



# ETHICS COMMISSION

## CITY AND COUNTY OF SAN FRANCISCO

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LEEANN PELHAM  
EXECUTIVE DIRECTOR

Date: June 22, 2017

To: Members of the Ethics Commission

From: Jeff Pierce, Senior Investigative Analyst  
Kyle Kundert, Senior Policy Analyst

Re: **AGENDA ITEM 5: Staff Memorandum Regarding Policy Considerations and Possible Approaches for Obtaining Ethics Commission Independent Legal Counsel**

**Summary:** This memorandum provides Staff's policy research and possible approaches regarding Commissioner Kopp's April 24, 2017, request to amend Section 15 of the San Francisco Charter to provide the Ethics Commission with independent legal counsel.

**Action Requested:** That the Commission review and discuss the approaches articulated in this memo and provide Staff with further policy direction for any preferred approach.

### Introduction

At the Ethics Commission's April 24, 2017, regular meeting, Commissioner Kopp asked Staff for recommendations for Charter language that would provide the Commission with its own independent legal counsel separate from the City Attorney's Office. This memorandum provides policy considerations and alternative approaches in response to that request.

### Background

#### 1. City Attorney's Office: Authority, Overlap with Ethics Commission, and Structure

- a. Absent a conflict, the City Attorney's Office is the legal advisor and litigation counsel to every City division, officer, and employee.

Section 6.102 of the San Francisco Charter requires, among other things, that the City Attorney represent the City in any legal proceedings in which it has an interest, commence legal proceedings whenever a cause of action exists in favor of the City that the City Attorney knows about or that the Board of Supervisors directs the City Attorney to bring, and provide

advice or a written opinion to any officer, department head or board, commission or other unit of government of the City whenever any of those parties requests advice.<sup>1</sup>

City officials with reason to believe the City Attorney has a financial conflict of interest that state law prohibits or an ethical conflict of interest that the California Rules of Professional Conduct prohibit may ask the City Attorney's permission to hire outside counsel to represent them.<sup>2</sup> If the City Attorney refuses, the official may refer the issue of that conflict of interest to a retired judge or justice of the state courts of California.<sup>3</sup> If the judge finds a conflict of interest, then the City official may hire outside counsel.<sup>4</sup>

- b. The City Attorney's Office and the Ethics Commission share the responsibility both to advise City officers and employees on government ethics and to enforce those laws against City officers and employees.

The City's Charter provides that any person—including City officers and employees—may seek written advice from the Ethics Commission concerning campaign finance, conflicts of interest, lobbying or governmental ethics.<sup>5</sup> It likewise provides that City officers and employees may seek advice from the City Attorney on conflicts of interest and governmental ethics laws.<sup>6</sup> The Charter therefore tasks both the Ethics Commission and the City Attorney's Office with advising City officers and employees regarding their individual liability for violating laws that fall within the Ethics Commission's jurisdiction.

The Charter also requires both the City Attorney's and District Attorney's concurrence whenever the Ethics Commission issues written formal advice to a City employee regarding that person's duties under the Charter or under any ordinance relating to campaign finance, conflicts of interest, lobbying, or governmental ethics.<sup>7</sup> Without those concurrences, the Commission's written advice cannot provide to the requester any immunity from civil penalties (including administrative enforcement) or criminal penalties.<sup>8</sup>

The Ethics Commission and the City Attorney's Office share not only the responsibility to advise but also the authority to enforce. Under the Charter, if the Commission has reason to believe that a violation of the Charter or City ordinances relating to campaign finance, lobbying, conflicts of interest or governmental ethics has occurred—whether based on a third party's sworn complaint or through its own initiative—the Commission is required to immediately forward the complaint to both the City Attorney and the District Attorney.<sup>9</sup> The Charter gives the City Attorney and District Attorney ten days to inform the Commission in writing whether either has already initiated or intends to initiate its own investigation.<sup>10</sup>

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<sup>1</sup> SF Charter § 6.102(1), (3), (4).

<sup>2</sup> *Id.* § 6.102(1).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § C3.699-12(a).

<sup>6</sup> *Id.* § C3.699-12(d).

<sup>7</sup> *Id.* § C3.699-12(a).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

- c. The City Attorney's Office divides its responsibilities across several divisions to streamline its services and to minimize its actual and potential conflicts of interest, but historically only minimally in the case of its relationship with the Ethics Commission and the laws within the Commission's jurisdiction.

The City Attorney's Office handles its competing obligations through four separate divisions: (1) litigation, claims and investigations; (2) government; (3) neighborhoods and community services; and (4) administration. According to the City Attorney's website,

The litigation, claims and investigations teams handle all civil claims and lawsuits filed against the City and County of San Francisco. Litigators sometimes also pursue civil actions in which the city is a plaintiff. Trial attorneys, investigators and legal support professionals handle many cases in addition to defense work, on matters as varied as code enforcement; public integrity cases against public officials, lobbyists and contractors; unfair competition actions against corporate defendants; and many others.

Government division attorneys . . . provide advice on an array of legal issues requiring expertise in public finance, transportation, land use, environmental regulation, real estate, contracts, construction, labor, public utilities (water, power, sewer), rate setting, aviation and maritime law.

With respect to governmental ethics specifically, the City Attorney's Office occupies three essential domains. The City Attorney:

1. Provides advice on ethics compliance issues to City officers and employees and to Commission Staff, and participates in policy discussions with all agencies within City government, including the Ethics Commission;
2. Advises the Commission's Enforcement staff on matters related to investigations and enforcement, and determines whether to pursue its own independent enforcement of possible ethics violations; and
3. Represents the Commission as a judicial clerk during administrative enforcement proceedings.

Attorneys from the City Attorney Government Division's Advice Section fulfill each of these three domains. Currently the same attorney fulfills obligations in the first and second domains. First, that attorney advises both City officers and employees of their potential for individual liability under laws that fall within the Ethics Commission's jurisdiction, as well as advises Commission Staff on how to interpret compliance requirements under those laws. The Commission's Enforcement & Legal Affairs Program may eventually investigate some of those same individuals. Second, the same attorney likewise advises the staff of the Commission's Enforcement & Legal Affairs Program in their handling of those investigations and enforcement matters. Third, having advised both those individuals subject to the Commission's Enforcement jurisdiction and the Commission's Enforcement Program itself, the same attorney then evaluates complaint referrals sent pursuant to Charter Section C3.699-13(a) to determine whether the City Attorney's Office should exercise its concurrent civil jurisdiction.

2. California Rules of Professional Conduct and conflicts of interest among government attorneys

- a. The Rules of Professional Conduct prohibit all attorneys, including government attorneys, from representing multiple clients whose interests conflict unless the attorney obtains their informed, written consent.

As described, the Charter provides that City officials may ask the City Attorney's permission to hire outside counsel whenever the City Attorney may have a prohibited conflict of interest under the California Rules of Professional Conduct. All members of the State Bar of California, including those who represent governmental entities, are governed by the Rules of Professional Conduct.<sup>11</sup> Rule 3-310 requires California attorneys to disclose reasonably foreseeable conflicts of interest and obtain informed written consent from their clients whenever the attorney wishes to represent more than one client in a matter in which the interests of the clients potentially or actually conflict.<sup>12</sup> While this provision constrains government attorneys, courts have articulated special considerations applicable to evaluating claims of conflict of interest in the public sector.<sup>13</sup>

- b. California law follows the one client rule, whereby the City Attorney's single client is the City of San Francisco, except in limited exceptions involving a subentity or official who has power to act independently of the City.

One special consideration governing conflicts of interest among government attorneys is identifying a government attorney's client for purposes of analyzing an actual or potential conflict. Courts in California and the California State Bar Standing Committee on Professional Responsibility and Conduct (the Committee) have interpreted the Rules to provide that a government attorney generally has a single client, the governmental entity itself.<sup>14</sup> This departs from the rule in other jurisdictions where a government attorney represents the "people" or the "public interest,"<sup>15</sup> or the agency itself, or the statutory mission of the agency,<sup>16</sup> or employees within the jurisdiction, or some combination of these.

However, a constituent subentity or official of the governmental entity may become an independent client of the government attorney. That happens only if the constituent subentity or official possesses

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<sup>11</sup> See, e.g., *People ex rel. Deukmejian v. Brown* (1981) 29 Cal. 3d 150, 157 (affirming that Rules of Professional Conduct govern the Attorney General and empower him to withdraw from representing statutorily imposed clients if he or she believes them to be acting contrary to law, even if he cannot take a position adverse to those same clients).

<sup>12</sup> Cal. Rules. Prof. Cond. § 3-310(C).

<sup>13</sup> See, e.g., *In re Lee G.* (1991) 1 Cal. App. 4th 17, 34 (noting that the conflict of interest rules were developed in the private sector and "do not squarely fit the realities of public attorneys' practice").

<sup>14</sup> See *Ward v. Superior Court* (1977) 70 Cal. App. 3d 23, 32–35 (concluding that Los Angeles county counsel had only one client, namely the County, and that no separate attorney-client relationship had been established between the county counsel's office and the assessor's office merely because counsel advised the latter, pursuant to its obligations under the County Charter, in matters pertaining to the latter's official duties, since the assessor's office is "merely an arm of county government over which the board of supervisors has direct supervision").

<sup>15</sup> See Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265, 329 (1996).

<sup>16</sup> *Conflicts of Interest in the Legal Profession* (1981) 94 HARV. L. REV. 1413, 1414.

the authority to act independently of the overall governmental entity and if the government attorney is asked to represent the constituent subentity or official in that independent capacity.<sup>17</sup>

- i. A subentity or official may have a separate attorney client-relationship—and hence a situation involving a conflict of interest for which access to independent legal counsel may be necessary—when neither the Mayor nor the Board of Supervisors may control it and when litigation between the subentity or official and the City may ensue.

The Court of Appeal analyzed conflicts of interest among government attorneys in *Civil Service Commission v. Superior Court*.<sup>18</sup> There, two employees of San Diego County’s Department of Social Services filed complaints before the Civil Service Commission alleging their employer had improperly demoted or terminated them.<sup>19</sup> County Counsel and a Deputy County Counsel advised members and staff of the Civil Service Commissioners during their investigation of those complaints.<sup>20</sup> The same Deputy County Counsel also served as the principal lawyer advising the Department of Social Services, the very department of which the employees had complained and which the Commission was investigating.<sup>21</sup> The Commission eventually ordered reinstatement and backpay compensation.<sup>22</sup> The County disagreed and sought judicial review of the Commission’s decision, and the County Counsel’s office represented the County in that effort.<sup>23</sup> The Civil Service Commission had obtained independent counsel and moved to disqualify the County Counsel from representing the County on the basis that because he had represented the Commission during the investigation the conflict of interest prevented him from representing the County in a lawsuit against the Commission on the same matter.<sup>24</sup> The court found for the Commission, holding that the County Counsel should have been disqualified.<sup>25</sup>

The court based its holding on two conclusions. First, the court acknowledged “the general proposition that a public attorney’s advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney’s relationship to the overall governmental entity of which the agency is a part.”<sup>26</sup> However, it likewise acknowledged an exception where an agency

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<sup>17</sup> See Cal. State Bar Standing Comm. on Prof. Resp. and Conduct, Formal Opinion No. 2001-156 (citing *Civil Service Com. v. Superior Court* (1984) 163 Cal. App. 3d 70). The Committee observes moreover that a city attorney “must not mislead constituent subentities or officials who have no right to act independently of the governing body of the entity and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city’s interest if that interest is or becomes adverse to the constituent or official.” See also *Ward*, 70 Cal. App. 3d at 34–35 (holding that county was the county counsel’s sole client, and, analogizing to private sector cases involving corporate entities, ruled that the county counsel represents the entity, not the individual officers through whom the entity acts, such that no confidential relationship existed between county counsel and the county assessor arising out of general discussions regarding the operation of the assessor’s office).

<sup>18</sup> *Civil Service Com. v. Superior Court* (1984) 163 Cal. App. 3d 70.

<sup>19</sup> *Id.* at 74.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 83.

<sup>26</sup> *Id.* at 78.

functioned independently of the overall entity, as the County Charter provided for the Civil Service Commission.<sup>27</sup> The court distinguished the commission's quasi-independence from situations in which the board of supervisors or city council might directly supervise a given jurisdiction's departments so as to resolve any interagency conflicts.<sup>28</sup> As evidence of sufficient independence for purposes of a separate attorney-client relationship, the court identified a situation in which litigation between an agency and the county may ensue.<sup>29</sup>

Second, the court held that because "the relationship between County Counsel and the Commission is an ongoing one with respect to matters other than the one at issue here,"<sup>30</sup> disqualification was required under the "general rule that an attorney may simply not undertake to represent an interest adverse to those of a current client without the client's approval."<sup>31</sup> The court reasoned that mandatory disqualification arises from a concern about impaired functioning:

The attorney who represents a client with interests adverse to another current client encounters the very real danger "that he will be tempted, perhaps unconsciously, to favor the interests of a particularly important client over the adverse or potentially adverse interests of a less favored client." Here there is every reason to believe that County Counsel would be tempted to favor the interests of the County in giving advice to the Commission. The Commission's primary, if not sole function, is to pass judgment on the conduct of the County toward its employees. Every Commission decision has the potential of being adverse to one of the County's constituent agencies. Because County Counsel is directly responsible to the Board of Supervisors, it is difficult to conceive how any member of the County Counsel's office can render independent advice to the Commission. The structure of the system would appear necessarily to skew such advice in favor of the County and against the county employees. And even in those circumstances where County Counsel renders advice to the Commission favoring the employee, such advice places him in a position adverse to his client, the County.<sup>32</sup>

While the court declined to "define [permanent] solutions for the difficult problem" of such conflicts, the court proposed one possibility—namely, that if the Commission were afforded access to independent legal advice, there would be no reason County Counsel could not continue "to vigorously represent the County even when such representation results in litigation against the Commission."<sup>33</sup>

- ii. A separation in both offices and functions may preclude finding a conflict of interest, as may provisions authoring independent legal representation.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 83.

<sup>30</sup> *Id.* at 78, n. 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (quoting *Conflicts of Interest in the Legal Profession* (1981) 94 HARV. L. REV. 1244, 1296).

<sup>33</sup> *Id.* at 83–84.

Elsewhere, the Court of Appeal has declined to find a disqualifying conflict of interest. *In re Lee G.* involved a contested review hearing for a dependent child before the juvenile court.<sup>34</sup> The dependent's mother allegedly suffered acute paranoia and delusions and could not care for her son.<sup>35</sup> As a result she was herself under a conservatorship, but had an opportunity to satisfy the conditions of a "reunification plan" to resume caring for her son.<sup>36</sup> County counsel represented both the juvenile dependency division and conservatorships.<sup>37</sup> The mother contested the dependency finding and argued that the county had a conflict of interest: she argued that county counsel (in handling conservatorships) insisted on the one hand that as a conservatee she could not commit to contracts, and yet county counsel (in handling juvenile dependency) simultaneously insisted on the other hand that she could understand and manage the reunification plan.<sup>38</sup>

The Court of Appeal held that disqualification of the county counsel was improper, based in part on the fact that the county counsel's juvenile dependency division was in a completely separate office from the county counsel who handled conservatorships, and that attorneys from those separate divisions did not share cases.<sup>39</sup> The court likewise reasoned that because a conservatee had a right of separate representation in conservatorship proceedings, and because the parent of a dependent child could likewise secure separate representation to protect his or her individual rights in dependency proceedings, the legislature had adequately accounted for possible conflicts among county counsel.<sup>40</sup> The court distinguished its case from the decision in *Civil Service Commission* on the basis that no party had argued that either of the county entities at issue had independent authority that might have rendered it a separate county authority and so established a separate attorney-client relationship.<sup>41</sup>

- iii. In the absence of adequate separation, California courts may impose such separation to eliminate probable conflicts of interest.

Finally, the Court of Appeal has imposed an ethical screening process where none existed. In *Howitt v. Superior Court*, a sheriff sought an administrative hearing before the "quasi-independent administrative tribunal" County Employment Appeals Board after he was transferred and suspended.<sup>42</sup> The sheriff discovered that a deputy county counsel would represent the sheriff's department before the Board and, at the same time, the county counsel would advise the Board at the hearing and throughout the Board's decision making process, including by preparing the Board's written decision.<sup>43</sup> The court of appeal reversed the trial court's refusal to disqualify the county counsel's office.<sup>44</sup> The court observed that the Employment Appeals Board was just like the Civil Service Commission in *Civil Service Commission*.<sup>45</sup>

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<sup>34</sup> 1 Cal. App. 4th at 21.

<sup>35</sup> *Id.* at 22.

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.* at 23.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 23, 31.

<sup>40</sup> *Id.* at 30–31.

<sup>41</sup> *Id.*

<sup>42</sup> *Howitt*, (1992) 3 Cal. App. 4th 1575, 1578.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

The court in *Howitt* allowed that only under certain conditions could a county counsel's office "advocate for one party in a contested hearing while at the same time serving as the legal advisor for the decision-maker."<sup>46</sup> The court reasoned that due process concerns in the context of dual representation persist even if different lawyers in the same office perform two functions.<sup>47</sup> Instead, only ethically screening the "advocate" from the "advisor" can satisfy due process concerns.<sup>48</sup> The court added that the law office performing the dual roles (in *Howitt*, the county counsel) bears the burden to prove the adequacy of its screening procedures, since only that office has meaningful access to evidence of such separation.<sup>49</sup> The court concluded that if the county counsel's office could not demonstrate effective screening, a renewed petition for disqualification should be granted.<sup>50</sup>

## Analysis

### 1. Defining the Problem

As to its representation of the Ethics Commission, the City Attorney's Office is burdened by the same ongoing conflict of interest at issue in *Civil Service Commission* and other decisions of the California Court of Appeal applying Rule 3-310 to the government attorney context.

- a. The unique mandate of the Ethics Commission gives it an attorney-client relationship with the City Attorney's Office separate from the single client of the City, creating the potential for conflicts of interest in the City Attorney's fulfillment of its various obligations.

Under the California rule, the City Attorney's Office serves its single client the City and County of San Francisco as a whole. In the course of representing that client, the City Attorney's Office provides advice to multiple City entities and to the individuals who staff them. Put differently, the City Attorney's Office has one "Client" but innumerable "clients."

The City Attorney's Office does not form separate attorney-client relationships with the majority of City entities, officials, and staff whom it counsels, unless those entities have a right under the Charter to act independently of the City and they obtain advice in their separate capacity. Most City officers and employees are subject to the oversight of the Mayor or members of the Board of Supervisors and therefore lack the requisite independence to form a separate attorney-client relationship with the City Attorney's Office.

However, like the Commission at issue in *Civil Service Commission v. Superior Court*, the San Francisco Ethics Commission was structured by the voters to have some intentional institutional independence from the City and County of San Francisco even while creating it as a city department. The Charter empowers the Commission to investigate complaints and enforce the law against the Mayor, members of the Board of Supervisors, and even those in the City Attorney's Office itself. As in *Civil Service*

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<sup>46</sup> *Id.* at 1580.

<sup>47</sup> *Id.* at 1586.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1587.

<sup>50</sup> *Id.*



*Commission*, “an adverse Commission ruling is not always warmly embraced by the affected county agency.”<sup>51</sup> As a result, the same conflict arises on an ongoing basis in San Francisco as that which existed in *Civil Service Commission*. And while the Charter empowers any City officer to seek permission to retain outside counsel on a given matter for which a conflict may exist, the structural problem at issue here concerns a potential conflict in every matter. Because the Ethics Commission has a broad range of duties, including authority to provide advice and to pursue independent enforcement action, and because it may sue or be sued over any given matter, Rule 3-310 prohibits dual representation with informed written consent in any matter for which the clients face a potential conflict of interest.

- b. Inadequate separation of offices and functions creates an ongoing and structural conflict of interest in the City’s Attorney’s fulfillment of its responsibilities toward the Ethics Commission and the laws in the Commission’s jurisdiction.

As described above, with respect to its relationship with the Ethics Commission, the City Attorney’s Office functions in the following domains:

1. It advises City officers and employees of potential liability under the laws falling within the Commission’s jurisdiction, advises Commission Staff on how to interpret compliance requirements under those laws, and participates in policy discussions with all agencies within City government, including by working with the Ethics Commission to draft proposed ordinance language;
2. It advises the Commission’s Enforcement staff on matters related to investigations and enforcement, including against those individuals whom it has advised in Domain 1, and determines whether to exercise its concurrent civil jurisdiction over the facts and laws on which it has advised both City officers and employees and Commission staff under Domain 1;<sup>52</sup> and
3. Represents the Commission as a judicial clerk during administrative enforcement proceedings that prosecute the individuals implicated in Domains 1 and 2.

Also as described above, the City Attorney’s Office likewise fulfills additional duties affecting the whole of the City and County, including by representing the City whenever it may be a party to litigation.

To be sure, the conflicts at issue here are not limited to “a particular matter”<sup>53</sup> but are ongoing and structural, and can have the effect of impairing the exercise of sound judgment by any single attorney.<sup>54</sup> The Harvard Law Review defined this structural problem as the “dual representation” problem within a class of conflicts it calls “conflicts of function.”<sup>55</sup>

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<sup>51</sup> 163 Cal. App. 3d at 74.

<sup>52</sup>The City Attorney’s Office rarely initiates a civil enforcement action based on the complaints referred by the Ethics Commission pursuant to the Charter.

<sup>53</sup> SF Charter § 6.102(1).

<sup>54</sup> That possibility exists independently of the ethical scrupulousness of any individual attorney. The court in *Civil Service Commission*, for example, insisted that its judgment “in no way questions the honesty or integrity of the County Counsel’s office or any of the individuals involved in this case.” 163 Cal. App. 3d at 84.

<sup>55</sup> *Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV at 1416.

Some government attorneys face conflicts among the interests of different “clients” within the government. This type of conflict arises in its most common form when the government provides legal representation to public employees who are sued for acts committed within the scope of their employment. Typically, the government is also an actual or potential party in the action, and its interests may not always coincide with those of the individual employee. In some cases, it may be possible to maintain the dual representation within the government by strict separation between two offices, just as many large agencies separate their investigative and adjudicative personnel. When such separation is not possible, however, the government will probably have no choice but to contract out one advocate’s function to a private attorney.<sup>56</sup>

The solutions Harvard proposed—whether stringent ethical screens or separate counsel—are specifically structural in nature and do not rely on ethically scrupulous attorneys tasked with fulfilling conflicting roles.

Before June 19, 2017, the same Deputy City Attorney occupied Domains 1 and 2. (A second Deputy City Attorney fulfilled the duties in Domain 3.) Based on the law described above, the same Deputy City Attorney may not simultaneously fulfill Domains 1 and 2 without creating a conflict of interest. As explained further below, the City Attorney’s Office has agreed to impose ethical screens between the attorneys handling Staff’s advice and policy functions and its enforcement functions. As of June 19, 2017, one Deputy City Attorney will be responsible for Domains 1 (advice and policy) and 3 (Commission clerk), and a separate Deputy City Attorney will be responsible for Domain 2 (advising Enforcement staff and recommending whether to exercise civil jurisdiction).

## 2. Possible Solutions

Staff has identified three approaches for the Commission’s consideration to address the structural tensions described above.

- Alternative 1: Heightened ethical screens and the FPPC’s three-attorney model

An “ethical screen” is a set of procedures that create an absolute barrier to communication between or among the attorneys in a single office to prevent them from having any connection with a particular matter. For example, the City Attorney’s Office recently took the step of assigning a member of its Litigation Division to defend a respondent of an Ethics Commission investigation. The Deputy City Attorney from the Government Division continues to represent the Ethics Commission, but he and his opposing counsel from the Litigation Division are prohibited from sharing information or discussing the Commission’s investigation in any manner.<sup>57</sup> In addition, until June 19, the City Attorney’s Office

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<sup>56</sup> 94 HARV. L. REV. at 1421–22 (citations omitted).

<sup>57</sup> Voluntary recusal is also an effective tool for reducing the impact of inherent conflicts of interest. For example, a target of an Ethics Commission investigation recently alleged that someone in the City Attorney’s Office advised her that she did not violate the City ethical rules. The implicated attorney disagrees with the employee’s account of their conversation and therefore recused himself from any role in the investigation.

assigned a separate attorney from within the Government Division to represent the Commission itself throughout every enforcement proceeding it handles as a quasi-judicial body. By providing the members of the Commission with independent counsel separate from the attorney who advised Commission Staff, the City Attorney's Office effectively screened the Commission from conflicts of interest specifically related to active litigation after the fashion envisioned in *Howitt*.

However, prior to June 19, 2017, the same Deputy City Attorney was advising City employees, Enforcement Staff, making enforcement decisions on behalf of the City Attorney's Office, and advising the Commission's advice and policy Staff. Staff raised its concerns with this approach with the City Attorney's Office and, on June 19, 2017, the City Attorney's Office voluntarily imposed a new ethical screen between attorneys giving enforcement advice and those giving compliance and policy advice. As of June 19, one Deputy City Attorney will advise the Commission's Enforcement & Legal Affairs Program (Domain 2) and evaluate and make recommendations regarding the suitability for the City Attorney to take civil enforcement action (also Domain 2). Another Deputy City Attorney will continue advising City employees regarding their liability under the City's governmental ethics laws (Domain 1), advising Staff's advice and policy teams (also Domain 1), and serving as the Commission clerk during Staff's administrative enforcement hearings (Domain 3).

Staff welcomes this development and is grateful for the City Attorney's responsiveness to Staff's concerns. If the City Attorney's Office can demonstrate that it adheres to stringent ethical screening procedures, this solution would likely comply with the holding in *Howitt* that only demonstrably stringent separation can secure due process in the face of dual representation.<sup>58</sup> It would likewise mirror the strict ethical screens in place at the Fair Political Practices Commission (FPPC), which retains separate counsel for its Enforcement Division (handling enforcement cases), Executive Director (advising the Commission), and its General Counsel (giving advice and policy recommendations).

Staff nevertheless outlines two alternative proposals below, should the Commission wish to go further than what the City Attorney's Office has voluntarily undertaken.

- Alternative 2: Independent counsel and the modified San Diego model

As noted above, the City Attorney's Office represents all City agencies and departments in litigation in which the City is a party. In doing so, the City Attorney's Office represents the City's best interest and ensures a uniform litigation message and strategy throughout the government. At the May 22, 2017, Commission meeting, Commissioner Renne expressed strong support for maintaining the Commission's relationship with the City and the City Attorney's Office when the Commission is the subject of litigation. This approach would maintain the Commission's relationship with the City Attorney's Office for purposes of outside litigation.

The San Diego Ethics Commission retains outside, independent counsel for all non-litigation matters, but is represented by the City Attorney when it is a named party in litigation. San Diego's independent attorney is on contract with the Ethics Commission. She reports directly to the Commission's Executive

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<sup>58</sup> Those procedures should be especially robust since the attorneys handling these separate domains occupy not only the same physical office but also the same political division, in contrast to the separation at issue in *In re Lee G.* in which the separate attorneys occupied separate physical offices and distinct political functions.

Director on matters as needed, but she retains full-time employment with a local law firm. The San Diego Ethics Commission must pay its outside attorney's fees from its annual budget, whatever they may be in a given fiscal year.

Within its jurisdiction, however, the San Francisco Ethics Commission has a broader mandate, including campaign finance, a public campaign financing program, lobbying, and governmental ethics. Its mandated functions and duties include public disclosure, advice, audits and enforcement. As a result, if the Commission wishes to pursue a model of independence similar to San Diego's, a full-time, in-house general counsel would be necessary rather than a part time, external counsel. This approach would require Charter change, and the following language could be considered for achieving that end:

Related to the Ethics Commission: San Francisco City Charter Section 15.102

~~The City Attorney shall be the legal advisor of the Commission. The Commission shall have its own legal counsel independent of the City Attorney, who is exempt from the competitive civil service selection process under Charter Section 10.104(13), except that the City Attorney will represent the Commission in any court proceeding where the Commission is a party.~~

Staff recommends that its in-house counsel fulfill the responsibilities of Domain 2 because each enforcement matter could potentially develop into a matter "in any court proceeding," leaving the City Attorney's Office to fulfill Domains 1 and 3.

- Alternative 3: General Counsel and the modified FPPC model

At the state level, the Political Reform Act authorizes the FPPC to appoint and discharge "counsel" consistent with applicable civil services laws. Gov't. Code § 83107. The general counsel to the FPPC is a full-time, in-house attorney who reports to the FPPC's full-time agency head, the Commission Chair. In addition to her duties as counsel to the Commission, the FPPC's general counsel leads a team of lawyers and support staff to advise members of the Commission and staff on the interpretation and analysis of laws, court decisions, and rules and regulations affecting the Commission. The general counsel also coordinates outside litigation strategy, and coordinates the development of legislative proposals, regulations and Commission opinions. The FPPC general counsel has a counterpart in the Chief of the Enforcement Division, who oversees that agency's enforcement program. That division allows the FPPC to fully separate its day-to-day advice and policy functions from its enforcement obligations.

Under this approach, the Commission would provide for in-house counsel to fulfill Domains 1 and 3 (providing compliance and policy advice to Commission Staff, and advising members of the Commission during proceedings), and likewise empower the Director of Enforcement to fulfill the responsibilities of Domain 2 (advising the Commission's Enforcement Staff on how to interpret the law within the Commission's jurisdiction and how to pursue matters related to investigation and enforcement). This alternative would not upset the role of the City Attorney's Office in providing uniform litigation support throughout the City, including when the Commission is a party to litigation, but would otherwise limit the role of the City Attorney's Office to advising City officers and employees about potential liability and

determining when to exercise its concurrent civil jurisdiction. This approach also would require a charter change.

Should the Commission decide to pursue this third alternative, it may wish to consider the following language:

Related to the Ethics Commission: San Francisco City Charter Section 15.102

The City Attorney shall be the legal advisor of the Commission. The Commission shall have its own legal counsel independent of the City Attorney, who is exempt from the competitive civil service selection process under Charter Section 10.104(13), except that the City Attorney will represent the Commission in any court proceeding where the Commission is a party. In addition, the Commission's Deputy Director of Enforcement will be responsible for handling legal matters arising in the context of investigations and enforcement.

We look forward to your discussion on Monday and to answering any questions you might have about our research or these policy considerations.

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

ANDREW SHEN  
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June 23, 2017

**VIA E-MAIL**

LeeAnn Pelham, Executive Director  
San Francisco Ethics Commission  
25 Van Ness Avenue, Suite 220  
San Francisco, California 94102  
E-mail: leeann.pelham@sfgov.org

Re: Staff Memorandum Regarding Independent Legal Counsel

Dear Executive Director Pelham:

We write in response to your staff's June 22, 2017 memorandum to the Ethics Commission ("Commission") regarding "Policy Considerations and Possible Approaches for Obtaining Ethics Commission Independent Legal Counsel" (the "Memorandum"). While I will attend the Commission's upcoming June 26 meeting, we wish to provide you, your staff, and the Commission with our office's views on your memorandum in writing before that discussion. As you know, our office was not consulted in the drafting or review of the Memorandum and had only a very limited opportunity to provide feedback to you and your staff before its posting.

As we explain further below, the Memorandum is incorrect in critical respects on the facts and the law. The discussion in the Memorandum ignores the time-tested role this office has played, fails to appreciate the importance of an independent elected City Attorney under the City Charter, and misconceives our current practices in advising and representing the Commission. Most importantly, the Memorandum is wrong in asserting that City Attorney's Office has a conflict of interest as to its current representation of the Commission; the City Attorney's Office has no such conflict. Accordingly, the Memorandum rests on a faulty premise and we disagree with the recommendations your staff makes in the Memorandum.

**A. The City Attorney's Office and its Roles in Ethics-Related Matters**

At the outset, to correct some of the inaccuracies in the Memorandum, we wish to clarify (1) the organizational structure of the City Attorney's Office, and (2) its roles in ethics-related matters.

**1. The City Attorney's Office's Organizational Structure**

The City Attorney's Office is comprised of a number of teams, generally divided by subject matter expertise. By dividing our attorneys on this basis, the City Attorney ensures that each team acquires and develops substantial expertise in its assigned areas. The City Attorney did not create these teams to "minimize [our] actual and potential conflicts of interest" as your staff's Memorandum suggests, on page 3. For example, the City Attorney's Office has a Complex Litigation Team that handles affirmative, consumer protection, and other social impact litigation, a Contracts and Construction Team that provides general support on contracting and public works projects, and a Labor Team that works with the Department of Human Resources

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and individual City departments on labor and employment matters. The City Attorney's Office also has an Ethics and Election Team that works with the Ethics Commission, the Department of Elections, and ethics and elections-related matters with other City departments and officials. The Ethics and Elections Team has three members: Jon Givner, Andrew Shen, and Josh White. As you know, I serve as the primary point of contact between the Commission and the City Attorney's Office and have done so for most of the past nine years.

Through this assignment, I have gained recognized experience and expertise in state and local law regarding campaign finance, conflicts of interest, governmental ethics, lobbying, and public meetings and public records. But to the extent appropriate, I also turn to my colleagues in the City Attorney's Office for assistance in other matters. For example, if your staff requests that I prepare a contract with a vendor, I likely will turn to Deputy City Attorneys with subject matter expertise on the Contracts and Construction Team for assistance. In other words, a single matter may involve members of multiple teams in the City Attorney's Office to ensure the consistency and high quality of our legal advice.

## **2. The City Attorney's Office's Role in Ethics-Related Matters**

The Memorandum, on page 3, lists "three essential domains" of our office as to ethics-related matters. This list captures several of our roles, but not all of them – below is a more complete listing:

- providing ethics compliance advice and trainings to City departments, officers, and employees;
- providing ethics advice to appointing authorities regarding potential candidates for appointment to city offices, boards and commissions;
- drafting legislation regarding local conflict of interest and ethics laws;
- advising City officials on pending state legislation that addresses conflict of interest and ethics laws;
- investigating potential conflict of interest and ethics violations; and
- with respect to the Commission,
  - staffing Commission meetings;
  - advising the Commission's enforcement division and the Commission itself on enforcement matters;
  - reviewing referrals of ethics complaints filed with the Commission
  - working with the Commission's education and compliance division on requests for advice from the public and City officers and employees; and
  - providing advice to the Commission's policy division on legislation and other policy initiatives.

Except for enforcement matters pending before the Commission, which we discuss further below, my work in these areas is not exclusive. For example, other Deputy City Attorneys may provide ethics compliance advice to their assigned departments, boards, and commissions. But internally the Ethics and Elections Team is responsible for ensuring that our office issues consistent advice to all City agencies and officers.

In this regard, we must specifically correct a mischaracterization in the Memorandum about potential overlap in these roles. The Memorandum inaccurately states on page 3, "the



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same attorney” who provides ethics compliance advice to City officers and employees advises your staff in “investigations and enforcement matters” regarding “some of those same individuals.” To be clear, the vast majority of City departments, employees, and officers we have advised never become the subject of an ethics complaint or a Commission investigation. In the rare circumstances in which I have provided compliance advice to a City employee or officer, and that individual later becomes the subject of an ethics complaint, I do not advise your enforcement staff on that matter, nor do I advise the Commission. In these circumstances, we have assigned other Deputy City Attorneys to work with your enforcement staff and with the Commission. You and the Commission should be aware of this long-standing practice of our office.

More broadly, you should also understand that the City Attorney’s Office provides consistent advice to City departments and officials on ethics issues. When presented with the same legal questions, the City Attorney’s Office’s Ethics and Elections Team will provide consistent advice to all its City clients – whether the client is an elected official, a City employee or a member of the Commission’s staff. Indeed one of the core purposes of the Charter’s provision for an elected City Attorney is to ensure this very consistency. In providing ethics advice, we do not play favorites.

**B. The City Attorney’s Office Has No Conflict of Interest with Respect to the Commission**

**1. The City Attorney’s Office’s Client is the City and County of San Francisco**

In the Memorandum, your staff correctly notes that in California, a government attorney’s client is the government entity itself. *See, e.g., Ward v. Superior Court* (1977) 70 Cal.App.3d 23; California Rule of Professional Conduct 3-600(A); Cal. State Bar Eth. Op. 2001-156. The San Francisco Charter is in lockstep with this principle by designating, in Section 6.102, that an elected City Attorney shall be the legal advisor to and representative of the City and all of its constituent boards, commissions, departments, employees, and officials. In addition, to the extent there are potential conflicts of interest in a particular matter involving individual members of our office, we would follow the process for such matters set forth in Section 6.102. Formal principles aside, this structure provides time-tested, practical benefits to the City.

The City Attorney is elected, giving the City Attorney the ability to provide objective, independent, and unbiased advice to all of the officials, boards and departments of the City. The City Attorney does not give the Commission the advice it wants to hear so the City Attorney can help ensure job security, as could be the case for in-house counsel subject to the Commission’s supervision or private outside counsel hired by the Commission. In other words, we do not tell the Commission and its staff what you want to hear so we can keep our job, we tell you the legal reality. The City Attorney’s role, as an independent elected official, allows policymakers to reach policy decisions on their merits free of internal legal battles between various legal staffs. As former City Attorney Louise Renne wrote in an article published recently in the *Golden Gate University Law Review*, “Can you imagine the chaos that would ensue if the Mayor or the Board of Supervisors or separate departments or agencies decided to hire their own attorney, particularly if they did not like the advice provided by the City Attorney?” That admonition applies with equal force to the Memorandum’s proposals here. A copy of the article is attached.

Just as importantly, a single City Attorney’s Office allows the City to speak with one voice on legal issues, and avoids the uncertainty and gridlock, as well as tremendous taxpayer expense, that would result if each City department could hire its own counsel to expound its view



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of the City's legal rights and obligations. Ms. Renne's recent article also describes the role of the City Attorney and the benefits to the City of City officials receiving consistent legal advice from a unified law office so that the City speaks with one legal voice.

**2. The *Civil Service Commission* opinion does not establish that the City Attorney's Office has a conflict of interest with respect to the Commission**

In the Memorandum, your staff relies on an incorrect legal analysis of *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, to conclude on pages 8-9, that the City Attorney's Office has a conflict of interest as to its representation of the City and the Commission. In *Civil Service Commission*, the Court of Appeal held that San Diego's County Counsel had a conflict of interest and could not bring an action in the name of the County of San Diego against its Civil Service Commission after simultaneously advising San Diego County Department of Social Services and San Diego's Civil Service Commission relating to a personnel matter in the social services department. The Court of Appeal reasoned that the Civil Services Commission was a "quasi-independent" agency that is legally distinct from the County of San Diego for conflict of interest purposes. But in the Memorandum your staff misapplies the holding in the *Civil Service Commission* case.

First, *Civil Service Commission* stands only for the proposition that that a conflict arises where a public entity's attorney brings an action in the name of the entity against one of its constituent agencies after advising that an agency on the matter giving rise to the litigation. That case does not hold that a conflict of interest arises simply because a public entity attorney advises two constituent agencies of that entity on the same subject matter where one of the agencies has the authority to overrule the other one. There is obviously no ongoing litigation between the City and its Commission, nor is there any immediate prospect of such a lawsuit. *Civil Service Commission* thus has no bearing here.

Second, the Commission is not a "quasi-independent" agency separate and distinct from the City. Like many other City agencies and departments, the voters created the Commission through an amendment to the City's Charter. All of the Commission's duties, responsibilities, and roles are set forth in the Charter or local ordinances – it has no authority to act, except as provided in local law. The Commission is subject to the same budget process as other City departments. And all of the Commission's hiring and employment decisions are subject to the same Civil Service restrictions as other agencies. And in creating the Ethics Commission, the voters expressly stated in Charter Section 15.105 that the City Attorney would be the legal advisor for the Commission, just as the City Charter requires our office serves as the advisor for every other City department and commission. For conflict of interest purposes, the Commission is no different from any other City agency or department.

On page 9 of the Memorandum, your staff suggests that the Commission should be considered a "quasi-independent" agency because its decisions are "not always warmly embraced by the affected county agency" (citing *Civil Service Commission*, 163 Cal.App.3d at 74). While this may be true as a practical matter, it is hardly unique to the Commission and in any event it is not legally significant. The City is comprised of many agencies, boards, commissioners, department heads, and elected officials with different policy views – and they may disagree in ways not "embraced" by the parties involved. And often they exercise checks and balances functions over other City agencies. For example, the Mayor may veto legislation that has been passed by the Board of Supervisors. The Board of Appeals is often asked to overrule another department's approval of a permit. The Controller's Office may investigate a whistleblower's complaint that a department head has allegedly misused City funds. City

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departments may disagree, a City department may overrule another department's decision, and City departments (other than the Commission) can investigate City employees and other City agencies – but this reality does not mean each of these agencies and departments is “quasi-independent” for the purposes of the rules of professional conduct. Otherwise a governmental structure with built in checks and balances could not have a single lawyer whose duty is to give independent and consistent advice to all the government's officers and agencies.

Likewise, that the Ethics Commission may initiate administrative actions and “be sued over any given matter” does not make it is “quasi-independent” as the Memorandum states on page 9. As just one example, the City's Office of Labor Standards Enforcement can also initiate administrative actions against private parties (for violations of the Health Care Security Ordinance, the Minimum Compensation Ordinance, the Paid Parental Leave Ordinance, and a variety of other labor laws that apply to private workplaces). And the Commission is far from alone in being previously named as a defendant in a lawsuit. City agencies and officials are routinely sued in a wide variety of matters handled by the City Attorney's Office.

In sum, the Memorandum sets forth an analysis that is legally erroneous and provides an untenable conclusion. While critically important to the City, the Commission's authority, duties, and responsibilities are not unique either within the City or within many other state and local governmental entities. Accordingly there is no reason to conclude that it “functions independently of the overall entity,” *Civil Service Commission*, 163 Cal.App.3d at 78, and that the City Attorney's Office then has any conflict in advising and representing the Commission and the City as a whole.

### **C. Due Process Requirements in Enforcement Proceedings**

Separate from the preceding conflict of interest concerns, constitutional due process requires that the City Attorney's Office assign and wall off from one another certain Deputy City Attorneys who advise the Commission in administrative enforcement proceedings and different Deputy City Attorneys who advise the Commission's staff who appear as a party in those enforcement actions. Our office has long-recognized the importance of these due process concerns, and strictly follows these requirements.

When “an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.” *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737. “A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party.” *Id.* A tribunal may be unduly biased when one of the attorneys appearing before it as an advocate for a party is simultaneously serving as the tribunal's legal advisor in the same proceeding. *Id.* at 739.

For this reason, the City Attorney's Office has, as to the Commission's administrative enforcement matters, assigned me to primarily advise the Commission's enforcement staff and Josh White to primarily advise the Commission itself on such matters. The Court of Appeal has upheld the City Attorney's Office's approach to this issue in similar administrative proceedings. *See Richardson v. City and County of San Francisco Police Com.* (2013) 214 Cal.App.4th 671, 702-06 (approving the City's due process screens in police disciplinary proceeding).

Earlier this month, I met with you and Deputy Director Jessica Blome regarding this arrangement, and you requested that Josh and I switch roles with respect to enforcement matters. While there are no ethical or due process concerns with our current assignments, to be responsive to your request, on June 19, our office agreed to do so and I informed Deputy Director Blome that the City Attorney had decided that Josh and I would switch these roles. But to clarify this reassignment, there will be occasions in which Josh will directly advise City departments and

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personnel on ethics compliance matters and may review draft ordinances involving ethics issues. While I tend to take the lead on such assignments, there will be occasions in which Josh's assistance is necessary and appropriate. We will continue to maintain appropriate due process screens in individual enforcement matters, but the Memorandum is incorrect to suggest that there will be an "ethical screen" between Josh and me on policy or advice matters unrelated to a specific enforcement proceeding. The law does not require a screen in those circumstances, and the City Attorney does not intend to apply one.

**D. The City Attorney's Office Opposes Staff's Proposed Alternatives**

Because the City Attorney's Office has no conflict of interest as to advising the Commission and also because we already fully address any due process requirements, we disagree with staff's proposed alternatives set forth at the end of the Memorandum. There is no legal basis for the Commission to have "independent" legal counsel and such counsel would more likely lead to biased legal advice, costly legal fights and inconsistent approaches to the same legal issues faced by City departments and personnel.

The City Attorney's Office also specifically disagrees with the aspects of "Alternative 2" and "Alternative 3" that suggest that the Commission have its own counsel and that the City Attorney's Office would continue to represent the Commission in litigation. Such a recommendation ignores that providing sound legal advice requires consideration of litigation risks, and that it is common for advice attorneys to consult their litigation colleagues about policy matters likely to lead to legal challenges. A complete division of advice-related roles and litigation between different legal offices is ultimately impractical and unworkable, and we would oppose any such proposed division.

Thank you for considering these comments, and I look forward to discussing this further at Monday's Commission meeting.

Very truly yours,

DENNIS J. HERRERA  
City Attorney



ANDREW SHEN  
Deputy City Attorney

cc: Members, Ethics Commission (via e-mail)  
Dennis J. Herrera, City Attorney  
Jessica Blome, Deputy Director (via e-mail)  
Jeffrey Pierce, Senior Investigative Analyst (via e-mail)  
Kyle Kundert, Senior Policy Analyst (via e-mail)

Attachment: Golden Gate Law Review article

## ARTICLE

# THE OFFICE OF THE CITY ATTORNEY OF SAN FRANCISCO

LOUISE RENNE\*

### I. THE UNIQUE ROLE OF THE SAN FRANCISCO CITY ATTORNEY

The San Francisco City Attorney's Office serves the Mayor, Board of Supervisors, and other elected officials as well as the approximately 100 departments, boards, commissions, and offices that comprise the City and County of San Francisco's government.<sup>1</sup> In many ways, the office is unique among city attorney offices, both because of the extraordinary scope of activities performed by the City and County of San Francisco's government, and the scope of the City Attorney's Office activities within that structure.

At the outset, it is important to note that the San Francisco City Attorney is elected — comparatively unusual among cities. All county counsels in California are appointed by the County Board of Supervisors, and most city attorneys are appointed by the City Council. Only a few other city attorneys in California are elected.<sup>2</sup> The first elected San Francisco City Attorney was Franklin Knight in 1898.

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\* Louise Renne is a partner at Renne Sloan Holtzman Sakai, LLP, also known as the Public Law Group, a firm that she co-founded in 2004 to serve public agencies, nonprofits, and community organizations. She practices public interest litigation and fights against elder financial abuse. Ms. Renne served as the elected City Attorney of San Francisco from 1986 to 2001, and served as a member of the San Francisco Board of Supervisors from 1978 to 1986.

Acknowledgments: I would like to thank the following for their review and input into this article: my two partners in private practice and former deputies in the office — Jon Holtzman, the instigator and champion of affirmative litigation in the office; and Randy Riddle, a specialist in ethics and government law; and Buck Delventhal, who has been and remains a widely respected government law attorney in the City Attorney's Office.

<sup>1</sup> See The Office, CITY ATT'Y OF S.F., <http://www.sfcityattorney.org/aboutus/theoffice/> (last visited Feb. 25, 2017) (providing a description of the office's mission and responsibilities).

<sup>2</sup> Michael Reiter, *Elected City Attorneys in California Versus Appointed City Attorneys in California*, MICHAEL REITER, ATTORNEY AT LAW BLOG (May 3, 2011), <https://michaelreiterlaw>



The large size of the office reflects the diversity of the tasks it undertakes. San Francisco is the only consolidated City and County in California. This makes the role of the San Francisco City Attorney unique because he or she acts both as county counsel and as city attorney. In all other counties in California, there is a County Counsel who represents the county in its legal affairs (e.g. county health and social services), while each city within the county has its own city attorney providing services typically associated with a city (e.g. police and fire services). As a result of this unique structure, the San Francisco City Attorney has far broader responsibilities than any individual county counsel or city attorney in California.

The San Francisco City Attorney also has broader responsibilities for historical reasons. At one time, neighboring San Mateo County was a part of San Francisco County, but San Mateo County separated in 1856.<sup>3</sup> At that time, San Francisco then became a City and County. However, portions of the land in San Mateo County remained under San Francisco ownership: San Francisco International Airport; Crystal Springs Reservoir, which is a part of the Hetch Hetchy water and power system that provides San Francisco with its drinking water; and Sharp Park Golf Course, which is owned and maintained by the San Francisco Recreation and Park Department.<sup>4</sup> The San Francisco City Attorney is the attorney for all these enterprises. Unlike most cities, San Francisco has its own port, airport, employee retirement system, water, power, and clean water systems; and is one of the very few cities that operate its own transportation system. This further expands the responsibilities of the office.

Another unique feature of the San Francisco City Attorney's office is that the San Francisco City Attorney (as well as a few other City Attorneys in California cities having a population in excess of 750,000) is authorized under state law (Bus. & Prof. code § 17200 et seq) to pursue allegations of unfair and unlawful competition in civil proceedings. As will be discussed further in this article, this state law assists the City Attorney in pursuing affirmative litigation on behalf of citizens and taxpayers. In such cases, the City Attorney represents the people of the State of California — a role more traditionally associated with that of the State Attorney General.

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.wordpress.com/2011/05/03/elected-city-attorneys-in-california-versus-appointed-city-attorneys-in-california/.

<sup>3</sup> *San Francisco History – Timeline*, SFGENEALOGY, <http://www.sfgenealogy.com/sf/history/hgtml.htm> (last updated Feb. 6, 2016).

<sup>4</sup> *Real Property Owned by the City and County of San Francisco: Parcels Outside of the City and County Boundaries*, CITY AND CTY. OF S.F. – REAL ESTATE DIV., <http://sfgov.org/realestate/real-property-owned-city-and-county-san-francisco-parcels-outside-city-and-county-boundaries> (last updated May 29, 2002).

Over the years, there has been discussion over whether having an elected City Attorney is a good idea. One side argues that having an elected City Attorney means the City Attorney may have his or her own political or policy agenda. From my point of view as a former City Attorney, electing this position has great merit because it helps to ensure that the City Attorney can be fully independent and neutral regarding legal advice offered. Neither the Mayor nor the Board of Supervisors can complain that the City Attorney inherently favors one side over the other because neither one appoints the City Attorney. Furthermore, since the City Attorney is an elected official, the City Attorney is accountable to the public. This reinforces the concept that in exercising the powers of the City's chief legal officer, the City Attorney must both provide the best possible legal advice and protect the public interest.

I began my journey as City Attorney due to the unfortunate death of George Agnost, who had served San Francisco from 1977 to 1986. I was appointed to fill out the remainder of his term by Mayor Dianne Feinstein, the first female San Francisco mayor. I became the first female City Attorney, and was reelected three times. Ultimately, I served as City Attorney for 16 years, from 1986 to 2002. During that time, we had the opportunity to more than double the size of the office. With more attorneys, we provided more specialized services in the areas of family and children services,<sup>5</sup> telecommunications, water, and environmental law. We also aggressively pursued affirmative litigation on behalf of the public. Currently, the office has about 185 attorneys.

## II. THE DUTIES OF THE SAN FRANCISCO CITY ATTORNEY

The San Francisco Charter controls the way in which San Francisco is governed. Charter § 6.102 sets forth the specific duties of the San Francisco City Attorney.<sup>6</sup> Some other local and state laws (such as Bus. & Prof. Code § 17200 et seq) augment these duties and powers. Because the charter mandates that the City Attorney is the chief legal advisor and

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<sup>5</sup> Now United States Senator Kamala Harris served as head of the Family and Children Services when she was in the City Attorney's Office.

<sup>6</sup> See S.F., Cal., CHARTER § 6.102, [http://library.amlegal.com/nxt/gateway.dll/California/charter\\_sf/articleviiotherelectiveofficers?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$anc=JD\\_6.102](http://library.amlegal.com/nxt/gateway.dll/California/charter_sf/articleviiotherelectiveofficers?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_6.102) (explaining the duties of the San Francisco City Attorney: representing the City and County in all legal proceedings; providing advice or written opinions to any officer, department head, board, commission or other unit of local government; making recommendations to the Board of Supervisors for or against the settlement or dismissal of legal proceedings; approving as to form all surety bonds, contracts and ordinances; examining and approving title to all real property to be acquired by the City and County; preparing reviews annually and making available to the public a codification of ordinances of the City and County; investigating, evaluating and recommending disposition of all claims made against the City and County).

representative of all elected officials and City units of government, the City speaks with one legal voice. Can you imagine the chaos that would ensue if the Mayor or Board of Supervisors or separate departments or agencies decided to hire their own attorney, particularly if they did not like the advice provided by the City Attorney? There will obviously be occasions where the City attorney may have a conflict, but the Charter provides a remedy in such cases by allowing the City Attorney to hire outside counsel.<sup>7</sup>

In general terms, the duties of the office can be divided into two sometimes-overlapping categories: (1) advice and (2) litigation. The advice side of the office provides oral or written advice and approves the form of all new contracts, ordinances, and other city documents. The litigation side of the office represents the City in all legal proceedings, including administrative hearings, proceedings in state or federal trial and appellate courts, and the United States Supreme Court. Since both halves serve all 100 city departments, the City Attorney's Office is called upon to be proficient in such diverse areas of law as arts and cultural matters, health and welfare issues (including issues involving children and families), public finance and tax, labor and employment issues, land use, ethics and public interest laws, environmental law, general municipal law (including the application of diverse state and federal laws), real estate, construction and contracts, code enforcement and more. How these various responsibilities are currently organized can be viewed on the City Attorney website.

#### A. ADVICE

On the advice side, the City Attorney's role is to provide legal advice applicable throughout the city and not to make policy, a role reserved to the City's policy makers including the elected officials and department heads. Drawing a distinction between giving legal advice and making policy is not always clear or easy; best understood, the City Attorney may frame legal options for its client agencies or elected officials, but it is the agencies or elected officials that must decide how to proceed. The City Attorney may privately harbor the opinion that a chosen policy is a bad one or that a poor business deal has been struck, but the City Attorney has an obligation to defend the City's final policy decision unless it is contrary to the Canon of Ethics or plainly unconstitutional.

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<sup>7</sup> See S.F., Cal., CHARTER § 6.102, [http://library.amlegal.com/nxt/gateway.dll/California/charter\\_sf/articleviiotherelectiveofficers?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$anc=JD\\_6.102](http://library.amlegal.com/nxt/gateway.dll/California/charter_sf/articleviiotherelectiveofficers?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_6.102).

The issues presented to the City Attorney are often novel and “on the cutting edge.” They can be raised in the context of a proposed piece of legislation on which the Mayor and the Board of Supervisors may or may not agree. A proposed ballot measure, whether emanating from within City Hall or from the citizens, may raise substantial legal issues to be “opined upon” by the City Attorney. An ethics or conflict of issue may arise which requires an opinion to be issued by the City Attorney. There are often contentious land use issues that will require the City Attorney to provide a legal answer. And of course, there will often be civil rights issues to be considered and addressed by the City Attorney’s Office. For example, I remember when the issue of domestic partner benefits was controversial. The affirmative stand of the City on this question ultimately led to the validation of same sex marriages, a history in which the San Francisco City Attorney’s office was involved from beginning to end.

During my time as City Attorney, one of the most dramatic events was the earthquake in 1989. The City Attorney’s Office was called upon to join the Mayor and other critical emergency personnel at the command headquarters to draft the important and required emergency declaration that would provide needed relief and allow emergency actions to take place.<sup>8</sup> In fact, if one reviews the myriad responsibilities undertaken by the City Attorney’s office, it is clear that there is little that occurs within city government that does not come through the door of the City Attorney’s office in one way or another and requires the considered advice of the City Attorney’s office.

One final point about the unusual role of the City Attorney in San Francisco: in a government as large and diverse as San Francisco’s, battles among officials, boards, and departments are inevitable. The City Attorney can serve a critical role in keeping the peace, actively working with different parts of the government to forge consensus.

## B. LITIGATION

The City Attorney represents the City and County in all legal proceedings, no matter the forum. This also includes all claims against the City even if they do not arise to formal litigation. Most of the claims and litigation handled by the office are on the defense side, ranging from individual “slip-and-fall” cases to large class actions. And they range

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<sup>8</sup> During that difficult time, members of the City Attorney’s office also volunteered to help with the shelters that were needed and were “on the spot” in the Marina area for several days working closely with the police and fire departments in providing needed service.



across all aspects of city government, literally from A to Z — the airport to the zoo.

Many matters (certainly the large and complex) involve not only significant amounts of money, but important questions of public policy. This requires the City Attorney not only to be a forceful advocate on behalf of the City, but also to work closely with the City's policy makers to ensure that the litigation can be successfully resolved. The City Attorney must take all settlements to the Board of Supervisors and the Mayor for approval.

The history of the City Attorney's office is replete with cases of high visibility raising important public policy issues. One such civil rights case arose shortly after I became the City Attorney with litigation filed against the Fire Department challenging the hiring and promotional policies of the department for discriminating against women and minorities. Challenges to the department's policies had a long history even before I became City Attorney, and there were strongly held views about the department policies (to put it mildly) on all sides. At the time, Ed Lee, now mayor of San Francisco, was an attorney for the plaintiffs. The deputy responsible for handling the case was a forceful advocate, but at the same time was able to work with all sides in the case to resolve it in a positive way, forever changing the department. The San Francisco Fire Department not only changed its policies, it set a precedent for other fire departments across the country. Not long after the case was resolved, the first African-American fire chief in San Francisco, Robert Demmons, was appointed; he was a lead plaintiff in the litigation. Today, the Fire Department is led by a woman, Joanne Hayes-White.

In addition to acting as the City's defense attorney, the San Francisco City Attorney's office has been at the forefront of pursuing affirmative litigation, acting as a plaintiff's attorney in matters where the City has a valid claim to enforce or where members of the public have been "wronged". Affirmative litigation cases can range from a code enforcement matter to unfair competition actions against corporate defendants and others, using California's Unfair Competition Law as a legal tool.<sup>9</sup> At the time we first pursued affirmative litigation, it was very much outside the norm of the generally defense-minded public law bar. But, given the array of affirmative litigation cases that the San Francisco City Attorney has pursued against banks, the lead paint companies, title companies, the tobacco industry and others, and the nearly \$1 billion in recoveries from those cases, I think that it is fair to say that the San

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<sup>9</sup> See CAL. BUS. & PROF. CODE § 17200 et seq. (West 2016).

Francisco City Attorney's office is now widely recognized as a national leader in public sector affirmative litigation.

One of the first affirmative litigation cases in which I was involved was the City's lawsuit against the Olympic Club challenging its policies barring women and all minorities from joining the club. Some argued that the club should be immune from the suit because it was private. But, as we pointed out, three of the holes in the Olympic Club golf course were on city-owned public land. So, we argued, the club had a choice; play golf on a 15-hole course and continue to discriminate, or play on 18 holes and accept women and minorities. Fortunately, the Club had a strong preference for 18 holes and changed its policies. Women and minorities became members and a woman has become President of the Club. The Olympic Club case foreshadowed similar fights elsewhere. Women are now able to join other prestigious golf clubs such as Augusta National. And, just recently, the British Open transferred its tournament from a well-known club in Scotland that continued to discriminate against women, to a club in Scotland that did not.<sup>10</sup>

Another case that stands out for its long-term historical consequences is the lawsuit to stop the Joe Camel ads targeting young people to get them to start smoking, which we won, and the related litigation in which other cities and counties throughout California joined against the tobacco companies because of the adverse health injuries caused by smoking. Ultimately, when there was a nation-wide global settlement involving all the State Attorneys General, California was unique in that local governments in California received half the proceeds allocated to California because of the effort that San Francisco and its local allies had made on behalf of California and its local governments.

I am proud to say that instead of just spending the money "willy nilly" as some jurisdictions did, the voters of San Francisco voted to use the proceeds to rebuild Laguna Honda Hospital — a hospital which has worked with the poor and those in need of skilled nursing services since the Gold Rush. San Franciscans really do have a heart!

In conclusion, it is obvious that the office of the San Francisco City Attorney is unique and plays a huge role in making San Francisco Government work. Whether on advice matters or litigation, the San Francisco City Attorney's office has often had a profound impact on the lives of San Franciscans and the government that serves them. The office now attracts the "best and the brightest" lawyers nationally, and works with top law schools to encourage lawyers who might otherwise have wound up in top private law firms. Throughout the years, the people of San

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<sup>10</sup> *Muirfield Out of Open as Women Members' Golf Ban Stands*, RTE (May 19, 2016), <http://www.rte.ie/news/2016/0519/789499-golf-scotland/>.

Francisco have been fortunate to have a City Attorney's office staffed by attorneys and staff dedicated to the City and to the public interest. May it always be thus!