ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

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EXECUTIVE DIRECTOR

April __, 2011

Judy Melinek, M.D.
Assistant Medical Examiner
Office of the Chief Medical Examiner
850 Bryant Street – North Terrace
San Francisco, CA 94103

Dear Dr. Melinek:

You have asked for the Ethics Commission's advice regarding whether your paid expert testimony in a judicial proceeding in San Mateo County violates the Statement of Incompatible Activities of the General Services Agency.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *See* S.F. Charter § C3.699-12. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. *See id.* Informal advice does not provide similar protection. *See id.* Your request to the Commission is threefold: (1) you asked that an "exception" to the advance written determination be made to allow you to testify in a civil matter; (2) you assert that the Statement of Incompatible Activities ("SIA") for the General Services Agency is not valid; and (3) you request that the Ethics Commission take action to amend the SIA. Because in request (1) you provided specific facts about a future activity and are seeking advice regarding your duties under the SIA, the Commission is treating it as a request for formal advice. Although requests (2) and (3) are not requests for advice, we will address them in this letter in order to provide you a complete response.

Background

A. Statements of Incompatible Activities

In compliance with the requirements of Proposition E passed by the voters in 2003, the Ethics Commission adopted Statements of Incompatible Activities ("SIAs") for every City department, board and commission. Each SIA identifies outside activities that are inconsistent, incompatible, or in conflict with the duties of the officers and employees of a City department, board, commission or agency. *See* San Francisco Campaign and Governmental Conduct Code ("C&GC Code") § 3.218. The SIA of the General Services Agency ("GSA") covers all officers and employees of GSA, including the

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Office of the Chief Medical Examiner ("OCME"). In 2007 and 2008, the Ethics Commission adopted SIAs for 53 departments, boards and commissions after nearly two years of meet and confer sessions with the City's public employee labor unions. All SIAs took effect on October 8, 2008.

Section III of the SIA prohibits outside activities, including self-employment, that are incompatible with the mission of GSA. Subsection III.A sets forth restrictions that apply to all officers and employees of GSA. Subsection III.B identifies additional restrictions that apply only to officers and employees in specific positions. The section most relevant to your request is subsection III.B.3, which establishes the following restriction regarding officers and employees of the OCME:

> ***No officer or employee of the Office of the Chief Medical Examiner Division may provide expert testimony in a civil or criminal judicial proceeding unrelated to job duties, except as authorized by an advance written determination pursuant to subsection C of this section by the Chief Medical Examiner or his or her designee.***

Additionally, section III.A.2 prohibits employees from engaging in activities with excessive time commitments that would interfere with the employees' duties.

Under the SIA, any officer or employee may seek an advance written determination ("AWD") as to whether a proposed outside activity conflicts with the mission of the GSA, imposes excessive time demands, is subject to review by the GSA, or is otherwise incompatible and therefore prohibited by section III of the SIA. An AWD by a decision-maker that an activity is *not* incompatible provides the requestor immunity from any subsequent enforcement action for any alleged violation of the SIA if the material facts are as presented in the requestor's written submission. The decision-maker for an employee at the GSA is the director of the GSA, who is also the City Administrator. If the City Administrator delegates the decision-making to a designee and if the designee determines that the proposed activity is incompatible, then the employee may appeal the determination to the City Administrator. This is the only appeal right set forth in the SIA.

Separately, as noted above, the San Francisco Charter authorizes any person to seek a written opinion from the Ethics Commission with respect to that person's duties under provisions of the Charter or City ordinances relating to conflicts of interest and governmental ethics, including the SIAs. Any person who acts in good faith on a formal opinion issued by the Commission and concurred in by the City Attorney and District Attorney is immune from criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. An employee may seek written advice from the Ethics Commission regardless of whether the employee also seeks an AWD from the City Administrator or his or her designee. *See* SIA § III.C.1.

B. Your Request for an Advance Written Determination

On December 3, 2010, you sought an AWD as to whether you could provide expert opinion and possible testimony in a wrongful death civil suit in San Mateo Superior Court Case No. CIV

4811542, *Wolkoff v. AMR/County of San Mateo*. The City Administrator designated Dr. Amy Hart, the Chief Medical Examiner, as the initial decision-maker. On December 12, 2010, Dr. Hart determined that the proposed activity was incompatible with the SIA. On or about December 30, 2010, you appealed Dr. Hart's determination to Ed Lee, the City Administrator. On February 1, 2011, Amy Brown, who was appointed Acting City Administrator after Mr. Lee assumed office as Mayor, determined that your proposed activity was incompatible with your duties as an employee of the OCME and would violate the SIA.

By letter dated February 24, 2011, you filed an appeal with the Ethics Commission. On March 9, after Ethics staff informed you that the City Administrator's determination is not subject to appeal under the SIA, you clarified in an email that you are requesting formal written advice from the Commission pursuant to Charter section C3.699-12.

Discussion

In your February 24, 2011 request, you asked for an "exception" to the AWD, you asserted that the SIA of the GSA is not valid because your union representative claims that the union was never provided a copy of the SIA containing the language in section III.B.3, and you requested that the Commission take action to revise section III.B.3. We address each of these requests in turn below.

1. Exception to the AWD

In your email, you ask the Commission to adopt an "exception" to allow you to testify in the *Wolkoff* case. But the SIA prohibits the proposed activity. Section III.B.3 provides that unless the decision-maker determines otherwise, you as an employee of the OCME may not provide expert testimony in a civil or criminal proceeding unrelated to your job duties. You have proposed to provide expert opinion and possible testimony in a civil matter unrelated to your job duties. This you may not do under the plain language of section III.B.3 unless you obtain an AWD that provides that you may engage in such activity. You sought an AWD, which was denied by the Chief Medical Examiner, and you appealed that decision to the City Administrator, who also denied the AWD. For that reason, the proposed activity is prohibited under the SIA.

In an advice letter, the Ethics Commission cannot change or adopt an exception to the SIA that is inconsistent with the plain language of the SIA. The SIAs may only be amended by a specific process set forth in C&GC Code section 3.218 and the regulations adopted to implement that section. Nor can the Ethics Commission substitute its judgment in an AWD request for the judgment of the authorized decision-maker unless the SIA explicitly provides that authority, and GSA's SIA does not so provide. For this reason, and because the AWD process was followed correctly here, the Commission concludes that the proposed activity described in your request would violate the SIA.

2. Satisfying the Meet and Confer Obligations

You assert that section III.B.3 of GSA SIA should not apply to you because the SIA was never forwarded to your union, the Union of American Physicians and Dentists ("UAPD"), during the

Ethics Commission's consideration of it. As a consequence, you claim that the City failed to satisfy the meet-and-confer obligations under C&GC Code section 3.218, and the SIA is not legally operative. The records of the Ethics Commission and the Department of Human Resources demonstrate otherwise.

The Ethics Commission first considered the SIA of the GSA at a publicly noticed meeting on June 11, 2007. On June 4, 2007, Ethics staff sent notice of the meeting to representatives of all unions representing affected employees. A copy of the GSA SIA dated June 4, 2007 was attached to the email. Section III.B.3 in that SIA contained the following language: ***"No officer or employee of the Office of the Chief Medical Examiner Division may provide expert testimony in a civil or criminal judicial proceeding unrelated to job duties, except as authorized by an advance written determination pursuant to subsection C of this section by the Chief Medical Examiner or his or her designee."*** This language is identical to the language that appears in the current version of the GSA SIA.

Ethics staff sent the June 4 email to, among others, two individuals with the UAPD email address, al@uapd.com and pat@uapd.com. These were the email addresses provided by the union to the City's Department of Human Resources ("DHR") as official contacts for the UAPD. None of the emailed messages bounced back. Contemporaneous with the SIA adoption process in 2007 and 2008, these two individuals communicated with the DHR on behalf of UAPD, using the same email addresses. These two UAPD representatives continue to represent the union and continue to use the same email addresses today. Indeed, one of them is an address you now use to communicate with your union.

On June 11, 2007, the Commission preliminarily approved the GSA SIA at a public meeting in City Hall. No representative from UAPD attended and spoke at that meeting.

The Ethics Commission's preliminary approval was only the first step in the adoption of GSA's SIA. Before final adoption, the law required the City to satisfy meet and confer obligations. DHR scheduled meet and confer discussions for September 21, 2007 about the GSA SIA with miscellaneous unions, including the UAPD, that represent employees at GSA. Prior to that date, on August 20, 2007, DHR sent notice of the meeting to the UAPD via an email addressed to the two same email addresses referenced above. DHR has informed the Commission that none of the emailed messages bounced back. On August 21, 2007, DHR also sent notice of the September 21, 2007 meeting via a facsimile to the UAPD at a phone number provided by UAPD for the purpose of fax communications. DHR has a confirmation record that the facsimile was received by UAPD on August 21, 2007 at 8:25 a.m. Both DHR's email and facsimile messages explained that any union that was unable to meet and confer on the scheduled date could contact DHR to request another time to meet; otherwise, the City would consider the failure to make such a request or to attend the meeting "an unequivocal waiver of the right to meet and confer on the department's SIA." On September 21, staff from GSA, DHR, the Ethics Commission and the City Attorney's Office attended the scheduled meeting. No representative from the UAPD attended; nor did anyone from UAPD request a different meeting date and time to meet. Prior to final approval of the SIAs, the City held numerous meetings with City unions regarding the SIAs for all departments and provided notice to each union; several unions sent representatives to those meetings.

The Ethics Commission scheduled a meeting to give final consideration to the GSA SIA on November 5, 2007. Prior to that date, on October 26, 2007, Ethics staff sent notice about the Commission's meeting to, among others, the UAPD via email to the two same UAPD email addresses. Recipients of the notice were informed that a copy of the proposed final SIA was available to the public at the Commission's office and on its website. At a public meeting on November 5, 2007, the Commission finally approved the GSA SIA. Again, no representative from the UAPD attended.

The language of section III.B.3 remained unchanged throughout the process of the Commission's initial consideration of the SIA, the meet-and-confer process, and the Commission's final consideration of the SIA. The City offered the UAPD several opportunities to participate in the process, but the UAPD declined to do so. Because the City provided adequate notice of the meet-and-confer process, it met its meet-and-confer obligations under section 3.218 of the C&GC Code. The SIA is binding on all employees and officers of GSA.

3. Amending the SIA

While the Commission cannot consider an appeal of a decision-maker's determination in an AWD request, the Commission has the authority to amend any SIA. *See* C&GC Code § 3.218. In drafting the SIAs, the Commission worked closely with the management and employees of each department, recognizing that the department heads often had vital information regarding what outside activities were incompatible with the department's mission. Similarly, in authorizing department heads to approve AWD requests, the Commission recognized that department heads generally are well equipped to determine whether specific outside activities are incompatible, inconsistent or in conflict with the mission of their departments. For this reason, department heads have great latitude in determining whether to grant AWD requests.

In consulting with GSA representatives, the Commission has learned that the City Administrator does not support a change to section III.B.3. The Commission understands that in making advance written determinations regarding this provision, the Chief Medical Examiner and the City Administrator use the following six-question framework:

> Q1: Have you been retained to provide, or is it reasonably foreseeable that you will provide, expert testimony in a judicial proceeding, other than in your official capacity as an employee of the Medical Examiner's Office?
>
> Answer to Q1:
>
> *Yes.* Then ask Q2.
>
> *No.* SIA § III.A.3 does not apply; no AWD is required. Employee may engage in the activity.
>
> Q2: Does the case involve a death, injury or incident that occurred in the City and County of San Francisco?
>
> Answer to Q2:
>
> *Yes.* The activity is incompatible. Department Head will deny AWD.
>
> *No.* Then ask Q3.

Q3: Will the case involve a public entity or will the case involve an entity/person that has a professional relationship with the City and County of San Francisco?

Answer to Q3:

Yes. Then ask Q4.

No. The outside activity is not incompatible. Department Head will grant AWD.

Q4: Does the case involve the interpretation or review of the findings or work of another Medical Examiner, Coroner or a person acting as an agent of the Medical Examiner or Coroner?

Answer to Q4:

Yes. Then ask Q5.

No. The outside activity is not incompatible. Department Head will grant AWD.

Q5: Would your testimony interfere with the City and County of San Francisco's professional relationship with the other public entity or entity/person in a manner that would disrupt the efficient operations or practices of the City and County of San Francisco?

Answer to Q5:

Yes. Then ask Q6.

No. Outside activity is not incompatible. Department Head will grant AWD.

Q6: Has any party already relied on your ability to testify in the case based on an agreement you entered into prior to June 2010 to provide such testimony?

Answer to Q6:

Yes. Outside activity is not incompatible. Department Head will grant AWD

No. Outside activity is incompatible. Department Head will deny AWD.

The Commission believes that such a framework is reasonable and provides guidance as to what outside activities might be considered incompatible or not. The Commission could amend the SIA to incorporate this framework explicitly, but as long as the department consistently applies the framework, as it has done here, there is no need to amend the SIA. The Commission finds the language in section III.B.3 to be precise and clear, not so broad or confusing as to recommend a revision.

Sincerely,

John St. Croix, Executive Director

By: Mabel Ng, Deputy Executive Director

S:\ADVICE\conflicts of interest\Misc\11-0309 Melinek\letter to Melinek.doc

From: Judy Melinek/ADMSVC/SFGOV
To: Mabel Ng/ETHICS/SFGOV@SFGOV
Cc: pat@uapd.com, llim@giccb.com, Jon Smith/ADMSVC/SFGOV@SFGOV

Date: Wednesday, March 09, 2011 02:11PM
Subject: SIA/AWD for OCME

History: This message has been forwarded.

Per our phone conversation today, where you notified me about the procedure regarding approaching the ethics commission, I am clarifying that I am r **equesting advice** from the commission on this case in particular, with the hopes that an exception can be made as there is clearly no conflict of interest for the City & County of San Francisco. As I notified you in an earlier e mail and by phone, the attorney will be filing expert disclosure on Friday and I plan to have them disclose me as a witness, but not schedule me to testify until we have the opinion by the ethics commission. If the hearing process can be expedited, it would clearly help avoid any further delay and potential damages.

I did speak to my UAPD union representation, Patricia Hernandez, and she is adamant that the specific SIA language for our division was never forwarded to UAPD for a meet and confer; she said that they have requested proof from DHR that it was forwarded to them and this proof has never been provided. I suggest you contact DHR and check your own records as you told me you would do, since an absence of notification of our union, UAPD, would undermine the validity and enforcement of the SIA.

I stand by the request in my letter (attached) that the ethics commission revise the SIA language for our department to language that is clearer and less subject to arbitrary interpretation and implementation. Our union representatives are looking forward to discussing with you alternate language.

(See attached file: AWD denial appeal to EC with docs.pdf)

Judy Melinek, M.D.
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Cell: 415-760-1673
Fax: 415-553-1650

Attachments: Save All to a Lotus Quickr Place...

AWD denial appeal to EC with docs.pdf | Save to a Lotus Quickr Place...

Medical Examiner's Office
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Judy Melinek, M.D.
Assistant Medical Examiner
Phone: (415) 553-9007

February 24, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220, San Francisco, CA 94102
Phone: (415) 252-3100/Fax: (415) 252-3112
ethics.commission@sfgov.org

RE: Appeal of denial on Advance Written Determination (AWD)

To the Ethics Commission,

I would like to appeal a determination made by my supervisors, Chief Medical Examiner Dr. Amy Hart, and City Administrator Amy L. Brown, regarding the Statement for Incompatible Activities (SIA) for the Office of the Chief Medical Examiner. The SIA for our Department dictates that "No officer or employee of the Office of the Chief Medical Examiner Division may provide expert testimony in a civil or criminal judicial proceeding unrelated to job duties, except as authorized by an advance written determination pursuant to subsection C of this section by the Chief Medical Examiner or his or her designee." Recently, I submitted an Advance Written Determination (AWD) form requesting approval to testify as a legal consultant on a case that is outside the jurisdiction of the San Francisco Office of the Chief Medical Examiner (attached). The case, San Mateo Superior Case # CIV4811542, Wolkoff v. AMR/County of San Mateo, State of California Department of Forestry, Instrumentation Industries Inc, and State of California Department of Transportation, involves a wrongful death lawsuit for a passenger in a motor vehicle accident. The City and County of San Francisco is not a party in the lawsuit and my testimony would be restricted to my expertise as a forensic pathologist (e.g. cause, manner and mechanism of death or injury). When I testify in a consultative capacity it is <u>always</u> done on my own time, with approved leave from the Office of the Chief Medical Examiner, and I testify under oath that I am speaking as a retained expert witness, not as a representative of the City and County of San Francisco.

When I asked Dr. Hart why the AWD had been denied, given that for many years I have testified in similar cases with her knowledge and approval and without any adverse consequences, I was told "the real reason is that the whole totality of the case involves people who have cross relations with our county." She defined "relationship" as "enough of a relationship that it would cause an adverse impact on this department and the City." My supervisor wouldn't define "adverse impact."

I appealed her decision to Ed Lee, City Administrator, (currently Acting Mayor) on the following grounds:

1. Denial of outside consultative work is an infringement on my ability to support my family. The Assistant Medical Examiner position (#2598) is an hourly position; I am not a salaried employee. The past practice set by this office allowed Assistant Medical Examiners to perform outside consultative work in order to supplement their income. Chief Medical Examiner Dr. Boyd Stephens did outside consultation work for private gain as well. Invoking the SIA process in order to limit my ability to earn for my family is a violation of my rights as an employee, previously agreed upon Union MOU and contract.

2. Denial of expert testimony based on the details of the case is a violation of my First Amendment right to free speech. (See: *Hoover v. Morales* US Court of Appeals, Fifth Circuit, 164 F.3d 221).

3. The SIA language (C9.113.d) requires that a meet and confer occur with unions before its implementation. UAPD has informed me that a meet and confer never occurred and that they were not presented with the specific language pertaining to the SIA for our individual department.

4. Work on this particular case does not conflict with my official duties, require use of City resources, nor does it have excessive time demands.

5. This case does not present any conflict of interest to the City and County of San Francisco.

6. The number of Board Certified Forensic Pathologists available to give expert testimony is extremely limited, and hence to deprive litigants access to all publicly-employed physicians in any case involving another public agency (as would be the result of Dr. Hart's approach) would be deleterious to the administration of justice in our courts.

On February 1, 2011, I received a letter from Amy L. Brown, Acting City Administrator (attached) denying my appeal. The letter did not address the grounds for my appeal and instead indicated that the reason my testimony was denied was because my request to provide outside testimony in a case against AMR of San Mateo risks interfering with the close working relationship between the Office of the Chief Medical Examiner and AMR of San Mateo County. The letter asserts that "Expert witness testimony by an Assistant Medical Examiner risks disrupting office operations by interfering with those important working relationships."

I am therefore appealing this decision to the Ethics Commission. The letter from Ms. Brown indicates that the Statement of Incompatible Activities is being used by City officials to suppress testimony for political means. The SIA was initially created as the result of a voter-approved Proposition E in November 2003 (attached), with the intention of increasing transparency and ethical behavior in government. The stated intention on the ballot was to prevent government employees from having a financial interest that would affect their ability to

function ethically in their official role as government employees by disclosing "personal, professional and business relationships with people who are affected by the decisions they make." The portions pertaining to a Statement of Incompatible Activities (SIA) did not include the actual language of the SIA for each department; did not define "incompatible" or "conflict of interest" and required a meet and confer with the Unions prior to implementation.

In the denial of the AWD that I received, the reason given for my testimony being incompatible with my job for the City & County of San Francisco was not because of any ethical conflict of interest, but instead because of a perceived "risk" that such testimony would be a threat to the cooperative relationships between the City & County of San Francisco and AMR of San Mateo. No evidence was given that these relationships have ever been threatened in the past by previous testimony against vendors for the City. Furthermore, the contention that "Expert witness testimony by Assistant Medical Examiners in which the named party is a vendor of San Mateo County and/or a public agency of the County of San Mateo can and has interfered with the operations of the Medical Examiner's Office in the past" is false. The only information ever given to UAPD representatives regarding any "disruption" of operations was of a records request in late 2009 or early 2010, which is part of the legal mandate of our office to provide, and would have been easily integrated into the typical public records requests the Medical Examiner's office receives on a daily basis. No proof of this records request has ever been provided.

Furthermore, the denial of testimony against a government agency or vendor, while allowing testimony in defense of a government agency or vendor, indicates that the City & County of San Francisco is using the SIA as an instrument to suppress transparency in government and citizen's access to competent expert testimony in complaints against government entities. It also shows a complete lack of understanding of the role of an expert witness. Expert scientific opinions and testimony are not advocacy. I am a scientist; not a legal advocate. Were a person to die in San Francisco General Hospital due to negligence incurred in San Mateo County or by one of its vendors, it would be my duty to testify truthfully to my autopsy findings, as part of my job for San Francisco. I would be expected to testify truthfully regardless of whether the testimony affected the relationships with San Mateo County or its vendors. In fact, I have testified in cases where the City & County of San Francisco was a named party in the lawsuit and this was not a conflict of interest, even when my testimony did not help the City Attorney. The same ethical standards apply if I were to testify pro-bono or as a retained expert. To restrict my testimony as a volunteer or independent contractor, while expecting it as a San Francisco City & County employee, is unethical and unfair. That gives the appearance of ethical impropriety on the part of City Administrators, whose chief priority appears to be to suppress adverse testimony and conspire with adjacent Counties or their vendors to cover-up negligence.

I also want to add that my years of qualified testimony in multiple jurisdictions (including New York, Texas, California, Florida and Oregon) makes me a valuable employee and an asset to the City & County of San Francisco. I have shared my knowledge with my colleagues and have educated our investigators, rotating students and other City employees, including attorneys at the Public Defender's and City Attorney's offices, on the topics of expert witness testimony, cause of death determination and in-custody death. It is because of outside work and testimony that I am recognized as a national expert in forensic pathology, wound interpretation, in-custody

death investigation and medical malpractice/therapeutic complications. To continue to restrict my testimony limits my professional development and would hinder my ability to adequately serve the City & County of San Francisco. It would also encourage me to find employment elsewhere, as one other Assistant Medical Examiner has already done.

I respectfully request a hearing in front of the Ethics Commission regarding these issues with my Union representation present. I would like the Ethics Commission to also consider the supportive testimony of attorneys who know my work and ethical standards. Finally, I request that the Ethics Commission revise the SIA language for the Office of the Chief Medical Examiner so that it clearly defines the ethical requirements for our position via a meet and confer with our Unions, rather than leaving them to the interpretation of my supervisor via the AWD process. The AWD process as it is currently being implemented is arbitrary, burdensome and breaches attorney-client confidentiality, without actually increasing transparency or improving ethics. Recently, another Assistant Medical Examiner was told by Dr. Hart that in the future she would not be able to testify on cases for outside jurisdictions where she performed the autopsy, even if it meant she would have to violate a court order to testify. Clearly, this would cause her to choose between violating the SIA and violating a court order, either one of which would be grounds for termination. All the Assistant Medical Examiners, Medical Examiners Investigators, and Forensic Toxicologists who hold outside employment have been affected adversely by the wording of this SIA. I believe we would all be willing to come to the table and agree upon a clearer and more workable SIA, with the participation of our respective unions.

Sincerely,

Judy Melinek, M.D.

cc: Patricia Hernandez, UAPD
Kim Carter, IFTPE Local 21
Ricardo Lopez, SEIU Local 1021
Linda Lim, Gwilliam, Ivary, Chiosso, Cavalli & Brewer

Attachments: AWD denial
Letter from Acting City Administrator Amy L. Brown dated February 1, 2011
Text of voter-approved Proposition E
Hoover v. Morales US Court of Appeals, Fifth Circuit, 164 F.3d 221
Letters of support (14)

der section 3.218 of the San Francisco Campaign and Governmental Conduct Code, each Department, Board, or Commission has adopted a Statement of Incompatible ivities ("SIA") that lists those outside activities that are inconsistent or incompatible with the duties of the officers and employees of the Department, Board, or Commission. ction III.C of the SIA permits an officer or employee to seek an Advance Written Determination whether a proposed outside activity is prohibited because it is inconsistent or herwise in conflict with the officer's or employee's duties. A written Determination by the Decision-Maker that an activity is not incompatible with the SIA provides the questor immunity from any subsequent enforcement action for a violation of the SIA, if the material facts are as presented in the Requestor's written submission. A written termination does not provide immunity from any other laws that prohibit the proposed activity. An officer or employee may also seek a written opinion from the Ethics mmission to determine whether the person's proposed activities violate the SIA or any other local law relating to conflicts of interest and governmental ethics.

obtain a written Determination, please fill out Sections A-E legibly and completely, and submit this form to the Decision-Maker indentified in Section C. Please note that the ecision-Maker may require you to provide additional information in order to make a Determination. At any time, the Decision-Maker may revoke the Determination, by oviding written notice to you specifying the changed facts, circumstances or other good cause that warrants the revocation.

I am a:

- ☒ City employee (Submit completed form to your Department head or his or her designee, or as directed in your SIA.)
- ☐ Department head (Submit completed form to your appointing officer.)
- ☐ Appointed member of a City board or commission (Submit completed form to your appointing officer, your Board or Commission, or the Ethics Commission, as directed in section III.C of the SIA. If the form is to be submitted to the Ethics Commission, please send the completed form to the Ethics Commission office at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102 or by faxing it to (415) 252-3112.)
- ☐ Elected official (Submit completed form to the Ethics Commission.)

. Requestor Information (Please Print Clearly)

Melinek, Judy
ame (Last, First)

Assistant Medical Examiner
itle

415-553-9007
ffice Phone

Judy.Melinek@sfgov.org
mail

Office of Chief Medical Examiner
lame of Department, Board, or Commission

850 Bryant Street 94103
)ffice Address / Zip Code

C. Decision-Maker Information (Please Print Clearly)

Hart, Amy P. M.D.
Name (Last, First)

Chief Medical Examiner
Title

Office of the Chief Medical Examiner
Name of Department, Board, or Commission

415 553-1799
Office Phone

amy.hart@sfgov.org
Email

HOJ 850 Bryant St. San Francisco, CA 94103
Office Address / Zip Code

Decision-Maker is (check applicable):

- ☒ Department head
- ☐ Department head's designee
- ☐ Board or Commission
- ☐ Appointing officer
- ☐ Ethics Commission

Please turn page over.

The Requester and Decision-Maker should retain a copy of this document for their records.

Written Request

For Department Use Only—Date Written Request Received: 12/3/10 [initials]

ide a description of the proposed activity and an explanation of why the activity is not incompatible under the SIA of your artment, Board, or Commission SIA. Describe the proposed activity in sufficient detail for the Decision-Maker to make a informed determination. If necessary, the Decision-Maker may require additional information from you. Attach additional uments as appropriate.

Description of Proposed Activity: Expert opinion and possible testimony San Mateo Superior Court – Case # CIV481542 Jerald Wolkoff + Sandra R Wolkoff versus AMR/County of San Mateo, State of CA Dept of Forestry, Instrumentation Industries INC, State of CA Dept of Transportation. autopsy in San Mateo County Coroner – review of material with expectation to testify on cause + manner of death in a passenger motor vehicle fatality with therapy.

Verification

☒ *I certify under penalty of perjury that the information provided on this request for Advance Written Determination is true, complete, and correct. I understand that if the Decision-Maker determines that the proposed activity is incompatible, I will not be immune from prosecution from any subsequent enforcement action brought for a violation of the SIA. I further understand that if the Decision-Maker makes a determination that the proposed activity is not incompatible, the Decision-Maker may revoke that Determination at any time based on the changed facts, circumstances, or other good cause, by providing written notice to me.*

Melinek, Judy	[signature]	12/3/10
ne of Requestor (Last, First)	Signature	Date Request Submitted

SAN FRANCISCO MEDICAL EXAMINER DEC PM 2:40

Written Determination by the Decision-Maker

For Department Use Only—Date notice provided to Requestor:

ased on the information submitted, I, the undersigned, find that the proposed activity:

☒ is incompatible with the SIA of the Department, Board, or Commission.

☐ is not incompatible with the SIA of the Department, Board, or Commission.

Hart, Amy P. M.D.	Office of the Chief Medical Examiner
int Name of the Decision-Maker (Last, First)	Department, Board, or Commission
Amy P. Hart M.D [signature]	12/2/10
gnature	Date

. Comments:

12/3/10

Wolkoff's are the family. This is a wrongful death civil suit. AMR is a contractor with the County of San Mateo. State of Ca Agencies who maintain or are responsible for the roadway. Dept of Forestry is one of the Jet Insufflator is used with a tracheotomy. COD: OC: [illegible] she doesn't think [illegible] Instrumentation Industries Inc is the manufacter. 12/9/10 [initials]

The Requester and Decision-Maker should retain a copy of this document for their records.

OFFICE OF THE
CITY ADMINISTRATOR

Edwin M. Lee, Mayor
Amy L. Brown, Acting City Administrator

February 1, 2011

Judy Melinek, M.D.
Assistant Medical Examiner
Office of the Chief Medical Examiner
850 Bryant Street
San Francisco, CA 94103

Re: Appeal of Advance Written Determination, San Mateo Superior Case No. CIV 4811542
Wolkoff v. AMR/County of San Mateo

Dear Dr. Melinek:

I am in receipt of your appeal to Ed Lee, dated December 30, 2010, regarding Dr. Amy Hart's denial of your request to work as a paid expert in San Mateo Superior Case No. CIV 4811542, Wolkoff v. AMR/County of San Mateo. You requested approval to provide voluntary, paid expert services to the plaintiff, Wolkoff. As I'm sure you know, since your appeal Ed Lee has been appointed to be Mayor. I am serving as Acting City Administrator in his absence. I have reviewed your appeal carefully and have decided to deny your appeal of the denial of request for Advance Written Determination. Based on the facts you presented in your request, your proposed outside activity is incompatible with your position and would violate the Statement of Incompatible Activities. My decision is based in part on the following factors:

The San Francisco Medical Examiner's Office by necessity has a close and open working relationship with San Mateo County, and I have significant concerns that your proposed expert services could jeopardize and disrupt that relationship. Due to the lack of a tertiary medical care facility in San Mateo County, there are frequently death investigation cases in which the incident occurs in San Mateo and the person eventually dies in San Francisco. These types of deaths, and the mutual aid agreement between San Mateo and San Francisco, require that the public agencies from these two counties have a close, cooperative relationship in order to conduct adequate death investigations. Your request to provide expert services risks interfering with that close working relationship. Expert witness testimony by Assistant Medical Examiners in which the named party is a vendor of San Mateo County and/or a public agency of the County of San Mateo can and has interfered with the operations of the Medical Examiner's Office in the past, and the practical effect of your proposed activity would disrupt the operations of the office.

Additionally, the vendor, AMR, whom you note is a party in this case, also provides contract services to the City and County of San Francisco. In San Francisco, AMR provides contract services as an ambulance provider. The Medical Examiner investigations require patient care reports (out of hospital medical records) and Assistant Medical Examiners as well as other staff may need to contact AMR staff to clarify or obtain additional investigative information. Expert witness testimony by an Assistant Medical Examiner risks disrupting office operations by interfering with those important working relationships.

Very truly yours,

Amy L. Brown
Acting City Administrator

Ethics Reform E

PROPOSITION E

Shall the City consolidate its governmental ethics law in one code, amend some of those ethics laws, and create new ethics laws?

YES ⬅
NO ⬅

Digest

by the Ballot Simplification Committee

THE WAY IT IS NOW: The City Charter and City ordinances contain ethics rules for City officers and employees. For example, City law prohibits City officers and employees from:

- Making decisions in which they have a financial interest;
- Accepting gifts or campaign contributions from certain sources;
- Engaging in outside activities that are incompatible with their work for the City;
- Contracting with the City;
- Disclosing confidential City information; and
- Lobbying other City officers.

Ethics laws in the Charter or in ordinances passed by the voters may be changed only by the voters. The Board of Supervisors may change all other ethics laws.

Individuals who are guilty of official misconduct while in City office are permanently barred from City office or employment. In general, City officers who are convicted of crimes involving violence or fraud must be removed from office.

THE PROPOSAL: Proposition E is a Charter amendment that would modify and clarify the City's ethics laws as follows:

- Consolidate all of the City's ethics laws into its Campaign and Governmental Conduct Code;
- Amend some of these ethics laws; and
- Create new ethics laws.

The Board of Supervisors could amend these ethics laws by a two-thirds vote with the approval of four-fifths of the Ethics Commission. Voter approval no longer would be required.

In addition to the existing ethics laws, the new and amended laws would:

- Prohibit City officers and employees from making employment decisions regarding family members;
- Require City officers and employees to disclose their personal, professional and business relationships with people who are affected by the decisions they make;
- Restrict gifts from subordinates and from persons who contact City officers or employees;
- Change the restrictions on campaign contributions from City contractors;
- Regulate referrals made by City officers and employees;
- Require each City department to list outside activities that are incompatible with service or employment in that department; and
- Regulate the activities of City officers and employees after they leave City service or employment.

Any person removed from federal, state, county or city office because of official misconduct would be barred from City office or employment for five years.

Any City officer or employee would be removed if convicted of a felony crime involving violence or fraud, and if the Ethics Commission determined that the crime warrants removal. Any person removed from federal, state, county or city office because of such a crime would be barred from City office or employment for 10 years.

A "YES" VOTE MEANS: If you vote "Yes," you want to make these changes to the City's ethics laws.

A "NO" VOTE MEANS: If you vote "No," you do not want to make these changes.

Controller's Statement on "E"

City Controller Edward Harrington has issued the following statement on the fiscal impact of Proposition E:

Should the proposed charter amendment be approved by the voters, in my opinion, there would be a minimal increase in the cost of government.

How "E" Got on the Ballot

On July 22, 2003 the Board of Supervisors voted 10 to 0 to place Proposition E on the ballot.

The Supervisors voted as follows:
Yes: Supervisors Ammiano, Daly, Dufty, Gonzalez, Hall, Maxwell, McGoldrick, Newsom, Peskin, and Sandoval.
Absent: Supervisor Ma.

THIS MEASURE REQUIRES 50%+1 AFFIRMATIVE VOTES TO PASS.

ARGUMENTS FOR AND AGAINST THIS MEASURE IMMEDIATELY FOLLOW THIS PAGE. THE FULL TEXT BEGINS ON PAGE 88.
SOME OF THE WORDS USED IN THE BALLOT DIGEST ARE EXPLAINED ON PAGE 28.

E Ethics Reform

PROPONENT'S ARGUMENT IN FAVOR OF PROPOSITION E

The Board of Supervisors authorized the submission of the following argument. As of the date of the publication of this Voter Information Pamphlet, the following Supervisors endorse the measure: Supervisors Ammiano, Daly, Dufty, Gonzalez, Hall, Ma, Maxwell, McGoldrick, Newsom, Peskin, and Sandoval.

Faith in government is the cornerstone of democracy. To maintain the public's faith in local government, San Franciscans have enacted various conflict of interest laws. These laws seek to ensure that City officials make their decisions in a manner that is fair and evenhanded for all of our City's residents.

Many of these laws are outdated, confusing or don't adequately address the conduct they were intended to regulate. As a result, the San Francisco Ethics Commission spent the last 11 months analyzing and discussing these laws with members of the public, City officials and employees, and legal experts from across California. Proposition E is the result of that process.

Proposition E updates, clarifies and strengthens the City's conflict of interest laws. Some of Proposition E's major provisions:

- Restrict City officers and employees from making decisions that affect their financial interests and their own character or conduct;
- Restrict gifts to City officers and employees from individuals and entities that do business with the City;
- Prohibit City officers and employees from participating in outside activities that are incompatible with their official duties;
- Mandate removal of City officers and employees who are convicted of felony crimes involving violence or fraud; and
- Restrict post-service activities of City officers and employees including additional restrictions for former Mayors and members of the Board of Supervisors.

Proposition E is a vital step towards keeping democracy alive and well in San Francisco. Please vote YES on Proposition E.

Supervisor Tom Ammiano
Supervisor Aaron Peskin
Supervisor Tony Hall
Supervisor Jake McGoldrick
Supervisor Gerardo Sandoval
Supervisor Fiona Ma
Supervisor Matt Gonzalez

REBUTTAL TO PROPONENT'S ARGUMENT IN FAVOR OF PROPOSITION E

BOSS TWEED WOULD LIKE PROPOSITION E:

William Marcy Tweed, New York Democratic Alderman (1852-1853), U.S. Congressman (1853-1855), frequent State Senator, and Tammany Hall leader ran the most corrupt political machine in American history until his 1871 extortion conviction.

Richard Sullivan, bag man of the "Tweed Ring", entered the American language as the original "Tricky Dick". Sullivan jumped $1,000,000 bail, fleeing to Egypt with his remaining $6,000,000.

Proposition E is a piece of "reform legislation" worthy of Tweed and Sullivan.

Proposition E removes ethics laws from the City Charter, where there would be a public vote on any changes, to the Campaign and Governmental Code, which the Supervisors can amend.

Proposition E ends the two (2) year ban on former Supervisors lobbying City agencies, the new bar being only one (1) year.

If Sullivan were still alive, he would send an endorsement letter for Proposition E from Egypt.

Proposition E smells bad.

Terence Faulkner, J.D.
Past County Chairman
San Francisco Republican Party

Thomas C. Agee

Max Woods
County Central Committeeman

Gail E. Neira
County Central Committeewoman

Arguments printed on this page are the opinion of the authors and have not been checked for accuracy by any official agency.

Ethics Reform E

OPPONENT'S ARGUMENT AGAINST PROPOSITION E

DON'T GIVE UP YOUR RIGHT TO VOTE ON SAN FRANCISCO'S VITAL CONFLICT OF INTEREST PROVISIONS:

Proposition E will transfer our City's conflict of interest rules for public office holders from the City Charter (where the voters must approve any changes) to the local Campaign and Governmental Conduct Code (which can be modified by a two-thirds vote of the Board of Supervisors). Important questions involving the ethics of public officials should be voted upon by the people. Quick "fixes" are not in the City's best interest.

BE MORE CAREFUL ABOUT HIRING PAST VIOLENT FELONS AND THOSE REMOVED FROM PUBLIC OFFICE FOR OFFICIAL MISCONDUCT:

Lately, San Francisco has been hiring a number of people to deal with the public who are really little more than thugs. Banning those removed from official employment because of *"felony crime involving moral turpitude...for ten years and [those]... removed...[for] official misconduct...for five years"* is not enough. Such persons should only be hired after the necessary five or ten year ban and by at least a two-thirds vote of the Board of Supervisors after a full investigation of the individual proposed City employee. Dangerous criminals are not needed in San Francisco's public service.

DON'T REDUCE THE TWO YEAR LOBBYING BAN ON FORMER SUPERVISORS TO ONE YEAR:

The two (2) years ban on former Board of Supervisors members lobbying the City Government and its agencies should not be reduced to one (1) year.

VOTE AGAINST PROPOSITION E:

For all the above reasons, vote against this unwise Proposition E.

Golden Gate Taxpayers Association

Dr. Terence Faulkner, J.D.
Chairman, Golden Gate Taxpayers Association

REBUTTAL TO OPPONENT'S ARGUMENT AGAINST PROPOSITION E

The Board of Supervisors authorized the submission of the following argument. As of the date of the publication of this Voter Information Pamphlet, the following Supervisors endorse the measure: Supervisors Ammiano, Daly, Dufty, Gonzalez, Hall, Ma, Maxwell, McGoldrick, Newsom, Peskin, and Sandoval.

It has been nearly 30 years since the City conducted a complete review of local laws that govern the conduct of City officials and employees. Many of our existing ethics laws are outdated and fail to adequately address today's complex concerns. Accordingly, the Ethics Commission, **with input from the public and ethics experts from across California,** spent nearly one-year examining the City's existing laws and developing these amendments.

The opponents would like you to believe that Proposition E is an unwise measure. But contrary to what the opponents argue, Proposition E actually:

- Strengthens restrictions on the types of individuals who may serve the City **by mandating the removal of a City officer or employee upon conviction of certain felony crimes involving moral turpitude;**
- Strengthens post-service laws by imposing on all City officers and employees, including members of the Board of Supervisors, **a lifetime ban on lobbying about certain matters in which the officer or employee participated while serving the City;**
- **Maintains your right to vote on ethics laws,** but, like the City's campaign finance laws, permits a super-majority of the Board of Supervisors to amend the City's ethics laws only if the changes are approved by four-fifths of the Ethics Commission.

Listen to the Ethics Commission and the experts and approve this much-needed reform to our City's ethics laws. **Please vote Yes on Proposition E!**

San Francisco Common Cause

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E Ethics Reform

PAID ARGUMENTS IN FAVOR OF PROPOSITION E

SAN FRANCISCO DEMOCRATIC PARTY urges **YES on E** -- Strengthens rules against political conflicts of interest.

Jane Morrison, Chair, San Francisco Democratic Party

The true source of funds used for the printing fee of this argument is the San Francisco Democratic Party.

The three largest contributors to the true source recipient committee are: 1. Tom Lantos 2. John Burton 3. Carole Migden.

In 1995, I crafted Prop N, San Francisco's first major Ethics reform. Let's continue to fight for clean government. Please vote Yes.

Terence Hallinan

The true source of funds used for the printing fee of this argument is the Committee to Re-Elect Terence Hallinan DA 2003.

The three largest contributors to the true source recipient committee are: 1. Grace Ko 2. Michael Levy 3. James O'Connor.

The San Francisco Labor Council supports Proposition E. Consolidation of all of the City's ethics laws in one code makes sense.

The San Francisco Labor Council recommends a **YES** vote on Proposition E.

San Francisco Labor Council AFL-CIO

The true source of funds used for the printing fee of this argument is the San Francisco Labor Council.

Arguments printed on this page are the opinion of the authors and have not been checked for accuracy by any official agency.

PAID ARGUMENTS AGAINST PROPOSITION E

This Measure is Extremely Misleading.

Who could be against "ethics" in government? No one. But Proposition E is an extremely misleading measure. It includes many ideas that make sense, but these are bundled in with some terrible ideas that will make City government work even worse than it already does. It tries to write a law against every ethical lapse of the last eight years, but is so overly-broad and so overreaching that it will literally tie the City into knots. And if it passes, there will be no way to change the provisions without going back to the ballot. Among its major problems:

- Prop. E will make it extremely difficult to recruit citizen volunteers to serve on commission and advisory boards.
- Prop. E will make it harder to hire knowledgeable people to work for the City.
- Prop. E is a veiled power grab by the Board of Supervisors.

Vote No on Prop. E.

For more information, see www.spur.org

San Francisco Planning and Urban Research Association (SPUR)

The true source of funds used for the printing fee of this argument is the SPUR Urban Issues Committee.

The three largest contributors to the true source recipient committee are 1. Oz Erickson 2. James Chappell 3. Peter Mezey.

Case of the Fox Guarding the Henhouse?

Proposition E proclaims that it's an ethics reform measure, but, in fact, it would move various ethics and conflict of interest provisions for city officers and employees from the Charter into the Campaign and Government Conduct Code—where voter approval would no longer be required for changes in the law.

The San Francisco Association of REALTORS® was one of the few organizations in San Francisco that supported the creation of an ethics commission during the last decade. And, we would be the first to admit that Proposition E contains many worthwhile new provisions governing ethics and conflicts of interest among city officers and employees. But moving the ethics and conflict of interest provisions from the Charter into ordinance form—eliminating voter approval of any changes—strikes us as not being in the public's interest. For that reason, we must respectfully urge a "NO" vote on Proposition E.

VOTE NO ON E

San Francisco Association of REALTORS®

The true source of funds used for the printing fee of this argument is the San Francisco Association of REALTORS®.

Arguments printed on this page are the opinion of the authors and have not been checked for accuracy by any official agency.

LEGAL TEXT OF PROPOSITION E

Describing and setting forth a proposal to the qualified voters of the City and County of San Francisco to amend the Charter of the City and County of San Francisco by amending Sections 4.108, 4.109, 15.100, 15.103, 15.105, 16.118 and Article XVII, deleting Sections 15.104, 15.106, 15.108, C8.105 and adding Section 18.115 and Appendix Sections C9.101, C9.102, C9.103, C9.104, C9.105, C9.106, C9.107, C9.108, C9.109, C9.110, C9.111, C9.112, C9.113, C9.114, C9.115, C9.116, C9.117, C9.118, C9.119, C9.120, C9.121, C9.122, C9.123, C9.124, C9.125, C9.126 and C9.127 to enact new conflict of interest provisions, to make technical changes, to move various provisions into ordinances, and to clarify existing provisions.

The Board of Supervisors hereby submits to the qualified voters of the City and County, at an election to be held on November 4, 2003, a proposal to amend the Charter of the City and County by amending Sections 4.108, 4.109, 15.100, 15.103, 15.105, 16.118 and Article XVII, deleting Sections 15.104, 15.106, 15.108 and C8.105 and adding Section 18.115 and Appendix Sections C9.101, C9.102, C9.103, C9.104, C9.105, C9.106, C9.107, C9.108, C9.109, C9.110, C9.111, C9.112, C9.113, C9.114, C9.115, C9.116, C9.117, C9.118, C9.119, C9.120, C9.121, C9.122, C9.123, C9.124, C9.125, C9.126 and C9.127 to read as follows:

Note: Additions are *single-underline italics Times New Roman.*
Deletions are ~~strikethrough italics Times New Roman.~~

SEC. 4.108. FIRE COMMISSION.

The Fire Commission shall consist of five members appointed by the Mayor, pursuant to Section 3.100, for four-year terms. Members may be removed by the Mayor. *In addition to any other powers set forth in this Charter, the Fire Commission is empowered to prescribe and enforce any reasonable rules and regulations that it deems necessary to provide for the efficiency of the Department, provided that the civil service and ethics provisions of this Charter shall control in the event of any conflict with rules adopted under this section.*

SEC. 4.109. POLICE COMMISSION.

The Police Commission shall consist of five members appointed by the Mayor, pursuant to Section 3.100, for four-year terms. Members may be removed by the Mayor.

Notwithstanding any other provision of the Charter, the Chief of Police may be removed by the Commission or the Mayor, acting jointly or separately of each other. *In addition to any other powers set forth in this Charter, the Police Commission is empowered to prescribe and enforce any reasonable rules and regulations that it deems necessary to provide for the efficiency of the Department, provided that the civil service and ethics provisions of this Charter shall control in the event of any conflict with rules adopted under this section.*

SEC. 15.100. ETHICS COMMISSION.

The Ethics Commission shall consist of five members who shall serve six-year terms; provided that the first five commissioners to be appointed to take office on the first day of February, 2002 shall by lot classify their terms so that the term of one commissioner shall expire at 12:00 o'clock noon on each of the second, third, fourth, fifth and sixth anniversaries of such date, respectively; and, on the expiration of these and successive terms of office, the appointments shall be made for six-year terms.

The Mayor, the Board of Supervisors, the City Attorney, the District Attorney and the Assessor each shall appoint one member of the Commission. The member appointed by the Mayor shall have a background in public information and public meetings. The member appointed by the City Attorney shall have a background in law as it relates to government ethics. The member appointed by the Assessor shall have a background in campaign finance. The members appointed by the District Attorney and Board of Supervisors shall be broadly representative of the general public.

In the event a vacancy occurs, the officer who appointed the member vacating the office shall appoint a qualified person to complete the remainder of the term. Members of the Commission shall serve without compensation. Members of the Commission shall be officers of the City and County, and may be removed by the appointing authority only pursuant to Section 15.105.

No person may serve more than one six-year term as a member of the Commission, provided that persons appointed to fill a vacancy for an unexpired term with less than three years remaining or appointed to an initial term of three or fewer years shall be eligible to be appointed to one additional six-year term. Any term served before the effective date of this Section shall not count toward a member's term limit. Any person who completes a term as a Commissioner shall be eligible for reappointment six years after the expiration of his or her term. Notwithstanding any provisions of this Section or any other section of the Charter to the contrary, the respective terms of office of the members of the Commission who shall hold office on the first day of February, 2002, shall expire at 12 o'clock noon on said date, and the five persons appointed as members of the Commission as provided in this Section shall succeed to said offices on said first day of February, 2002, at 12 o'clock noon; provided that if any appointing authority has not made a new appointment by such date, the sitting member shall continue to serve until replaced by the new appointee.

During his or her tenure, members and employees of the Ethics Commission are subject to the following restrictions:

(a) Restrictions on Holding Office. No member or employee of the Ethics Commission may hold any other City or County office or be an officer of a political party.

(b) Restrictions on Employment. No member or employee of the Ethics Commission may be a registered lobbyist or campaign consultant, or be employed by or receive gifts or other compensation from a registered lobbyist or campaign consultant. No member of the Ethics Commission may hold employment with the City and County and no employee of the Commission may hold any other employment with the City and County.

(c) Restrictions on Political Activities. No member or employee of the Ethics Commission may participate in any campaign supporting or opposing a candidate for City elective office, a City ballot measure, or a City officer running for any elective office. For the purposes of this section, participation in a campaign includes but is not limited to making contributions or soliciting contributions to any committee within the Ethics Commission's jurisdiction, publicly endorsing or urging endorsement of a candidate or ballot measure, or participating in decisions by organizations to participate in a campaign.

~~*For a period of one year upon completing his or her service with the Commission, no member of the Commission may: be a lobbyist or campaign consultant, be employed by, or receive any gifts or other compensation from a lobbyist or campaign consultant, or a person who employs someone required to register as a lobbyist or campaign consultant. For purposes of this section, the terms lobbyist and campaign consultant mean persons required to register under the City's lobbyist or campaign consultant ordinances.*~~

The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers.

SEC. 15.103. CONFLICT OF INTEREST.

~~*All officers and employees of the City and County shall be subject to all state laws and City ordinances prescribing conflicts of interest and incompatible activities, as well as the provisions of Section C8.105. Any violation of such laws shall be official misconduct and shall be a basis for discipline and/or removal, in addition to any other penalties prescribed by law.*~~

Public office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust. The City may adopt conflict of interest and governmental ethics laws to implement this provision and to prescribe penalties in addition to discipline and removal authorized in this Charter. All officers and employees of the City and County shall be sub-

(Continued on next page)

ject to such conflict of interest and governmental ethics laws and the penalties prescribed by such laws.

~~*SEC. 15.104. PENALTY FOR OFFICIAL MISCONDUCT.*~~

~~*Any person found guilty of official misconduct shall forfeit his or her office, and shall be forever after disbarred and disqualified from being elected, appointed or employed in the service of the City and County.*~~

SEC. 15.105. SUSPENSION AND REMOVAL.

(a) ELECTIVE AND CERTAIN APPOINTED OFFICERS. Any elective officer, and any member of the Airport Commission, Asian Art Commission, Civil Service Commission, Commission on the Status of Women, *Golden Gate Concourse Authority Board of Directors,* Health Commission, Human Services Commission, Juvenile Probation Commission, *Municipal Transportation Agency Board of Directors, Port Commission,* Public Utilities Commission, Recreation and Park Commission, Fine Arts Museums Board of Trustees, *Taxi Commission,* War Memorial and Performing Art Center Board of Trustees, Board of Education or Community College Board *is subject to suspension and removal for official misconduct as provided in this section. Such officer* may be suspended by the Mayor ~~*and removed by the Board of Supervisors for official misconduct,*~~ and the Mayor shall appoint a qualified person to discharge the duties of the office during the period of suspension. *Upon*~~*On*~~ such suspension, the Mayor shall immediately notify the Ethics Commission and Board of Supervisors thereof in writing and the cause thereof, and shall present written charges against such suspended officer to the Ethics Commission and Board of Supervisors at or prior to their next regular meetings following such suspension, and shall immediately furnish a copy of the same to such officer, who shall have the right to appear with counsel before the Ethics Commission in his or her defense. ~~*Hearing by t*~~ *T*he Ethics Commission shall *hold a hearing* ~~*be held*~~ not less than five days after the filing of written charges. After the hearing, the Ethics Commission shall transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained. If, after reviewing the complete record, the charges are sustained by not less than a three-fourths vote of all members of the Board of Supervisors, the suspended officer shall be removed from office; if not so sustained, or if not acted on by the Board of Supervisors within 30 days after the receipt of the record from the Ethics Commission, the suspended officer shall thereby be reinstated.

(b) BUILDING INSPECTION COMMISSION, PLANNING COMMISSION, BOARD OF APPEALS, ELECTIONS COMMISSION, ETHICS COMMISSION, AND ENTERTAINMENT COMMISSION. Members of the Building Inspection Commission, the Planning Commission, ~~*and*~~ the Board of Appeals, *the Elections Commission, the Ethics Commission, and the Entertainment Commission* ~~*who were appointed by the Mayor*~~ may be suspended and removed pursuant to the provisions *of subsection (a) of this section* ~~*set forth above*~~ *except that the Mayor may initiate removal only of the Mayor's appointees and the appointing authority shall act in place of the Mayor for all other appointees.* ~~*Members of the Commission appointed by the President of the Board of Supervisors may be suspended and removed pursuant to the same procedures, except that the President of the Board shall act in place of the Mayor. Members of the Elections Commission and Ethics Commission may be suspended and removed pursuant to the provisions set forth above, except that the appointing authority shall act in place of the Mayor.*~~

(c) REMOVAL FOR CONVICTION OF A FELONY CRIME INVOLVING MORAL TURPITUDE.

(1) Officers Enumerated in Subsections (a) and (b).

(A) ~~*The Mayor*~~ *An appointing authority* must immediately remove from office any ~~*elective*~~ official *enumerated in subsections (a) or (b) upon:*

(i) a court's final conviction of that official ~~*convicted*~~ of a *felony* crime involving moral turpitude*; and*

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the official was convicted warrants removal.

(B) For the purposes of this subsection, the Mayor shall act as the appointing authority for any elective official. ~~*and failure of the Mayor so to act shall constitute official misconduct on his or her part. Any appointee of the Mayor or the Board of Supervisors guilty of official misconduct or convicted of a crime involving moral turpitude must be removed by the Mayor or the Board of Supervisors, as the case may be and failure of the Mayor or any Supervisor to take such action shall constitute official misconduct on their part. Any member of the Elections Commission or Ethics Commission guilty of official misconduct or convicted of a crime involving moral turpitude must be removed by the appointing authority, and failure of the appointing authority to act shall constitute official misconduct on his or her part.*~~

(C) Removal under this subsection is not subject to the procedures in subsections (a) and (b) of this section.

(2) Other Officers and Employees.

(A) At will appointees. Officers and employees who hold their positions at the pleasure of their appointing authority must be removed upon:

(i) a final conviction of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(B) For cause appointees. Officers and employees who by law may be removed only for cause must be removed upon:

(i) a final conviction of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(3) Penalty for Failure to Remove. Failure to remove an appointee as required under this subsection shall be official misconduct.

(d) DISQUALIFICATION.

(1)(A) Any person who has been removed from any federal, state, county or city office or employment upon a final conviction of a felony crime involving moral turpitude shall be ineligible for election or appointment to City office or employment for a period of ten years after removal.

(B) Any person removed from any federal, state, county or city office or employment for official misconduct shall be ineligible for election or appointment to City office or employment for a period of five years after removal.

(2)(A) Any City department head, board, commission or other appointing authority that removes a City officer or employee from office or employment on the grounds of official misconduct must invoke the disqualification provision in subsection (d)(1)(B) and provide notice of such disqualification in writing to the City officer or employee.

(B) Upon the request of any former City officer or employee, the Ethics Commission may, after a public hearing, overturn the application of the disqualification provision of subsection (d)(1)(B) if: (i) the decision that the former officer or employee engaged in official misconduct was not made after a hearing by a court, the Board of Supervisors, the Ethics Commission, an administrative body, an administrative hearing officer, or a labor arbitrator; and (ii) if the officer or employee does not have the right to appeal his or her restriction on holding future office or employment to the San Francisco Civil Service Commission.

(e) OFFICIAL MISCONDUCT. Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

(Continued on next page)

~~*SEC. 15.106. DUAL OFFICE HOLDING.*~~

~~*Any person holding an office under the City and County with an annual salary in excess of $2,500 whether by election or by appointment, who shall, during his or her term of office, hold or retain any other office with such a salary under the government of the United States, the State of California, or the City and County shall be deemed to have thereby vacated the office held by him or her under the City and County.*~~

~~*SEC. 15.108. EMPLOYMENT OF FORMER MAYOR OR SUPERVISOR.*~~

~~*No person shall be eligible for a period of one year after the last day of service as Mayor or member of the Board of Supervisors for appointment to any full time, compensated employment with the City and County. This restriction shall not apply to a former Mayor or Supervisor elected to an office of the City and County, appointed to fill a vacancy in an elective office of the City and County, or appointed to a board or commission in the executive branch.*~~

SEC. 16.118. APPENDIX C — ETHICS PROVISIONS.

The following sections of the Charter of 1932, as amended, shall be included in Appendix C with full force and effect, and each shall be designated with a prefix "C":

3.699-10—3.699-16 Ethics Commission Procedures

~~*3.105 Conflict of Interest and Other Prohibited Practices*~~

The provisions of Appendix C may be amended only pursuant to the provisions of state law governing charter amendments.

ARTICLE XVII: DEFINITIONS

For all purposes of this Charter, the following terms shall have the meanings specified below:

"Business day" shall mean any day other than a Saturday, Sunday or holiday on which governmental agencies are authorized by law to close.

"Confirm" or "confirmation" shall mean the approval by a majority of the members of the Board of Supervisors.

"Discrimination" shall mean violations of civil rights on account of race, color, religion, creed, sex, national origin, ethnicity, age, disability or medical condition, political affiliation, sexual orientation, ancestry, marital or domestic partners status, gender identity, parental status, other non-merit factors, or any category provided for by ordinance.

"Domestic partners" shall mean persons who register their partnerships pursuant to the voter-approved Domestic Partnership Ordinance.

"Elector" shall mean a person registered to vote in the City and County.

"For cause" shall mean the issuance of a written public statement by the Mayor describing those actions taken by an individual as a member of a board or commission which are the reasons for removal, provided such reasons constitute official misconduct in office.

"General municipal election" shall mean the election to be held in the City and County on the Tuesday immediately following the first Monday in November in odd-numbered years.

"Initiative" shall mean (1) a proposal by the voters with respect to any ordinance, act or other measure which is within the powers conferred upon the Board of Supervisors to enact, any legislative act which is within the power conferred upon any other official, board, commission or other unit of government to adopt, or any declaration of policy; or (2) any measure submitted to the voters by the Mayor or by the Board of Supervisors, or four or more members of the Board.

"Notice" shall mean publication in an official newspaper (as defined by ordinance), and a contemporaneous filing with the Clerk of the Board of Supervisors or other appropriate office.

~~*"Official misconduct" shall mean any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any willful or corrupt failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers.*~~

"One-third," "a majority" or "two-thirds" of the Board of Supervisors or any other board or commission of the City and County shall mean one-third, a majority or two-thirds of all members of such board or commission.

"Published" shall mean published in an official newspaper of the City and County.

"Referendum" shall mean the power of the voters to nullify ordinances involving legislative matters except that the referendum power shall not extend to any portion of the annual budget or appropriations, annual salary ordinances, ordinances authorizing the City Attorney to compromise litigation, ordinances levying taxes, ordinances relative to purely administrative matters, ordinances necessary to enable the Mayor to carry out the Mayor's emergency powers, or ordinances adopted pursuant to Section 9.106 of this Charter.

"Special municipal election" shall mean, in addition to special elections otherwise required by law, the election called by (1) the Director of Elections with respect to an initiative, referendum or recall, and (2) the Board of Supervisors with respect to bond issues, election of an official not required to be elected at the general municipal election, or an initiative or referendum.

"Statewide election" shall mean an election held throughout the state.

"Voter" shall mean an elector who is registered in accordance with the provisions of state law.

SEC. 18.115. DELETION OF ORDINANCES REGULATING CONFLICTS OF INTEREST AND TRANSFER OF CHARTER SECTIONS REGULATING CONFLICTS OF INTEREST INTO THE CAMPAIGN AND GOVERNMENTAL CONDUCT CODE.

(a) On the effective date of this Charter Amendment, Section 1.50 of the Administrative Code and Section 1.200; Article III, Chapter 2 and Section 3.200; Article III, Chapter 3 and Section 3.300; Article III, Chapter 4 and Sections 3.400 and 3.405; Article III, Chapter 5 and Sections 3.500, 3.505, 3.510, 3.515, 3.520, 3.525, 3.530, 3.535, 3.540, 3.545; Article III, Chapter 6 and Section 3.600; and Article III, Chapter 7 and Sections 3.700, 3.705, 3.710, 3.715, 3.720, 3.725, 3.730, 3.735, and 3.740 of the Campaign and Governmental Conduct Code shall be deemed repealed, and the City Attorney is authorized and directed to take appropriate steps to remove them from future editions of published codes.

(b) On the effective date of this Charter Amendment, Charter Sections C9.101 – C9.127 shall be deemed enacted into ordinance, and the City Attorney is directed and authorized to codify Section C9.101 as Administrative Code Section 1.50; Section C9.102 as Campaign and Governmental Conduct Code Section 1.200; Section C9.103 as Campaign and Governmental Conduct Code Section 3.1-102.5; Section C9.127 in a new Chapter 3 of the Campaign and Governmental Conduct Code titled "Ethics Commission" as Section 3.300; and the remaining sections in a new Chapter 2 of the Campaign and Governmental Conduct Code titled "Conflict of Interest and Other Prohibited Activities" as follows: Section C9.104 as Section 3.200; Section C9.105 as Section 3.202; Section C9.106 as Section 3.204; Section C9.107 as Section 3.206; Section C9.108 as Section 3.208; Section C9.109 as Section 3.210; Section C9.110 as Section 3.212; Section C9.111 as Section 3.214; Section C9.112 as Section 3.216; Section C9.113 as Section 3.218; Section C9.114 as Section 3.220; Section C9.115 as Section 3.222; Section C9.116 as Section 3.224; Section C9.117 as Section 3.226; Section C9.118 as Section 3.228; Section C9.119 as Section 3.230; Section C9.120 as Section 3.232; Section C9.121 as Section 3.234; Section C9.122 as Section 3.236; Section C9.123 as Section 3.238; Section C9.124 as Section 3.240; Section C9.125 as Section 3.242; and Section C9.126 as Section 3.244.

These sections may be amended by the Board of Supervisors if (a) the amendment serves the purposes of the Ordinance; (b) the Ethics Commission approves the proposed amendment by at least a four-fifths vote of all its members; (c) the proposed amendment is available for public review at least 30 days before the amendment is considered by the Board of Supervisors; and (d) the Board of Supervisors

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~~*SEC. 15.106. DUAL OFFICE HOLDING.*~~

~~*Any person holding an office under the City and County with an annual salary in excess of $2,500 whether by election or by appointment, who shall, during his or her term of office, hold or retain any other office with such a salary under the government of the United States, the State of California, or the City and County shall be deemed to have thereby vacated the office held by him or her under the City and County.*~~

~~*SEC. 15.108. EMPLOYMENT OF FORMER MAYOR OR SUPERVISOR.*~~

~~*No person shall be eligible for a period of one year after the last day of service as Mayor or member of the Board of Supervisors for appointment to any full time, compensated employment with the City and County. This restriction shall not apply to a former Mayor or Supervisor elected to an office of the City and County, appointed to fill a vacancy in an elective office of the City and County, or appointed to a board or commission in the executive branch.*~~

SEC. 16.118. APPENDIX C — ETHICS PROVISIONS.

The following sections of the Charter of 1932, as amended, shall be included in Appendix C with full force and effect, and each shall be designated with a prefix "C":

3.699-10—3.699-16 Ethics Commission Procedures

~~*8.105 Conflict of Interest and Other Prohibited Practices*~~

The provisions of Appendix C may be amended only pursuant to the provisions of state law governing charter amendments.

ARTICLE XVII: DEFINITIONS

For all purposes of this Charter, the following terms shall have the meanings specified below:

"Business day" shall mean any day other than a Saturday, Sunday or holiday on which governmental agencies are authorized by law to close.

"Confirm" or "confirmation" shall mean the approval by a majority of the members of the Board of Supervisors.

"Discrimination" shall mean violations of civil rights on account of race, color, religion, creed, sex, national origin, ethnicity, age, disability or medical condition, political affiliation, sexual orientation, ancestry, marital or domestic partners status, gender identity, parental status, other non-merit factors, or any category provided for by ordinance.

"Domestic partners" shall mean persons who register their partnerships pursuant to the voter-approved Domestic Partnership Ordinance.

"Elector" shall mean a person registered to vote in the City and County.

"For cause" shall mean the issuance of a written public statement by the Mayor describing those actions taken by an individual as a member of a board or commission which are the reasons for removal, provided such reasons constitute official misconduct in office.

"General municipal election" shall mean the election to be held in the City and County on the Tuesday immediately following the first Monday in November in odd-numbered years.

"Initiative" shall mean (1) a proposal by the voters with respect to any ordinance, act or other measure which is within the powers conferred upon the Board of Supervisors to enact, any legislative act which is within the power conferred upon any other official, board, commission or other unit of government to adopt, or any declaration of policy; or (2) any measure submitted to the voters by the Mayor or by the Board of Supervisors, or four or more members of the Board.

"Notice" shall mean publication in an official newspaper (as defined by ordinance), and a contemporaneous filing with the Clerk of the Board of Supervisors or other appropriate office.

~~*"Official misconduct" shall mean any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any willful or corrupt failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers.*~~

"One-third," "a majority" or "two-thirds" of the Board of Supervisors or any other board or commission of the City and County shall mean one-third, a majority or two-thirds of all members of such board or commission.

"Published" shall mean published in an official newspaper of the City and County.

"Referendum" shall mean the power of the voters to nullify ordinances involving legislative matters except that the referendum power shall not extend to any portion of the annual budget or appropriations, annual salary ordinances, ordinances authorizing the City Attorney to compromise litigation, ordinances levying taxes, ordinances relative to purely administrative matters, ordinances necessary to enable the Mayor to carry out the Mayor's emergency powers, or ordinances adopted pursuant to Section 9.106 of this Charter.

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"Statewide election" shall mean an election held throughout the state.

"Voter" shall mean an elector who is registered in accordance with the provisions of state law.

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(a) On the effective date of this Charter Amendment, Section 1.50 of the Administrative Code and Section 1.200; Article III, Chapter 2 and Section 3.200; Article III, Chapter 3 and Section 3.300; Article III, Chapter 4 and Sections 3.400 and 3.405; Article III, Chapter 5 and Sections 3.500, 3.505, 3.510, 3.515, 3.520, 3.525, 3.530, 3.535, 3.540, 3.545; Article III, Chapter 6 and Section 3.600; and Article III, Chapter 7 and Sections 3.700, 3.705, 3.710, 3.715, 3.720, 3.725, 3.730, 3.735, and 3.740 of the Campaign and Governmental Conduct Code shall be deemed repealed, and the City Attorney is authorized and directed to take appropriate steps to remove them from future editions of published codes.

(b) On the effective date of this Charter Amendment, Charter Sections C9.101 – C9.127 shall be deemed enacted into ordinance, and the City Attorney is directed and authorized to codify Section C9.101 as Administrative Code Section 1.50; Section C9.102 as Campaign and Governmental Conduct Code Section 1.200; Section C9.103 as Campaign and Governmental Conduct Code Section 3.1-102.5; Section C9.127 in a new Chapter 3 of the Campaign and Governmental Conduct Code titled "Ethics Commission" as Section 3.300; and the remaining sections in a new Chapter 2 of the Campaign and Governmental Conduct Code titled "Conflict of Interest and Other Prohibited Activities" as follows: Section C9.104 as Section 3.200; Section C9.105 as Section 3.202; Section C9.106 as Section 3.204; Section C9.107 as Section 3.206; Section C9.108 as Section 3.208; Section C9.109 as Section 3.210; Section C9.110 as Section 3.212; Section C9.111 as Section 3.214; Section C9.112 as Section 3.216; Section C9.113 as Section 3.218; Section C9.114 as Section 3.220; Section C9.115 as Section 3.222; Section C9.116 as Section 3.224; Section C9.117 as Section 3.226; Section C9.118 as Section 3.228; Section C9.119 as Section 3.230; Section C9.120 as Section 3.232; Section C9.121 as Section 3.234; Section C9.122 as Section 3.236; Section C9.123 as Section 3.238; Section C9.124 as Section 3.240; Section C9.125 as Section 3.242; and Section C9.126 as Section 3.244.

These sections may be amended by the Board of Supervisors if (a) the amendment serves the purposes of the Ordinance; (b) the Ethics Commission approves the proposed amendment by at least a four-fifths vote of all its members; (c) the proposed amendment is available for public review at least 30 days before the amendment is considered by the Board of Supervisors; and (d) the Board of Supervisors

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approves the proposed amendment by at least a two-thirds vote of all its members.

~~***C8.105 CONFLICT OF INTEREST AND OTHER PROHIBITED PRACTICES***~~

~~*(a) No officer or employee of the city and county shall become directly or indirectly interested in any contract, franchise, right privilege or sale or lease of property awarded, entered into or authorized by him or her in his or her capacity as an officer or employee, or by an officer or employee under his or her supervision and control, or by a board or commission of which he or she is a member, unless same is devolved upon him or her by law. An officer or employee with such an interest, however acquired, shall become divested of said interest within 60 days or shall resign said office or employment.*~~

~~*(b) No officer or employee shall give or promise any money or other valuable thing in consideration of his or her nomination, appointment, or election to any city and county office or employment or accept, other than lawful political campaign contributions, any gratuity in money or other valuable thing, either directly or indirectly, from any subordinate or employee or from any candidate or applicant for a position as employee or subordinate under him or her.*~~

~~*(c) No officer or employee shall make, participate in making or in any way attempt to use his or her office or employment to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest, as defined by California Government Code Section 87103.*~~

~~*(d) No officer or employee of the city and county shall willfully or knowingly disclose any privileged information concerning property, government, or affairs of the city and county, unless a duty to do so is imposed upon said person by law, nor shall that person use any privileged information obtained by him or her by virtue of his or her office or employment to advance the financial or other private interest of himself or herself or others.*~~

~~*(e) No person who has served as an officer or employee of the city and county shall within a period of two years after termination of such service or employment appear before the board or agency of the city and county of which he or she was a member in order to represent any private interest, provided, however, that said officer or employee may appear before said board for the purpose of representing himself or herself.*~~

~~*(f) No officer or employee of the city and county shall receive, directly or indirectly, any compensation, reward or gift from any source except compensation from the City and County of San Francisco, or any other governmental agency to which he or she has been duly appointed for any service, advice, assistance or other matter related to the governmental processes of the city and county, except for fees for speeches or published writing.*~~

~~*(g) The ethics commission with respect to officers and employees whose positions are subject to the civil service provisions of the charter other than officers and members of the fire and police departments, the fire commission with respect to officers and members of the fire department and the police commission with respect to officers and members of the police department, are each empowered to prescribe and enforce such reasonable rules and regulations as each commission deems necessary to effectuate the purposes and intent of this section. Such rules and regulations may provide for restrictions against activities, employments and enterprises other than those described or mentioned herein when such restrictions are found necessary for the preservation of the honor or integrity of the city and county. Rules and regulations previously adopted or approved by the civil service pursuant to this section shall remain in effect until amended by the ethics commission.*~~

~~*The civil service commission with respect to officers and employees whose positions are subject to the civil service provisions of the charter other than officers and members of the fire and police departments, the fire commission with respect to officers and members of the fire department and the police commission with respect to officers and members of the police department, are each empowered to prescribe and enforce such reasonable rules and regulations as each commission deems necessary to provide for the efficiency of the city and county civil service.*~~

~~*(h) An officer or employee shall not be deemed to be interested in any transaction described in Subsections (a) or (c) above if he or she has only a remote interest in the transaction and if the fact of such interest is disclosed and noted in the official records of the board, commission or department and thereafter the board, commission or department authorizes, approves, or ratifies the transaction in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest or by his or her immediate superior unless the transaction must be awarded to the highest or lowest responsible bidder as the case may be on a particular day and the vote of such officer or member is necessary to a quorum on that day.*~~

~~*(1) As used in this article "remote interest" means:*~~

~~*(A) That of a nonsalaried officer of a nonprofit corporation;*~~

~~*(B) That of an employee or agent of the party involved in the transaction, if such party has 10 or more other employees and if the officer or employee was an employee or agent of said party for at least three years prior to his or her initially accepting his or her office or employment.*~~

~~*For the purposes of this subsection, time of employment with the party by the officer or employee shall be counted in computing the three year period specified in this subsection even though such party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by such officer. Time of employment in such case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the party is the same or substantially similar to that which existed before such transfer or change in organization. For the purposes of this subsection, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the "real or ultimate ownership" of such party.*~~

~~*(C) That of a parent in the earnings of his or her minor child for personal services;*~~

~~*(D) That of a landlord or tenant of the transacting party;*~~

~~*(E) That of an attorney of the transacting party;*~~

~~*(F) That of a supplier of goods or services when such goods or services had been supplied to the transacting party by the officer or employee for at least five years prior to his or her election or appointment to office or employment;*~~

~~*(G) That of an officer, director, or employee of a bank, bank holding company, or savings and loan association with which a party to the transaction has the relationship of borrower or depositor, debtor or creditor.*~~

~~*(2) The provisions of this subsection shall not be applicable to any officer or employee interested in a transaction who influences or attempts to influence another officer or employee to enter into the transaction.*~~

~~*(i) An officer or employee shall not be deemed to be interested in a transaction pursuant to Subsections (a) and (c) above if his or her interest is:*~~

~~*(1) The ownership of less than three percent of the shares of a corporation for profit, provided the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed five percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed five percent of his or her total annual income;*~~

~~*(2) That of an officer or employee in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duty;*~~

~~*(3) That of a recipient of public services generally provided by the board, commission or department of which he or she is a member or employee, on the same terms and conditions as if he or she were not a member or employee of the board, commission or department.*~~

~~*(4) That of a landlord or tenant of the transacting party if such party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoin-*~~

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LEGAL TEXT OF PROPOSITION E (CONTINUED)

~~ing state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of such transaction is the property in which such officer or employee has such interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning and subject to the provisions of Subsection (g).~~

~~(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.~~

~~(6) That of a spouse of an officer or employee in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.~~

~~(7) That of a nonsalaried member of a nonprofit corporation, provided that such interest is disclosed at the time of the first consideration of the transaction and provided further that such interest is noted in its official records.~~

~~(8) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of a borrower or depositor, debtor or creditor.~~

~~(j) No member of any board or commission of the city and county shall knowingly vote on or in any way attempt to influence the outcome of governmental action on any measure or question involving his or her own character or conduct, his or her right as a member, or his or her appointment to any office, position, or employment, wherein the said member's financial interest is immediate, particular, and distinct from the public interest. The word "knowingly" as used in this paragraph shall mean actual or constructive knowledge of the existence of the interest which would disqualify the vote under the provisions of this section.~~

~~If under any provision of this charter or of any ordinance, resolution, rule or regulation, action on any measure or question must be taken on a particular day and such action cannot be taken by a qualified voting quorum of the board or commission on that day by reason for the disqualification from voting under the provisions of this section, said action may be postponed until, but not later than, there are sufficient qualified members present to vote and take action on said measure or question. The term "a qualified voting quorum" as used in this paragraph shall mean the presence of a sufficient number of qualified voting members of the board or commission to take either affirmative or negative action on the measure or question before the board or commission.~~

~~(k) The city attorney, the district attorney of the City and County of San Francisco or any resident or group of residents of the City and County of San Francisco may bring a suit in the superior court to compel compliance with the provisions of this section.~~

~~(l) The provisions of Section 8.105 shall not apply to any member serving as a representative of any profession, trade, business, union or association on any board, commission or other body heretofore or hereafter created by an ordinance of the City and County of San Francisco which requires that the membership consists in whole or in part of representatives of specific professions, trades, businesses, unions or associations. Conflicts of interest and prohibited practices of such members and the penalties therefor shall be as prescribed by the ordinance creating such board, commission or other body or by an amendment thereto.~~

~~(m) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, upon a final judgment of conviction of same, shall be removed from office or in the alternative shall be subject to a penalty of not more than one year in jail and/or fine of not more than $10,000, as well as removal.~~

~~(n) Every contract made in violation of any of the provisions of Section 8.105 may be avoided at the insistence of any party except the officer or employee interested therein. No such contract may be avoided because of the interest of an officer or employee therein unless such contract is made in the official capacity of such officer or employee, or by a board or body of which he or she is a member.~~

C9.101. OFFICERS OF THE CITY AND COUNTY.

The officers of the City and County shall be the officers elected by vote of the people, members of the Board of Education, members of boards and commissions appointed by the Mayor and the Board of Supervisors, members of the Building Inspection Commission, members of the Ethics Commission, members of the Elections Commission, members of the Retirement Board, members of the Health Service Board, members of the Sunshine Ordinance Task Force, members of the Youth Commission, members of the Small Business Commission, members of the Board of Law Library Trustees, the Superintendent of Schools, the executive appointed as the chief executive officer under each board or commission, the Controller, the City Administrator, the head of each department under the Mayor, and such other officers as may hereafter be provided by law or so designated by ordinance.

C9.102. PROHIBITION ON MULTIPLE CAMPAIGN ACCOUNTS.

An officer of the City and County of San Francisco, or any person or committee on behalf of an officer of the City and County of San Francisco, is hereby prohibited from establishing any account, other than a campaign fund, for the solicitation and expenditure of funds. Nothing in this section shall prohibit an officer from spending personal funds on official or related business activities.

(a) An account established by an officer or on behalf of an officer of the City and County of San Francisco is defined as any account used to pay expenses incurred directly in connection with carrying out the usual and necessary duties of holding office, including but not limited to, travel between an officer's residence and public office, meetings with constituents which are not campaign related meetings, salary payments to staff for other than campaign activities, office promotional materials, advertising, mailings, postage, and paid radio or television airtime.

(b) Any and all monies or services accepted or received by an officer or on behalf of an officer, except monies or services accepted or received from or as a result of the officer's personal or business activities, unrelated to his or her office, shall be deposited, credited or otherwise reported to a campaign fund established by the officer and shall be subject to the provisions contained in Section 1.114 of the Campaign and Governmental Conduct Code.

(c) This Section shall not be applied retroactively. Funds held in officeholder accounts, or accounts on behalf of any officer, existing on November 2, 1993, may be expended on official or business related activities notwithstanding this Section. No further deposits, transfer, credits or other additions to the balance of the account shall be made. Upon depletion of all available funds in the officer's account, the account shall be closed.

C9.103. FAILURE TO FILE

(a) Subject to the removal and Civil Service provisions of the Charter as well as any applicable Civil Service Rules, any officer or employee of the City and County of San Francisco who fails to file any statement required by sections 3.1-101 and 3.1-102 of the Campaign and Governmental Conduct Code within 30 days after receiving notice from the Ethics Commission of a failure to file may be subject to disciplinary action by his or her appointing authority, including removal from office or termination of employment.

(b) The Ethics Commission may issue a letter to an appointing authority recommending removal of any City officer or termination of any City employee who has failed to file a statement required by sections 3.1-101 and 3.1-102 of the Campaign and Governmental Conduct Code if the City officer or employee has not filed the required statement within 30 days of receiving notice from the Ethics Commission of

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his or her failure to file.

(c) Every appointing authority whose appointees file statements required by sections 3.1-101 and 3.1-102 of the Campaign and Governmental Conduct Code with the Ethics Commission shall provide written notice to the Ethics Commission of the name of any appointee who has assumed or left office or employment. Such notice shall be provided within 15 days of the City officer or employee assuming or leaving office or employment. Failure to provide such notice may constitute official misconduct.

C9.104. FINDINGS AND PURPOSE

(a) The people of the City and County of San Francisco declare that public office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust. To assure that the governmental processes of the City and County promote fairness and equity for all residents and to maintain public trust in governmental institutions, the people of the City and County declare that they have a compelling interest in creating laws regulating conflicts of interest and outside activities of City officers and employees.

(b) The proper operation of the government of the City and County of San Francisco requires that public officers and employees be independent, impartial, and responsible to the people and that public office and employment not be used for personal gain. The public interest, therefore, requires that officers and employees of the City and County be prohibited from making, participating in making or otherwise seeking to influence governmental decisions in which they have a financial interest or accepting gifts and other things of value from regulated sources.

(c) In order to maintain the public's confidence in the integrity of governmental decisions related to the appointment and discipline of public officers and employees, public officers and employees must not give or receive anything of value in consideration of their appointment or accept anything of value from their subordinates, and must not participate in decisions related to their own character or conduct or that of their family members.

(d) City and County contracts should be, and should appear to be, awarded on a fair and impartial basis. The practice of members of Boards and Commissions of the City and County contracting with the City and County creates the potential for, and the appearance of, favoritism or preferential treatment by the City and County. Prohibiting members of Boards and Commissions of the City and County from contracting with the City and County will eliminate both actual and perceived favoritism or preferential treatment without creating unnecessary barriers to public service.

(e) Government decisions of officers and employees of the City and County should be, and should appear to be, made on a fair and impartial basis. The practice of former officers and employees communicating with their former colleagues on behalf of private interests and the practice of current officers of the City and County communicating with other officers and employees on behalf of any other person for compensation creates the potential for, and the appearance of, undue influence, favoritism or preferential treatment. Prohibiting former officers and employees from communicating orally, in writing, or in any other manner with their former colleagues for specified periods of time and prohibiting current officers from communicating orally, in writing, or in any other manner with other officers and employees of the City and County on behalf of any other person for compensation will eliminate both actual and perceived undue influence, favoritism or preferential treatment without creating unnecessary barriers to public service.

C9.105. CONSTRUCTION

This Chapter shall be liberally construed in order to effectuate its purposes, provided that nothing in this Chapter shall be interpreted or applied to prohibit officers, members and representatives of employee organizations from engaging in organizational activities that are protected by the California Meyers-Milias-Brown Act, the First Amendment to the United States Constitution or any other federal, state or local law. No error, irregularity, informality, neglect or omission of any officer in any procedure taken under this Chapter which does not directly affect the jurisdiction of the Board of Supervisors or the City and County to control the ethical conduct of its officers and employees shall avoid the effect of this Chapter.

C9.106. AMENDMENT OR REPEAL OF THIS CHAPTER

The voters may amend or repeal this Chapter. The Board of Supervisors may amend this Chapter if all of the following conditions are met:

(a) The amendment furthers the purposes of this Chapter;

(b) The Ethics Commission approves the proposed amendment by at least a four-fifths vote of all its members;

(c) The proposed amendment is available for public review at least 30 days before the amendment is considered by the Board of Supervisors or any committee of the Board of Supervisors; and

(d) The Board of Supervisors approves the proposed amendment by at least a two-thirds vote of all its members.

C9.107. FINANCIAL CONFLICTS OF INTEREST

(a) **Incorporation of the California Political Reform Act.** No officer or employee of the City and County shall make, participate in making, or seek to influence a decision of the City and County in which the officer or employee has a financial interest within the meaning of California Government Code section 87100 et seq. and any subsequent amendments to these sections.

(b) **Incorporation of California Government Code 1090, et seq.** No officer or employee of the City and County shall make a contract in which he or she has a financial interest within the meaning of California Government Code section 1090 et seq. and any subsequent amendments to these sections.

(c) **Future Employment.** No officer or employee of the City shall make, participate in making, or otherwise seek to influence a governmental decision, affecting a person or entity with whom the officer or employee is discussing or negotiating an agreement concerning future employment.

SEC. C9.108. APPOINTMENTS AND NOMINATIONS

No person shall give or promise, and no officer or employee of the City and County may solicit or accept, any money or other valuable thing in consideration for (i) the person's nomination or appointment to any City and County office or employment, or promotion or other favorable City and County employment action, or (ii) any other person's nomination or appointment to any City and County office or employment or promotion or other favorable City and County employment action.

C9.109. VOTING ON OWN CHARACTER OR CONDUCT

(a) **Prohibition.** No officer or employee of the City and County shall knowingly vote on or attempt to influence a governmental decision involving his or her own character or conduct, or his or her appointment to any office, position, or employment.

(b) **Exceptions.** Nothing in this section shall prohibit an officer or employee from (i) responding to allegations, applying for an office, position, or employment, or responding to inquiries; or (ii) participating in the decision of his or her board, commission, or committee to choose him or her as chair, vice chair, or other officer of the board, commission, or committee.

C9.110. DECISIONS INVOLVING FAMILY MEMBERS

(a) **Prohibition.** No officer or employee of the City and County may make, participate in making, or otherwise seek to influence a decision of the City and County regarding an employment action involving a relative. Nothing in this section shall prohibit an officer or employee from acting as a personal reference or providing a letter of reference for a relative who is seeking appointment to a position in any City department, board, commission or agency other than the officer or employee's department, board, commission or agency or under the control of any such department.

(Continued on next page)

board, commission or agency.

(b) **Delegation.** A Department Head who is prohibited under subsection (a) from participating in an employment action involving a relative shall delegate in writing to an employee within the department any decisions regarding such employment action.

(c) **Definitions.** For purposes of this section, the term "employment action" shall be limited to hiring, promotion, or discipline, and the term "relative" shall mean a spouse, domestic partner, parent, grandparent, child, sibling, parent-in-law, aunt, uncle, niece, nephew, first cousin, and includes any similar step relationship or relationship created by adoption.

C9.111. DISCLOSURE OF PERSONAL, PROFESSIONAL AND BUSINESS RELATIONSHIPS

(a) **Disclosure.** A City officer or employee shall disclose on the public record any personal, professional or business relationship with any individual who is the subject of or has an ownership or financial interest in the subject of a governmental decision being made by the officer or employee where as a result of the relationship, the ability of the officer or employee to act for the benefit of the public could reasonably be questioned. For the purposes of this section, the minutes of a public meeting at which the governmental decision is being made, or if the governmental decision is not being made in a public meeting, a memorandum kept on file at the offices of the City officer or employee's department, board, commission or agency shall constitute the public record.

(b) **Penalties.** A court may void any governmental decision made by a City officer or employee who fails to disclose a relationship as required by subsection (a) if the court determines that: (1) the failure to disclose was willful; and (2) the City officer or employee failed to render his or her decision with disinterested skill, zeal, and diligence and primarily for the benefit of the City. No other penalties shall apply to a violation of this section, provided that nothing in this section shall prohibit an appointing authority from imposing discipline for a violation of this section.

(c) **Regulations.** The Ethics Commission may adopt regulations setting forth the types of personal, professional and business relationships that must be disclosed pursuant to this section.

C9.112. GIFTS

(a) **Prohibition on bribery.** No person shall offer or make, and no officer or employee shall accept, any gift with the intent that the City officer or employee will be influenced thereby in the performance of any official act.

(b) **General gift restrictions.** In addition to the gift limits imposed by California Government Code section 89503, section 3.1-101 of the Campaign and Governmental Conduct Code and any subsequent amendments to those sections, no officer or employee of the City and County shall solicit or accept any gift in excess of $100 in a calendar year from a person who the officer or employee knows or has reason to know is a restricted source. For purposes of this subsection, the term gift has the same meaning as under California Government Code section 89503 and any subsequent amendments to that section.

(1) Restricted Source. For purposes of this section, a restricted source means: (A) a person doing business with or seeking to do business with the department of the officer or employee; (B) any person who during the prior 12 months knowingly attempted to influence the officer or employee in any legislative or administrative action.

(2) Adjustment of gift limits. The Ethics Commission is authorized to adjust annually the gift limits imposed by this section to reflect changes in the California Consumer Price Index.

(c) **Gifts from subordinates.** No officer or employee shall solicit or accept any gratuity in money or other valuable thing, either directly or indirectly, from any subordinate or employee or from any candidate or applicant for a position as employee or subordinate under him or her. The Ethics Commission shall issue regulations implementing this section, including regulations exempting voluntary gifts that are given or received for special occasions or under other circumstances in which gifts are traditionally given or exchanged.

(d) **Additional Restrictions.** Nothing in this section shall prohibit a City department, agency, board or commission from imposing additional gift restrictions on its officers or employees.

C9.113. INCOMPATIBLE ACTIVITIES

(a) **Prohibition.** No officer or employee of the City and County may engage in any employment, activity, or enterprise that the department, board, commission, or agency of which he or she is a member or employee has identified as incompatible in a statement of incompatible activities adopted under this section. No officer or employee may be subject to discipline or penalties under this section unless he or she has been provided an opportunity to demonstrate that his or her activity is not in fact inconsistent, incompatible or in conflict with the duties of the officer or employee.

(b) **Statement Of Incompatible Activities.** Every department, board, commission, and agency of the City and County shall, by August 1 of the year after which this section becomes effective, submit to the Ethics Commission a statement of incompatible activities. No statement of incompatible activities shall become effective until approved by the Ethics Commission after a finding that the activities are incompatible under the criteria set forth in subsection (c). After initial approval by the Ethics Commission, a department, board, commission or agency of the City and County may, subject to the approval of the Ethics Commission, amend its statement of incompatible activities. The Ethics Commission may, at any time, amend the statement of incompatible activities of any department, board, commission or agency of the City and County.

(c) **Required Language.** Each statement of incompatible activities shall list those outside activities that are inconsistent, incompatible, or in conflict with the duties of the officers and employees of the department, board, commission, or agency of the City and County. This list shall include, but need not be limited to, activities that involve: (1) the use of the time, facilities, equipment and supplies of the City and County; or the badge, uniform, prestige, or influence of the City and County officer or employee's position for private gain or advantage; (2) the receipt or acceptance by an officer or employee of the City and County of any money or other thing of value from anyone other than the City and County for the performance of an act that the officer or employee would be required or expected to render in the regular course of his or her service or employment with the City and County; (3) the performance of an act in a capacity other than as an officer or employee of the City and County that may later be subject directly or indirectly to the control, inspection, review, audit or enforcement of the City and County officer or employee's department, board, commission or agency; and (4) time demands that would render performance of the City and County officer or employee's duties less efficient. The Ethics Commission may permit City boards and commissions to exclude any required language from their statement of incompatible activities if their members, by law, must be appointed in whole or in part to represent any profession, trade, business, union or association.

(d) **Meet and Confer.** No statement of incompatible activities or any amendment thereto shall become operative until the City and County has satisfied the meet and confer requirements of State law.

(e) **Notice.** Every department, board, commission and agency of the City and County shall annually provide to its officers and employees a copy of its statement of incompatible activities.

(f) **Existing Civil Service Rules.** Rules and Regulations relating to outside activities previously adopted or approved by the Civil Service Commission shall remain in effect until statements of incompatible activities are adpoted pursuant to this section.

C9.114. PROHIBITION ON DUAL OFFICE HOLDING

Any person holding an office under the City and County with an annual salary in excess of $2,500, whether by election or by appointment, who shall, during his or her term of office, hold or retain any other office with such a salary under the government of the United States, the

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State of California, or the City and County shall be deemed to have thereby vacated the office held by him or her under the City and County. For the purposes of this section, the term salary does not include: (1) a stipend, per diem, or other payment provided for attendance at meetings; or (2) health, dental or vision insurance, or other non-cash benefits.

C9.115. PROHIBITING MEMBERS OF BOARDS AND COMMISSIONS FROM CONTRACTING WITH THE CITY AND COUNTY

(a) **Definitions.** For purposes of this section, the following definitions shall apply:

(1) Board or Commission. The term "board or commission" means an appointed board or commission created by Charter or ordinance of the City and County, but does not include advisory boards or commissions.

(2) Business. The term "business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, or other legal entity or undertaking organized for economic gain.

(3) City and County. The term "City and County" includes any commission, board, department, agency, committee, or other organizational unit of the City and County of San Francisco.

(4) Contract. The term "contract" means any agreement to which the City and County is a party, other than a grant funded in whole or in part by the City and County or an agreement for employment with the City and County in exchange for salary and benefits.

(5) Subcontract. The term "subcontract" means a contract to perform any work that a primary contractor has an agreement with the City and County to perform.

(b) **Prohibition.** No member of a board or commission of the City and County shall, during his or her term of office, contract or subcontract with the City and County, the San Francisco Redevelopment Agency, the San Francisco Housing Authority, the San Francisco Unified School District, or the San Francisco Community College District, where the amount of the contract or the subcontract exceeds $10,000.

(c) **Exceptions.** This section shall not apply to the following contracts or subcontracts:

(1) A contract or subcontract with a nonprofit organization;

(2) A contract or subcontract with a business with which a member of a board or commission is affiliated unless the member exercises management and control over the business. A member exercises management and control if he or she is:

(A) An officer or director of a corporation;

(B) A majority shareholder of a closely held corporation;

(C) A shareholder with more than five percent beneficial interest in a publicly traded corporation;

(D) A general partner or limited partner with more than 20 percent beneficial interest in the partnership; or

(E) A general partner regardless of percentage of beneficial interest and who occupies a position of, or exercises management or control of the business;

(3) A contract or subcontract with the City and County entered into before a member of a board or commission commenced his or her service; or

(4) An agreement to provide property, goods or services to the City and County at substantially below fair market value.

(d) **Limitation.** Failure of a member of a board or commission to comply with this section shall not be grounds for invalidating any contract with the City and County.

C9.116. PROHIBITION ON REPRESENTING PRIVATE PARTIES BEFORE OTHER CITY OFFICERS AND EMPLOYEES – COMPENSATED ADVOCACY.

(a) **Prohibition.** No officer of the City and County shall directly or indirectly receive any form of compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City and County with the intent to influence a government decision.

(b) **Exceptions.** This section shall not apply to any communication by: (1) an officer of the City and County on behalf of the City and County; (2) an officer of the City and County on behalf of a business, union, or organization of which the officer is a member or full-time employee; (3) an associate, partner or employee of an officer of the City and County, unless it is clear from the totality of the circumstances that the associate, partner or employee is merely acting as an agent of the City and County officer; or (4) a City officer acting in his or her capacity as a licensed attorney representing clients in communications with the City Attorney's Office, outside legal counsel hired by the City, or representatives of the City who are named in a pending litigation matter.

(c) **Waiver.** The Ethics Commission may waive the prohibitions in this section for any member of a City board or commission who, by law, must be appointed to represent any profession, trade, business, union or association.

C9.117. REFERRALS

No officer or employee of the City and County shall: (a) receive any money, gift or other thing of economic value from a person or entity other than the City and County for referring a member of the public to a person or entity for any advice, service or product related to the processes of the City and County; or (b) condition any governmental action on a member of the public hiring, employing, or contracting with any specific person or entity. The Ethics Commission may waive the restriction in subsection (b) if the Commission determines that granting a waiver is necessary for the proper administration of a governmental program or action.

C9.118. DISCLOSURE OR USE OF CONFIDENTIAL CITY INFORMATION

No current or former officer or employee of the City and County shall: (a) willfully or knowingly disclose any confidential or privileged information, unless authorized or required by law to do so; or (b) use any confidential or privileged information to advance the financial or other private interest of himself or herself or others. Confidential or privileged information is information that at the time of use or disclosure was not subject to disclosure under the Sunshine Ordinance or California Public Records Act.

C9.119. PROHIBITION ON POLITICAL ACTIVITY

(a) **Solicitation of Contributions.** No City officer or employee shall knowingly, directly or indirectly, solicit political contributions from other City officers or employees or from persons on employment lists of the City. Nothing in this section shall prohibit a City officer or employee from communicating through the mail or by other means requests for political contributions to a significant segment of the public which may include City officers or employees.

(b) **Political Activities in Uniform.** No City officer or employee shall participate in political activities of any kind while in uniform.

(c) **Political Activities on City Time or Premises.** No City officer or employee may engage in political activity during working hours or on City premises. For the purposes of this subsection, the term "City premises" shall not include City owned property that is made available to the public and can be used for political purposes.

C9.120. PROHIBITION ON USE OF PUBLIC FUNDS FOR PRINTED GREETING CARDS.

(a) **Definitions.** The term "greeting card" means any printed card that celebrates or recognizes a holiday.

(b) **Prohibition.** No public funds may be used to design, produce, create, mail, send, or deliver any printed greeting card. The Controller of the City and County of San Francisco shall, in the Controller's sole discretion, determine whether a payment is prohibited under this section.

The Controller's decision regarding whether a payment is prohibited under this section is final.

C9.121. POST-EMPLOYMENT RESTRICTIONS

(a) **All Officers and Employees.**

(1) General Post-Employment Restrictions.

(A) Permanent restriction on representation in particular matters. No former officer or employee of the City and County, after the ter-

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mination of his or her service or employment with the City, shall, with the intent to influence, act as agent or attorney, or otherwise represent, any other person (except the City and County) before any court, or before any state, federal, or local agency, or any officer or employee thereof, by making any formal or informal appearance or by making any oral, written, or other communication in connection with a particular matter:

(i) in which the City and County is a party or has a direct and substantial interest;

(ii) in which the former officer or employee participated personally and substantially as a City officer or employee;

(iii) which involved a specific party or parties at the time of such participation; and

(iv) which is the same matter in which the officer or employee participated as a City officer or employee.

(B) Permanent restriction on assisting others in particular matters. No former officer or employee of the City and County, after the termination of his or her service or employment with the City, shall aid, advise, counsel, consult or assist another person (except the City and County) in any proceeding in which the officer or employee would be precluded under subsection (A) from personally appearing.

(C) Exception for testimony. The prohibitions in subsections A and B do not prohibit a former officer or employee of the City and County from testifying as a witness, based on the former officer's or employee's personal knowledge, provided that no compensation is received other than the fees regularly provided for by law or regulation of witnesses.

(D) One year restriction on communicating with former department. No former officer or employee of the City and County, for one year after termination of his or her service or employment with the City, shall, with the intent to influence a government decision, communicate orally, in writing, or in any other manner on behalf of any other person (except the City and County) with any officer or employee of the department, board, commission, office or other unit of government, for which the officer or employee served.

(E) Waiver. (i) At the request of a former City officer or employee, the Ethics Commission may waive any of the restrictions in subsections (a)(1)(A), (a)(1)(B) and (a)(1)(D) if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage. The Ethics Commission shall adopt regulations implementing this provision. (ii) The Ethics Commission may waive any of the restrictions in subsections (a)(1)(A), (a)(1)(B) and (a)(1)(D) for members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business, union or association.

(2) Future Employment.

(A) Future Employment With Parties That Contract With The City. No officer or employee of the City shall, for a period of one year after termination of City service or employment, be employed by or otherwise receive compensation from a person or entity that entered into a contract with the City within the 12 months prior to the officer or employee leaving City service where the officer or employee personally and substantially participated in the award of the contract.

(B) Waiver. At the request of a former City officer or employee, the Ethics Commission may waive the prohibition in subsection (a)(2)(A) if the Commission determines that imposing the restriction would cause extreme hardship for the former City officer or employee. The Ethics Commission shall adopt regulations implementing this provision.

(b) Mayor and Members of the Board of Supervisors.

(1) One year restriction on communicating with City departments. For purposes of the one-year restriction under subsection (a)(1)(D), the "department" for which a former Mayor or member of the Board of Supervisors served shall be the City and County and the prohibition in subsection (a)(1)(D) shall extend to communications with:

(A) a board, department, commission or agency of the City and County;

(B) an officer or employee of the City and County;

(C) an appointee of a board, department, commission, agency, officer, or employee of the City and County; or

(D) a representative of the City and County.

(2) City service. No former Mayor or member of the Board of Supervisors shall be eligible for a period of one year after the last day of service as Mayor or member of the Board of Supervisors, for appointment to any full time, compensated employment with the City and County. This restriction shall not apply to a former Mayor or Supervisor elected to an office of the City and County, appointed to fill a vacancy in an elective office of the City and County, or appointed to a board or commission in the executive branch.

C9.122. AIDING AND ABETTING

No person shall knowingly and intentionally provide assistance to or otherwise aid or abet any other person in violating any of the provisions of this Chapter.

C9.123. FILING OF FALSE CHARGES

No person shall knowingly and intentionally file with the Ethics Commission, the District Attorney or the City Attorney any false charge alleging a violation of this Chapter.

C9.124. PROVISION OF FALSE OR MISLEADING INFORMATION; WITHHOLDING OF INFORMATION; AND DUTY TO COOPERATE AND ASSIST.

(a) **Prohibition.** No person shall knowingly and intentionally furnish false or fraudulent evidence, documents, or information to the Ethics Commission, District Attorney or City Attorney, or knowingly and intentionally misrepresent any material fact, or conceal any evidence, documents, or information relevant to an investigation by the Ethics Commission, District Attorney or City Attorney of an alleged violation of this Chapter.

(b) **Duty to Cooperate and Assist.** The Ethics Commission, District Attorney or City Attorney may request and shall receive from every City officer and employee cooperation and assistance with an investigation into an alleged violation of this Chapter.

C9.125. PENALTIES AND ENFORCEMENT

(a) **Criminal Penalties.** Any person who knowingly or willfully violates any of the City's conflict of interest and governmental ethics laws shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $10,000 for each violation or by imprisonment in the County jail for a period of not more than one year in jail or by both such fine and imprisonment.

(b) **Civil Penalties.** Any person who intentionally or negligently violates any City conflict of interest or governmental ethics law shall be liable in a civil action brought by the City Attorney for an amount up to $5,000 for each violation.

(c) **Injunctive Relief.** The City Attorney or any resident may bring a civil action on behalf of the people of San Francisco to enjoin violations of or compel compliance with a conflict of interest or governmental ethics law. No resident may commence a civil action under this section without first notifying the City Attorney in writing of the intent to file a civil action under this section. If the City Attorney fails to notify the resident within 120 days of receipt of the notice that the City Attorney has filed or will file a civil action, the complainant may file the action. No resident may file an action under this section if the City Attorney responds within 120 days that the City Attorney intends to file an action or has already filed a civil action. No resident may bring an action under this section if the Ethics Commission has issued a finding of probable cause arising out of the same facts, the District Attorney has commenced a criminal action arising out of the same facts, or another resident has filed a civil action under this section arising out of the same facts. A court may award reasonable attorney's fees and costs to any resident who obtains injunctive relief under this section.

(d) **Administrative Penalties.** Any person who violates any of the City's conflict of interest or governmental ethics laws shall be liable in an administrative proceeding before the Ethics Commission held pursuant to the Charter. In addition to the administrative penalties set forth in the Charter, the Ethics

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Commission may issue warning letters to City officers and employees.

*(e) **Statute Of Limitations.** No person may bring a criminal, civil or administrative action under this section against any other person more than four years after the date of the alleged violation.*

C9.126. SEVERABILITY

If any provision of this Chapter, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Chapter and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

C9.127. ETHICS COMMISSION.

The powers and duties of the Ethics Commission are governed by Charter Sections 15.100, et seq., and Appendix C, Sections C3.699-10—C3.699-16.

164 F.3d 221
United States Court of Appeals,
Fifth Circuit.

Robert HOOVER, Doctor; Texas Faculty Association, Plaintiffs-Appellees,
v.

Dan MORALES, individually and in his official capacity as Attorney General of the State of Texas; Barry Thompson, Doctor in his official capacity as Chancellor of the Texas A&M University System, Defendants-Appellants.

No. 97-50734.Dec. 31, 1998.

Professors and faculty association brought § 1983 action challenging constitutionality of Texas state university policy and state appropriations rider prohibiting university professors and other state employees from acting as consultants or expert witnesses on behalf of parties opposing state in litigation. Professors and association moved for preliminary injunction. The United States District Court for the Western District of Texas, James R. Nowlin, J., granted motion. State attorney general and university chancellor appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) *Pullman* abstention was inappropriate; (2) fact that one is paid to be an expert witness does not make his testimony "commercial speech"; (3) challenged restrictions had effect of curtailing speech on matters of public concern, and state's interest in preventing state employees from speaking in a manner contrary to state's interests did not outweigh free speech rights of employees, particularly as applied to expert testimony by faculty members; and (4) restrictions violated First Amendment by drawing distinction between state employee speakers based on content of employees' relative speech.

Affirmed.

DeMoss, Circuit Judge, concurred in the result and filed a separate opinion.

Opinion, 146 F.3d 304, superseded.

West Headnotes (12)

1 **Injunction**⇐Nature and Scope of Provisional Remedy
Injunction⇐Grounds and Objections

A preliminary injunction is an extraordinary equitable remedy that may be granted only if the plaintiff establishes four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.

Cases that cite this headnote

2 **Federal Courts**⇐Trial De Novo
Federal Courts⇐Preliminary Injunction; Temporary Restraining Order
Federal Courts⇐Equity in General and Injunction
Injunction⇐Hearing and Determination

The four elements required for grant of preliminary injunction are mixed questions of law and fact, and thus Court of Appeals reviews the factual findings of the district court only for clear error, but reviews its legal conclusions de novo, and though the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision based on erroneous legal principles is reviewed de novo.

Cases that cite this headnote

3 **Federal Courts**⇐Questions of State or Foreign Law Involved

Under "*Pullman* abstention", federal courts should not determine the federal constitutional implications of state law when that law has not yet been authoritatively construed by the state courts, and the law could be given a construction by the state courts which would avoid the constitutional dilemma.

Cases that cite this headnote

4 **Federal Courts**⇐First Amendment; Freedom of Religion, Speech and Press

Pullman abstention was inappropriate in constitutional challenge to state appropriations rider prohibiting state employees from acting as consultants or expert witnesses on behalf of parties opposing state in litigation, despite contention that there were open questions of state law as to whether rider applied to pro bono expert testimony and to expert testimony against political subdivisions of state, as opposed to state directly, as constitutional overbreadth problem posed by rider could not be avoided by any interpretation which its language would bear. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

5 **Constitutional Law**⇐Difference in Protection Given to Other Speech

Commercial speech is generally less protected than other speech under First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

6 **Constitutional Law**⇐What Is "Commercial Speech"

The fact that one is paid to be an expert witness does not make his testimony "commercial speech," for purposes of determining extent of First Amendment protection. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

7 **Constitutional Law**⇐What Is "Commercial Speech"

The defining element of "commercial speech," for purposes of determining extent of First Amendment protection, is not that the speaker is paid to speak, but rather that the speech concerns the economic interests of the speaker and his audience. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

8 **Constitutional Law**⇐Public or Private Concern
Constitutional Law⇐Efficiency of Public Services

The test for governmental restriction of its employees' speech, under *Pickering*, is essentially in two parts: first, district court must determine whether state's action or policy restricts speech of its employees on matters of public concern; if so, then district court must weigh interest of employee in freedom of expression and his audience's legitimate need for access to the information against government's interest, as employer, in promoting efficiency of public services it performs through its employees. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

9 **Colleges and Universities**⇐Staff and Faculty
Constitutional Law⇐Public or Private Concern
States⇐Evidence

Texas state university policy and state appropriations rider prohibiting state employees from acting as consultants or expert witnesses on behalf of parties opposing state in litigation had effect of curtailing speech on matters of public concern, and state's interest in preventing state employees from speaking in a manner contrary to its interests did not outweigh free speech rights of employees, particularly as applied to expert testimony by faculty members. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

10 **Colleges and Universities**⇐Staff and Faculty
Constitutional Law⇐Employees
States⇐Evidence

Texas state university policy and state appropriations rider prohibiting state employees from acting as consultants or expert witnesses on behalf of parties opposing state in litigation violated First Amendment by drawing a distinction between state employee speakers based on the content of the employees' relative speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

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11 **Constitutional Law**⇐Content-Based Regulations or Restrictions

A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

12 **Constitutional Law**⇐Content-Based Regulations or Restrictions

Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

R. James George, Jr., Renea Hicks, Evan Scott Polikov, George, Donaldson & Ford, Austin, TX, for Plaintiffs-Appellees.
James C. Todd, Asst. Atty. Gen., Austin, TX, for Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, DeMOSS and PARKER, Circuit Judges.

Opinion

ROBERT M. PARKER, Circuit Judge:

We *sua sponte* withdraw our prior opinion, *Hoover v. Morales*, 146 F.3d 304 (5th Cir.1998), and substitute the following:

I.

FACTS & PROCEDURAL HISTORY

At issue in this case are two Texas state policies, one legislative and one administrative, which have the effect of prohibiting state employees from acting as consultants or expert witnesses on behalf of parties opposing the State in litigation. The first such policy is Texas A&M University System ("TAMUS") policy No. 31.05, which prohibits university professors from taking employment as consultants or expert witnesses when doing so would create a conflict with the interests of the State. The second policy is in the form of an "expert witness rider" attached to the Texas Legislature's 1997 appropriations bill. The rider provides:

> Because of an inherent conflict of interest, none of the funds appropriated by this Act shall be expended in payment of salary, benefits, or expenses of any state employee who is retained as or serves as an expert witness or consultant in litigation against the state, unless the state employee serves in that capacity on behalf of a 224 state agency on a case in which the state agency is in litigation against another state agency.

Appropriations Act 1997-99, art. IX, § 2(5); Tex. Sess. Law Serv. at 6352.

Certain professors, who have been retained or have volunteered on a *pro bono* basis to testify in various litigation against the State,[1] and the Texas Faculty Association filed suit under § 1983 against the Texas Attorney General and the TAMUS Chancellor, seeking to enjoin enforcement of the "expert witness rider" and TAMUS policy No. 31.05, on the grounds that these policies offend the First Amendment and the Equal Protection clause of the Fourteenth Amendment. The district court granted the plaintiffs' requested preliminary injunction and the State appeals. The State argues that the district court should have abstained from deciding the merits of the constitutional challenge under the *Pullman* doctrine. Alternatively, the State argues that the district court abused its discretion by granting the preliminary injunction on the merits.

II.

LAW & ANALYSIS

A.

Standard of Review

12 A preliminary injunction is an extraordinary equitable remedy that may be granted only if the plaintiff establishes four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest. These four elements are mixed questions of law and fact. Accordingly, we review the factual findings of the district court only for clear error, but we review its legal conclusions *de novo.* Likewise, although the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision based on erroneous legal principles is reviewed *de novo.* *Sunbeam Products, Inc. v. West Bend Co.*, 123 F.3d 246, 250 (5th Cir.1997), *citing Blue Bell Bio-Medical v. Cin-Bad, Inc.*, 864 F.2d 1253, 1256 (5th Cir.1989). All the arguments on this appeal concerning the merits of the preliminary injunction focus on the first element-likelihood of success on the merits of the constitutional challenge.

B.

Abstention

34 *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), established that federal courts should not determine the federal constitutional implications of state law when that law has not yet been authoritatively construed by the state courts, and the law could be given a construction by the state courts which would avoid the constitutional dilemma. *See Word of Faith World Outreach Center Church, Inc. v. Morales*, 986 F.2d 962, 967 (5th Cir.1993). The State argues that there are two such open questions under the "expert witness rider" which are in need of authoritative state court interpretation before a federal court can address its constitutional implications, i.e., whether the rider applies to *pro bono* expert testimony, and whether the rider applies to expert testimony against political subdivisions of the State, as opposed to the State directly.2

Abstention is inappropriate in this case, because the constitutional overbreadth problem posed by the expert witness rider cannot 225 be avoided by any interpretation which its language will bear.

C.

Is Speech Still Free If You Get Paid For It?

567 There is a side-debate in this case about whether testimony by a state employee acting as a paid expert witness is "commercial speech" or just "speech". The difference is critical, as commercial speech is generally less protected. *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). In this case, we are dealing with just "speech". If all it takes to make speech commercial is that the speaker is paid to say it, then every writer with a book deal, every radio D.J., and every newspaper and television reporter is engaged in commercial speech. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak," *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801, 108 S.Ct. 2667, 2680, 101 L.Ed.2d 669 (1988). Likewise, the fact that one is paid to be an expert witness, does not make his testimony commercial speech. *Central Hudson*, 447 U.S. at 561, 100 S.Ct. at 2349 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience") (citing cases). Therefore, the defining element of commercial speech is not that the speaker is paid to speak, but rather that the speech concerns the "economic interests of the speaker and its audience." *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996)(product advertisement), *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995)(solicitation of legal services).

D.

***Pickering* & Its Progeny**

"The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

8 Thirty years ago in *Pickering*, the Supreme Court distilled a test for governmental restriction of its employees' speech. The test is essentially in two parts. First, the district court must determine whether the State's action or policy restricts the speech of its employees on matters of public concern. *Pickering, supra* at 568, 88 S.Ct. 1731; *Connick v. Myers*, 461 U.S. 138, 145-149,

103 S.Ct. 1684, 1689-1691, 75 L.Ed.2d 708 (1983). If so, then the district court must weigh the interest of the employee in freedom of expression and his audience's legitimate need for access to the information against the government's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra* at 568, 88 S.Ct. 1731; *Connick, supra* at 142, 103 S.Ct. 1684; *Waters v. Churchill,* 511 U.S. 661, 668, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994); *United States v. National Treasury Employees Union,* 513 U.S. 454, 465-466, 115 S.Ct. 1003, 1012, 130 L.Ed.2d 964 (1995); *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 116 S.Ct. 2342, 2347-48, 135 L.Ed.2d 843 (1996).

i.

Matters of Public Concern

9 TAMUS policy No. 31.05 and the expert witness rider both have the effect of curtailing speech on matters of public concern in this case. For example, some of the parties in this case have been retained as expert witnesses in the State of Texas suit against the tobacco companies. Although the specific testimony to be offered by the faculty-member plaintiffs may be highly esoteric and of little interest to the public, that testimony bears on the addictive nature of cigarettes/nicotine, its health consequences and resulting public costs, which are matters of public concern. Ultimately, a ban on testimony by state employees in litigation against [226] the State, such as TAMUS Policy No. 31.05, or a refusal to fund the salary and benefits of state employees who testify in litigation against the State, such as the expert witness rider, can be expected to curtail speech on a wide variety of matters of public concern.

ii.

The Competing Interests

The plaintiffs' right is generally identified as the right to speak freely on matters of public concern. More specifically, it is the right to serve as (*pro bono*) or be retained as (for hire) an expert witness or consultant in litigation against the State (expert witness rider) or when doing so would create a "conflict of interest" with the State (TAMUS policy No. 31.05). Balanced against that, under *Pickering,* is the State's interest "as an employer, in promoting the efficiency of the public services it performs through its employees."

The justification offered by the State is the State's right to prevent its employees from acting contrary to the State's interests. The State argues that an inherent conflict of interest is created by state employees acting as or being retained as consultants or expert witnesses for the opposition in litigation against the State. Since the State has an interest in preventing such conflicts of interest, the expert witness rider and TAMUS policy No. 31.05 are designed to prevent state employees from speaking against the State when doing so would create a conflict with the interests of the State. Boiled down to its core, the State is simply arguing that the State's interest is in preventing state employees from speaking in a manner contrary to the State's interests.

Whatever else we might say about that "justification", the State's amorphous interest in protecting its interests is not the sort which may outweigh the free speech rights of state employees under *Pickering.* The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment. The scope of state interests which may outweigh the free speech rights of state employees is much narrower than that. Indeed, the only state interest acknowledged by *Pickering* and its progeny, which may outweigh the right of state employees to speak on matters of public concern, is the State's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees."

In this case, the State has not identified how the State's interest in promoting efficiency of the public services it performs through its employees will be adversely affected by allowing state employees to serve as or be retained as expert witnesses or consultants. We may safely assume that there will be occasions when the State's interest in efficient delivery of public services will be hindered by a state employee acting as an expert witness or consultant, and therefore, the expert witness rider or TAMUS policy No. 31.05 would legitimately curtail that employee's speech. However, the problem with the rider and policy No. 31.05 is the quantity and quality of speech they will curtail, which would not adversely affect the interest of the State in efficient delivery of public services. That is, by their operation, the expert witness rider and TAMUS policy No. 31.05 would likely serve to silence those whose speech would not adversely affect the efficiency of the public services performed by the State through its employees. Specifically, this Court does not see how the expert testimony of the faculty-member plaintiffs in this case will adversely affect the efficient delivery of

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educational services by the institutions in which these faculty members serve. Even if such an adverse impact might occur, the State has not identified it. The State bears the burden of justifying these restrictions, and when it enacts a "wholesale deterrent to a broad category of expression by a massive number of potential speakers", the burden of justification is indeed heavy. *National Treasury Employees Union*, 513 U.S. at 466-67, 115 S.Ct. at 1013. In this case, the State's burden proved too heavy, and having identified the flaws in the expert witness rider and TAMUS policy No. 31.05, the district court properly enjoined their enforcement.

[9] E.

Content-Based Restriction

10 An additional basis for enjoining enforcement of the expert witness rider and TAMUS policy No. 31.05 is that they draw a distinction between state employee speakers based on the content of the employees' relative speech. The one who testifies as an expert witness or acts as a consultant on behalf of the State is protected. The one who testifies as an expert witness or acts as a consultant on behalf of those who oppose the state in litigation is punished.3

1112 "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991), *citing Leathers v. Medlock*, 499 U.S. 439, 447, 111 S.Ct. 1438, 1443-44, 113 L.Ed.2d 494 (1991). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992)(holding that government restriction of otherwise unprotected speech ("fighting words") on the basis of ideas expressed thereby, is unconstitutional content-based regulation). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id., quoting Regan v. Time, Inc.*, 468 U.S. 641, 648-49, 104 S.Ct. 3262, 3266-67, 82 L.Ed.2d 487 (1984). Therefore, the district court's decision to enjoin enforcement of the expert witness rider and TAMUS policy No. 31.05 may be justified on this alternative basis as well.

III.

CONCLUSION

The district court properly refused to abstain from addressing the constitutionality of the expert witness rider, because no matter how it is construed by the Texas courts, the constitutional problem cannot be avoided. The district court properly granted the preliminary injunction against enforcement of TAMUS policy No. 31.05 and the expert witness rider, because they both will cause the censorship of more speech by state employees than may be justified in order to protect the efficient delivery of public services. Furthermore, the expert witness rider and TAMUS policy No. 31.05 are presumptively impermissible content-based regulations of otherwise protected speech. Therefore, we affirm the district court's decision to enjoin the enforcement of these policies.

As we previously have stated, there may be occasions when the State's interest in efficient delivery of public services will be hindered by a state employee acting as an expert witness or consultant. Certainly the State's interests heighten when the employee happens to be a policy maker. We can hypothesize examples of legislative or administration rules limiting expert testimony which would not violate the First Amendment, including rules regulating outside employment that do not turn on the content of any speech related activity that may be part of the outside employment. Moreover, the opinion should not be taken to decide or draw into question other kinds of rules regulating arguably expressive conduct by public sector employees. *See, e.g., Weaver v. United States Information Agency*, 87 F.3d 1429 (D.C.Cir.1996); *Vicksburg Firefighters Assoc., Local 1686 v. City of Vicksburg*, 761 F.2d 1036, 1040 (5th Cir.1985); *Zook v. Brown*, 865 F.2d 887 (7th Cir.1989); *Arceneaux v. Treen*, 671 F.2d 128 (5th Cir.1982). But our task in this case requires us to apply a Pickering case-by-case analysis, and in doing so we conclude that the expert witness rider and TAMUS policy No. 3105 are impermissibly overbroad. Our opinion does not foreclose consideration of rules and regulations aimed at limiting expert testimony of faculty members or other state employees which adhere to our First Amendment jurisprudence.

AFFIRMED.

[8] DeMOSS, Circuit Judge, specially concurring:

I concur only in the result.

The only issue before this Court is whether the district court abused its discretion by granting a temporary injunction enjoining the enforcement of Texas A&M University System Policy 31.05 and Regulation 31.0501 (the "TAMUS Policy") and the "Expert Witness Rider" attached to the Appropriations Act 1997-99, art. IX, §

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2(5) (the "Rider"). The Order of the district court granting that injunction does not address and does not constitute any final determination concerning:

a. whether the district court would apply the abstention doctrine of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and *Word of Faith World Outreach Center Church, Inc. v. Morales*, 986 F.2d 962 (5th Cir.1993);

b. whether the "speech" in this case is "commercial speech";

c. whether the speech in this case relates to "matters of public concern";

d. whether a balancing of interest between the rights of the employee and the rights of the state as employer under *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) would require a result in favor of plaintiff/appellees;

e. whether the TAMUS policy or the Rider constitute an unconstitutional content based restriction on the free speech rights of the plaintiffs/appellees under *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

Likewise, the district court did not file any findings of fact and conclusions of law on these issues for us to review.

In my view this case raises a serious and fundamental issue not previously decided by the United States Supreme Court or this Court. That is, whether the State of Texas or one of its state universities can prohibit a state employee or a full-time professor at the university from serving as a compensated expert witness against the state when the subject matter of his testimony and the basis of his qualifications as an expert are directly connected with, and are the product of, his employment by the state. That issue was expressly left undecided by the Supreme Court in *National Treasury Employees* and needs far more factual development and legal analysis by the parties and the Court than it has received on the hearing for preliminary injunction.

Our task on this appeal is much narrower than the decision penned by the majority. We are simply to decide whether, based upon the limited evidence presented at this early stage of the litigation, we believe that the district court's decision is so wanting for support that it constitutes an abuse of discretion. I can imagine several reasons why the district court might have found it appropriate to grant an injunction. For example, the expert testimony relationships which are the subject of this case appear to have been entered into prior to the effective date of the Rider; and raise an issue concerning whether the Rider should be retroactively applied against the plaintiffs during the pendency of this suit. Where I differ from the majority is that I would have neither assumed to know the reasoning of the district court nor presumed to include that reasoning in an opinion disposing of the more narrow preliminary injunction question.

Consequently, I concur with the majority that the district court did not abuse its discretion, but I decline to join in the discussion and commentary by the majority relating to matters which, in my view, are not raised by this appeal.

Parallel Citations

131 Ed. Law Rep. 652, 14 IER Cases 1867

Footnotes

1 E.g.: Prof. Robert Hoover, Dr. Finis Welch and Dr. Cecil Reynolds of Texas A&M have been retained as expert witnesses for the defense in the State of Texas law suit against various tobacco companies; Prof. Frank Skillern of the Texas Tech University School of Law has volunteered his services on a pro bono basis to members of a Lubbock, Texas, neighborhood association opposing state permitting of a nearby incinerator.

2 The State concedes that the district court properly reached the merits of TAMUS policy No. 31.05 and of the "expert witness rider" to the extent that the rider prohibits state employees from acting as paid expert witnesses in litigation against the state directly. Appellant's Brief, pp. 24-26.

3 It is this discriminatory treatment of state employees based on the content of their speech which prompted the plaintiffs' Equal Protection challenge. Our resolution of the plaintiff's First Amendment claim makes it unnecessary to discuss the merits of plaintiffs' Equal Protection challenge.

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February 10, 2011

Confidential

San Francisco Ethics Commission
25 Van Ness Avenue, Ste. 220
San Francisco, CA 94102

RE: Judy Melinek: Denial of Appeal of Advance Written Determination, San Mateo Superior Court Case No. CIV 4811542, Wolkoff v. AMR/County of San Mateo, et al.

Members of the Ethics Commission:

I am the attorney representing the family of decedent Steven Wolkoff. Mr. Wolkoff tragically died on June 21, 2008 after a motor vehicle accident as a result of sequelae of multiple traumatic injuries, status post attempted resuscitation. On behalf of his family my office has undertaken representation to hold accountable those causing and contributing to Steven's death in civil proceedings filed in San Mateo County Superior Court.

In the course of our investigation and based on the San Mateo Coroner's Pathology Report it has been learned that the attempted emergency resuscitation performed on Steven Wolkoff was done in a grossly negligent fashion and contributed to Steven's death. Recently, The San Mateo Superior Court issued an order finding that there was sufficient evidence of culpability to allow the case to proceed to trial.

My office has retained Judy Melinek, MD to consult with and assist my office in understanding the pathologic findings and conclusions of the San Mateo Coroner and to comment on cause of death and the subsequent storage and release of Steven's remains. Dr. Melinek is uniquely qualified because of her training and work experience to provide expert consultation on this case. In our research we have not discovered anyone else possessing the necessary qualifications willing to assist us in this matter.

It has been brought to my attention that Dr. Melinek's superiors in the San Francisco Medical Examiner's office, and the Office of the City Administrator, have recently denied Dr. Melinek the right to work as a contracted consultant to my office, entirely on her own time, and completely outside of her official position as an Assistant Medical Examiner, contending that her service as an expert consultant and witness in the Wolkoff case may infringe on "important working relationships" between the San Francisco Medical Examiner's Office and San Mateo County and AMR. Please understand that she is not being asked to comment on the conduct of the paramedics, only on how their attempted interventions were a substantial factor in Mr. Wolkoff's death.

In review of the San Francisco Department of Human Resources, Statement of Incompatible Activities, I note that the San Francisco Charter permits any person to seek a written opinion from the Ethic's Commission with respect to that person's duties under provisions of the Charter or any City ordinance relating to conflicts of interest and governmental ethics. Dr. Melinek has informed me that she is requesting such an opinion. This letter is in support of Dr. Melinek to provide an invaluable public service not only to my clients but to all residents of the County of San Mateo.

The denial of Dr. Melinek's participation in this case appears to be directed at, and certainly has the effect of limiting the victims of negligent conduct by public entities and their contractors from obtaining the evidence necessary to sustain their burden of proof in the civil case. As I am sure you understand there is an extremely limited pool of qualified individuals expert in the forensic analysis of cause of death, virtually all of whom are in working relationships with various coroners' offices. The pool is even more limited to the few who do private consulting.

The effect of interpreting the SIA in such a way that litigants are not able to obtain necessary and honest opinions from the most well qualified forensic scientists when that testimony may lead to a finding that a public entity or its contractor is legally responsible serves only to perpetuate suppression of the truth to the benefit of the public entity and does not benefit the public at large or the individual litigants. In my view this not only ethically improper, but runs counter to the mission of the Medical Examiner's office.

I find it hard to understand how allowing an honest appraisal of the cause of death and critique of the standard of care in San Mateo can impact adversely the relationship between the County of San Mateo/AMR and the City & County of San Francisco unless the purpose of limiting the testimony of Dr. Melinek is to assist the County of San Mateo/AMR in their attempt to avoid the just consequences of their actions.

If it is the truth that we are after, access to the truth should be paramount and should be the highest ethical aspiration of the San Francisco Medical Examiner. Unfortunately, the actions of the Chief Medical Examiner and the Acting City Administrator appear

solely to impede the ascertainment of the truth. The result intended or not, protects the legally responsible parties by suppressing the truth. Rather than promoting the finding of truth so that justice can be attained for the Wolkoff family and the citizens of San Mateo County and California, the decision to enjoin Dr. Melinek from participating as an expert witness on behalf of the Wolkoff family effectively assures that justice will not be served.

It appears from the documentation I have seen that nothing more than a hypothetical worry that some vague, undefined adverse impact might occur between CCSF and San Mateo County if Dr. Melinek is allowed to serve a role in discovering the truth of Steven's death. Any such impact, adverse or otherwise, is merely speculative and should never serve as the basis for enjoining Dr. Melinek's right to free speech or my clients' right to contract freely with a most qualified expert.

The Ethics Commission must not allow unfettered, discretionary power in the hands of the Chief Medical Examiner to decide who gets the truth and who doesn't. Absent a clear and convincing showing by the Medical Examiner's office of actual irreparable harm to the reputation or integrity of the office, or a clear violation of an ethical duty by Dr. Melinek, this Commission has a responsibility to allow Dr. Melinek to consult with and testify on behalf of private citizens outside of her capacity as assistant Medical Examiner even against other public entities or its contractors.

Very truly yours,

Steven J. Brewer

SJB/sb

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February 9, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

To Whom It may Concern:

I write on behalf of Dr. Judy Melinek of your Medical Examiner's Office in support of her appeal from an adverse ruling regarding her ability to maintain a private practice.

Having been engaged in a civil rights practice here in the Deep South for over forty years, I am outraged that anyone would try to prevent an expert of her quality from assisting in the prosecution of social justice issues.

Dr. Melinek was my expert in a civil case where corrections officers ("COs") employed at a local parish (county) jail stood accused of beating a pre-trial detainee to death. Her assistance was simply invaluable.

Quite often in beating death cases of this kind, the autopsy is done by a coroner hired by the parish (county) operating the jail facility. Predictably, such an autopsy report will be contrived so as to clear the offending COs. In this very situation, and without leaving San Francisco, Dr. Melinek was able to provide the legitimate and accurate information that blew up the local coroner's findings. Within a week of her telephone deposition by opposing counsel, the matter was appropriately resolved. Without her, the family of the African-American deceased would surely have been denied the justice without which our legal system collapses.

I would urge reconsideration of Dr Melinek's case. She seems to have been historically able to conduct a private practice without restricting her duties for

your City. Please don't let this fall through the cracks. We need her!

Sincerely,

Henry C. Walker

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February 9, 2011

VIA US MAIL AND EMAIL

San Francisco Ethics Commission
25 Van Ness Ave, Suite 220
San Francisco, CA 94102

RE: Judy Melinek, M.D.

To the Members of the San Francisco Ethics Commission:

I have been an attorney for 31 years specializing in representing cities, counties and public agencies when they have been sued for personal injuries, civil rights violations and wrongful death. My clients include the City of Alameda, Alameda County, the City of Pleasanton, Alameda Reuse and Redevelopment Agency, San Francisco Redevelopment Agency and others in the Bay Area.

In a number of cases, including one very high profiled wrongful death case in which I was lead counsel for the City of Alameda, I have had the good fortune of working with Dr. Melinek. I have retained Dr. Melinek as an expert forensic pathologist to assist in the defense of my public entity clients. Her brilliance and dedication in assisting my clients and myself in determining the manner and cause of death have been invaluable and often the tipping point in deciding whether to settle or go to trial.

I know from speaking with my defense bar colleagues that Dr. Melinek has assisted the State of California and other public entities. In view of the dearth of the experienced impartial forensic pathologists in the Bay Area it would be a major loss to public entity defendants if Dr. Melinek is prohibited from providing her expert assistance.

I respectfully urge the Ethics Commission to continue to permit Dr. Melinek to provide her expertise in assisting public entities and their counsel.

Very truly yours,

DANG and TRACHUK

Thomas J. Trachuk

TJT/co
cc: July Melinek, MD

PAUL EDMOND STEPHAN

Attorney-At-Law
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San Francisco, CA 94105
(415) 979-2011

February 10, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: **Judy Melinek, M.D.**

Dear Commissioners:

I wish to go on record supporting the fine work of Judy Melinek as a Board Certified Forensic Pathologist who has provided first rate expert analysis to civil litigation cases I have had the privilege to work on.

Secondly, I believe it is a disservice to Bench, the Bar and litigants to restrict access to pathologists, such as Dr. Melinek, for matters that have absolutely no nexus to her employment with the City of San Francisco.

In my dealings with Dr. Melinek, she has constantly complied with all City Ethics Laws with regards to her consultation for me in expert matters. She has never consulted with me on city time, never used city facilities and has never leveraged her position in order to obtain work as a consultant in any other case I am aware of. Overall, her forensic pathology work has been first rate and has assisted resolution of cases outside of the San Francisco Court jurisdiction.

One of the most significant uses of a qualified, Board Certified Forensic Pathologist is to determine legal issues arising out of a death. The qualified pool of experts in this field is very limited. The qualified experts in this field also have to be routinely engaged in the "clinical practice" of forensic pathology in order to stay current in many of the methods of forensic pathology. Therefore, typically, the most qualified pathologists are those who are still actively engaged in pathology services for a municipality. To remove those highly qualified persons from the legal process would do a disservice to both sides.

I am at a loss to see how it can be incompatible for Dr. Melinek to consult with me on a case arising out of a death in another State or County having absolutely no relationship to any service provided by the City of San Francisco. Yet, it is my understanding that there has been some claim that a pathologist from the City of San Francisco is in some type of conflict situation providing consulting services to a law firm engaged in a litigation hundreds of miles from San Francisco. That has simply not occurred in any case I have worked with Dr. Melinek on.

I believe I have some experience dealing with actual and perceived conflicts as I have served as a Deputy District Attorney, a Deputy County Counsel, a Police Officer, a United States Military Officer and a practicing lawyer in numerous jurisdictions in the country. I have an appreciation when there is a conflict on both an ethical level and a legal level. Dr. Melinek's work presents no such conflict for the City of San Francisco.

Very truly yours,

Paul Edmond Stephan, Esq.
(SBN 075081)

THE HALEY LAW OFFICES
A Professional Corporation

February 14, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Judy Melinek, M.D.

To Whom It May Concern:

I am a trial attorney. I have been in practice for almost 30 years. I am a member of numerous trial lawyer organizations. I am most proud of my membership in The American Board of Trial Advocates because its members are both plaintiff and defense attorneys. Membership is by invitation only, and you must have extensive jury trial experience to be a member. I represent primarily plaintiffs.

In my work, I frequently retain medical legal experts. I understand the Commission has precluded Judy Melinek M.D. from consulting and testifying in a medical malpractice case on the basis it will impede the City and County's relationship with those entities. I write to implore you to allow her to do these consultations.

It is critical for parties to be able to find, identify and retain knowledgeable, experienced and qualified experts. In her field, Dr. Melinek is one of the best. She is accessible, easy to work with and absolutely candid in her opinions about the cases that she sees. To lose her as an expert would be a great loss to our civil justice system. You only need read recent news articles involving local pathologists to find why Dr. Melinek is such an asset.

The real question is why Dr. Melinek's truthful and professional assistance in the case would infect San Francisco's relationship with these other parties. The only explanation is you and those parties are concerned that Dr. Melinek's consultations would assist the victim of some negligence occasioned by those parties. They are trying to use their influence with San Francisco to prevent her from offering her honest opinions, good or bad. If we are taking about ethics, It seems to me unethical for San Francisco to prohibit one if their most knowledgeable physicians to consult in a case because the negligent party who injured some poor victim will be upset with the City if Dr. Melinek tells the truth. The commission should welcome Dr. Melinek's outside consultation as long as she is truthful.

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Lets also not forget that by allowing Dr. Melinek to consult, a claim or potential claim against one of San Francisco's partners might be avoided. She would only be consulted by someone who trusts her, knowing full well that her truthful opinion will either help or hurt. If it hurts, a case may be over.

Ultimately, the Commission's only concern should be is that the opinions Dr. Melinek offers in the case are well founded, reasoned and, most importantly, truthful. Indeed, you should reject the efforts by your partners to stifle the truth from being revealed. Your great city should not participate in what we have long called a conspiracy of silence.

Very truly yours,

Matthew D. Haley
MDH:jr

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February 8, 2011

VIA E-MAIL

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

RE: Dr. Judith Melinek, Forensic Pathologist

Dear Ethics Commission:

I have retained Dr. Judith Melinek to work with my office as a forensic pathologist in three Civil cases over the past six years. Each case involved a Civil claim where a crucial issue at trial was the cause of death. These cases arose in jurisdictions considerable distance from San Francisco; specifically, the Federal Court for the Western District of Washington, the Federal Court for the Eastern District of Pennsylvania, and lastly the Philadelphia Court of Common Pleas. Dr. Melinek reviewed all of the applicable medical records, all work done by the relevant Medical Examiners' Offices, authored an expert report, and testified at a deposition.

In each instance, Dr. Melinek's independent conclusions were consistent with findings from the Medical Examiner's Office in each of the designated jurisdictions. Based on her exceptional credentials, hard work, and ability to articulate, Dr. Melinek made a very forceful and convincing presentation. Most importantly, for your purposes, her work complimented the work of other Medical Examiners' Offices and was a tribute to the City of San Francisco and the San Francisco Medical Examiner's Office. The national reputation that Dr. Melinek is well on the way to developing is well deserved and a credit to the City of San Francisco and the Chief Medical Examiner. Thank you for your consideration of this matter.

Sincerely,

Jack Meyerson

JM/rjb

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February 8, 2011

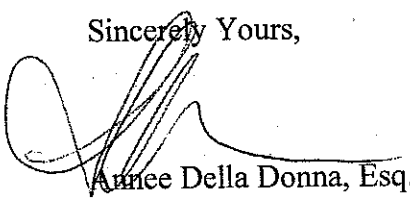
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Dr. Judy Melinek

Dear Commissioners:

We are writing this letter on behalf of Dr. Judy Melinek in support of her appeal disallowing her testimony in a civil action. In civil matters, in order to seek justice it is imperative litigants have access to qualified, competent forensic pathologists. Without Dr. Melinek's thorough investigation into the cause of death, many families would never know the truth about their loved one's demise. As civil attorneys we cannot always rely upon a hospital autopsy for finding the truth, especially when the hospital is a potential defendant. We therefore need an unbiased pathologist to discover what no other medical expert can- the true cause of death.

Sincerely Yours,



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February 8, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Dr. Judy Melinek

Dear Ethics Commission:

Our firm represents families of loved ones who have died with life insurance policies. We have retained Dr. Judy Melinek over the last several years in three cases to assist us in determining the cause of death. In those cases, the insurance companies took the position that benefits were not covered by the terms of the life insurance policies.

In one case, Dr. Melinek disagreed with the decision of the life insurance company and, based on her report, our clients were able to recover the benefits without filing a lawsuit. In the two other cases, Dr. Melinek agreed with the life insurance companies' determination of causes of action.

Dr. Melinek "calls them the way she sees them" and we greatly value her honesty and integrity. Not only has she saved our clients considerable expenses and aggravation, but she performed a valuable service to the judicial system by eliminating lawsuits that should not be filed. I cannot imagine how Dr. Melinek's honest opinions could possibly cause any concern to the City and County of San Francisco.

I would be pleased to provide any further information requested.

GALINE, FRYE & FITTING

John N. Frye

JNF:clp

From: jason jungreis (jasonjungreis@gmail.com)
To: drjudymelinek@yahoo.com;
Date: Thu, February 10, 2011 11:49:17 AM
Cc:
Subject: Re: Letters of support for Dr. Melinek

Judy,

Let me suggest that you simply print and initial it for me: the only catch in such a thing would be if the initialing was unauthorized, and please know that here I am expressly authorizing you to do so.

Thanks.

Jason

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February 10, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

re: Denial of Dr. Judy Melinek=s right to employment as consultant

To the Ethics Commission:

This is a letter in support of Dr. Judy Melinek=s right to employment as a consultant. As you know, Dr. Melinek has ably served San Francisco as a consultant in the Office of the Chief Medical Examiner. However, she has sought and been denied the opportunity to serve as a consultant in a private matter that is independent of San Francisco and independent of her work for San Francisco. I know Dr. Melinek and I believe it would be to the great detriment of San Francisco to risk losing her services, and as a San Franciscan I resent a new standard being applied to her that may result in costly litigation.

I have reviewed the law in this area, including cases involving right to employment, free speech, and conflicts of interest, and it is my opinion that Dr. Melinek=s outside consultancy work does not affect San Francisco and does not affect Dr. Melinek=s ability to provide appropriate continued services to San Francisco. I am concerned that I do not see evidence that a reasoned opinion by the City Attorney was sought or received. It is my opinion that there is a risk of litigation due to the failure to review appropriate law and precedents.

I am confident that a careful review will necessitate a reversal of this decision. I look forward to hearing of your decision in this important matter.

Sincerely,

Jason Jungreis

cc: Dr. Melinek

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February 8, 2011

The San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220,
San Francisco, CA 94102

Phone: (415) 252-3100/Fax: (415) 252-3112
ethics.commission@sfgov.org

To the Ethics Commission,

RE: Appeal of Denial on Advance Written Determination (AWD)
Judy Melinek, M.D.
Assistant Medical Examiner

I am a civil rights attorney for over 31 years, with a practice representing victims of United States and California constitution violations. My firm has employed Dr Melinek as an Expert Medical Examiner and found her testimony to be invaluable. She was truly an Expert Witness for the truth, for the jury, for the court, not an advocate of my client, even though we hired her. Her disclaimer to the court and jury that she was testifying on her own time, and not representing the City & County of San Francisco, was announced at the outset of her testimony.

The consumer and trial advocate bar is in great need of experts with the wealth of experience, knowledge and training that Dr. Melinek possesses. Victims of civil rights violations are prejudiced if experts are only drawn from the private sector because often the expert for the opposing side is a public employee Medical Examine. This carries a positive prejudice in favor of that examiner's testimony as one is testifying not as a "hired gun". Public employee Expert Medical Examiners for the trial bar help to even the playing field, thereby positively creating a balance in our justice system.

Acting City Administrator, Ms. Amy Brown in denying Dr. Melinek's appeal states:
"I have reviewed your appeal carefully and have decided to deny your appeal of the denial of request for Advance Written Determination. Based on the facts presented in your request, your proposed outside activities is not compatible with your position and would violate the Statement of Incompatible Activities."

Ms. Brown's rationale for the denial of Dr. Melinek' appeal is arbitrary, and not based on a legitimate business or government purpose so as to outweigh Dr. Melinek's constitutional rights of free speech, free association and her due process and liberty interest as is afforded in the first and fourteenth amendments.

According to Ms. Brown, "Expert witness testimony by Assistant Medical Examiner in which the named party is a vendor of San Mateo County and/or a public agency of San Mateo can and has interfered with the operations of the Medical Examiner's Office in the past, and the practical effect of your proposed activity would disrupt the operations of the office."

Ms. Brown does not cite the manner of the speculative disruption, nor what "practical effect" this disruption would have on the operations of the office. Clearly, the Medical Examiner's office will continue to function to the same high standards with which it now functions, and has functioned during Dr. Melinek's tenure with the office. During this tenure she has testified in several cases involving public entities without one incident of disruption. A government must have a legitimate reason to curtail the constitutional rights of an employee, who is vested with a property interest in her employment. Ms. Brown rationale for the denial of Dr. Melinek's right to testify in cases not involving the City and County of San Francisco is void of any legitimate or rational basis. Hence, Ms. Brown's denial of Dr. Melinek's right to testify is a constitutional violation of her rights.

The purpose of this letter is to urge you to reverse Ms. Brown's decision and restore Dr. Melinek's rights guaranteed by the United States Constitution.

Thank you for your urgent attention to this matter.

Very truly yours,

Charles A. Bonner

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JODY STRUCK, OF COUNSEL

February 16, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, California 94102

Re: Dr. Judy Melinek

To Whom It May Concern:

The following letter is offered in support of Dr. Judy Melinek's petition to work as a forensic pathologist consultant.

During 2007 and 2008, Dr. Melinek facilitated our defense of a federal civil rights lawsuit involving the in-custody death of a Santa Cruz County Jail inmate. One of the critical issues in this matter was ascertaining the medical cause of the inmate's death. Dr. Melinek's skill and expertise as a forensic pathologist was instrumental in both our defense of this civil lawsuit, and also for the overarching community need to know how and why the inmate died.

There is a wide range in education, skill and expertise for individuals whom hold themselves out to be pathologists. A worst case scenario is when a pathologist offers his or her professional opinion concerning the cause of an individual's death that proves to be misleading, or simply wrong. In these cases, it is essential that we as attorneys, and the community at large, have access to people of the stature of Dr. Melinek to facilitate justice by sharing her insight as an excellent forensic pathologist.

Very truly yours,

HAAPALA, THOMPSON & ABERN, LLP

Clyde A. Thompson
(Direct Dial 510-550-8557)

CAT/lcd

cc: Dr. Judy Melinek [via e-mail only]

National Organization of
Parents Of Murdered Children, Inc.
For the families and friends of those who have died by violence.

100 East Eighth Street, Suite B-41 • Cincinnati, OH 45202 • Toll Free: (888) 818-POMC
Fax (513) 345-4489 • Website: www.pomc.org • Email: natlpomc@aol.com

February 14, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Judy Melinek, M.D.

Dear Commission Members:

Parents Of Murdered Children is the only non-profit organization in this country devoted to providing non-financial support to survivors of homicide. As such, we have intimate knowledge of the problems faced by parents, children, siblings and significant others of homicide victims.

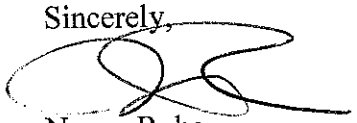
Aside from the immediate trauma, the most devastating experience comes when the survivors must reopen their wounds because a conviction has been overturned on appeal, or even worse, the wrong person was convicted and the murderer has been free for years. For these reasons, this organization has always championed the need for a defendant to have adequate representation and expert consultants of quality equal to those retained by the prosecution.

Dr. Melinek has volunteered for Parents Of Murdered Children doing pro bono work by looking at different cases in our Second Opinion Service Program. She has taken many hours with families helping them understand their loved ones death by suicide or if she feels it isn't suicide has helped them with more information to take to their district attorney. We were excited when she offered to volunteer with our organization and her expertise, openness and honesty has helped so many families through the very difficult and painful time of their loved ones death. Having Dr. Melinek and who understands how important it is to survivors that everything possible is being done to solve their case and is sensitive to our members and in seeing that justice is served for these families is invaluable to our organization and to families who need help with questions about their loved ones death.

It has been brought to our attention that the immediate supervisor of Dr. Melinek and the Acting City Administrator intend to deprive the courts of her expertise, even though such expertise is provided on her own time. A similar event happened in Minnesota within the last few years, where a prosecutor pressured a coroner to not allow the forensic pathologist working for the coroner to testify for the defense in a different county. That prosecutor was publicly sanctioned and removed from office by the state bar.

The justice system requires open dialogue by certified experts; in the absence of such experts, the system fails. The recent Frontline show demonstrated the severe shortcomings of the current system; restricting experts from telling the truth will only make the situation worse and confirm to the public that there is no transparency in government. Nor can we ignore the recommendations of the National Academy of Science regarding forensic sciences and the current hearings before the United States Congress.

Sincerely,



Nancy Ruhe
Executive Director

TUCKER ELLIS & WEST LLP

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February 9, 2011

VIA U.S. MAIL

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Judy Melinek, M.D.

To the Ethics Commission:

We write in support of Judy Melinek, M.D. and her appeal of the denial of the Advance Written Determination for approval to testify as a legal consultant. Our firm has engaged Dr. Melinek as an expert witness in the area of forensic pathology in unrelated cases. The general purpose of these engagements is to review the facts and evidence and opine on the cause of death. In our experience, Dr. Melinek gives her unbiased assessment and professional opinion based on the evidence presented. She operates under the highest ethical standards, and for this reason, and because of her ability, she is a well-respected expert in her field.

A qualified expert witness plays a very important role in litigation. A qualified expert is not an advocate for a litigant. The expert's role is to educate the parties, the judge and the jury. Because of the complexity of many cases where the cause of death is a central question, Dr. Melinek's expertise as a forensic pathologist is particularly useful in synthesizing the evidence and opinions of other experts. The courts would be deprived of a key resource if experienced, independent and ethical pathologists, such as Dr. Melinek, were prohibited from acting as expert witnesses.

Very truly yours,

TUCKER ELLIS & WEST LLP

Mollie F. Benedict

Mollie F. Benedict, Esq.

cc: Judy Melinek, M.D.

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February 8, 2011

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Private Forensic Practice of Dr. Judy Melinek, M.D.

Dear Ethics Commission:

I am writing this letter in support of Dr. Judy Melinek's appeal from the denial of her request to testify as an expert forensic pathologist in litigation cases.

I am a criminal defense attorney, and have on several occasions used Dr. Melinek in her private capacity as a consulting expert on cases that have relevant medical issues. In my experience, when interpretation of medical evidence it is at-issue, the ability to discuss, consult, and analyze medical records confidentially, and without restriction, is critically important in the preparation of a criminal defendant's case. Such an undertaking may, or may not, lead to preparation of a written report from, or testimony by, the expert. Such an undertaking may also lead to a swift resolution of a criminal case, when no issue of factual controversy is discovered after examination of the medical evidence. In my opinion, formed after having been in practice for over twenty-years, it is ineffective assistance of counsel and a constitutional violation of my client's rights not to consult with a qualified forensic medical expert when a medical issue of some consequences becomes relevant in a criminal prosecution.

Turning specifically to Dr. Melinek, I understand she is employed by the San Francisco Medical Examiner's office, and accordingly, she is called upon at times to testify in criminal cases in San Francisco. I expect that she is usually called by the prosecution to testify, although I also expect that she would be available to answer questions and testify to factual matter within her knowledge by the defense on cases assigned to her. Such work is not consulting work. In such matters, all within the city and county of San Francisco, her testimony would be given as a examining doctor, with knowledge of the facts of a case, interpreted and explained based on her experience, training, and professional expertise.

I find it curious, and mildly offensive, to hear that there is a concern that in cases that do not concern opinions about the practice of the San Francisco Medical Examiner's Office, her colleague's work, nor her own, that anyone could suggest Dr. Melinek would have a professional conflict of interest. Dr. Melinek is a highly trained physician, not a partisan. She has no stake in the outcome of the cases on which she consults. I, myself, have had the experience of paying her to consult with me on a case, only to hear her give me opinions that conflict with my goals or the goals of my client. While I may be disappointed when her expertise leads her to conclusions that are contrary to my theory of a case, I would be more disappointed if Dr. Melinek were not able to offer her true opinions and conclusions, no matter their effect. It is precisely because Dr. Melinek is the type of doctor that will not waiver from what her training leads her to conclude, that she is a valuable asset to the litigation community in Northern California. She is not there to persuade. She is there to interpret scientific information based on her knowledge and experience, and on the facts presented to her. She is fundamentally a scientist, and thus not an advocate. Her convictions about her profession and her work lead her to give the same information to either party in a lawsuit, and this is what makes her a credible witness when called to testify.

I urge you to reconsider the initial decision restricting Dr. Melinek's ability to testify due to concerns about potential conflicts of interest. There are few forensic pathologists available for private hire in the greater Bay Area, and I urge you not to limit the pool of these experts by removing her from that number. Dr. Melinek possesses a particular skill that makes her my own medical expert of choice: she has a very clear way of expressing her medical opinions and conclusions orally. Her medical training has not obfuscated her ability to speak in layman's terms in a manner that is understandable to those of us without medical training. This is a critical skill for a litigation expert to have. Please do not deprive us of the ability to hire Dr. Melinek for private litigation purposes. Such a loss would be felt by clients and jurors alike, and would be antithetical to the true administration of justice.

Yours Very Truly,

Cindy A. Diamond

CAD/bms