

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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

Jan I. Goldsmith
CITY ATTORNEY

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 Manager¹ 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 matter.

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

OFFICE OF

THE CITY ATTORNEY
CITY OF SAN DIEGO

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

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

JOHN W. WITT
CITY ATTORNEY

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

November 10, 1977

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.

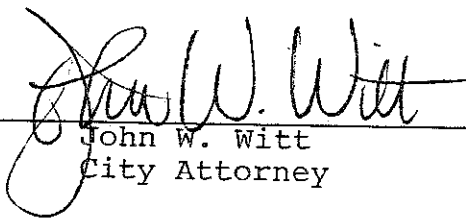
Furthermore, the other sentence in the cited paragraph from Section 40 requires the Council to include in the budget of departments involved the cost of retaining needed attorneys. From this it is clear the intent was that investigations and prosecutions were for City departments, not of them.

Councilman Leon Williams

November 10, 1977

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