

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** February 6, 2020

**TO:** Honorable Members of the Audit Committee

**FROM:** City Attorney

**SUBJECT:** Preliminary Response to Interim Auditor's Request for Independent Legal Counsel

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**INTRODUCTION**

On January 24, 2020, the Interim City Auditor (ICA) issued a memorandum requesting support for a ballot measure that would amend the San Diego City Charter (Charter) to authorize the City Auditor to obtain independent legal counsel. The ICA alleges that such an amendment would protect the City Auditor's independence. This memorandum provides a preliminary response to the request which the Office of the City Attorney understands will be agendaized and discussed at the Audit Committee meeting on February 19, 2020. This memorandum is not intended to be a full analysis of the issues raised.

First and foremost, this Office notes that the electorate will determine during the March 2020 primary whether to amend the Charter to change the manner in which the City Auditor is appointed. This Office understands that a recruitment to fill this position with a permanent City Auditor will begin immediately thereafter. The enactment of such a fundamental, permanent change in the Charter to provide independent counsel to the City Auditor is uncharted territory for the City of San Diego and will necessarily affect the City Auditor's department and the way that the new City Auditor conducts his or her operations. Furthermore, the new City Auditor may have additional proposed amendments to the Charter relating to the Office of the City Auditor that he or she would like addressed. It may be advantageous to postpone this discussion until after the new City Auditor is hired so that she or he may have an opportunity to provide input as to which proposals, if any, should be considered for inclusion on an upcoming ballot.

**PRELIMINARY ANALYSIS**

Irrespective of its timing, a number of issues related to the ICA's request require more research, analysis, and discussion before a final determination is made as to whether a measure should be placed on the ballot to provide the City Auditor with authority to retain independent counsel. Preliminarily, the issues are as follows:

**I. WHETHER THERE IS AN ACTUAL NEED FOR A CHARTER REVISION TO PROVIDE THE CITY AUDITOR WITH INDEPENDENT COUNSEL**

There are five points this Office would like to highlight relating to this issue, which are as follows:

First, it is not a conflict of interest for this Office to represent different City departments because City departments are “component parts of an indivisible municipal corporation.” 2010 City Att’y MOL 392 (2010-21; Oct. 5, 2010). This Office represents the City of San Diego, and not a particular individual or department. *Id.* It is common for departments to have differing views on policy matters requiring legal advice, or competing perspectives. “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.” *Id.*, citing Op. Cal. State Bar 2001-167. This Office addresses this common issue by assigning an attorney to advise each department specific to its particular needs and establishing ethical walls between these attorneys. For instance, this Office advises the City’s Civil Service Commission (the decision-maker) and the department imposing employee discipline (an advocate appearing before the decision-maker). The courts have held that a single public law agency like the City Attorney’s Office may advise both 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, 162-66 (2008).

Second, the Charter already authorizes the use of outside counsel when the Office has a conflict of interest, lacks expertise, or does not have sufficient resources available to handle a particular matter. San Diego Charter § 40. For example, this Office recently retained outside counsel with specialized expertise to assist the ICA in investigating and analyzing a Fraud Hotline complaint. The need to retain outside legal counsel rarely materializes. Accordingly, it is worth exploring whether a Charter revision is necessary when the need for outside counsel is rare.

Third, the ICA equates his need for independent counsel to that of the Ethics Commission, although the Auditor and Ethics Commission have fundamentally different roles and legal needs. The Ethics Commission is a regulatory enforcement entity with the power to enforce the City’s governmental ethics laws and to issue legally binding administrative enforcement orders regarding violations of these laws. *See* San Diego Municipal Code (SDMC) §§ 26.0414(e) and 26.0439. Furthermore, the Ethics Commission has the authority to levy fines of up to \$5,000 per violation. SDMC § 26.0440. Their enforcement role necessitates the need for subpoena power<sup>1</sup> and independent counsel. San Diego Charter § 41(d).

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<sup>1</sup> In the past, the City Auditor has erroneously asserted that he had subpoena power, which was addressed by this Office in a memo dated August 4, 2014. 2014 City Att’y MOL 304 (2014-16; Aug. 4, 2014). It is also important to note that the creation of the independent Auditor position has its origins in the Kroll Report, yet there is no mention in that report of the need for independent counsel to allow the City Auditor to fulfill his or her role or to protect the City Auditor’s independence.

The Auditor, on the other hand, provides recommendations on how to improve the efficiency and effectiveness of City departments and programs, and on how City management should address substantiated findings of fraud, waste, or abuse. *See* San Diego Charter § 39.2.

Fourth, the ICA's request mentions only one city, which is outside of California, that has taken this approach of providing its auditor with independent counsel. This Office suggests including the Independent Budget Analyst (IBA) in this discussion, as she may have input on how prevalent this approach is and whether California cities, particularly major California cities, have taken this approach and the reasons for and against doing so.

Fifth, even assuming there is a need for independent counsel, the question is whether outside counsel could deliver services comparable to the services provided by this Office. Attorneys advising the City Auditor must be familiar with and knowledgeable about the regulations affecting all City departments and programs as well as the rules regarding City governance, policies, and procedures. This Office has attorneys with a wide range of subject matter expertise involving every City department and program. Without comprehensive expertise, outside counsel would have to acquire such knowledge at a significant cost to the City. In addition, competent outside counsel will need to communicate with and involve the City Attorney's Office to some degree, as the Office remains the City's Chief Legal Advisor under section 40 of the Charter.

## **II. THE NEED FOR AN ACCURATE CALCULATION OF THE COST OF PROVIDING INDEPENDENT COUNSEL TO THE CITY AUDITOR**

The ICA's request asserts an estimated annual budget for independent counsel of \$180,000 per year based solely on the budget for outside counsel by the Ethics Commission. No additional research or analysis has been performed. Based on the comprehensive services that are provided by this Office to the City Auditor, this figure may significantly underestimate the cost of providing independent counsel, unless the level of legal services is drastically reduced. This Office recommends that the IBA analyze the full cost of the ICA's request, which should include the cost of the independent counsel services per fiscal year based on at least five years of data.

## **III. THE NEED TO MEET-AND-CONFER WITH AFFECTED CITY LABOR UNION(S)**

Because the ICA's request directly impacts the work of attorneys and support staff in the Office, represented by the Deputy City Attorneys' Association (DCAA) and the San Diego Municipal Employees Association (SDMEA) respectively, there is a legal requirement to notify the DCAA and the SDMEA, and to meet-and-confer on the ICA's request, before any proposal may appear on the ballot.

## CONCLUSION

While this Office stands ready to further discuss these issues and any others that may be raised related to the ICA's request for independent counsel, this Office believes that such discussions should include input from the new City Auditor whose department and operations will be most affected by such a change. Furthermore, this Office believes that there should be appropriate research and analysis conducted on the issues raised in this memorandum to better inform any further discussions.

MARA W. ELLIOTT, CITY ATTORNEY

By           /s/ Mara W. Elliott          

Mara W. Elliott  
City Attorney

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cc: Honorable Mayor Kevin Faulconer  
Honorable Members of the City Council  
Aimee Faucett, Chief of Staff, Mayor  
Kris Michell, Chief Operating Officer  
Ron Villa, Assistant Chief Operating Officer  
Andrea Tevlin, Independent Budget Analyst  
Kyle Elser, Interim City Auditor