter. Any attempt to undermine the role of the City Attorney undermines the will of the people.

QUESTION PRESENTED

May the Council include in the Appropriation Ordinance a section to require that the City Attorney seek Council approval prior to filing any action and dismiss a legal action not approved by the Council?

SHORT ANSWER

No. The Council may not limit the City Attorney's statutory and Charter authority to file cases. State law provides that a City Attorney may file a civil action for a violation of the California False Claims Act. Any action by the City Council to limit that authority would be contrary to state law. Under Charter section 40, the City Attorney is the chief legal advisor to the City. The Charter imposes no limitations on the authority of the City Attorney to file actions on behalf of the City, including any requirement to obtain Council approval prior to filing any action. Further, the Council has no authority to direct that the City Attorney dismiss any action.

ANALYSIS

I. The Proposal is Preempted by State Law.

The California False Claims Act (Cal. Gov't Code §§ 12650-12656) [CFCA] is designed to prevent fraud on the public treasury and ultimately to protect the public fisc. *State v. Altus Finance*, 36 Cal. 4th 1284, 1296-1297 (2005). It provides that any person who knowingly submits a false claim to the State of California, or to a political subdivision, may be liable in a court action for treble damages and civil penalties. *State ex rel. Harris v. PricewaterhouseCoopers, LLC*, 39 Cal. 4th 1220, 1223 (2006) (*PwC*); §§ 12651, 12652. For purposes of the CFCA, a political subdivision includes "any city, city and county, county, tax or assessment district, or other legally authorized local government entity with jurisdictional boundaries." *Id.* at 1227; § 12650(b)(3).

In *PwC,* the Supreme Court considered who may prosecute actions under the CFCA:

> The CFCA specifies in detail who may bring and prosecute actions under that statute, depending on whether state or political subdivision funds are involved. If *state* funds are involved, the *Attorney General* may bring the action. (Gov. Code, § 12652, subd. (a)(1).) If *political subdivision* funds are involved, the action may be brought by the political subdivision's 'prosecuting authority' (*id.*, § 12652, subd. (b)(1)), i.e., 'the *county counsel*, *city attorney*, or other local government official charged with investigating, filing, and conducting

> civil legal proceedings on behalf of, or in the name of, *[the] particular political subdivision'* (*id.*, § 12650, subd. (b)(4), italics added). Where both state and political subdivision funds are involved, each of these officials may intervene, on *behalf of the public entity he or she represents*, in an action initiated by the other. (*Id.*, § 12652, subds. (a), (b).)

The City Council does not have a role in deciding whether to file a claim under the CFCA. The California Supreme Court has implied that local prosecuting authorities may "unilaterally" initiate actions under the California False Claim Act. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1183 (2006). As a practical matter, it is also in a defrauded city's best interest to have its prosecuting authority file the action as expeditiously as possible - doing so would allow the city to foreclose participation by a qui tam plaintiff, who would reduce the city's potential recovery. In light of the Act's purpose to protect the public fisc and the incentives the Act provides to public and private plaintiffs, a city should not be able to prevent its own "prosecuting authority" from initiating a similar lawsuit on its behalf, especially when that prosecuting attorney is elected by the public.

II. The City Council May Not Limit the City Attorney's Authority, Obligations, and Duties as Set Forth in Charter Section 40.

A city council possesses no authority after a charter is adopted by the voters to thereafter pass any law which would limit, alter, or amend any of the provisions of the city charter. *Harder v. Denton*, 9 Cal. App. 2d 607 (1935). Under section 40 of the City Charter, the City Attorney is the "chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers." Further, section 40 provides that the City Attorney shall "perform all services incident to the legal department; . . . to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; . . . to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law." Accordingly, the plain language of Charter section 40 grants the City Attorney the authority to prosecute actions to protect the public interest. Moreover, "[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter." *Scott v. Common Council of the City of San Bernardino*, 44 Cal. App. 4th 684, 695 (1996).

The Charter does not, in any respect, require that the City Attorney obtain City Council approval prior to filing a claim or defending the City in any action. However, the City Council may require that the City Attorney file certain actions in certain circumstances. First, the City Attorney is required "upon the order of the Council" to sue for injunction relief to ". . . restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption." Second, the City Attorney is required "upon the order of the Council" to seek a court order "to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance." Thus, while the City Attorney has unfettered authority under

Charter section 40 to prosecute actions in the name of the City, the two provisions above are the only instances in which the Council has the authority to direct the City Attorney.

The legislative history of Charter section 40 confirms the independence of the City Attorney from the City Council. As discussed in an April 26, 2005 report by the City Attorney:

> The duty of the City Attorney is to give legal advice to every department and official of city government on municipal matters. He must also act as the representative of various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. If elected, the city attorney is in the position of complete independance (sic) and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

"Report on the Role of the City Attorney as Independent Representative of the People and City of San Diego," http://www.sandiego.gov/cityattorney/pdf/role050426.pdf at p. 6.

In drafting the reform charter of 1931, the board of freeholders decided to create an elected City Attorney in order to insulate that position from the influences of "appointed" power. In so doing, the express intent of the charter changes was to repose in the City's chief legal representative the power and obligation to prosecute legal claims on behalf of the citizens. As the Court of Appeal in *Scott v. Common Council* stated: "[T]he legislative body cannot act in excess of its authority by first eliminating mandatory government functions, such as the investigative function of the city attorney in this case." *Id.*. at 697. Accordingly, the intent of Charter section 40 is to give the City Attorney independence from the City Council before prosecuting or initiating cases on behalf of the City.

III. The Purpose of the Appropriation Ordinance is to Enact the Budget, Not to Give Policy Direction.

The purpose of the Appropriation Ordinance is to provide spending authority for City operation for Fiscal Year 2008 and to enact the City Budget. This is what differentiates the Appropriation Ordinance from other City legislation. Under Charter section 71, "the Council shall prepare an appropriation ordinance using [the Budget] as a basis." Under the Strong Mayor form of government, the Budget is proposed by the Mayor [Charter Section 265(b)(15)] and ultimately approved by the Council after a formal negotiation process with the Mayor [Charter Section 290(b)(2)(C)]. At the conclusion of that process, the Appropriation Ordinance becomes the "controlling document for preparation of the Annual Appropriation Ordinance for the ensuing fiscal year."

The Appropriation Ordinance is an improper vehicle for enunciating policy. The Mayor expressly has no veto power over the Appropriation Ordinance making any policy matters attached to the Appropriation Ordinance particularly suspect. In fact, at the same time the Council will consider adoption of the proposed Appropriation Ordinance, the Council will also consider adoption of a Statement of Budgetary Principles. It is notable that such document includes a principle that the Appropriation Ordinance shall not be used to establish policy directions. Accordingly, the Charter does not permit the Council to add policies in the Appropriation Ordinance and thereby deprive the Mayor of his right to veto such policies.

Moreover, the Appropriation Ordinance is intended to last only one fiscal year. If the Council desires to adopt policies, it should do so by other means. Otherwise, the policy would expire unless readopted each year. Further, the Appropriation Ordinance has strict timelines for adoption. In particular, it has to be adopted during July of each year. By placing last minute, extraneous policies in the Appropriation Ordinance, the Council is under pressure to make hasty decisions. Similarly, a Councilmember may feel undue pressure to accept policy changes so that the Appropriation Ordinance is adopted and to ensure programs are timely funded. The matter of limiting the City Attorney's authority should be more fully discussed, debated, and analyzed. It should not be raised only days before the Council must adopt the Appropriation Ordinance.

IV. The City Council May Not Infringe on the City Attorney's Duty to Protect the Public Interest.

The proposed language limits the ability of the City Attorney to protect the public interest. While the proposal attempts to provide an exception for cases in which the City Attorney faces a statute of limitation deadline, there are other situations where the public interest requires that the City Attorney move expeditiously without Council approval. The proposal ignores cases where the health and safety of citizens or other vital interests of the City are at risk and demand immediate redress. The City Attorney must have the authority to act promptly and use all appropriate resources in matters affecting the public health and safety.

The proposed language also requires the City Attorney to dismiss "without prejudice" any action not approved by the City Council. The City Attorney is obligated to dismiss such action whether or not there is a vital public interest at stake, including serious health and safety risks. Under the proposal, the Council would usurp the unique legal determinations that are vested in the elected City Attorney. Under the proposal, there would be no options to conduct the litigation with City staff, or seek alternative means of pursuing the action. This provision of the proposed language clearly violates Charter section 40 and is void.

The independence of the City Attorney also ensures that politically sensitive cases may be pursued without first obtaining the approval of the Council. Such cases could be avoided though Council inaction and the requirement to minimize expenditures pending approval would limit potential legal strategies and compromise the outcome if the case is approved. If this proposal had been in place last year, the City Attorney would not have had the authority to file the case against Sunroad for violating Federal Aviation Administrative regulations by

constructing a building that was a public safety hazard. Delays in prosecuting this case would have significantly impaired the litigation strategy of the City.

CONCLUSION

The proposal to require that the City Attorney obtain Council approval is flawed in several ways. First, the proposal is preempted by state law. The California Supreme Court has implied that local prosecuting authorities may "unilaterally" initiate actions under the California False Claim Act. Second, it is clear that the Council may not limit the City Attorney's authority, obligations, and duties as set forth in Charter section 40. The Charter imposes no limitations on the authority of the City Attorney to file actions on behalf of the City, including any requirement to obtain Council approval prior to filing any action. Third, the Appropriation Ordinance is intended as a vehicle to enact the budget and should not contain policy matters. Finally, the proposed language infringes on the City Attorney's ability to protect the public interest. For all the above reasons, if this proposal is adopted, it will have no legal force or effect.

MICHAEL J. AGUIRRE, City Attorney

By Michael J. Aguirre
Michael J. Aguirre
City Attorney

MJA:jab
ML-2007-10

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OPINION NUMBER 2008-1

DATE: April 10, 2008

SUBJECT: Interpretation of San Diego City Charter Regarding City Attorney's Authority to Initiate Litigation

PREPARED BY: City Attorney

INTRODUCTION

The City Attorney's authority is governed by San Diego City Charter section 40, requiring interpretation of the City's Constitution. *See Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017 (city charter is equivalent of local constitution). The ramifications of this interpretation are not limited to one issue, one case or one City Attorney; rather, interpretation of Charter section 40 defines the structure of the City Attorney's Office and its duties and responsibilities. Questions regarding the scope of the City Attorney's authority have arisen in the context of the City Attorney's ability to initiate litigation without prior consent of the City Council. This Opinion addresses that issue and defines the scope of the City Attorney's authority in detail.

QUESTION PRESENTED

What is the scope of the authority of San Diego's elected City Attorney to initiate litigation?

SHORT ANSWER

As detailed below, the plain language of Charter section 40 authorizes the City Attorney, as "chief legal adviser," to "prosecute" "all" lawsuits brought in the name of the City. There is no requirement whatsoever that the City Attorney obtain permission to sue in any case. This interpretation is supported not only by the language of Section 40 read in its entirety, but also by the legislative history of the provision, the common law authority afforded to elected public attorneys, state statutes authorizing the City Attorney to sue and long-standing practice. The check of an independent legal advisor is required in the interests of the people. Indeed, it is a constitutional safeguard.

ANALYSIS

Since 1931, San Diego voters have chosen a form of government that provides for an elected City Attorney, who is an officer of and "chief legal adviser" to the City. This separation of powers and the broad authority afforded the City Attorney under San Diego's Charter contrast with the City Attorney's status in general law cities. Under the state law governing general law cities, the city attorney is appointed by the city council, is a "subordinate" city officer, and performs legal services only as directed by the council. By contrast, San Diego voters have granted different and broader authority to its elected City Attorney, as allowed under a Charter city government.

As the California Supreme Court has written:

> [W]e construe the charter in the same manner as we would a statute. Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.

Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal.4th 161, 171-72.

It is instructive to consider the ways in which a court would construe San Diego's City Charter. In construing the Charter, a court must consider the obvious purposes and objects sought to be attained and construe the language to effectuate that purpose. *Gibson v. City of San Diego* (1945) 25 Cal.2d 930, 934-35. In particular, a court must give "great weight" to the interpretation offered by the City Attorney. *E.g.*, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 ("the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction"; this is required "especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion"); *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1289; *MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219-220.

I. The Plain Language of Charter Section 40 Authorizes the City Attorney to Initiate City Litigation

Possibly the best way to understand the meaning and intent of Charter section 40 is to juxtapose its terms with the provisions governing city attorneys in general law cities. Charter section 40 not only differs dramatically from the general law provisions governing city attorneys, but provides sweeping authority to the elected City Attorney: Section 40 provides that "The City Attorney shall be ***chief legal adviser of***, and ***attorney for the City and all Departments and offices thereof*** in matters relating to their official powers and duties . . . ." (emphasis added); whereas, the general law city attorney is a "***subordinate***" official, who "shall perform . . . legal

services ***required from time to time by the legislative body***." *See* Section C., *infra*.; Cal. Govt. Code, §§ 36505, 41803.

Thus, in sharp contrast to general law cities, San Diego voters adopted an autonomous city attorney form of government, in which the City Attorney is independently elected, counter-balancing the other branches of City government —the Mayor and Council. Charter, Art. V, § 40. In the realm of legal affairs, the City Attorney is "the chief legal adviser of . . . the City . . ." with the "duty . . . to perform ***all services*** incident to the legal department." *Id.* (emphasis added). *See also* Charter, Art. XV, § 265(b)(2) ("Nothing in this section [establishing "strong mayor" government] shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1"); *id.* §§ 270, 275 (enumerating power of City Council; no mention of initiating or controlling litigation or authority over legal affairs).

Detailing the duties of its "chief legal adviser," San Diego's Charter section 40 provides:

> It shall be the City Attorney's ***duty***, either personally or by such assistants as he or she may designate . . . ***to prosecute or defend, as the case may be, all suits or cases to which the City may be a party***; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law . . . . (Emphasis added).

This language could not be more plain or broad: The City Attorney has an express "duty" to "prosecute" "all" lawsuits "to which the City may be a party." The plain meaning of "prosecute," which governs,[1] is "[t]o ***commence*** and carry out a legal action . . . ." *Black's Law Dict.* (8th ed. 2004) (emphasis added). *See also Oxford English Dict. Online* (Oxford Univ. Press 2008) ("prosecute" is defined as: 2.a.: "To ***institute*** (an action, claim) in a court of law; to ***initiate*** or carry on (civil or criminal proceedings)"; 2.b.: "To institute legal proceedings against (a person, organization, etc.) . . ."; 2.c.: "To institute, conduct, or pursue legal proceedings against someone. . ."; 2.d.: "To institute legal proceedings against a person . . .") (emphasis added); *Webster's II New College Dict.* (1995) p. 888 ("prosecute" is "to initiate legal or criminal court action against" or "to initiate and conduct legal proceedings"); *The American Heritage College Dict.* (4th ed. 2002) ("prosecute" is "[t]o initiate civil or criminal court action against"); *accord Buck v. City of Eureka* (1895) 109 Cal. 504, 519 (when [the law] says 'all suits' . . . the language will bear no other construction than that which is patent on its face."). In short, the Charter authorizes the City Attorney to institute or initiate "all" lawsuits. There is no

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[1] *E.g.*, *Gillespie v. San Francisco Public Library Comm'n* (1998) 67 Cal.App.4th 1165, 1174 (plain meaning governs interpretation where possible; examining dictionary definition of term).

limitation on this authority, and there is no requirement whatsoever that the City Attorney obtain permission to sue.[2]

In addition to this plenary authority to institute "all" litigation, the City Attorney must also obey the Council's directive to initiate litigation ***as to a limited subset of lawsuits***. Charter section 40 further provides:

> [1] The City Attorney ***shall apply, upon order of the Council,*** in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption.
>
> [2] The City Attorney ***shall apply, upon order of the Council,*** to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.

Thus, while the City Attorney has broad discretion and authority to institute any lawsuit in the name of the City, he or she must, when directed by the Council, follow that directive and institute litigation in these specific classes of cases. These provisions do not preclude the City Attorney from filing lawsuits of this type under his own general authority to institute "all" cases; they merely require that the City Attorney ***must*** do so regardless his own proclivity if the Council so directs in these specific kinds of actions. *Cf. Board of Supervisors v. Simpson*, 36 Cal. 2d 671, 673 (1951) (district attorney required to bring nuisance suit when statute required him to do so at the direction of the Board of Supervisors).[3]

These provisions do ***not*** provide that the City Attorney ***shall obtain Council approval***; rather, they provide that the City Attorney ***shall bring the action*** ("shall apply") when the

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[2] The mode prescribed for the exercise of power by a public officer is the measure of that power. *E.g., Kennedy v. Ross* (1946) 28 Cal.2d 569, 581. Because the City Attorney is given the mode to "prosecute" cases, he must have the power to do so. *Id.* at 581-82 (holding that San Francisco charter vesting authority in city official impliedly created all powers incident to performance of that function, even when not expressed). *See also Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 433 (implying broad authority for City Attorney in absence of prohibition).

[3] When the Council directs the initiation of litigation, it must comply with the Brown Act, Cal. Gov. Code, §§ 54950-54963.

Council so orders. ***These are not permission-to-sue provisions; they are requirement-to-sue provisions.***[4]

Finally, Charter section 40 provides that "[t]he City Attorney shall 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." (Emphasis added). Hence, the City Council may add to the City Attorney's legal duties by ordinance, and the City Attorney must perform his duties under state law. In short, the notion that the City Attorney needs ***permission to sue is wholly absent*** from Charter section 40.

It is instructive to compare the San Diego Charter adopted in 1931 to the former Charter. In *Ward v. San Diego School Dist.* (1928) 203 Cal. 712, 714, the California Supreme Court discussed the prior charter, under which the City Attorney was an appointed City official. By stark contrast to Section 40's current description of the City Attorney as the "chief legal adviser" with plenary authority to "prosecute" "all" lawsuits, the former Charter, Art. 3, Ch. 5, § 2, provided "'that ***the Common Council shall have control of all litigation of the city . . . .***'" *Ward,* 203 Cal. at 714 (emphasis added). That provision was dropped three years later when current Charter section 40 was adopted.

Because the City Charter assigns the power to "prosecute" "all" suits to the City Attorney, the legislature (the Council) may not interfere with that function. *See Rafael v. Boyle* (1916) 32 Cal.App.2d 623, 625-26 (interpreting San Francisco Charter providing that city attorney "must prosecute and defend for the city and county all actions at law or in equity"; "This express provision clearly indicates an intention that the city attorney should handle all legal work of the various departments of the city government . . . . The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business"). *See also Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240-41 (legislature could not interfere with prosecutorial function); *Dadmun v. City of San Diego* (1908) 9 Cal.App. 549, 551 ("[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter . . . ."). *Accord Scott v. Common Council of San Bernardino* (1996) 44 Cal.App.4th 684, 689-70 (city council could not use budgetary process to prevent city attorney from carrying out charter-mandated prosecutorial duties). *See generally Citizens for Responsible Behavior v. Super. Ct.* (1991) 1 Cal.App.4th 1013, 1034 (Charter may be amended only by majority vote of electorate and ordinance cannot limit charter provisions).

In sum, the plain language of Charter section 40 largely eschews Council control over City litigation, and instead provides the City Attorney with authority to initiate "all" lawsuits. The Council's role is limited to the ability to direct the City Attorney to file lawsuits in a small class of cases. This interpretation is not only the straightforward reading of the language, but it is confirmed by all other authorities.

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[4] Even if they were permission-to-sue provisions, however, the mandamus provision extends only to actions compelling "the performance of duties of any ***officer*** or ***commission***." Charter, Art. V, § 40.

II. Other Sources Universally Confirm the City Attorney's Authority to Initiate City Litigation

A. The Legislative History of Charter Section 40 Recognizes the City Attorney's Broad Legal Power

The elected office of San Diego City Attorney was created by the voters in the general election held on April 7, 1931. The elected City Attorney provision adopted by the electorate was a triumph over the 1929 Charter Proposal, which would have provided for an appointed City Attorney.[5]

The rationale for the "Independent City Attorney" explained at the time was:

> The city attorney is to be elected by the people. This is a guarantee that the legal head of the government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of counsel or manager.[6]

Charter section 40 has been amended seven times since its adoption over 75 years ago. Charter, Art. V, § 40. However, the voters' choice to have an independent, elected City Attorney has not changed.[7]

One of the interim amendments to Charter section 40 sheds further light on the legislative intent. To increase City Attorney autonomy from the Mayor, staggered elections were adopted. While this practice was later abandoned in favor of increasing voter turnout through combined elections, the ballot statement at the time is instructive:

> The city attorney as a popularly elected official is responsible first of all to the voters of the city. He should be protected from the possibility of the threat of economic pressure from an unfriendly city council . . . . A city attorney elected at a different period than the majority of the city council and protected from economic pressure by the city council is San Diego's best insurance against

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[5] The lengthy proceedings surrounding this adoption, and the political milieu at the time, is detailed in a 2005 Report by the City Attorney's Office. (Report on the Role of the City Attorney, April 26, 2005. See http://www.sandiego.gov/cityattorney.

[6] Ballot Brochure, "Plan for Progress," published by San Diego Straight Ahead. Expressions of intent of the framers of the Charter are relevant in construing its meaning. *E.g., Kennedy v. Ross* (1946) 28 Cal.2d 569, 577; *see also Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1018 (statements made to voters relevant in construing intent).

[7] The other two major California cities —San Francisco and Los Angeles— also have city charters authorizing an elected city attorney.

> the establishment of a politically dominant faction in our democratic municipal government.

Ballot Statement at p. 16.

A preeminent treatise on local government describes the resulting relationship among the branches of local government:

> The relation existing between a city attorney and the city council is not, in all respects, that of attorney and client; ***the city attorney is the law officer of the city, but is not the servant of the city council.*** . . . In all matters that . . . concern the public . . . ***the city attorney is wholly independent of the city council, is a servant of the people,*** and as to such matters, ***vested with powers and burdened with duties over which the council has no jurisdiction.***

3 McQuillin, *The Law of Municipal Corporations* (3d ed. 2007) § 12.52.05; *see also* J. Martinez, 1 *Local Gov. Law* (2007) § 9.8 ("An extra measure of autonomy is granted in some states to the chief law officer of the local government unit . . . . Although certain of his actions may be subject to final disposition by the entity's executive or legislative branch, the legal officer is often said to be wholly independent of the other branches of local government.").

Thus, the breadth of the City Attorney's authority must be viewed through the lens of his status as an independent elected officer of the City. Where a local government official is popularly elected, in interpreting the authority of that official, the intent of the electorate to free that official from city council interference and to operate autonomously in his assigned sphere must be respected. *See Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1019-20 (electorate intended independently elected rent control board to be autonomous in legal affairs where it was provided power to enforce the law).

B. Elected Public Attorneys Have the Power to Initiate Litigation Under Common Law

The breadth of the City Attorney's authority is also readily evident by an examination of his California counterpart—the independently elected state Attorney General.

Regarding the Attorney General, who operates under constitutional and statutory directives largely indistinguishable from Charter section 40,[8] the courts repeatedly have held

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[8] *See* Cal. Const., Art. 5, § 13 ("the Attorney General shall be the chief law officer of the State") (emphasis added); Cal. Govt. Code, § 12512 ("The Attorney General shall . . . ***prosecute or defend all causes*** to which the State, or any State officer is a party in his or her official capacity") (emphasis added).

that, as chief law officer of the state, the Attorney General has broad common law powers, ***among which is the power to file any civil action he deems necessary***. *E.g.*, *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14; *Pierce v. Super. Ct.* (1934) 1 Cal.2d 759, 761-62 (absent legislative prohibition, Attorney General has common law power as chief law officer of state to "file any civil action or proceeding" he deems necessary in public interest); *People v. New Penn Mines* (1963) 212 Cal.App.2d 667, 671 ("As chief law officer of the state the Attorney General has broad common law powers. In the absence of legislative restriction he has the power to file any civil action which he deems necessary for the enforcement of the laws of the state and the protection of public rights and interests."); *People v. Birch Securities Co.* (1948) 86 Cal.App.2d 703, 707 (in absence of contrary statute, attorney general has the power to institute, conduct and maintain all civil actions involving interests of State).

In discussing the Attorney General's "paramount duty to represent the public interest," 11 Cal.3d at 15-16, the Supreme Court's statements in *D'Amico* are particularly pertinent:

> The Attorney General . . . is the chief law officer of the state . . . . As such he possesses not only extensive statutory powers but also ***broad powers derived from the common law relative to the protection of the public interest. "[H]e represents the interest of the people in a matter of public concern."*** Thus, 'in the absence of any legislative restriction, ***[he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the*** enforcement of the laws of the state, the preservation of order, and the ***protection of public rights and interest***."

Id. at 14 (citations omitted) (emphasis added).

Thus, it is well established that the Attorney General, as the state's elected chief legal officer, with the power to "prosecute" cases involving the state, has the independent power to initiate litigation. This is both a matter of inherent common law authority, and the statutory authority to "prosecute and defend." *See People ex rel. Lockyer v. United States Forest Service* (N.D. Cal., July 11, 2005, No. C04-02588 CRB) Not Reported in F.Supp.2d [2005 WL 1630020 *6] (Attorney General "retains broad common law authority to sue the federal government to protect the state's interests"; "In addition to his common-law powers, the Attorney General also has the duty to 'prosecute or defend all causes to which the State . . . is a party . . . .'") (citing Cal. Gov. Code, § 12512; other citations omitted).

The concomitant of this broad authority to initiate litigation is nearly unlimited discretion free from judicial restraint. *See People v. Honig* (1996) 48 Cal.App.4th 289, 355 (superior court may not interfere with Attorney General's decision to prosecute case absent manifest abuse of discretion and burden is on defendant to establish abuse of discretion, rather than on Attorney

General to justify decision; Attorney General's decision to institute lawsuit must be upheld unless no reasonable person could reach same conclusion).[9]

The broad authority of the elected state Attorney General, operating under nearly indistinguishable statutory authorization to initiate litigation free from legislative control, indicates that the City Attorney, operating under the same mandate in Charter section 40, enjoys the same discretion. Indeed, if anything, the Attorney General's power under the California Constitution is ***more limited than the City Attorney's under Charter section 40***: ***"Subject to the powers and duties of the Governor***, the Attorney General shall be the chief law officer of the State." Cal. Const., art. V, § 13 (emphasis added); *compare* Charter section 40 (stating, without qualification, that City Attorney is "the chief legal adviser of . . . the City . . ."); Charter, Art. XV, § 265(b)(2) ("Nothing in this section [establishing "strong mayor" government] shall be interpreted or applied to add or subtract from power conferred upon the City Attorney in Charter sections 40 and 40.1"). Thus, whereas the Constitution and Government Code limit the Attorney General's powers somewhat (though his prosecutorial powers are still broad), the Charter provides almost no limit to the City Attorney's legal powers.[10]

In sum, as can be seen by analogy to the elected California Attorney General, who operates under an indistinguishable, if not more restrictive statutory scheme, the power of the chief legal adviser —here the City Attorney— to initiate litigation in the public interest of his elected constituency derives both from his inherent common law authority as the head of the law

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[9] The law of other states, too, recognizes this common law power. *E.g.*, *Perdue v. Baker* (Ga. 2003) 586 S.E.2d 606, 619-20 (state attorney general enjoys broad general authority, based upon the independent constitutional role of the attorney general as chief legal officer of the state, to independently initiate litigation and to represent the state in all civil actions); *People ex rel. Salazar v. Davidson* (Colo. 2003) 79 P.3d 1221, 1230 (state attorney general has broad common law powers, including power to initiate lawsuits, except to the extent specifically repealed or limited by statute); *Lyons v. Ryan* (Ill. 2002) 780 N.E.2d 1098, 1105 (state attorney general has "exclusive constitutional power and prerogative to conduct the state's legal affairs," including by initiating lawsuits in his or her discretion); *State Consol. Pub. Co. v. Hill* (Az. 1931) 39 Ariz. 21, 24 (city attorney "***stands to his city what the Attorney General stands to the state***"; "As . . . legal adviser, one of his principal duties, it is obvious, was . . . ***to institute proceedings*** for . . . recovery [of public funds] when unlawfully . . . paid out . . . .") (emphasis added) (emphasis added).

[10] Note that the California Constitution expressly subordinates the Attorney General to the Governor, while the Charter does not similarly limit the City Attorney. *See People ex. Rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 158-59. Indeed, *Deukmejian* expressly notes that a public attorney's authority must be determined by the "peculiarities of the prevailing law" in the pertinent jurisdiction and that its rule does not apply where the laws "permit their attorneys general to sue . . . without restriction." *Id.* at 158 (explaining that California law circumscribes the power of the Attorney General but, the law in other states is different, and in those states, the Attorneys General are not subject to the Governors) (citing Massachusetts, Connecticut, Illinois, and Kentucky law).

department, and from the constitutional (Charter) provision authorizing him to "prosecute" "all" litigation.

C. The City Attorney Has the Power to Initiate Litigation by State Statute

State law is relevant to this debate in another respect: multiple state statutes confirm the City Attorney's authority to initiate litigation. These statutes provide for enforcement by the City Attorney, ***without reference to, much less requirement of, prior legislative approval.*** *See, e.g.*, Cal. Bus. & Prof. Code, § 17204 ("Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General . . . or any city attorney of a city having a population in excess of 750,000 . . ."); Cal. Govt. Code, § 12650(b)(4) (False Claims Act) ("'Prosecuting authority' refers to . . . city attorney . . . charged with investigating, filing, and conducting civil legal proceedings . . ."); Cal. Health & Safety Code, § 25249.7(c) ("Actions pursuant to this section may be brought . . . by any city attorney of a city having a population in excess of 750,000 . . .").[11]

As discussed at length in *People v. Bhakta* (2006) 135 Cal.App.4th 631, such statutes, including the state Unfair Competition law and the Red Light Abatement Law, specifically permit the City Attorney to bring actions in the name of the people. *Id.* at 656-55, 659. *See also* Cal. Govt. Code, § 91005.5 (providing for civil action to be "brought" under Political Reform Act by "the elected city attorney").

In sum, the concept that the City Attorney cannot initiate litigation without prior Council approval is flatly inconsistent with numerous state laws, which contain no such restriction.

D. Construing Section 40 to Require the City Attorney to Obtain Permission to Sue from the Legislative Branch Would Violate Separation of Powers Principles

The doctrine of separation of powers provides that the powers of government are legislative, executive, and judicial, and that "persons charged with the exercise of one power may not exercise either of the others" except as expressly permitted. Cal. Const., Art. III, § 3; *see also Case v. Lazben Fin. Co.* (2002) 99 Cal.App.4th 172, 182. The purposes of separation of powers —which are pivotal here— are "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government, as well as to avoid overreaching by one governmental branch against the other." *See, e.g., Case*, 99 Cal.App.4th at 183 (internal quotations and citations omitted). Accordingly, none of the three branches may co-opt the core functions of any other branch. *See, e.g., People v. Bunn* (2002) 27 Cal.4th 1, 14 (each branch is vested with "core or essential functions that may not be usurped by another branch"). The doctrine "prohibits the legislative branch from arrogating to itself core functions

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[11] Prosecuting authorities ordinarily have the sole discretion to determine what charges to bring. *E.g., Manduley v. Super. Ct.* (2002) 27 Cal.4th 537, 552.

of the executive or judicial branches." *See, e.g., Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal. 4th 287, 298. The doctrine of separation of powers "fully applies to legislative action of local legislative bodies." *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, n.7. Applying a different interpretation of Section 40 would do precisely what the doctrine prohibits: it would transfer core functions of the executive branch to the legislative branch.

The structure of the current Charter, dating back to 1931, incorporates fundamental principles of separation of powers. Under the Charter, the City Council is the legislative body, and it is vested with "[a]ll legislative powers of the City." Charter, Art. III, § 11. The Charter Article describing the Council is entitled "Legislative Power." *Id.* Although the Charter does not define "legislative power," it is well settled that "[t]he core functions of the legislative branch include passing laws, levying taxes, and making appropriations." *See* Cal. Const., Art IV, §§ 1, 8(b); *Carmel Valley Fire Protection Dist.*, 25 Cal.4th at 299. "Essentials of the legislative function include the determination and formulation of legislative policy." *Id.* (quoting *State Bd. of Educ. v. Honig* (1993) 13 Cal.App.4th 720, 750). The powers expressly conferred on the San Diego City Council are consistent with these descriptions of the legislative power. Charter, Art. III, § 11 *et seq.*; *id.* Art. XV § 270.

By contrast, the City Attorney's authority is separately described in Article V, entitled "***Executive and Administrative Service***." The City Attorney is vested with powers that include, among other things, to prosecute all suits to which the City may be a party and to prosecute criminal actions. Charter, Art. V, § 40. Determining when and whether to prosecute and on what grounds is a core executive function that cannot be usurped by another branch. *See, e.g.*, Cal. Const., Art. V, § 13 (law enforcement and the prosecution of crimes is part of executive branch of government); *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1282 (judicial intrusion into a prosecutor's actions should be minimal because prosecuting involves "executive discretion of such high order"); *People v. Honig* (1996) 48 Cal.App.4th 289, 355 ("separation of powers doctrine ... precludes courts from interfering with the executive decisions of prosecutorial authorities"); 71 Ops. Cal. Atty. Gen. 255, 260 (1988) ("prosecution and legal advice . . . are both executive powers"). Thus, there can be no question that the Charter separates the executive powers of the City Attorney and the legislative powers of the Council.

Reading Section 40 otherwise would allow the legislative body —the Council— to usurp a core executive function, the decision of when and whether to institute legal action. To interpret it to mean the City Attorney must obtain the approval of the legislative body before initiating a lawsuit gives the legislative body the authority to entirely prevent the City Attorney from carrying out core executive functions, thereby allowing the legislative branch to usurp the executive function of enforcing the laws. The Council would have the authority to determine whether a particular law could be enforced. If the Council denied the City Attorney permission to prosecute, the Council would entirely prevent the executive from enforcing the law.

This is exactly what separation of powers forbids: "[i]n our tripartite system of government, legislative function is limited to declaring the law and providing the ways and means of its accomplishment. ***The Legislature cannot exercise direct supervisorial control over***

the execution of the laws." *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 63; *cf. Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, 696-97 (holding that Council could not eliminate city investigators through budget cuts because doing so exceeded the Council's legislative power by preventing the City Attorney from carrying out his core functions); *see also Buck v. City of Eureka* (1895) 109 Cal. 504, 511 (it was not within the power of the Council to modify the duties assigned by law to the city attorney). One should not construe Section 40 to give the Council, a legislative body, direct control over the execution of the laws.[12]

There also is no question that the City Attorney, as a public entity lawyer, has the authority in appropriate cases to sue the constituent branches of the client entity, *e.g.*, departments, agencies or officials of the City, as part of his duty to uphold the law; public lawyers often sue subdivisions of their entity client. *See, e.g., City of Long Beach v. Mansell* (1970) 3 Cal. 3d 462, 477 (city sued city manager and clerk); *City and County of San Francisco v. Boyd* (1943) 22 Cal. 2d 685, 687 (city attorney for city sued city controller); *People v. City and County of San Francisco* (1979) 92 Cal.App.3d 913, 915 (district attorney sued client).[13]

E. Longstanding Practice Confirms the Power of the Elected City Attorney to Initiate Litigation

It is noteworthy that the interpretation espoused here is not the unique view of the current City Attorney; all recent occupants of the office have jealously guarded the independence of their authority for the benefit of the public, including the ability to initiate litigation in the public interest. Such interpretations are to be afforded "great weight." *Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at 7-8 ("evidence that the agency 'has consistently maintained the interpretation in question, especially if it is long-standing'" warrants substantial deference in interpretation of law).

The prior pronouncements of broad City Attorney authority include:

- James Ingram's "Report on the City Attorney's Office," prepared for the Charter Review Committee's Subcommittee on Duties of Elected Officials at 3: "[O]ne of the differences

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[12] Nor is there any basis to conclude that it should be the Mayor's decision to initiate litigation. The revisions to the Charter to adopt the "Strong Mayor" form of government expressly disclaim intent to intrude on the City Attorney's authority under Charter section 40, *see* Charter, Art. XV, § 265(b)(2) ("Nothing in this section [establishing "strong mayor" government] shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1"), and the description of the Mayor's duties in the Charter does not remotely encompass decision-making regarding initiation of litigation. Charter, Art. XV, § 265.

[13] *See generally City Attorney Ethical Issues* (2001) 188 PLI/Crim 387, 400 ("***In addition to a public lawyer's role as an adviser or advocate for his or her entity, the public lawyer appears to have an additional duty, directly to the public, to act as a check on governmental action and to accurately advise the public.***") (emphasis added).

in the way that San Diego handles the City Attorney's office, as compared to Los Angeles, is that ***L.A. specified that the City Council would control litigation while San Diego gave the officer a free hand.***" (Emphasis added).

- City Attorney John W. Witt's Memorandum of Law, dated November 10, 1977 at 2: 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." (Emphasis added).

- Ted Bromfield, Chief Deputy City Attorney to John Witt, Memorandum dated August 3, 1982 at 2: The "exclusive authority to prosecute is specifically provided in Section 40 of the . . .Charter. . . . [U]nder the charter. . .the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter . . . ."

- John W. Witt, City Attorney, Memorandum dated October 6, 1983 at 1-2, declining Council request to abstain from enforcement of the law: "I must advise you that I am respectfully declining your request to delay any further enforcement actions . . . . Section 40 of the Charter provides . . . that it is my duty. . . to: . . . 'prosecute or defend, as the case may be, all suits or cases to which the City may be a party . . . .' It is clear that what the Committee requests is in effect that I not abide by my Charter-mandated duty to enforce the law. . . . My office is presently proceeding with enforcement actions as required of us. . . . I am sure that you understand my position and agree that the legislative branch should not influence prosecutorial authority."

- John W. Witt, City Attorney, Opinion No. 86-7, November 26, 1986 at 7: "The framers of our Charter intended a clear distinction between the necessarily political legislative arm of City government and the administrative arm."

- Sharon A. Marshall, Deputy City Attorney to City Attorney John Witt, Memorandum dated January 20, 1993 at 3-4: "The City Attorney, as an independently elected official, has broad discretionary power . . . ." (opining that City Attorney has power to initiate litigation on his own, but may "choose to confer" with Council).

- John W. Witt, City Attorney, "Report to the Civil Service Commission re Legal Representation by the City Attorney," dated February 23, 1995 at 2: "[T]he City Attorney of San Diego, an independently elected official, is charged with providing legal advice to the City Council and its Committees . . . . The drafters of the 1931 City Charter ensured that the City Attorney ultimately reported, not to the Mayor and Council . . ., but to the voters. By making the office an elected one, its independence was ensured."

- Michael J. Aguirre, City Attorney, Memorandum dated July 20, 2007 at 2: "The Council may not limit the City Attorney's statutory and Charter authority to file cases. State law provides that a City Attorney may file a civil action for a violation of the California False Claims Act. Any action by the City Council to limit that authority would be contrary to state law . . . . The Charter imposes no limitations on the authority of the City Attorney to file actions on behalf of the City, including any requirement to obtain Council approval prior to filing any action."

As these historical interpretations uniformly make clear, the independence of the City Attorney is a constitutional structure which transcends the particular occupant of the office. If a court or council were to attempt to alter this arrangement, the uncertainty that would follow from the disruption of long-settled roles and expectations is incalculable.[14]

III. General Law Limitations on Public Attorneys Do Not Apply

Finally, as noted at the outset, it is critical to bear in mind the stark contrast between charter law and general law cities; a comparison of the role of the city attorney in a general law city highlights the breadth of the elected City Attorney's authority under our Charter.

In *People v. Chacon* (2007) 40 Cal.4th 558, 571 n.13, the Supreme Court explained the fundamental difference between general and charter law cities, and the limited authority of the city attorney in a ***general law*** city:

> In California, cities are classified as 'general law cities,' organized under the general law of the state, or 'chartered cities,' organized under a charter. The government of a general law city is vested in the city council, city clerk and treasurer, police and fire chiefs, 'and [a]ny *subordinate officers* or employees provided by law.' A city council may appoint a city attorney and '*such other subordinate officers* or employees as it deems necessary.' The city attorney and other appointive officers and employees serve at the pleasure of the city council.

(Emphasis in original; citations omitted). As the Supreme Court noted in *Chacon*, the City of Bell Gardens at issue in that case "is a general law city, in which the city attorney is a subordinate officer of the city council, appointed by and serving at its pleasure." *Id.* at 571. *See also* Cal. Govt. Code, § 36505 (in general law city, the "city council shall appoint the chief of

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[14] For example, if the Council must direct the initiation of litigation, questions arise as to the fate of decisions to file cross-complaints, to appeal, to dismiss litigation, to submit amicus curiae briefs and to prosecute civil or criminal actions under state law. The City Council, many of whose members are not lawyers, and who are charged by law with the legislative —not the executive function— should not be empowered to micro-manage litigation, directing or overruling the City's designated "chief legal adviser" under the Charter.

police. It may appoint a city attorney . . . and such other subordinate officers or employees as it deems necessary."). Because, in a general law city, the city attorney is appointed and, by statute, subordinate, serving at the pleasure of, and acting at the direction of the council —none of which was adopted in San Diego's charter— general law is instructive only to show the alternative restricted form of authority that was ***rejected*** by the voters of this City.

The rules governing general law cities place the authority of the City Attorney under San Diego's Charter in sharp contrast. Here, as detailed above, the duties of the City Attorney are delimited by the Charter, not by the general law statutes, and the Charter expressly authorizes the City Attorney to prosecute "all" lawsuits, without any reference to the Council in the authorizing provision.

CONCLUSION

As detailed above, the plain language of Charter section 40 authorizes the elected City Attorney, as "chief legal adviser," to "prosecute" "all" lawsuits brought in the name of the City and gives the City Attorney broad authority to initiate litigation. The legislative history of Section 40, common law authority, state statutes authorizing the City Attorney to sue and long-standing practice support this role. Indeed, the City Attorney's independence is a constitutional safeguard. Those who would impose requirements upon the City Attorney that fall outside of the clear language of Section 40 would rewrite San Diego's City Charter and cast aside the will of the electorate.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

LO-2008-1

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MEMORANDUM OF LAW

DATE: April 29, 2008

TO: Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: City Attorney's Office Budget: Funding of Charter Mandated Duties

INTRODUCTION

Mayor Sanders' budget for fiscal year 2008 forced the layoffs or job eliminations of 14 deputy city attorneys, approximately 10 percent of the attorneys employed by the City Attorney's Office and the prior administration. The resulting layoffs and attrition created a situation in which areas of the City no longer receive basic public safety services from this Office, due to the elimination of certain neighborhood prosecutors.

In response, the City Attorney has proposed a reasonable budget for fiscal year 2009 that seeks to repair some of last year's damage. The proposed budget would restore Criminal Division staffing to meet the City's public safety needs, by reinstating neighborhood prosecutors and adding service for South Bay not previously provided. The budget also would fund three litigators added to the Civil Division, needed to ensure the Office can meet service mandates of City Charter section 40.

Despite deep cuts to the Office in the last fiscal year, Mayor Sanders now proposes an additional five percent reduction from the final FY2009 budget for the City Attorney's Office, adjusted for current salaries, by way of a vacancy factor.

The City Attorney thus is faced with a Mayoral proposal to cut the Office budget deeply enough to threaten its ability to carry out Charter-mandated duties. This memorandum explains that the Mayor has no authority to reduce or reallocate the City Attorney's budget and affirms the Council's duty to set a budget that allows the City Attorney to meet Charter mandates.

QUESTION PRESENTED

1. What is the obligation of the Council to fund mandated duties of the City Attorney's Office?

SHORT ANSWER

1. The City Attorney's Office is not a Mayoral department and not in the administrative service. The Mayor can make a recommendation, but has no authority to reduce or reallocate the City Attorney's Office budget. Rather, the Mayor is charged only with collecting the budget estimate from the Office and transmitting it in proper form for Council consideration. Additionally, the City Council, as the legislative body that sets the budget, must provide the Office sufficient funds to carry out Charter-mandated duties.

ANALYSIS

I. The Charter Imposes Mandates on the City Attorney's Office.

Charter section 40 provides in relevant part that the City Attorney is the "chief legal advisor of, and attorney for the City and all Departments and offices thereof. . ."

It further states, "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 Council, its Committees, the Manager [Mayor under the Strong Mayor form of government], the Commissions, or Directors of any department. . . " (Emphasis added.) Moreover, "the City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council."

Among the many duties of the Office mandated by Section 40, it "shall be the City Attorney's duty" to "prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law." Further, the City Attorney is mandated "to prepare in writing all ordinances, resolutions, contract, bonds, or other instruments in which the City is concerned."

The Council votes on an annual appropriation ordinance and Salary Ordinance. The elected City Attorney then exercises control over how to spend its budgeted amounts and is empowered to set the number of persons employed in the Office to carry out Charter-required duties, which include public safety responsibilities to uphold our loss.

II. The City Council Must Provide a Budget Sufficient for the City Attorney's Office to Carry Out Charter-Mandated Duties.

San Diego City Charter section 69 provides that the Mayor shall collect budget estimates from non-Mayoral Departments for transmittal to the City Council. The Council then holds public hearings and has discretion to make certain revisions in compliance with Charter section 71. The Council – not the Mayor - ultimately decides budget issues for the City Attorney's

Office. However, in its consideration of the City Attorney's Office budget, the Council must take care to ensure the budget is adequate to allow the Office to carry out Charter-mandated duties.

This premise has been upheld by the courts. Courts will not uphold budget cuts in the office of an elected official that prevent that official from carrying out his or her mandated duties. *See*, *Scott v. Common Council of City of San Bernardino*, 44 Cal. App. 4th 684 (1996). Thus, local legislative bodies may not by indirection accomplish that which they are precluded from accomplishing directly. For example, the Council cannot impair the City Attorney in the performance of Charter-defined prosecutorial duties by instituting staff cuts touted as necessary budget measures.

In *Scott*, the City Attorney of San Bernardino also was charged by the Charter with mandated duties, including the duty to represent the city in actions brought against it, and the duty to prosecute certain violations of state law. *Id.* at 686. Yet the budget eliminated the only investigator positions in the office. The City Attorney argued investigators were indispensable to his ability to perform mandatory duties and the Council had a legal duty to fund the positions. The Court held that the Council "cannot relieve a charter officer of the city from the duties devolving upon him by the charter..." *Id.* at 695. Moreover, the Court noted the trial court's findings that the City Attorney's budget had been cut in retaliation for his investigation of the Council for Political Reform Act violations. Thus, the Council's budget decision prevented the performance of the city attorney's mandatory duties as enumerated in the city charter and materially impaired the performance of his prosecutorial duties. *Id* at 694.

In the absence of Charter provisions specifying the manner in which the Council may reduce or eliminate "salaries and probable wants" of a City department, or the number and compensation of employees to take precedence over the provisions specifying the duties of the City Charter, the court held the Council could not use the budget process "to eliminate functions otherwise specified in the Charter." *Id.* at 697.

Similarly, in *Hicks v. Board of Supervisors*, 69 Cal. App. 3d 228, 241 (1977), an appellate court disallowed the Board of Supervisors' transfer of 22 investigators from the District Attorney's Office to another agency. The court found that the Board had "no power to control the district attorney in the performance of his investigative and prosecutorial functions, and may not do so indirectly by requiring that he perform his essential duties through investigators who are subject to the control of another county officer." This supports the principle that it is the elected officer running the prosecutorial office – here, the City Attorney - who must make decisions regarding how his Office budget will be used to meet Charter mandates.

As stated in an Attorney General opinion:

> . . . just as a city council may not effectively destroy a municipal office by setting its compensation so low that no one would serve to discharge its duties, so too may it not emasculate the Legislature's design for municipal government by depriving an

> officer adequate quarters and indispensable help and equipment with which his or her statutorily set duties might be carried out. (*Cf. Hicks v. Board of Supervisors* [citation omitted here]). Instead, a city council is required to provide for appropriate quarters and such help and equipment as is essential for the effective functioning of the office in question. . . "

69 Ops.Cal.Atty.Gen. 25, 28 (1986) (considering whether council of a general law city may specify location of the office where an elected treasurer conducts business).

Additionally, it is important to note that Charter section 11.1 provides in relevant part that "The City Council shall give priority in the funding of municipal services to the need of the citizens for police protection in considering adoption of this salary ordinance and the annual budget ordinance." This language should be kept in mind when setting the budget for the Criminal Division of the City Attorney's Office, which must have the requisite public safety resources to employ sufficient prosecutors to keep pace with misdemeanor arrests.

CONCLUSION

The authorities cited above support the conclusion that the City Attorney must be provided sufficient resources to meet the mandates of Charter section 40 and that the City Attorney retains control over how his Office budget is to be allocated. The Mayor, who now seeks to propose a percentage of budget cuts based on a number of allotted employees, is operating outside of the authority vested in him by the Charter. The Mayor is charged only with gathering the Office's budget estimate. The Council ultimately sets the budget for this non-Mayoral department and must do so with Charter mandates in mind.

MICHAEL J. AGUIRRE

Michael J. Aguirre

City Attorney

MJA:amt
ML-2008-9
Attachment

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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

---

[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

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ML-2009-11
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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, 374 (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 <u>for</u> City departments, not <u>of</u> 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

[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 _____
Josephine A. Kiernan
Deputy City Attorney

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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.[1]

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[2] whether to authorize retention of outside council.[3]

Once the City Council has authorized the retention of outside counsel,[4] 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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[1] 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.

[2] 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 . . . ."

[3] 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).

[4] 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.[5]

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.

JAN I. GOLDSMITH, CITY ATTORNEY

By _____
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Assistant City Attorney

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[5] 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).

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August 15, 2011

REPORT TO REDEVELOPMENT AGENCY
OF THE CITY OF SAN DIEGO AD HOC COMMITTEE

ABSENCE OF CONFLICTS OF INTEREST PERTAINING TO THE RESPECTIVE ROLES OF THE CITY COUNCILMEMBERS, THE MAYOR, AND THE CITY ATTORNEY'S OFFICE IN REDEVELOPMENT MATTERS

INTRODUCTION

During a scheduled meeting on July 25, 2011, the Redevelopment Agency of the City of San Diego Ad Hoc Committee (Committee) discussed, among other things, agenda item no. 2, pertaining to the potential replacement of the Mayor as the Executive Director of the Redevelopment Agency of the City of San Diego (Agency) and the potential replacement of the City Attorney's Office as the Agency's General Counsel. At that time, Councilmember Marti Emerald stated that the Mayor and the City Attorney's Office should no longer serve in their current capacities on the Agency's behalf based largely on her perception that there is a conflict of interest inherent in their respective performance of dual roles on behalf of both the Agency and the City of San Diego (City). The City Attorney's Office provided a verbal response that there is no inherent conflict in the City Attorney's Office serving as the legal adviser to both the City and the Agency. The City Attorney's Office, however, did note that, in accordance with the California Rules of Professional Conduct governing all attorneys generally, this Office will evaluate any particular factual situations on a case-by-case basis to determine if there is a potential conflict of interest and, if necessary, this Office will recuse itself from legal representation of the Agency in those particular situations.

Later in the Committee meeting, Councilmember Kevin Faulconer asked the City Attorney's Office to identify how often and how recently the City Attorney's Office has determined the need to recuse itself from legal representation of the Agency in a legal matter. In response, City Attorney staff stated that recusal due to a conflict of interest is very rare, but identified one "discrete example" in which this Office had recently determined a conflict of interest existed with respect to our participation in one specific aspect of settlement negotiations with the County of San Diego arising from the adoption of Senate Bill 863, by which the California Legislature lifted the "cap" on collection of tax increment revenue in the Centre City Redevelopment Project Area. The verbal comments made by City Attorney staff in response to Councilmember Faulconer's question were not intended, and should not be construed, to suggest that there is a conflict of interest inherent in this Office's dual role as the chief legal adviser to both the City and the Agency. Rather, the comments pertained to a voluntary recusal arising from a personal conflict of interest of the City Attorney in that the City Attorney's personal residence is located in close proximity to a particular project in San Diego that may be involved in the settlement negotiations with the County of San Diego.

One purpose of this Report is to elaborate on those verbal comments and to provide the legal analysis explaining why the City Attorney's Office can serve as legal counsel to the City and the Agency in accordance with applicable California authority, such as the California Community Redevelopment Law, set forth at California Health and Safety Code sections 33000-33855 (Community Redevelopment Law), and the ethical standards governing the conduct of attorneys in California. At the outset, however, this Report will explain why it is legally permissible for the Councilmembers and the Mayor, respectively, to serve dual roles on behalf of the City and the Agency.

DISCUSSION

I. ROLE OF CITY COUNCIL IN REDEVELOPMENT MATTERS

Under California Health and Safety Code section 33200(a), the legislative body of the community may establish itself as the governing body of the redevelopment agency, in which case all of the rights, powers, duties, privileges, and immunities vested in the agency pursuant to the Community Redevelopment Law are vested in the legislative body, except as otherwise set forth in the Community Redevelopment Law. In this instance, the Council (i.e., the legislative body of the community) designated itself to serve as the Agency's Board of Directors (Agency Board) upon the formation of the Agency. Council Resolution No. 147378 (May 6, 1958). Accordingly, there is no impermissible conflict of interest under State law arising from the dual role of each Councilmember on the Council and the Agency Board. It is also noteworthy that the most common governance structure for redevelopment agencies throughout California involves the city council or the county board of supervisors serving as the board of directors of the redevelopment agency.

Each Councilmember, in his or her capacity as a member of the governing body of the City and the Agency, owes a fiduciary duty to act in the best interests of those two entities. Yet, from a practical perspective, each Councilmember's simultaneous fulfillment of the fiduciary duty to both entities does not give rise to an "inherent" conflict of interest. As discussed in Part III.B.2 below, the City and the Agency are clearly striving toward a common goal or purpose when they are mutually involved in a redevelopment matter. Given this close alignment, there is no legitimate risk of conflicting interests arising from the dual role of each Councilmember. Similarly, there is no legitimate risk of conflicting interests arising from the respective dual roles of the Mayor and the City Attorney's Office.

II. ROLE OF MAYOR IN REDEVELOPMENT MATTERS

The Mayor presently holds the dual positions of the City's Chief Executive Officer pursuant to the San Diego Charter and the Agency's Executive Director pursuant to a series of Agency resolutions designating the Mayor for that role over the past several years. There is no impermissible conflict of interest arising from the Mayor's dual role in that regard, for the reasons described below and in Part I above.

The Agency Board is permitted under California Health and Safety Code section 33126(a) to select, appoint, and employ permanent and temporary officers, agents, and employees of the Agency. There is no provision in the Community Redevelopment Law that prohibits the Agency Board from selecting the Mayor to serve as the Agency's Executive

Director on a permanent or temporary basis. Moreover, this Office has previously opined that the Mayor's dual role as the City's Chief Executive Officer and the Agency's Executive Director does not give rise to the holding of incompatible public offices. 2005 City Att'y Report 524, 530-31 (2005-22; Aug. 4, 2005).[1]

III. ROLE OF CITY ATTORNEY'S OFFICE IN REDEVELOPMENT MATTERS

A. Background of Dual Role of City Attorney's Office.

This Office presently serves as the City's chief legal adviser pursuant to San Diego Charter section 40. This Office also presently serves as the Agency's General Counsel pursuant to the documents described below. As explained below, there is no disqualifying conflict of interest arising from this Office's dual role as the chief legal adviser for the City and the Agency.

The Community Redevelopment Law does not prohibit a city attorney's office or a private law firm specializing in municipal law from providing legal representation to both a city and its counterpart redevelopment agency. In fact, California Health and Safety Code section 33126(a) permits a redevelopment agency's board of directors to select, appoint, and employ legal counsel for the redevelopment agency on a permanent or temporary basis. In this instance, the Agency Board adopted a resolution in 1969 stating, in pertinent part: "The City Attorney or his designated representative is hereby appointed as the General Counsel of the Redevelopment Agency of The City of San Diego." Redevelopment Agency Resolution No. 5 (Apr. 29, 1969). The Agency Board subsequently approved an amendment to Article II, Section 1 of the Agency's Bylaws that, among other things, confirmed the City Attorney's role as the Agency's General Counsel. Redevelopment Agency Resolution No. 121 (Apr. 1973). The City also has agreed to provide legal services and other administrative services to the Agency pursuant to the "First Amended Agreement" executed by the City and the Agency in 1991. City Clerk Document RR-278441 (July 30, 1991). Thus, the dual role of the City Attorney's Office as the chief legal adviser for the City and the Agency has been formalized for more than forty years and has continued without interruption during that period of time.[2]

B. There Is No Conflict of Interest Pertaining to the Dual Role of the City Attorney's Office as Legal Counsel to the City and the Agency.

1. There Is a Relaxed Standard for the Analysis of Conflict of Interest Applicable to Public Attorneys.

The standards for professional ethics governing attorneys in California are contained in the California Business and Professions Code and the Rules of Professional Conduct of the State Bar of California (Professional Rules).[3] These ethical standards apply to all attorneys who are

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[1] As identified by City Attorney staff during the Committee meeting on July 25, there is a separate issue as to whether the San Diego Charter might apply to the dual roles of the Mayor and the City Attorney's Office on behalf of the City and the Agency. A discussion of that issue is beyond the scope of this Report.

[2] We also believe that this Office served as the Agency's General Counsel commencing upon the formation of the Agency in 1958. Yet, this Office's role as the Agency's General Counsel was not formalized until 1969.

[3] All citations in this Report to specific "Rules" shall refer to Rules set forth in the Professional Rules.

admitted to practice law in California, including public attorneys.[4] Rule 1-100(A), (B)(1)(d). Under these ethical standards, attorneys owe three fundamental obligations to their clients. First, they owe a duty of loyalty to the existing client. *Flatt v. Superior Court*, 9 Cal. 4th 275, 288 (1994). Second, they owe a duty of confidentiality to both existing and former clients. *Id.* at 283-86; Cal. Bus. & Prof. Code § 6068(e). Third, they owe a duty to perform legal services with competence. Rule 3-110. The common theme among these ethical standards is to minimize the influence of any factors or incentives that may diminish the ability of an attorney to provide effective legal services in an ethical manner.

Rule 3-310(C), which addresses an attorney's simultaneous representation of more than one client, 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.

The Discussion portion of Rule 3-310 confirms that Rule 3-310(C) is intended to apply to the simultaneous representation of multiple clients in litigation as well as transactional matters.

It is important to note, however, that California courts have long recognized that special considerations must be evaluated before public attorneys are determined to have a conflict of interest under Rule 3-310 that disqualifies them from representing a public entity client (referred to herein as a "disqualifying conflict of interest"). *Practicing Ethics: A Handbook for Municipal Lawyers* (Ethics Handbook) at 14 (League of Cal. Cities 2004). The Ethics Handbook states:

> Conflict of interest rules were drafted with private attorneys primarily in mind. In the public sector, the financial incentive to favor particular clients over others or to ignore conflicts is reduced if not eliminated. The disqualification of a public attorney can result in minimal benefits while causing dislocation and public expense. For these reasons courts should not assume the existence of a conflict of interest in the public sector and should attempt to limit the reach of disqualification in such cases.

Id. The Ethics Handbook further explains that, due to the reduced potential for conflicts of interest in the public sector and the cost to the public of disqualifying public attorneys, California courts have condoned the use of internal screening procedures or "ethical walls" to avoid

[4] For purposes of this Report, the phrase "public attorneys" shall refer to all attorneys who are members of the State Bar of California and work for a governmental entity or entities (e.g., city attorneys, county counsel, and attorneys in private law firms who represent municipalities on a contractual basis) or for a nonprofit legal corporation.

conflicts of interest. *Id.* These general principles are discussed in greater detail below in the context of specific opinions issued by California authorities.[5]

In *Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal. App. 3d 1432 (1991), the appellate court held that a nonprofit legal office representing both parents and children with potentially adverse interests in the same dependency proceedings in juvenile court did not give rise to a disqualifying conflict of interest among the attorneys in the legal office, even where the multiple clients apparently did not provide informed written consent to the dual representation. The court drew a sharp distinction between lawyers in private practice and those in the public sector with respect to simultaneous representation of multiple clients, as follows:

> In a private law firm, clients pay for legal services the firm renders on their behalf. [The nonprofit legal office], by contrast, represents clients who cannot and do not pay for services rendered on their behalf. A third party, the board, funds [the nonprofit legal office], and clients do not pay for the services the law firm renders. Hence no client becomes "more important" than some other client, and no . . . lawyer has any "obvious financial incentive" to favor one client over another. Quite the opposite is true; because a third party pays, the attorney has every incentive to devote his or her entire efforts on behalf of the client.

Id. at 1441. The court endorsed the opinion of a law school professor concerning the basic purpose of conflict of interest rules, as follows:

> "Rules that forbid lawyers to accept matters because of a 'conflict,' and rules that impute a lawyer's conflict to his or her associates, have one paramount object – to prevent lawyers from entering into situations in which they will be seriously tempted to violate a client's right to loyalty and secrecy. Conflict rules try to strike an appropriate balance between protecting against risks to loyalty and confidentiality, on the one hand, and fostering the availability of counsel on the other. Because conflict rules mainly deal with risk of unethical conduct, arguments about these rules often use words like 'may,' 'might,' and 'could,' usually followed by phrases like 'be tempted to.' Obviously, such words are highly elastic. They tell

[5] Different standards have been developed in California case law to evaluate whether public attorneys have a disqualifying conflict of interest in a particular situation, depending on whether the alleged conflict arises out of simultaneous representation or successive representation. Simultaneous representation is involved when an attorney seeks to represent multiple parties in a single matter, typically a lawsuit, with potentially adverse interests. Successive representation is involved when an attorney gains confidential information about a former client during previous legal representation and, in the present day, represents a current client adverse to the former client. The California courts have focused primarily on protecting the duty of loyalty in the context of simultaneous representation and protecting the duty of confidentiality in the context of successive representation. *See, e.g.*, *Flatt*, 9 Cal. 4th at 282-89. The discussion in this Report will rely mainly on the case law relating to simultaneous representation, which is more germane to the discussion of the dual role of the City Attorney's Office on behalf of the City and the Agency. As discussed herein, the case law generally has permitted the use of ethical walls or other screening procedures as a proper method to avoid a disqualifying conflict of interest when public attorneys are engaged in simultaneous representation of multiple clients, except in certain situations.

> us nothing about the appropriate tolerance for risk when measured against the social, professional, and monetary costs of disqualification or of forbidding a particular practice arrangement. We allow many arrangements that tolerate some risk because they also provide social or other benefits and because we are prepared to believe that lawyers take their ethical responsibilities seriously. The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically."

Id. at 1444 (citation omitted). The court's rationale in *Castro* has been echoed in other instances.[6]

In finding that there is a relaxed standard for analysis of conflict of interest applicable to public attorneys, the courts have often examined the screening procedures or other internal safeguards employed within the public office to avoid any conflict of interest.[7] In *Castro*, where the court held that a nonprofit legal office had no disqualifying conflict of interest in representing both parents and children in the same dependency proceedings, the court stressed that the nonprofit legal office did not solicit clients or accept referrals from the public, did not allow attorneys to communicate directly with the opposing party with respect to any dependency proceeding, and generally took precautions to safeguard against improper conduct of attorneys. 232 Cal. App. 3d at 1442. The court stated: "It is not to be assumed hypothetically, in the absence of facts, that [the nonprofit legal office's] attorneys will act to violate their client's confidence or to compromise their legal interests. The structures of the organization reinforce

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[6] In *Rhaburn v. Superior Court*, 140 Cal. App. 4th 1566 (2006), the court rejected a claim that a public defender whose office previously represented witnesses for the prosecution in two cases was subject to automatic disqualification due to a conflict of interest. The court stated: "'[P]ublic sector lawyers do not have a financial interest in the matters on which they work. As a result, they may have less, if any, incentive to breach client confidences.'" *Id.* at 1579 (citation omitted). The court also stated that frequent disqualifications of public attorneys would substantially increase the cost of legal services for public entities, often with only speculative or minimal benefit. *Id.* at 1580. In published opinions, the California Attorney General's Office and the State Bar of California also have recognized that there are relaxed standards for the analysis of conflict of interest applicable to public attorneys. 80 Op. Cal. Att'y Gen. 127 (1997); State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2001-156. In the State Bar opinion, the standing committee reasoned that "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 the proposed ordinances, because neither had the potential to become the city attorney's client against the other." *Id.* The committee stated: "It is only this truly independent right of action that can give rise to a conflict of interest for a public attorney." *Id.* The committee also remarked that ethical rules developed in the private sector do not squarely fit the practical realities of the legal practice of public attorneys. *Id.*

[7] We briefly discuss the topic of screening procedures in this Report only for the sake of providing a complete picture of the legal authority governing the relaxed standard for analysis of conflict of interest in the public sector. By discussing screening procedures in this Report, we do not intend to suggest that the discussion is relevant in the present circumstance. Indeed, as discussed in Part III.B.2 below, we do not perceive any actual or potential conflict of interest arising from this Office's dual legal representation of the City and the Agency. As a result, there is no need for screening procedures in the present circumstance. Even if we assume in the absence of any facts that there might be a hypothetical situation in which a potential conflict of interest could arise, this Office, acting in an abundance of caution, has consistently implemented internal procedures designed to avoid any potential conflict of interest arising from the dual legal representation of the City and the Agency.

this ethical duty, which is well known to all attorneys." *Id.* The court's approach in *Castro* to examine internal safeguards within a public office has been followed in other situations.[8]

2. There Is No Conflict of Interest Involved in the Dual Representation Provided by the City Attorney's Office.

As discussed above, Rule 3-310(C) states that an attorney in California cannot simultaneously represent more than one client, without obtaining the informed written consent of each client, if there is an actual conflict or a potential conflict between the interests of those clients. The California courts and other authorities have long recognized, however, that there is a relaxed standard for analysis of conflict of interest applicable to public attorneys, especially where adequate screening procedures are implemented to avoid the risk that the public attorneys will be compromised in fulfilling their three fundamental duties of loyalty, confidentiality, and providing competent legal service. Based on the relevant circumstances, as discussed below, we are confident that no actual or potential conflict of interest for purposes of Rule 3-310(C) exists in the situation where this Office provides dual representation of the City and the Agency.

While the City and the Agency are separate legal entities, their organizational and governance structure, as well as their core activities and programs, are closely intertwined. As described in Part I above, the Councilmembers serve collectively as the governing body of both the City and the Agency and make any significant policy decisions on behalf of those two entities. The Agency serves as an agency of the State that performs local governmental functions within defined geographical boundaries in the City. *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666, 673 (1977); Cal. Health & Safety Code §§ 33122-33123. In situations where the City and the Agency are mutually involved in a redevelopment matter, they are clearly striving toward a common goal or purpose, such as the use of local property tax revenues to eliminate blight or provide affordable housing within designated redevelopment project areas throughout the City, in accordance with the requirements of the Community Redevelopment Law.[9] Given that these situations entail the collaborative efforts of the City and the Agency toward a common purpose in a manner required or envisioned by the Community Redevelopment Law, the interests of the two entities do not give rise to an actual or potential conflict for purposes of Rule 3-310(C).

This Office provides simultaneous representation of the City and the Agency in third party litigation, where both of those entities have been named as defendants (or respondents, in a

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[8] For example, in *People v. Christian*, 41 Cal. App. 4th 986 (1996), the appellate court rejected a claim that there was a disqualifying conflict of interest in a situation where one of the two defendants was represented by an attorney from the public defender's office and the other was represented by the alternate defender's office, even though both offices were under the supervision of one county public defender and the two defendants apparently did not provide informed written consent concerning this dual representation. The court approved the use of screening procedures between the two commonly-supervised offices as a suitable means to avoid a disqualifying conflict of interest. *Id.* at 1000. The court found "no evidence" that the use of screening procedures had been "ineffective in avoiding conflicts of interest between the [two offices]." *Id.* at 999. The court remarked that "'[s]peculative contentions of conflict of interest cannot justify disqualification of counsel.'" *Id.* at 1001-02 (citation omitted).

[9] Under the Community Redevelopment Law, the Council and the Agency Board are often required to jointly approve matters, such as: (i) actions necessary to amend an existing redevelopment plan; (ii) the disposition of publicly-owned real property to a private developer for monetary consideration that is not less than the fair market value or the fair reuse value of the property, in compliance with California Health and Safety Code section 33433; and (iii) the expenditure of redevelopment funds toward land acquisition costs or construction costs for publicly-owned buildings, facilities, or improvements, in compliance with California Health and Safety Code section 33445.

writ proceeding) and their interests in the litigation are closely aligned. It is common practice in the legal profession, whether in the public sector or private sector, for a single law office to represent multiple parties in the same legal proceeding where the interests of those parties are closely aligned. This approach enables the multiple clients to receive more efficient and less expensive legal services and to avoid unnecessary duplication of effort; it is often a significant cost-savings measure. There is plainly no conflict of interest under Rule 3-310(C) in this type of simultaneous legal representation because the interests of the City and the Agency remain closely aligned throughout the course of the legal proceeding.

As discussed in Part III.B.1 above, the courts have highlighted various special considerations as the basis for concluding that there is a relaxed standard for the analysis of conflict of interest applicable to public attorneys. Many of those special considerations are quite relevant in this instance. For example, the attorneys in this Office, unlike attorneys in the private sector, do not solicit work from clients and do not accept hourly fees or derive any personal financial benefit from the amount of hours billed to any particular client. Consequently, as in *Castro*, the attorneys in this Office have no obvious financial incentive to favor one client over another, and each attorney has every incentive to devote his or her entire efforts on behalf of the client. Moreover, the arrangement for dual representation of the City and the Agency enables this Office to provide more efficient and less expensive legal services on redevelopment matters compared to a situation in which all of the redevelopment legal work is outsourced to a private law firm.[10]

This Office has not been notified, and is not aware, of any specific situation in which the dual representation of the City and the Agency has caused any deficient, incompetent, or disloyal performance of legal services on behalf of either of those entities. The arrangement for dual representation of the City and the Agency is not only well-entrenched in San Diego (having been in place for at least forty years), but also is consistent with the common practice among public attorneys throughout California. In other words, it is typical for a single public law office, or a private law firm specializing in municipal law, to represent both a city or a county and its counterpart redevelopment agency. We are not aware of any ethical problems that have arisen as the result of this common practice in California. Moreover, we have not found any case law or other published opinions that question the ethical propriety of this common practice.

To paraphrase the court in *Castro*, the disqualification of this Office from performing legal work on behalf of the Agency would lead to only a speculative, unsubstantiated benefit to the City and the Agency, and the resulting significant increase in the cost of legal services being provided to the Agency would not be justified under the circumstances. To further paraphrase the opinion of the law school professor endorsed by the court in *Castro*, there is little to no reasonable likelihood of any ethical transgression stemming from the arrangement for dual representation, and therefore the arrangement should not be forbidden categorically. We are confident that this Office's established procedures in the arrangement for dual representation not only allow, but strongly encourage, attorneys in this Office to provide competent legal services

[10] The "fully-loaded" hourly rate attributable to the attorneys in this Office's redevelopment legal unit is substantially lower than the hourly rate charged to the Agency by outside special legal counsel on redevelopment matters. In addition, the attorneys in this Office are very familiar with the provisions of the San Diego Municipal Code, the City Charter, and other policies, regulations, and procedures of the City. This expertise often allows for a considerable savings of time and money in addressing legal issues on redevelopment matters that overlap into the policies, regulations, and procedures of the City.

to both the City and the Agency, free from personal bias or partiality. Consequently, we believe that it is neither proper, nor required under applicable ethical standards, for this Office to withdraw categorically from dual representation of the City and the Agency.

3. The Limited Situations in which the Courts Have Disqualified Public Attorneys from Representation of a Public Entity Client Are Not Applicable to the Present Situation.

There have been limited situations in which the courts have disqualified public attorneys from representation of a public entity client in a particular lawsuit, involving a successive representation scenario. For instance, in *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150 (1981), the Attorney General sued the State Personnel Board, the Governor and other state officers and agencies to compel them to ignore the employee relations statute because of its claimed conflict with the California Constitution. The California Supreme Court held that the Attorney General had a conflict of interest, enjoined him from proceeding and dismissed the case. The Court concluded that "the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients." *Id.* at 157.

In *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006), the city attorney, while in private practice, had previously represented the defendant company, which was being sued by the city in a matter substantially related to the city attorney's prior representation of the company. The California Supreme Court determined that there was a substantial relationship between the successive representations and that the city attorney had personally provided legal advice and services on a legal issue that was closely related to a legal issue in the litigation. On that basis, the Court disqualified the city attorney's office from representing the city in the litigation. *Id.* at 847. In a footnote, the Court reserved for later determination whether ethical screening might suffice to shield a senior supervisory attorney (as opposed to the head of the office) with a personal conflict. *Id.* at 850 n.2.

In *Civil Service Commission of the County of San Diego v. Superior Court*, 163 Cal. App. 3d 70 (1984), the County of San Diego (County) fired two employees, and the San Diego County Civil Service Commission (Commission) ordered their reinstatement. The County sued the Commission seeking to overturn the reinstatements. The county counsel's office had advised both the County and the Commission regarding the matter prior to litigation, and represented the County in the litigation. In response to a writ filed by the Commission, the appellate court disqualified the county counsel's office from representing the County in the litigation on the basis of a conflict of interest. *Id.* at 78. The court determined that an attorney-client relationship existed between the county counsel's office and the Commission (as a constituent sub-entity of the County) because the Commission possessed independent authority such that a dispute over the matter could result in litigation between the Commission and the County. *Id.* at 78. The court then determined that the county counsel's office faced a demonstrable conflict of interest because the office advised the Commission at an earlier stage and subsequently attempted to represent the County in litigation against the Commission. *Id.* at 80-81. The court was careful to limit its holding as follows: "[I]t should again be emphasized that a conflict of this nature only arises in the case of and to the extent that a county agency is independent of the County such that litigation between them may ensue." *Id.* at 83. The court also rejected the use of screening

procedures within the county counsel's office as a way to avoid conflicts of interest, particularly given the strong likelihood of a contentious dispute or litigation between the County and the Commission and the fact that the Commission had an ongoing relationship with the entire county counsel's office, including the office head. *Id.* at 81 n.5. In fact, the court questioned, in dicta (i.e., statements not essential to the outcome of the case), whether the county counsel's office should continue its practice of providing legal advisory services to both the County and the Commission in light of those same factors, as well as the fact that the office reported directly to the County's board of supervisors, not to the Commission. *Id.* at 78 n.1.

The situations in which the courts have disqualified public attorneys from representing clients in a particular matter due to a conflict of interest are factually distinguishable from the present situation. Those cases involved successive representation in a litigation context, rather than simultaneous representation in an advisory or transactional context (as is the circumstance with this Office's dual representation of the City and the Agency). Those cases also involved a very high potential of risk, due to a circumstance such as the contentious, litigious nature of the subject matter on which the public attorneys had provided legal advice (as in *Civil Service Commission*) or due to the fact that the public attorney in question was the head of the office and personally involved in the prior representation (as in *Deukmejian* and *Cobra Solutions*).

Unlike the above-cited cases, there is no legitimate risk that the City and the Agency will sue each other or become entangled in a hotly-contested dispute. Commencing with the formation of the Agency in 1958, we are not aware of any situation in which the City or the Agency have sued or even threatened to sue each other. It is very difficult to imagine a scenario in which such a lawsuit would occur, particularly because the filing of the lawsuit would need to be authorized by a majority vote of the Councilmembers, who serve collectively as the governing body for both the City and the Agency. Indeed, even if there might be a potential for conflicting interests in a given situation, the Councilmembers also would be subject to conflicting interests in light of their dual role on behalf of the City and the Agency. In any event, the advice that this Office routinely provides to the City and the Agency on redevelopment matters does not involve the type of inherently contentious situation at issue in *Civil Service Commission*. If that type of contentious situation or the threat of litigation arises at any point between the City and the Agency, then we will certainly evaluate whether our ethical obligations allow us to continue carrying out the dual representation of the two entities in that particular scenario. The court in *Castro*, however, emphasized that a hypothetical conflict scenario is irrelevant in the absence of actual facts demonstrating a conflict. No such facts exist here.

Additionally, this Office has not found any published opinion which disqualified public attorneys from providing simultaneous representation of multiple public entity clients in a particular situation, regardless of whether or not the situation involved a lawsuit. While the court in *Civil Service Commission* questioned (in dicta) whether the county counsel's office should continue its role as a legal adviser to both the County and the Commission, the court's rationale relied heavily on the key facts that the county counsel's office reported directly to the County's board of supervisors and that the office was providing legal advice on an inherently contentious subject matter with a strong likelihood of evolving into litigation between the County and the Commission.[11] As discussed above, the City and the Agency are governed by the same body

[11] Last year, this Office addressed *Civil Service Commission* in the context of recognizing that this Office "advises both the City's Civil Service Commission (the decision-maker) and the City Department imposing employee

(i.e., the Councilmembers), and there is not a contentious relationship between those two entities. To the contrary, the City and the Agency typically collaborate on many projects and activities toward the common objective of using local property tax revenue to facilitate their mutual efforts to achieve community revitalization.

It is also noteworthy that at least one out-of-state court, in Washington, has distinguished *Civil Service Commission* in refusing to disqualify a city attorney's office from providing simultaneous legal representation of both the city and multiple community councils that held the power to approve or disapprove certain city zoning ordinances. *Sammamish Community Municipal Corp. v. City of Bellevue*, 107 Wash. App. 686, 692-93 (2001). The court reasoned: "The community councils correctly point out that this case involves two independent governmental entities. However, in the context of this case and considering the interrelationship of the parties, this is a distinction without a difference." *Id.* at 693. The court also stated that "it is accepted practice for different attorneys within the same public office to represent different clients with conflicting or potentially conflicting interests so long as an effective screening mechanism exists within the office sufficient to keep the clients' interests separate." *Id.*

In summary, this Office's dual representation of the City and the Agency does not entail any of the risk factors that have prompted the courts, in limited situations, to disqualify a public attorney from providing legal representation to a public entity client in a particular matter due to an alleged conflict of interest.

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discipline (an advocate appearing before the decision-maker)." City Att'y MOL No. 2010-21 (Oct. 5, 2010), at 4 n.4. This Office observed: "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." *Id.* (citing *Howitt v. Superior Court,* 3 Cal. App. 4th 1575, 1586 and n.4 (1992); *In re Charlisse C.,* 45 Cal. 4th 145, 162-166 (2008)). As explained in Part III.B.2 above, the implementation of ethical screening walls is not pertinent to the circumstance described in this Report.

CONCLUSION

For the reasons discussed above, there is no disqualifying conflict of interest associated with the respective dual roles of the Councilmembers, the Mayor, and the City Attorney's Office on behalf of the City and the Agency.

JAN I. GOLDSMITH, GENERAL COUNSEL

By _____
Jan I. Goldsmith
General Counsel

By Kevin Reisch
Kevin Reisch
Deputy General Counsel

KR:nja
RC-2011-32

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.

OFFICE OF
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CITY OF SAN DIEGO

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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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SAN DIEGO, CALIFORNIA 92101
(714) 236-6220

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 establish 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, 44 (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

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