

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 20, 2023

TO: Honorable Members of the Rules Committee

FROM: City Attorney Mara W. Elliott

SUBJECT: Replacing the Elected City Attorney with a City Council-Appointed Attorney

INTRODUCTION

On July 26, 2023, Jared Quient and Gil Cabrera (Proposers) introduced a ballot measure (Proposed Measure) that would amend the San Diego Charter (Charter) to replace the elected City Attorney for the City of San Diego with two separate and distinct City law departments: legal counsel appointed by the City Council (Council) to handle civil matters and an elected City Prosecutor who would only prosecute misdemeanors and San Diego Municipal Code (Municipal Code or SDMC) violations. This Office has issued a separate Report that provides an initial analysis of the Proposed Measure. This memorandum accompanies that Report.

The Proposers describe the Proposed Measure as “a modest change that is in line with best practices nationwide,” and pledged that their measure would “reduce friction and public disputes between elected officials,” “increase the Mayor and Council’s accountability for they (sic) City’s legal issues,” “improve transparency,” “create the opportunity for better legislative and litigation outcomes,” and “allow the elected City Attorney to focus fully on important criminal prosecutions such as domestic violence, drunk driving, and code enforcement.”¹ The Proposers did not provide evidence to support their claims, nor did they respond to this Office’s request for information about the Proposed Measure.

In the absence of evidence, public engagement remains the best way to test those claims. Public engagement is also needed so that City residents, who may be asked to vote on three measures in November 2024, relating to the City Attorney’s Office (Office), understand the import of their vote. Voters could be asked: (1) whether they agree to give up their right to elect their City Attorney; (2) who should replace the termed-out City Attorney when the Proposed Measure makes their job responsibilities unclear; and (3) whether the City Auditor should have his own legal counsel. Without discourse and education, confused voters may opt not to vote at all even though the three measures are consequential.

¹ This language is from the concluding slide of their July 26, 2023, Rules Committee presentation. This presentation is not accessible online and was not provided to this Office in response to its request for information and records.

As discussed below, it is inaccurate to refer to the Proposed Measure as “a modest change.” Rather, this would be the largest structural change to City governance in decades. The Proposed Measure eliminates a branch of City government and, in doing so, takes from local voters their right to elect their City’s attorney. Local voters would empower the Council majority to control the legal advice rendered. The Proposed Measure would pit elected officials against one another; interfere with equitable access to legal services, reduce accountability from elected officials, and decrease transparency, all while increasing the City’s annual costs by creating a separate and distinct legal department.

ANALYSIS

I. ESSENTIAL PUBLIC ENGAGEMENT MUST OCCUR BEFORE AN INDEPENDENT BRANCH OF GOVERNMENT IS ELIMINATED

The City traditionally convenes a Charter Review Committee (CRC) before making substantive changes to the City’s governance structure. A CRC comprised of law professors and other experts would undoubtedly offer beneficial advice about the wisdom of eliminating this independent branch of government. CRCs ordinarily hold public meetings that provide the public with the opportunity to understand how the Proposed Measure would impact their lives and the ability to offer input through public testimony. The CRC could advise on the transition from an elected to appointed office (Municipal Counsel) – a key point that the Proposed Measure fails to address - while undergoing a holistic review of Charter section 40, which is long overdue.

II. THE PROPOSED MEASURE WOULD CREATE A POWER IMBALANCE THAT LEADS TO CONFLICT AND INEQUITY

Under the existing Charter, the City Attorney advises “the Council, its Committees, the Manager [Mayor], the Commissions, or Directors of any department,” without preferring one branch of government over the other. San Diego Charter § 40. The Proposed Measure changes that balance by creating a relationship where Municipal Counsel serves “at the pleasure of the Council.” The Council speaks as a body, and decisions are based on a majority vote. Municipal Counsel would be beholden to the Council’s majority, who would determine Municipal Counsel’s workload and priorities. Those in the minority may not receive equitable legal services, which would directly impact their constituents.

Similarly, the Proposed Measure would diminish the Mayor’s power under the City’s strong Mayor form of governance, as the Mayor would need the Council’s consent to access legal services. This power imbalance could negatively impact the City’s ability to fulfill its day-to-day operations.

III. THE CITY’S ATTORNEY, EVER PRESENT IN CITY AFFAIRS, WOULD BE SILENCED AND HIDDEN FROM THE PUBLIC

The City Attorney’s Office is likely the most transparent public sector legal office in the State of California. It issues public reports on matters of significant public interest, such as the City’s franchise negotiations with SDG&E, the sale of the former Qualcomm Stadium site to San Diego State University, and the terms of the 101 Ash Street settlement. The Office’s reports and

memoranda explain complex City matters, such as land use issues or the enactment of new laws, and their impact on our communities, in language intended to be understood by all San Diegans. This Office's work product helps the Mayor and Council understand the decisions before them and educates the public so that they may engage in their own City's governance. Since taking office on December 12, 2016, this administration has issued 186 public reports and memoranda of law.² In addition, attorneys from this Office regularly attend discussion items at public meetings with their assigned departments and answers questions during deliberations. After nearly 100 years, the public has come to expect this high level of transparency.

The Proposed Measure does not address Municipal Counsel's participation at public meetings, other than to reserve the right for the Council to select the attorneys with whom it wishes to work. It also does not address whether Municipal Counsel will continue to issue publicly accessible legal analysis and reports, and if it will, under which circumstances (i.e., would the Council vote to make that determination? Assign a point person who would make that determination for the Council? Codify rules to guide Municipal Counsel?) What is clear, however, is that local citizens would no longer directly engage with the City's legal counsel.

IV. THE PROPOSED MEASURE ELIMINATES IMPORTANT CHECKS AND BALANCES

The elected City Attorney has served as the public's watchdog for nearly a century. If the City Attorney's Office is divided as proposed, with an elected City Prosecutor and an appointed Municipal Counsel who serves at the pleasure of the Council, important checks and balances in local government will be jeopardized to the detriment of City taxpayers. City employees and the public are not likely to report concerns about malfeasance, corruption, or misconduct to the Council's appointed attorney, particularly if a Councilmember's conduct is at issue. Moreover, the oversight role City voters overwhelmingly approved for purposes of safeguarding their interests would be abolished. To address this deficiency, Council can implement ethical reforms that promote oversight, transparency, and accountability.

A. Strengthen Protections for Those Who Report Malfeasance, Corruption, and Misconduct

The City Attorney has long been a trusted repository for complaints from City employees and the public concerning malfeasance, corruption, and misconduct. As such, the City Attorney has counseled elected and appointed City officials about suspected and confirmed misconduct, initiated internal investigations, and made referrals to law enforcement.³ The City Attorney's Affirmative Civil Enforcement (ACE) Unit also independently investigates and pursues suspected corruption and unfair competition practices on behalf of the People of the State of California. To compensate for the accountability void that would exist if legal counsel is no longer independent, the City must strengthen protections for those who report malfeasance, corruption, and misconduct.

² That number is comprised of 153 Memoranda of Law, 32 City Attorney Reports, and 1 Legal Opinion.

³ This Office referred matters to the District Attorney, the San Diego Ethics Commission, the Fair Political Practices Commission, the San Diego Police Department, the State Attorney General, the United States Attorney, the Federal Bureau of Investigation, the California State Bar, and other regulatory authorities.

1. Adopt Strong City Hall Worker Protections to Encourage Reporting

City employees must be able to report suspected misconduct without retribution. It is therefore critical for the City to have a trusted whistleblower hotline *and* a law or policy that commits to protecting those who report misconduct from retaliation.

a. Whistleblower Hotline

This Office suggests establishing a whistleblower hotline that is overseen by an entity that is not directly or indirectly controlled by the Council or Mayor⁴ and an affiliated website. The website should assure whistleblowers that their identities will be protected from disclosure. The City and County of San Francisco have developed a helpful page on their website that reassures whistleblowers that they will be protected from retribution. *See* The City and County of San Francisco Whistleblower Program, <https://sf.gov/whistleblower-program> (last visited Sept. 18, 2023).

The recent corruption scandal at the City of Anaheim illustrates the importance of having a trusted whistleblower hotline. The FBI probe found that city workers did not report the undue influence exerted by the Anaheim Chamber of Commerce and the Disneyland resort district on City Hall because of possible retaliation. City of Anaheim employees thought councilmembers would berate them after meetings if they didn't say the right things, or provided an honest opinion that didn't fit the councilmember's agenda. City of Anaheim employees who reported malfeasance by the Mayor and several City Councilmembers are now concerned about their jobs. *See* Brandon Pho and Hosam Elattar, *Fear and Loathing at Anaheim City Hall: Working Under the Gun of Retribution*, The Voice of OC, Aug. 21, 2023, <https://voiceofoc.org/2023/08/fear-and-loathing-at-anaheim-city-hall-working-under-the-gun-of-retribution/?emci=a056e8f5-ca3e-ee11-a3f1-00224832eb73&emdi=ef2170a3-2240-ee11-a3f1-00224832eb73&ceid=202760>. City staff must feel safe, or they will not report suspected misconduct or corruption.

b. Adopt a City Hall Whistleblower Protection Law or Policy

To protect whistleblowers from retribution when reporting malfeasance, the City relies on California Labor Code section 1102.5 and California Government Code section 53087.6. The assurance would be more meaningful if the City included it in the Municipal Code and training curriculum. The City and County of San Francisco and the City of Oakland have codified these assurances into law, and the cities of Sacramento and Rocklin have adopted policies.

c. Adopt Policies That Require Civility

Many large cities have adopted a Code of Ethics or a Civility Pledge to promote and maintain the highest standards of personal and professional conduct in city governance. The City of San Diego has neither adopted such a code or pledge, nor does it have a written policy allowing the Council to issue a public censure citing a Councilmember for misconduct. Such policies also provide guidance to the public about decorum. Discourse fails and complaints are not lodged if meeting participants and attendees are not treated with respect. The National Conflict Resolution

⁴ Although the City Auditor operates a whistleblower hotline, City employees may not be inclined to use it because the City Auditor is hired and fired by the Council and has sought to disclose the identity of whistleblowers.

Center has developed a Civility Pledge that can be used by the City. They are also available to assist with conflict resolution training and policy development. The City boards, committees, and commissions must also be required to conduct their meetings professionally and treat the public and one another with respect.

B. Ensure Oversight Bodies Are Truly Independent and Properly Resourced

A City watchdog is eliminated if the elected City Attorney is replaced by an appointed legal counsel accountable solely to the Council majority and whose continued employment hinges on keeping the Council satisfied. For that reason, the City must fortify its other watchdog agencies – the City Auditor and the San Diego Ethics Commission – by ensuring they are truly independent and adequately resourced.

1. The City Auditor Should be the Independent Watchdog Voters Expect

The City Auditor must be truly independent to properly safeguard the interests of City taxpayers. *See* City Att’y Report 2022-1 (Feb.15, 2022). The current appointment structure compromises the City Auditor’s independence and erodes the public’s trust because the Council is empowered to appoint and terminate the City Auditor. Charter § 39.2.⁵ In addition, the Audit Committee, to whom the Auditor reports, is comprised of Councilmembers and Council-appointed public members.

In a prior report to the Council, we suggested amending the Charter so that the City Auditor is elected by and accountable to San Diegans and not to the Council or an Audit Committee. City Att’y Report 2022-1, at 5-6 (Feb. 15, 2022). As the Independent Budget Analyst (IBA) stated in her report to the CRC, “requiring the Auditor General to be elected would secure the greatest degree of independence.”⁶ In this case, the establishment of an Audit Committee would probably be unnecessary, as the Auditor General would report directly to the voters of the City of San Diego.” IBA Report 06-35, at 7 (Aug. 30, 2006).

Alternatively, the Council could reconfigure the composition of the Audit Committee so that it is comprised solely of qualified public members who are free from conflict and political allegiances. *See* 2007 San Diego Charter Review Committee Final Report, at 16-17 (Oct. 4, 2007), https://www.sandiego.gov/sites/default/files/legacy/iba/pdf/11_24Attachment2.pdf. To avoid the appearance of impropriety and depoliticize the appointment process, Audit Committee members should be appointed by a truly independent body,⁷ such as retired judges or other neutral decision makers, and the screening process should include a review of the applicants’

⁵ The City Auditor has never audited the Council. City Att’y Report 2022-1, at 5 (Feb. 15, 2022).

⁶ Other large cities like Oakland, Long Beach, Berkeley, and Los Angeles elect their auditors to ensure independence and public accountability.

⁷ Currently, appointees are screened by a Councilmember who serves as a Chair of the Audit Committee (Chair), the IBA, and two outside financial experts appointed by the Chair and IBA. San Diego Charter § 39.1. The Council then makes the appointment. *Id.*

actual and perceived conflicts of interest.⁸ The Ethics Commission, for instance, prohibits commissioners from contributing to the campaigns of Councilmembers; participating in City candidate campaigns through fundraising or endorsements; and supporting or opposing a City ballot measure unless the measure expressly pertains to the activities or authority of the Ethics Commission. SDMC § 26.0406(c)-(d). A commissioner who contributes to the campaign of a person running for City office “shall be treated as if the Commissioner had automatically resigned from the Commission.” SDMC § 26.0407. This automatic removal provision eliminates any need for a discretionary decision by elected officials and depoliticizes the removal.

2. The San Diego Ethics Commission Should be Independent and Properly Resourced

The Council created the San Diego Ethics Commission (Ethics Commission) by ordinance to “create a new City ethics code, investigate and enforce violations of the City’s government ethics laws, impose penalties and sanctions for violations, provide training and advice to City officials on ethics issues, and refer criminal violations to appropriate enforcement agencies.” San Diego Ordinance O-18945 (June 5, 2001). The Ethics Commission investigates elected City officials; candidates for City office; certain City employees, consultants, and members of City boards and commissions; and lobbyists, among others. SDMC § 26.0413.⁹ Despite voter intent, the Ethics Commission is neither independent nor properly resourced. Council could change that by taking the following actions:

Amend the Appointment Process. The Ethics Commission selection and appointment process is problematic. The Mayor appoints seven members from a pool of candidates nominated by Councilmembers and the City Attorney. SDMC § 26.0404(a). Those regulated by the Ethics Commission – the Mayor, Council, and City Attorney – should have no role in the selection and appointment process. To bolster the public’s confidence, San Diego Charter section 41(d) should be amended to delegate appointment authority to a body that is independent of the City, such as retired judges or other neutral decision makers.

Fill Vacancies. We are also concerned that the Ethics Commission has had difficulty achieving a quorum due to unfilled vacancies.¹⁰ We do not know if vacancies exist because the City’s recruitment efforts are insufficient, because this body is not a priority for those who are regulated, or because it is difficult to find qualified applicants. Without a quorum, the Executive Director’s ability to initiate investigations or impose penalties is hindered.

Enhance Independent Authority to Investigate. It is also problematic that the Ethics Commission Executive Director does not have independent authority to investigate complaints. The Executive Director must seek permission from the Ethics Commission before pursuing a complaint.¹¹

⁸ Audit Committee members should not be employed by entities that have City Councilmembers on their boards. Currently, one of the public Audit Committee members is employed by the San Diego MTS. The San Diego MTS board includes the Mayor and three Councilmembers; each has City Councilmember alternates.

⁹ In 2004, the voters amended the Charter to enable the Ethics Commission to retain legal counsel independent of the City Attorney. Prop. E, Gen. Elec. (Nov. 2, 2004).

¹⁰ The Ethics Commission has three vacancies.

¹¹ The cities of San Francisco, Los Angeles, and Oakland empower their executive directors to initiate investigations without prior authorization from their Ethics Commissions.

See Charter § 41(d); SDMC § 26.0423. Without approval from at least four commissioners, Ethics Commission staff can take no further action in the matter except to refer the matter to another governmental or law enforcement agency for appropriate action. SDMC § 26.0423(b). To be truly independent, the Executive Director must have independent authority to investigate any complaint that comes to her office without first seeking Ethics Commission approval. This is important for two reasons. First, if the Ethics Commission cannot meet because it cannot achieve a quorum, then the Executive Director and her team would not lose valuable time waiting for a quorum. Second, deferring to the Executive Director removes the appearance of politics in determining whether to pursue an inquiry. The City could adopt Municipal Code guidance for the Executive Director while protecting the Ethics Commission's oversight responsibilities.

Provide Adequate Resources. The City should commit to providing the Ethics Commission with adequate resources to handle additional oversight responsibilities.¹² Other California cities appear to be intentionally underfunding their Ethics Commissions to avoid oversight. In Oakland, the Ethics Commission Enforcement Chief spoke out against the Mayor's refusal to fund needed resources. The Chief claimed he would not be able to hire additional staff to investigate and prosecute campaign finance violations and other breaches of ethical rules by city staff and officials, and he would need to put existing ethics cases on hold indefinitely due to a prolonged staffing shortage. Eli Wolfe, *Oakland ethics commission reckons with "devastating" budget proposal*, The Oaklandside, May 11, 2023, <https://oaklandside.org/2023/05/11/oakland-commission-reckons-with-devastating-budget/>. In San Francisco, the Mayor's efforts to defund the Ethics Commission failed due to strong resistance from its Executive Director and the media. Mike Ege, *'Unusually Severe' Cuts Coming to San Francisco Ethics Agency, Says Commissioner*, The San Francisco Standard, June 5, 2023, <https://sfstandard.com/2023/06/05/san-francisco-ethics-watchdog-decries-severe-cuts-under-mayors-budget/>.

Sufficient resources required to perform the Ethics Commission's responsibilities as contemplated by the voters include funding for core staff, with the number of staff to be reasonably determined by the Executive Director, a sufficient budget to employ legal counsel and specialized consultants,¹³ and Charter authority to hire special counsel to handle complex ethics cases with a guaranteed budget for this purpose. See, for instance, the City of Los Angeles's Charter, which guarantees that its Ethics Commission has a budget of \$250,000 each fiscal year in case it needs to appoint a special prosecutor.

And last, other enforcements improvements are necessary, such as fortified subpoena power and increased penalties for ethical violations. The Ethics Commission can only assess up to \$5,000, even for egregious misconduct, which is not enough to deter future misconduct. Developer Midway Rising, for instance, which received a multi-billion dollar development deal from the City, was fined just \$5,000 for failing to file lobbying disclosures for three reporting periods. In San Diego, low penalties are a negligible cost of doing business. Other cities' ethics

¹² It currently has six full-time employees, including the Executive Director. The City Auditor has suggested that the Ethics Commission should oversee 750 classified staff.

¹³ Without that assistance, Ethics Commission staff must absorb this work to stay within budget, or forego it entirely, which impedes their ability to focus on core responsibilities, thus impacting oversight and enforcement efforts.

commissions can assess treble damages for misconduct. The City's Ethics Commission should be able to do the same.

C. Measures Intended to Increase Transparency Will Build the Public's Confidence in City Governance

Ensuring the public is privy to important information that impacts City decisions, and to give the public greater oversight over its legislative body, the Council should strengthen the City's lobbying laws and require increased disclosure from the City's decision makers.

Disclosure of Authors of Measures Before the Council. Councilmembers should be required to disclose *on the record* the originating author of ordinances and resolutions before them so that the public knows whether the work product originates with the City's attorneys or a special interest group. In such a case, the public would have been informed in agenda materials that the Council was considering adopting ordinances written by Legal Aid (the Tenant Protection Ordinance or TPO) and TRUST SD Coalition (the Surveillance Ordinance). This disclosure allows the public to know who influenced municipal decisions.

Disclosure of Lobbying Activity. The City's Lobbying Ordinance should be strengthened to require more public disclosure. As written, only a lobbyist or lobbying firm "that receives or becomes entitled to receive any amount of monetary or in-kind compensation to engage in lobbying activities on behalf of any other person, and that has had at least one direct communication with a City Official for the purpose of influencing a municipal decision," must disclose that communication to the public through City disclosure forms. SDMC § 27.4002. It's important to note that lobbying occurs even if the person lobbying is not specifically paid for that purpose.

An article in the Voice of Orange County (VOC) exposes the problem with limiting disclosure to paid lobbyists. VOC reported that a longtime registered lobbyist publicly represented concert promoter Live Nation in its efforts to operate a \$150 million amphitheater.¹⁴ The lobbyist, who attended a City Hall meeting and closed-door meetings with city leaders, did not file disclosure paperwork for Live Nation because he claimed to be doing the work for free. The public undoubtedly would be interested in knowing that this deal was so important to Live Nation that it hired or asked a well-known lobbyist to do its bidding.

Special interest groups regularly lobby the Council for government action that benefits them or their employer directly, and do not disclose their lobbying activity because they are not specifically paid to lobby. This includes attorneys who are advocating for a settlement and non-profit organizations that want laws on our books that protect their interests or advance their agendas. So, for example, if an attorney has a lawsuit against the City and sends a letter to a City official about the lawsuit or meets with a City official who has power to influence a settlement, then the attorney should be required to disclose that contact as lobbying activity. In addition, before voting on a matter involving that attorney, councilmembers who received correspondence or took meetings with that attorney would be required to disclose that contact on the record. This

¹⁴ Noah Biesiada, *Anaheim's Corruption Investigation Highlights How Lobbyists Across OC Slip Past Registration Rules*, The Voice of OC, Aug. 9, 2023, <https://voiceofoc.org/2023/08/anaheims-corruption-investigation-highlights-how-lobbyists-across-oc-slip-past-registration-rules/>.

requirement should extend to staff who have met with the attorney on the councilmember's behalf. The public should know who has the Council's ear.

Campaign Contributions. Elected officials who receive significant contributions from individuals seeking government action, such as the approval of a settlement agreement, should be required to publicly report the contribution when considering the item before them. Under recently amended pay-to-play laws, disclosure is required for certain contributions. *See* Cal. Gov't Code § 84308. However, those laws do not capture all discretionary decisions made by a legislative body or the Mayor. The City is permitted to adopt stricter and more comprehensive reporting requirements.

Use of Personal Devices. The VOC also reported that the City of Anaheim's corruption investigation revealed the city's sloppy recordkeeping, and electronic record retention policy made it much more difficult for residents and investigators to monitor whether elected officials, city administrators, or lobbyists are engaged in illegal activities. According to VOC, the investigator reviewed "nearly 1,000,000 emails," and "over 50,000 documents," but "they're still not sure they actually got to review all the records related to the scandal brewing at city hall."¹⁵ "The City of Anaheim's electronic retention policy did not necessarily include all electronic devices," investigators wrote. "The inability to conduct a forensic examination of former Mayor Sidhu's and former Councilmember O'Neil's telephones impeded this investigation." Investigators also disclosed that they could not determine whether city officials or staff violated the Brown Act during city meetings because investigators did not have access to all councilmembers' cell phones. "Although there was a great deal of suspicion concerning elected officials texting during City Council meetings to each other and to outside individuals in violation of the Brown Act, there was insufficient evidence uncovered to prove this has occurred," investigators wrote. *Id.* "However," they continued, "the practice of text messaging at the dais during City Council meetings has continued, and will likely continue to create doubt and suspicion with the public as to whether any such actions may be violations of the Brown Act." The investigators suggested that the City of Anaheim prohibit city officials from using personal phones or technology to conduct city business, and we agree.

This Office encountered the same obstacles when investigating the 101 Ash Street transaction. Despite using all available legal tools, we were unable to obtain pertinent City records from a high-level City official who conducted City business using personal technology, and this impeded both our investigation and our ability to protect the public's interests. The City should prohibit City employees and officials from using personal devices for City business to ensure the City has access to all City records.

We also believe the City should adopt a policy prohibiting the use of cell phones by the City Councilmembers during open and closed session meetings to prevent Brown Act violations, the prohibited disclosure of confidential information, or the appearance of collusion. Cell phone use is not necessary during open session meetings since Councilmembers' staff attend Council meetings and are accessible to their Councilmembers, either in person or through email on their computer.

¹⁵ Noah Biesiada, *Investigators: Anaheim Does A Horrible Job of Keeping Public Records For Public Access, Accountability*, The Voice of OC, Aug. 3, 2023, <https://voiceofoc.org/2023/08/investigators-anaheim-does-a-horrible-job-of-keeping-public-records-for-public-access-accountability/>.

Create a Transparency Office. This Office continues to advocate for a dedicated transparency office to ensure the City is in full compliance with California disclosure laws and prepared as new laws emerge. *See* City Att’y MS 2020-5 (Feb. 28, 2020). A new statewide ballot measure stiffening penalties associated with a government agency’s failure to disclose public records upon request will be on the ballot in 2024, and is all but certain to pass, and the City should be prepared. *See* Christopher Cadelago and Melanie Mason, *Sweeping ballot proposal would force California lawmakers to reveal lobbyist ties*, Politico, Aug. 2, 2023, https://www.politico.com/news/2023/08/02/california-lawmakers-lobbyist-meetings-ballot-proposal-00109316?utm_source=CalMatters+Newsletters&utm_campaign=611d36fe42-WHATMATTERS&utm_medium=email&utm_term=0_faa7be558d-611d36fe42-151361804&mc_cid=611d36fe42&mc_eid=77e52e4eca.

D. A Robust Analysis and Discussion of the Cost Implications Associated with the Creation of Two Separate and Distinct City Law Offices Should Occur Before the Proposed Measure is Presented to Voters

The Proposed Measure would create two separate and distinct City law offices: Municipal Counsel appointed by the Council and a City Prosecutor elected by City voters. The two offices must function independently of one another, as each has a different client (the Municipal Counsel’s client is the municipality; the City Prosecutor’s is the People of the State of California), and ethical walls must be maintained. As we pointed out in our Report, each law office would require its own administrative division to handle day-to-day operations including personnel, budgeting, accounting, information technology, contract management, communications, and ethical issues. These personnel cannot be shared.

A potential cost impact includes the use of outside legal counsel. The proposed language suggests that the Council may employ outside legal counsel even if Municipal Counsel has sufficient resources, the skill set necessary to accomplish the contemplated work, and does not have a conflict of interest. Currently, use of outside counsel is only permissible if the City Attorney determines that their office lacks sufficient resources, lacks the skill set necessary to accomplish the contemplated work, or has a conflict of interest. *See* Op. City Att’y 2020-1 (Sept. 9, 2020). The Proposed Measure would allow Council to unilaterally hire outside counsel at any time and for any reason, including when it does not receive the advice it desires.

Our Report also raises concerns about recruitment and retention. The Office attracts individuals who want to build a career working for the City and accept employment because of the opportunity to transfer between Office Divisions. This transfer opportunity would no longer exist, which could impact recruitment (it’s harder to hire which means we may need to employ outside counsel to compensate for vacancies), and retention (there would no longer be an incentive to stay and grow).

We defer to the IBA for a full analysis of costs associated with operating two distinct law offices.

E. Other Concerns Raised at Rules Committee or in Follow Up Conversations

1. Alleged Litigation Losses

Committee Chair Elo-Rivera and the Proposers inferred that Municipal Counsel would obtain better results in litigation but did not elaborate.¹⁶ The City Attorney's Office does not create the fact pattern that leads to litigation, and the Council and Mayor do not always follow this Office's advice. The Office must defend the actions of City officials and employees when they are acting within the course and scope of their employment even when we do not agree with the action taken. Cal. Gov't Code § 815.2(a).

2. Increased Transparency

As previously discussed, transitioning from elected legal counsel to appointed legal counsel will not increase transparency, but following the law will. This Office has defended numerous cases that allege Councilmembers improperly withheld public records from disclosure, prevented members of the public from speaking at public meetings, improperly disclosed confidential information to third parties, and inappropriately deliberated behind closed doors.

3. More Favorable Interpretation of the Law

Committee Chair Elo-Rivera also suggested that Municipal Counsel would provide a more favorable interpretation of the state's open government laws, including the Ralph M. Brown Act, and statutes defining privilege, confidentiality, and other ethical obligations. To be clear, the law will not change simply because the Council appoints its own attorney instead of using an attorney who is elected by and accountable to the voters. However, Municipal Counsel may not be as inclined to share frank legal advice contrary to the Council's wishes because the person holding that position will have a vested interest in remaining employed.

4. The Cost Associated with a Citywide Election for City Attorney

Committee Member Lee expressed concern in a follow up conversation about the costs associated with running in a citywide election.¹⁷ There are options short of eliminating a branch of City government, including public financing of local elections.

- In 2017, the City of Seattle implemented a democratic reform that diversified and grew the pool of people giving money to political campaigns with the goal of making city races more competitive. Seattle gives each eligible resident \$25 in "democracy vouchers" to donate to candidates of their choice each election cycle.

¹⁶ Mr. Cabrera said that opponents to City ballot measures have achieved some success in court and inferred that this was due to poor legal work by the City Attorney. Mr. Cabrera did not explain that the Council often changes ballot language over the objection of legal counsel, which may impact the Office's ability to defend the final work product. The Municipal Code should be changed so that appointed legal counsel maintains control of the ballot language that is submitted to voters.

¹⁷ The Mayor and City Attorney are the only citywide offices. There has been no discussion of eliminating the Mayor's position because of the cost associated with a mayoral election.

The candidate must commit to certain conditions, like limiting their spending and participating in debates.

- On November 8, 2022, Oakland voters approved ballot Measure W, the Oakland Fair Elections Act, creating a newly designed public campaign financing program that disburses \$100 in Democracy Dollar vouchers to eligible Oakland residents who can then assign the Dollars to the candidate of their choice. The Democracy Dollars Program is expected to launch beginning in the 2026 election cycle. *See*, Democracy Dollars Program | Oakland Fair Elections Act, <https://www.oaklandca.gov/topics/democracy-dollars>.
- The City of Los Angeles has created a public matching fund program. To be eligible, candidates must obtain 100 matching donors of \$114 (for council candidates) and agree to participate in a public debate. In 2022, council candidates were eligible for \$161,000 for the primary, and \$201,000 for the general election. The City Attorney was eligible for \$482,000 in the primary and \$482,000 in the general election. *See*, Matching Funds Regulations, Los Angeles Administrative Code, Division 24, Chapter 3, sections 24.31 *et seq.* (June 8, 2019), <https://ethics.lacity.org/wp-content/uploads/Laws-Campaigns-Matching-Funds-Regulations.pdf>.

The IBA may be amenable to performing additional research if this option is of interest to the Council.

5. More Resources for Gun Violence Prevention and Code Violations

Committee Chair Elo-Rivera also said that the Proposed Measure would free up the City Prosecutor to focus on more pressing issues like gun violence restraining orders (GVROs)¹⁸ and Municipal Code violations. More than fifty percent of the City Attorney’s personnel are assigned to the Criminal and Community Justice Division of this Office and are entirely focused on the practice of criminal law. Although dividing the Office as proposed will not free up resources, this Office would welcome additional positions and resources.

CONCLUSION

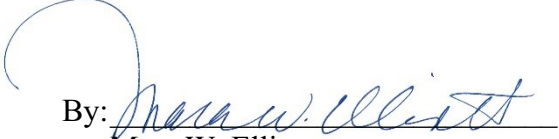
The Proposers erroneously describe the elimination of an independent branch of government as “a modest change that is in line with best practices nationwide.” They assert that voters should give up their right to elect their City’s attorney and trust the Council to appoint legal counsel who will protect the interests of *all* San Diegans. They allege that the Proposed Measure will encourage collaboration even though it deprives the City’s Chief Executive Office of legal services, thus pitting elected officials against one another. They claim increased accountability and transparency but fail to explain how that would occur if the City’s legal counsel is no longer accountable to the public and may only speak when permitted to do so. Finally, they falsely assert that the law will be more favorable to the City if the Council majority selects its own attorney. The City owes the public a truthful analysis based on fact and not conjecture. Good

¹⁸ This Office has prioritized the prevention of gun violence in our community. We have obtained more than 1,000 GVROs since starting the program in early 2018.

governance demands public engagement and valid information. Most importantly, the public needs to understand how the Proposed Measure protects its interests, and not just that of the Council majority. We look forward to the upcoming Rules Committee meeting discussion.

Sincerely,

MARA W. ELLIOTT, CITY ATTORNEY

By: 
Mara W. Elliott
City Attorney

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