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September 20, 2023

REPORT TO HONORABLE MEMBERS OF THE RULES COMMITTEE

Proposed Ballot Measure to Amend the San Diego Charter to Divide the City Attorney's Office by: (1) Replacing the Elected City Attorney with Legal Counsel Appointed by and Accountable to the City Council; and (2) Electing a City Prosecutor to Prosecute Misdemeanors and San Diego Municipal Code Violations.

INTRODUCTION

This Report summarizes this Office's initial review of a ballot measure (Proposed Measure) introduced by Jared Quient and Gil Cabrera (Proposers), which the Rules Committee considered at their meeting on July 26, 2023. The Proposed Measure would amend the San Diego Charter (Charter) to create two separate law departments in the City of San Diego (City):

- Legal Counsel Appointed by the City Council (Council). Voters would lose their right to elect a City Attorney accountable to local citizens. The Council would appoint legal counsel, referred to in the Proposed Measure as "Municipal Counsel," who would lead an office of attorneys and support staff responsible for all civil legal work for the City. The Proposed Measure does not prohibit the Council from retaining outside counsel to serve in this capacity instead of appointed Municipal Counsel and staff who would be City employees. The Ethics Commission, the Commission on Police Practices (CPP), and possibly the City Auditor, would also have their own legal counsel independent of Municipal Counsel.¹ The Council could remove Municipal Counsel and appoint a new person to serve in that role at any time, for any reason, and without notice or explanation.
- City Prosecutor. Voters would elect an attorney, referred to in the Proposed Measure as the "City Attorney,"² who would lead an office of prosecutors and support staff responsible only for the prosecution of misdemeanors and San Diego Municipal Code (Municipal Code or SDMC) violations.

This Report addresses why City voters opted through the Charter (i.e., the local constitution) to elect a city attorney who is accountable to them and explains the current

¹ The Ethics Commission and CPP use outside law firms. CPP will soon hire an employee to serve as its in-house legal counsel. It is unclear at this time whether the City Auditor would employ legal counsel or utilize one or more outside law firms.

² To avoid confusion, this position is referred to throughout this Report as "City Prosecutor."

operational structure of the City Attorney's Office. It also provides an initial analysis of the Proposed Measure.

The Proposers, their supporters, and some Rules Committee members said the Proposed Measure is a "modest" charter change that would allow the City Attorney to focus more on criminal prosecution, gun violence prevention, "slumlords," and workers' rights; "professionalize" the Office; and streamline legal services, among other suggested benefits. Rules Committee Chair Elo-Rivera suggested that the Council's policy direction regarding legal advice rendered by Municipal Counsel would lead to better local governance. No one explained how eliminating the watchdog branch of City government would benefit taxpayers, aid City governance, increase efficiencies, or ensure that all Council Districts receive equitable attention. Mr. Quient did not respond to this Office's attempts to obtain additional information.³ This Report therefore cannot analyze the Proposers basis for a wholesale reorganization of the City Attorney's Office.

This Office previously advised the Rules Committee that good governance demands a robust and public discussion with the electorate, which still has not occurred. *See* City Att'y MS 2023-6 (Aug. 1, 2023). If sufficient time is not allotted for education and public discourse, voters will not understand how this consequential proposal impacts their lives. This is particularly concerning since the November 2024 ballot may have three items relating to the City Attorney: whether the voters should give up their right to elect their City Attorney; who should replace the termed-out City Attorney and whether that person will serve as the City Attorney position exists today or as amended by the Proposed Measure; and whether the City Auditor should have their own independent legal counsel.

The City has traditionally convened a Charter Review Committee (CRC) before making substantive changes to the City's governance structure. However, that did not happen here, nor has there been a discussion with experts or interested stakeholders. The most important voices are those of the electorate, who are long accustomed to having a direct impact on City governance by exercising their right to elect their City Attorney. They must be given an opportunity to understand the Proposed Measure and a forum to voice their opinions. In addition, the CRC could conduct a holistic review of all fourteen paragraphs of Charter section 40 concerning the City Attorney's role and responsibility to determine whether other amendments are warranted.

The Rules Committee has indicated its interest in placing the Proposed Measure on the November 7, 2024, ballot⁴ and has asked this Office to conduct an initial legal analysis.

³ At the Rules Committee hearing on July 26, 2023, the Chair asked the Proposers to "work with the City Attorney's Office and the Independent Budget Analyst (IBA) to furnish background information, provide an analysis of the proposal, and report on their findings at a future Rules Committee meeting." On August 1, 2023, the Council President's Office emailed Mr. Quient and Mr. Cabrera to again suggest that they work with the City Attorney's Office and the IBA to prepare for the hearing on October 4, 2023. On August 8, 2023, City Attorney Mara W. Elliott phoned Mr. Quient and left a voicemail requesting background information on the Proposed Measure. To date, this Office has not received a response or additional information from either Proposer.

⁴ Mr. Quient requested that the Proposed Measure be placed on the ballot in March 2024.

HISTORY

San Diego voters created the City Attorney's Office in the general election of April 7, 1931.⁵ Under Charter section 40, the City Attorney serves as "the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties." The City Attorney also has "concurrent jurisdiction with the District Attorney of the County of San Diego to prosecute persons charged with or guilty of the violation of the state laws occurring within The City of San Diego for offenses constituting misdemeanors." San Diego Charter § 40.1.

Historical documents preceding the 1931 vote describe why the electorate decided to elect a City Attorney who would be accountable to the public, instead of delegating appointment authority to elected officials. Ray Mathewson, the labor union representative on the Freeholder Board,⁶ described the role of a voter-elected City Attorney as follows:

The duty of the city attorney is to give legal advice to every department and official of the city government on municipal matters. He also must act as the representative of the various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. If elected, the city attorney is in a position of complete independence and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

Voicing its support for an elected City Attorney, The Hillcrest News wrote: "The city attorney is to be elected by the people as a guarantee that the legal head of the city will be able to fearlessly protect our interests and not be an attorney appointed to carry out the wishes of council or manager."⁷

Ultimately, nearly 80% of City voters agreed that their City Attorney should be elected and not appointed.⁸ As the taxpayer's advocate, the City Attorney's Office is a separate and independent branch of government and the public's watchdog, reflecting a checks-and-balances system that has proved to be an effective model of good governance. The City Attorney helps oversee City government on behalf of taxpayers and works to keep the public informed. In recent years, the Office has issued public opinions opposing the 101 Ash Street settlement with Cisterra, advocating for fair deal terms for the sale of Qualcomm Stadium to San Diego State University, and explaining the terms of the SDG&E franchise agreement to rate payers. The City Attorney is at times at odds with the Mayor and Council because local citizens expect their

⁵ For the history of the City Attorney's Office, *see* Report on the Role of the City Attorney as Independent Representative of the People of San Diego" (Apr. 26, 2005), <https://www.sandiego.gov/sites/default/files/legacy/cityattorney/pdf/role050426.pdf>.

⁶ The Freeholder Board had the same role as today's Charter Review Commission.

⁷ James E. Parsons, Editor and Publisher, Endorsement Column, *Give San Diego A New Deal*, The Hillcrest News. The measure also received support from San Diego, which published a Ballot Brochure titled "Plan for Progress," and the San Diego Union Tribune (*Charter Endorsement, To Suit San Diego*, The San Diego Union Tribune, April 1931).

⁸ *See* Prop. 1, General and Charter Election Results, (Apr. 7, 1931), https://www.sandiego.gov/sites/default/files/result_04_07_1931_0.pdf.

elected attorney to protect their interests, even if that creates conflict. The City Attorney is no one's political ally and places the City's interests above all others.

Although Charter section 40 has been amended twelve times since 1931, the Council has never asked the voters to give up their right to elect their City Attorney, so that the Council can appoint legal counsel that it could hire and fire at any time and for any reason. Proposed Measure, § 42.2. That proposal emerged following the March 2020 primary election and again on July 26, 2023.

STRUCTURE OF THE OFFICE

The Office of the City Attorney (Office) is divided into five divisions: the Administration Division, the Civil Advisory Division, the Civil Litigation Division, the Criminal and Community Justice Division, and Your Safe Place, a Family Justice Center.

- The Administration Division, led by Assistant City Attorney (ACA) Jim McNeill, is responsible for the day-to-day operations of all divisions within the Office, including personnel management, budget, accounting, information technology, and contract management. This Division includes a team of employment and labor attorneys who assist the Office and all City departments with labor and personnel issues. ACA McNeill also supervises the Worker's Compensation Unit.
- The Advisory Division serves as general counsel to the City and provides advice to City officials and employees on day-to-day operations. This Division assists with the City's contracts, employment matters, claims, disputes, and the preparation of resolutions and ordinances, including drafting City laws. Each City department has at least two assigned Deputy City Attorneys (DCAs). In November 2020, the Office subdivided the Civil Advisory Division. ACA Leslie FitzGerald leads the Council Relations and Specialized Services Division, which focuses on the priorities of the legislative branch and independent City departments.⁹ ACA Jean Jordan manages legal work for the executive branch.¹⁰
- ACA Travis Phelps leads the Civil Litigation Division. ACA Phelps and his team defend the City and its officials in litigation, and initiate litigation on behalf of taxpayers as necessary. This Division is currently defending over 500 cases. This does not include cases before the Civil Service Commission or those handled by the Worker's Compensation Unit. Although the Affirmative Civil Enforcement Unit (ACE) is part of the Division, it reports directly to the City Attorney.
- ACA Paige Folkman leads the Criminal Division and the Community Justice Division. The Criminal Division, which employs City prosecutors and support staff, receives cases from 45 referring agencies, including the San Diego Police Department. It prosecutes criminal misdemeanors committed within City limits and Municipal Code violations on behalf of the People of the State of California.

⁹ A subcommittee of two Councilmembers selected ACA FitzGerald following an interview process.

¹⁰ The City Attorney's nationally recognized Gun Violence Response Unit is housed under ACA Jordan, as gun violence restraining orders are civil orders.

Once it receives a referral, the Division reviews the evidence to determine whether it can prove the case beyond a reasonable doubt. Criminal cases include domestic violence, driving under the influence, battery, vandalism, theft, weapons offenses, and hate crimes. The Community Justice Division focuses on quality-of-life crimes and houses the Nuisance Abatement Unit (NAU) and Neighborhood Justice and Collaborative Courts Unit (NJU). NAU enforces public nuisance, land use, and environmental laws, while NJU works with police officers and community members to address other quality-of-life crimes such as trespass, graffiti, vandalism, and chronic substance use. Prosecutors in NJU help develop and administer diversion programs such as the Community Justice Initiative and the Sex Trafficking Education and Prevention Program. They also work closely with the court on specialty courts such as Behavioral Health Court, Veterans Treatment Court, Drug Court, and Homeless Court.

- Your Safe Place (YSP), a Family Justice Center, is also a Division of the Office. Executive Director Diane Doherty and 17 full-time employees plus over 60 community partners and supporters provide free and confidential services to victims of domestic violence, human trafficking, and sexual assault. Executive Director Doherty reports directly to the City Attorney. The Proposed Measure does not address whether YSP would continue to exist, or where it would be housed if it survives the proposed reorganization.

In addition, the City Attorney participates on three oversight committees in her independent capacity as a taxpayer watchdog: the Funds Commission (Charter section 41(a)); the Disclosure Practices Working Group (DPWG) (SDMC sections 22.4101-22.4112); and the San Diego Facilities and Equipment Leasing Corporation (FELC).¹¹ In addition to being a member of DPWG, the City Attorney separately certifies City disclosure documents under the City's Debt Policy. It is unclear whether the appointed counsel would continue to monitor the work of these committees given the position lacks independence.

Finally, the City Attorney, again in her independent capacity, reviews the City Treasurer's decisions to cease collections on Cannabis Business Tax (SDMC section 34.0125); Transient Occupancy Tax (SDMC section 35.0123); and debts generally under Charter section 45.

The Office provides staff of over 400 the unique opportunity to transfer between all Divisions of the Office. For instance, Criminal Division DCAs may transfer to the Civil Litigation Division, and civil litigators may transfer to the Criminal Division. Similarly, secretaries transfer between Divisions, and clerical personnel take advantage of City-funded tuition to expand their skills to promote into paralegal or investigator positions. The flexibility to transfer between Divisions has improved this Office's ability to attract a broader range of applicants and retain personnel, which would be lost if the Office is divided into two separate

¹¹ According to its Articles of Incorporation, FELC's sole purpose "is to acquire and lease and/or sell to the City of San Diego real and personal property to be used in the municipal operations of the City." FELC's Board of Directors reviews and approves agreements related to the City's Water Revenue financings, for the purpose of assisting the City in the financing of capital improvements.

and distinct law offices as proposed. An employee wishing to transfer between departments would face a new obstacle of having to apply to a different appointing authority who is unfamiliar with them and their work.

The City Attorney directly supervises the ACAs, the Executive Director of YSP, the Director of Communications, the Chief of Ethics and Compliance, the Chief of Policy and Engagement, a Confidential Secretary, and ACE.¹² The Director of Communications, the Chief of Ethics and Compliance, the Chief of Policy and Engagement, and the Confidential Secretary handle work for the entire Office. The entire Office staff, but for YSP, is located at Civic Center Plaza and shares administrative resources (i.e., copiers, paper, and other office supplies).

The Municipal Counsel and the City Prosecutor would each require their own staff to handle day-to-day operations including personnel, budgeting, accounting, information technology, contract management, communications, and ethics issues. This circumstance would lead to inefficiencies and additional expenses compared to the current structure. Moreover, separating the Office into two separate parts would eliminate, or at least complicate, current cross-training opportunities offered to attorneys throughout the Office on important topics, such as effective legal writing and responding to California Public Records Act requests.

ANALYSIS OF THE PROPOSED MEASURE

I. PRELIMINARY CONSIDERATIONS

If the Proposed Measure advances, we suggest using the title “City Prosecutor” instead of “City Attorney” to avoid confusion associated with the use of a job description that has had a certain meaning for nearly a century. The job title of “City Prosecutor” is transparent and informs the public of associated job duties.

In addition, the Proposed Measure includes section 40.3, which addresses operational budgets, personnel, working conditions, and ethical issues common to both offices, and section 40.4, which cross-references proposed amendments in other areas of the Charter that refer to the City Attorney’s Office. The roles and responsibilities of Municipal Counsel and City Prosecutor should stand alone even if there is some repetition between the two sections. Further, section 40.4, which cross-references other Charter sections dealing with the Office, should be deleted, and all referenced Charter sections should be amended.

Lastly, the Proposed Measure does not address how or when the transition from a dual-purpose office to two separate City law departments would occur, but it should include an implementation date. Assistance from a consultant to determine transition steps would be well worth the expense. The ballot measure transitioning to a strong Mayor form of governance allowed for a winddown of more than one year. In addition, those running to replace the existing

¹² City Attorney Elliott created ACE in February 2018. ACE exercises independent civil prosecutorial authority to bring cases on behalf of the People of the State of California. ACE also handles most of the City’s amicus requests (“friend of the court” briefs). ACE estimates it has brought in nearly \$116 million since its inception. More research is needed to determine whether Municipal Counsel would be empowered by state law to ensure ACE can continue its important work. Cal. Bus. & Prof. Code § 17206.

City Attorney should know which position they are running for, and voters should be given adequate time to consider which candidate is best suited for the position.

II. ANALYSIS OF PROPOSAL

The Proposed Measure is analyzed in the order presented by Proposers.¹³

A. Election Date

Proposed Text - Title, recitals, and Section 1: These sections refer to a municipal general election date of November 3, 2020, and propose the addition of sections 40.2, 40.3, and 40.4 to the Charter.

Analysis: The municipal general election is on November 5, 2024, not November 3, 2020. As explained above, we suggest integrating the text of the proposed section 40.3, with proposed modifications, into sections 40.1 and 40.2. We also suggest deleting sections 40.3 and 40.4. The Charter sections referenced in section 40.4 should be amended and not cross-referenced. The Proposed Measure's title, recitals, and numbering would change as a result.

B. Term of Office

Proposed Text - Section 40, subd. (a): A City Attorney shall be elected for a term of four years in the manner prescribed by Section 10 of this Charter. The City Attorney shall hold office for the term prescribed from and after 10 a.m. on the tenth day of December succeeding the election and until a successor is elected and qualified. If the tenth day of December falls on a weekend or holiday, the term shall begin at 10 a.m. on the next calendar day that is not a weekend or a holiday.

Analysis: This language exists in the current Charter and is acceptable.

C. Term Limits

Proposed Text - Section 40, subd. (b): No person shall serve more than two consecutive four-year terms as City Attorney. If for any reason a person serves a partial term as City Attorney in excess of two years, that partial term shall be considered a full term for purposes of this term limit provision.

Analysis: Recent and credible studies indicate term limits may increase polarization instead of reducing partisanship. See Michael P. Olson and Jon C. Rogowski, *Legislative Term Limits and Polarization*, *The Journal of Politics*, Volume 82, Number 2 (Apr. 2020), <https://www.journals.uchicago.edu/doi/abs/10.1086/706764>. As such, the Council may wish to revisit term limits, which the voters approved in 1992. Prop. A, Primary Elec. (June 2, 1992). The cities of Oakland, Long Beach, and San Francisco do not impose term limits on their elected city attorneys. The San Diego County District Attorney does not have term limits. Office personnel have observed that a forced turnover every four to eight years decreases stability,

¹³ The "Proposed Text" is language from the Proposed Measure; "Analysis" reflects this Office's review.

increases staff turnover, and forces out senior lawyers. Modifying the term would increase stability, while also preserving the separation of powers and fortifying the watchdog function.

D. City Prosecutor Qualifications

Proposed Text - Section 40, subd. (c): ~~The City Attorney shall be the chief legal advisor of, and attorney for the City and all Departments and office thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney~~ The City Attorney and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City, except to carry to a conclusion any matters for which they have been retained prior to taking office. The City Attorney must be licensed to practice law in the State of California and must have been so licensed for at least ten years at the time he or she submits nominating petitions.

Analysis: The Council may wish to better explain the required qualifications for this position, particularly since the City of San Diego is one of our nation's largest cities and often on the forefront of complex and novel legal issues.¹⁴

- Is it sufficient, for instance, to be licensed to practice law in the State of California for a certain number of years without ever having practiced law?
- If the Proposed Measure passes, there would be a City Prosecutor responsible only for the prosecution of misdemeanors and Municipal Code violations. Should a candidate vying to be the City Prosecutor have criminal prosecution experience? If so, how much?
- Must one have an active law license to be deemed licensed to practice law, or is an inactive license sufficient? Note that the State Bar of California distinguishes between an active and inactive license to practice law. Those with inactive licenses may not appear as counsel in a court hearing and are not required to comply with mandatory continuing legal education requirements during the time they are deemed inactive.
- Would time with a suspended license count towards years of experience?

E. City Prosecutor's Ability to Appoint Subordinates

Proposed Text - Section 40, subd. (d): The City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter. ~~The City Attorney may appoint no more than six~~ appointment of Assistant City Attorneys and four other assistants, who shall serve at the pleasure

¹⁴ The San Diego County Grand Jury recommended that the Mayor and Council draft an amendment to Charter section 40 "specifying more clearly the qualifications, duties and responsibilities of the City Attorney, and submit it to the electorate at an appropriate future date." San Diego County Grand Jury 2007-2008, at *4, 7 (June 4, 2008), https://www.sandiegocounty.gov/grandjury/reports/2007_2008/CityAttorneyOfficeReport.pdf.

~~of the City Attorney and may be removed by the City Attorney at any time shall be consistent with Section 40.3.~~¹⁵

~~No Deputy City Attorney, who has served continuously as a Deputy City Attorney in the Office of the City Attorney for one year or more shall be terminated or suspended without good cause, except that any Deputy City Attorney may be subject to layoff due to lack of work or insufficient appropriation to meet the salary requirements necessary to maintain existing personnel in the Office of the City Attorney.~~

~~To ensure that Deputy City Attorneys conduct their legal work with the highest level of integrity, honesty, and professionalism, good cause for purposes of termination or suspension includes, but is not limited to, failure to comply with the California Rules of Professional Conduct.~~

Analysis:

Meet and Confer. The existing Charter language in sections 40 and 117(a)(10) authorizes the City Attorney to appoint up to six ACAs and four other assistants. The City negotiated these provisions with the Deputy City Attorneys Association (DCAA) in 2010. The Proposed Measure substantively changes the negotiated terms and reduces promotional opportunities for DCAA members from six to five. The Proposed Measure should be modified to match the numbers in the existing Charter (i.e., six ACAs and four other assistants). Note, however, that this modification would not prevent the need to meet and confer over transfer opportunities and other impacts on working conditions. The last two ACAs promoted to lead the Criminal Division and the Community Justice Division were formerly Civil Advisory Division Chiefs.

Allocation of Resources. The Proposed Measure authorizes the Council to allocate resources between its own appointed Municipal Counsel and the elected City Prosecutor. The City Prosecutor's ability to fulfill Charter-mandated responsibilities is impacted if the Council favors the budget of its own appointed counsel over that of the City Prosecutor. Similarly, the Charter limits the number of Confidential Secretaries the City may employ. The City Attorney is limited to just one. Charter § 117(a)(13). Courts will not uphold budget cuts in the office of an elected official that prevent that official from carrying out their mandated duties. *Scott v. Common Council of City of San Bernardino*, 44 Cal. App. 4th 684 (1996). Thus, the Council should consider creating a procedure guaranteeing that the City Prosecutor has sufficient resources.

¹⁵ Section 40.3 of the Proposed Measure provides that, “[w]ithin budgetary limitations established by the City Council consistent with this section, the City Attorney may appoint Assistant City Attorneys and other assistants, who serve at the pleasure of the City Attorney, and the Municipal Counsel may appoint Assistant Municipal Counsel and other assistants, who serve at the pleasure of the Municipal Counsel. The City Council may budget no more than a total of five assistant attorneys and no more than a total of four other assistants, to be divided between the Office of the City Attorney and the Office of Municipal Counsel as the City Council from time to time determines.”

Deleted Sections. The two deleted sections have been moved to the new sections 40.3(b) and (c). As discussed above, we suggest adding that language to both the City Prosecutor and Municipal Counsel positions even if there is repetition.

F. City Prosecutor's Role and Responsibilities

Proposed Text - Section 40, subd. (e): It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, ~~to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof; and to preserve in the City Attorney's office a docket of all said cases in which the City is interested in any of the courts and keep a record of all proceedings of said cases; to preserve in the City Attorney's office copies of all written opinions he or she has furnished to the Council, Manager, Commission, or any officer.~~ Such docket, ~~copies and papers~~ and record shall be the property of the City, and the City Attorney shall, on retiring from office, deliver the same, together with all books, accounts, vouchers, and necessary information, to his or her successor in office.

Analysis:

Concurrent Jurisdiction with the District Attorney. Under Charter section 40.1, which the voters approved on March 10, 1953, "[t]he City Attorney shall have concurrent jurisdiction with the District Attorney of the County of San Diego to prosecute persons charged with or guilty of the violation of the state laws occurring within the city limits of The City of San Diego for offenses constituting misdemeanors." San Diego Charter § 40.1. This Office will need to research whether the District Attorney must consent to the new City Prosecutor position. If the District Attorney dissents and has authority to rescind her consent to the sharing of prosecutorial responsibilities, then she may be empowered to assert jurisdiction over all misdemeanors prosecuted within City limits. This would impact City Prosecutor staff, who are represented by the DCAA and the San Diego Municipal Employees Association (SDMEA).

Representation. The City Prosecutor represents the People of the State of California, not the City's elected officials. Accordingly, elected officials should not have unrestricted access to a prosecutor's work product. Given the division in the responsibilities of each law office, it is appropriate to remove the provisions requiring the City Prosecutor to advise the Council, Mayor, and City departments. However, the provision requiring the City Prosecutor to preserve a docket of cases, which is in the existing Charter, relates to civil litigation matters, not criminal cases.

Separation between Prosecution and Politics. A prosecutor's work product is not the City's property. As explained above, the City Prosecutor represents the People of the State of California. For that reason, the provision which states "[s]uch docket and record shall be the property of the City, and the City Attorney shall, on retiring from office, deliver the same, together with all books, accounts, vouchers, and necessary information, to his or her successor in office," is inappropriate. The City Prosecutor must retain files consistent with applicable law.

Prosecutorial Discretion. The existing Charter language, which is repeated in the Proposed Measure, is antiquated and inaccurate. It says that the City Prosecutor "shall... prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law." The City Prosecutor may only prosecute cases that can be proven beyond a reasonable doubt.

Special Counsel. This Office suggests adding a provision that will empower the City Prosecutor to hire special counsel and investigators for complex criminal matters involving City officials or employees without having to seek Council approval. Requiring Council approval politicizes the City Prosecutor's work and could hinder their ability to seek justice on behalf of the City and the People of the State of California.

Guaranteed Budget Item. To separate politics from prosecution, the Council should include in the City's budget a separate line item for special prosecution as determined by the City Prosecutor. The City Prosecutor should not have to ask elected officials for authority or a budget to investigate public corruption or to otherwise pursue justice. Requiring the City Prosecutor to seek additional funding for prosecutions involving elected officials could violate Rules 3.8 and 3.10 of the California Rules of Professional Conduct.

G. City Prosecutor's Inability to Hold City Officials Accountable; Resources

Proposed Text - Section 40 (f): The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and, upon a receipt therefor, may demand and receive from any officer of the City any book, paper, documents, or evidence necessary to be used in any suit, or required for the purpose of the office.

~~The City Attorney shall apply, upon order of the Council, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption.~~

~~The City Attorney shall apply, upon order of the Council, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.~~

~~The City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State.~~

~~The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when~~

~~such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments.~~

Analysis:

Representation. To ensure public confidence in the criminal justice system, there must be a clear division between the City Prosecutor and elected officials. As such, City officials cannot have unfettered access to the City Prosecutor's records, nor should the City Prosecutor have unfettered access to City records. Both should use whatever tools the law allows to access one another's records, such as subpoenas or records requests. The first paragraph of this proposed section should be deleted.

Accountability. By deleting the second paragraph, the Proposed Measure removes from the City Prosecutor the express authority to hold accountable City officials and employees who misappropriate City funds, abuse their power, or engage in fraudulent or corrupt contracting practices. The City Prosecutor's power to hold City officials and employees accountable cannot be limited by Charter, nor can the Council be empowered to interfere in any way with the City Prosecutor's discretion whether to bring a criminal action.

Allocation of Resources. By deleting the fifth paragraph, the Proposed Measure removes language requiring the Council to appropriate funds necessary for the City Prosecutor to perform Charter-mandated responsibilities. While it is important to remove language that says the City Prosecutor will charge City departments for legal services rendered, the Council must allocate to the City Prosecutor sufficient funding to protect the public through prosecution and diversion programs. Without sufficient resources, the City Prosecutor must lobby the Mayor and Council for resources, which can politicize the office.

The third and fourth proposed paragraphs appropriately delete responsibilities that should be performed by Municipal Counsel, not the City Prosecutor.

H. City Prosecutor's Salary

Proposed Text - Section 40 (g): Effective December 10, 2020, the salary paid to the City Attorney will be equal to the salary prescribed by law and as adjusted by law for judges of the Superior Court for the State of California, provided that the salary of the City Attorney may not be decreased during a term of office.

Analysis: This language is consistent with the existing Charter language (i.e., the City Prosecutor will be paid whatever Superior Court judges are paid), but the language determining the effective date of the salary adjustment is no longer necessary and should be deleted.

I. City Prosecutor Vacancy

Proposed Text - Section 40 (h): Whenever a vacancy exists in the office of the City Attorney, an Assistant City Attorney, previously designated by the City Attorney to fulfill duties in the event of a vacancy and whose name has been recorded with the City Clerk as the Interim City Attorney in the event of a vacancy, shall fulfill the duties of the City Attorney as the Interim City Attorney until a replacement can be appointed or elected as provided by this Charter. The Interim City Attorney shall have the full authority of the Office.

Analysis: This language is consistent with the existing Charter language and is appropriate. If a vacancy in the City Attorney's Office occurs due to recall or removal, the Council "shall adopt procedures to fill the vacancy." Charter § 302(a). If a vacancy occurs for any other reason, the vacancy is filled by Council appointment if one year or less remains on the term, or by special election if more than one year remains on the term. Charter § 302(b)(1)-(2).

J. Council's Ability to Appoint and Remove Municipal Counsel

Proposed Text - Section 40.2: The Municipal Counsel shall be appointed by the Council, shall serve at the pleasure of the Council, and may be removed from office by the Council at any time. No person may simultaneously serve as the Municipal Counsel and City Attorney.

Analysis:

Strong Mayor Form of Government. Under the Proposed Measure, the Council hires and fires Municipal Counsel. The Mayor has no role in hiring, firing, or otherwise directing the work of Municipal Counsel. This structure suggests that Municipal Counsel is beholden to the Council's agenda, which is problematic under the City's strong Mayor form of government because it erodes the Mayor's authority.

As the City's Chief Executive Officer, the Mayor signs all legal instruments and documents; executes and enforces all City laws, ordinances, and policies; promulgates and issues administrative regulations that direct City services; recommends measures and ordinances to the Council; approves and vetoes certain Council actions; presides over closed sessions; and appoints high-level City officials including the Chief Operating Officer, Police Chief, and Fire Chief, among other responsibilities. San Diego Charter §265. Most of this Office's civil work is necessarily performed for mayoral departments responsible for the City's day-to-day operations. The Proposed Measure raises questions:

- Would the Council determine when the Mayor and his staff can access legal services from Municipal Counsel?
- Would the Council be able to prevent the Mayor from obtaining advice from Municipal Counsel on certain topics, particularly where the Council and Mayor disagree on how to best conduct City business?
- Which protective measures would be in place to ensure operational departments have timely access to legal services?

- Which guardrails would exist to ensure the Council does not put its own needs before the City's operational needs or otherwise politicize the rendering of critical City services?
- How will the City resolve disputes over access to legal services between the executive and legislative branches of City government?
- Should the Mayor have his own legal counsel to ensure the executive branch's legal needs are met? If so, what additional legal costs to the City would result?

Separation of Powers. The Charter mandates separation of powers. Specifically, “[e]xcept for the purpose of inquiry or communications in furtherance of implementing policies and decisions approved by resolution or ordinance of the Council, individual members of Council shall deal with the administrative service for which the Mayor is responsible only through the Mayor, the City Manager, or the Mayor’s designees.” San Diego Charter §270(g). This, too, raises questions when legal counsel is solely responsible to the Council:

- If, for instance, the Transportation Department needs Municipal Counsel to review a street-paving contract, must the department head, through the Mayor, first seek permission from the Council for such use? What does that look like since the Council acts as a body (i.e., through a majority or, in some cases, super-majority vote at an open and public meeting)?
- Would the Council assert the right to review the advice provided by Municipal Counsel to Mayoral staff?
- Could Council impede or prevent Mayoral proposals that it does not like before the proposal is even publicly presented?
- Will Mayoral staff postpone soliciting legal advice because they fear it will be shared with the Council before the proposal is ready for review or the administration is not yet committed to its implementation? If so, will the City's interests be undermined by tardy or rushed legal input?

To ensure City operations do not grind to a halt, the Council would need to adopt formal procedures to ensure it does not stymie City operations or impede the Mayor's authority.

Identify the Client. The Proposed Measure must specify who the client is and to whom the attorney owes duties. Specifically, the California Rules of Professional Conduct provide, in part, that “the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.” Cal. Rules of Prof. Conduct, rule 1.13(a). The Proposed Measure appears to reserve for the Council the unilateral power to determine confidentiality, privilege, and whether to waive a privilege and/or conflict.

Whistleblower Protections for Municipal Counsel. There are no whistleblower protections for in-house municipal attorneys. The attorney-client privilege supersedes all whistleblower protections. A Deputy Municipal Counsel (DMC) who learns of malfeasance may only report up the chain which, in this case, would be Municipal Counsel, who is beholden to the Council. Cal. Rules of Prof. Conduct, rule 1.13(b). If the concern identified by the DMC does not resolve, the DMC must resign or accept the malfeasance and face potential ethics violations. This is a meet and confer issue.

Fair Legal Representation for all Council Districts. Under the existing Charter, the City Attorney advises “the Council, its Committees, the Manager [Mayor], the Commissions, or Directors of any department,” without preferring one branch of government over the other. San Diego Charter § 40. The Proposed Measure changes that equitable balance by creating a relationship where Municipal Counsel serves “at the pleasure of the Council.” This raises questions:

- Must the Council, which acts as a body, approve a legal services request from Mayoral staff before Municipal Counsel commences any legal work?
- May Councilmembers directly request advice of Municipal Counsel? Or will they continue to follow the Rules of Council, codified in Municipal Code § 22.0101 and providing in pertinent part that “[m]atters for which the Council or Councilmembers request legal analysis from the City Attorney will be prioritized by the City Attorney as follows: (1) the Council, (2) committees; (3) the Council President, (4) committee chairs, and (5) individual Councilmembers. Prioritization will be subject to the City Attorney’s duty under City Charter section 40 to provide legal services to all City departments and offices and California State Bar ethical duties.” *See* Municipal Code, Chapter 2, Article 2, Division 1, section 22.0101, rule 6.6.5.
- What guardrails will exist to ensure all Council districts receive timely legal advice (i.e., in the event of a split Council, what can be done to ensure that the districts represented by the minority receive equal access to legal services?)
- Should the Council amend the Rules of Council to adopt a rotating Council President policy to ensure no one person has complete control over the rendering of legal services for more than one year?¹⁶

Case law and the California Rules of Professional Conduct establish that a city attorney’s client is the city itself, “acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.” Cal. Rules of Prof. Conduct, rule 1.13(a). It will be the job of Municipal Counsel to strike a balance between their ethical obligations under the Rules and the relationships created by the Proposed Measure.

¹⁶ Currently, the Council President directly controls the IBA, City Clerk, Interim Executive Director of the Housing Commission, and City Auditor. Add legal services through an appointed legal counsel, and the Council President arguably becomes the City’s most powerful elected official with the Mayor serving in a substantially diminished capacity.

Hiring Concerns. Municipal Counsel serves “at the pleasure of the Council” and can be fired at any time and for any reason. To attract top talent, and to convince applicants to leave a successful law practice that likely pays much more than the Municipal Counsel position would pay, the Council may wish to offer job protections, such as a set term of employment.¹⁷ For instance, the Auditor serves up to two five-year terms and may be terminated upon a 2/3 vote of the Council. San Diego Charter § 39.2.¹⁸

Fair and Competitive Selection Process. To ensure a qualified candidate is selected, the Council should include in the job description specific criteria that focus, for example, on candidates who have practiced municipal law as an appointed or elected attorney at any level of government for at least ten years. In addition, to protect the integrity of the appointment process, the Council may wish to exclude the Proposers and those who assisted in crafting the Proposed Measure from applying for the position their efforts may create.¹⁹ Finally, the Council may want to include the public in its interview process, as the City did when selecting a Police Chief.

K. Municipal Counsel’s Jurisdiction

Proposed Text - Section 40.2 (b): The Municipal Counsel shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of Municipal Counsel, or as this Charter or other law may otherwise require. The Municipal Counsel and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City, except to carry to a conclusion any matters for which they have been retained prior to taking office. The Municipal Counsel must be licensed to practice law in the State of California and must have been so licensed for at least ten years at the time he or she takes office.

Analysis:

Commission on Police Practices, Auditor. The proposed Charter language fails to recognize that the CPP, like the Ethics Commission, has its own legal counsel independent of the City Attorney. The language may need to be modified to reflect that the City Auditor has their own legal counsel if that measure is on the ballot in 2024 and is approved by a majority of voters. This Office would need to conduct more research as to how these potentially competing measures would be presented to the public for a vote.

¹⁷ City elective officers receive annual salaries based on the salary paid to Superior Court judges by the State of California. *See*, San Diego Charter § 11.1. The City Attorney’s salary is now lower than many DCAs in the Office.

¹⁸ Retirement and mileage benefits for appointed and elected officials are different. We defer to the IBA to explain the costs associated with those differences.

¹⁹ There may be a California Government Code section 1090 issue if the Proposers created the job to which they are ultimately appointed. This Office would seek further guidance from the Fair Political Practices Commission if such a scenario arises.

Residency Requirements. Under the existing Charter language, the City Attorney must reside within City limits. San Diego Charter § 7. There are no residency requirements for Municipal Counsel. As such, the Council could appoint a person who resides outside the City limits and may approve a telecommuting or a hybrid work arrangement.

Qualifications. As discussed in I.D., above, the Council may wish to define the required qualifications for the Municipal Counsel position. Is it sufficient, for instance, to be licensed to practice law in the State of California for ten years without having actively practiced law during that time frame? Is any practice area sufficient, or should the candidate have municipal law experience?²⁰ As a helpful point of reference, the Charter includes qualification requirements for the positions of City Auditor and IBA. San Diego Charter §§ 39.2, 39.3.

L. Municipal Counsel’s Ability to Appoint Subordinates

Proposed Text – Section 40.2(c): The Municipal Counsel shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter. The appointment of Assistant Municipal Counsel and other assistants shall be consistent with Section 40.3.

Analysis: As previously discussed, existing Charter language authorizes the City Attorney to appoint up to six ACAs and four other assistants. The proposed amendment (Section 40.3) provides that, “[w]ithin budgetary limitations established by the City Council consistent with this section, the City Attorney may appoint Assistant City Attorneys and other assistants, who serve at the pleasure of the City Attorney, and the Municipal Counsel may appoint Assistant Municipal Counsel and other assistants, who serve at the pleasure of the Municipal Counsel. The City Council may budget no more than a total of five assistant attorneys and no more than a total of four other assistants, to be divided between the Office of the City Attorney and the Office of Municipal Counsel as the City Council from time to time determines.”

- **Meet and Confer.** The City negotiated the Charter provisions identifying the number of ACAs with the DCAA in 2010. The proposed language presents a substantive change to previously negotiated terms and would reduce promotional opportunities for DCAA members.
- **Allocation of Resources.** The Council would allocate resources “within budgetary limitations established by the City Council” between Municipal Counsel, who reports to the Council, and the City Prosecutor, who is accountable to the People of California. The Council must ensure that the City Prosecutor has the resources necessary to perform their Charter-mandated duties. Courts will not uphold budget cuts that infringe on that ability. *Scott v. Common Council of City of San Bernardino*, 44 Cal. App. 4th 684 (1996).

²⁰ The Institute for Local Government’s (ILG) “Good Governance Checklist” suggests that agency counsel should be “an active member of the California State Bar in good standing with at least five years’ experience in municipal law.” See ILG, *Good Governance Checklist: Good and Better Practices*, at *22, (Dec. 2014), https://www.ca-ilg.org/sites/main/files/file-attachments/ilg_good_gov_checklist_final.pdf?1654062809.

M. Municipal Counsel's Role and Responsibilities

Proposed Text - Section 40.2 (d): It shall be the Municipal Counsel's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the civil legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof; to preserve in the Municipal Counsel's office a docket of all cases in which the City is interested in any of the courts and keep a record of all proceedings of said cases; to preserve in the Municipal Counsel's office copies of all written opinions he or she has furnished to the Council, Manager, Commission, or any officer. Such docket, copies and papers shall be the property of the City, and the Municipal Counsel shall, on retiring from office, deliver the same, together with all books, accounts, vouchers, and necessary information, to his or her successor in office.

Analysis: This language is from the existing Charter, except that the language relating to the prosecution of City ordinances and state law has been deleted, which is appropriate. The proposed language envisions use of legal services by all branches of City government, although it does not explain the process those who are not Councilmembers would use to obtain legal services. *See* discussion in II.J., above.

Exclusion of the Executive Branch. The proposed language is written for an office in which the City Attorney is both general counsel and the City's prosecutor, a structure that would no longer exist under the Proposed Measure. Municipal Counsel, which serves at the pleasure of the Council, would "perform all services incident to the civil legal department" and "give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department." *See* discussion in II.J., above.

Civil Litigation. The City Attorney reviews all cases against the City to determine whether the City is at fault, the cases' value, and whether to recommend to the Council that the cases settle or proceed to trial. The City Attorney's recommendation is based on the City's best interests and applicable law, and not on the desire of any one City official, or in response to media coverage. Under the Proposed Measure, the Council would control Municipal Counsel, thus having more significant control over case strategies, while also determining case outcomes over \$50,000.²¹ Regardless of the City's reporting structure, state law requires the City to defend and indemnify City employees who are performing responsibilities within the scope of their employment. To ensure fair and effective governance, the Council must not use litigation to send

²¹ The Council has delegated settlement authority of up to \$50,000 to the Mayor; Council makes determinations for claims valued at more than \$50,000. Council Policy 000-09 (Aug. 11, 2014). It is unclear whether Council would seek to rescind this delegation of authority.

a political message. To protect the public's interests, the Council should put into place standards for litigation recommendations so that politics do not guide litigation outcomes.²²

Appointing Authority. The Proposed Measure does not specify that Municipal Counsel is the appointing authority of deputies, assistants, and employees. Without this specificity, it is unclear whether Municipal Counsel can hire personnel without Council approval. Charter provisions for the City Auditor and IBA state that these positions are appointing authorities for their offices. San Diego Charter §§ 39.2, 39.3.

Approval as to Form. Municipal Counsel would be required “to endorse on each [i.e., all ordinances, resolutions, contracts, bonds, or other instruments] approval of the form or correctness thereof.” As this Office previously advised, this language is problematic. 2014 City Att’y Report 566 (Feb.5, 20014); also *see* at, <https://docs.sandiego.gov/cityattorneyreports/RC-2014-3.pdf>.

- There is an inconsistency between Municipal Counsel’s duties in Charter section 40, which requires Municipal Counsel to sign off as to “form or correctness,” and Municipal Counsel’s duty under Charter section 280(b), to sign off as to “form and legality.” This Office signs off as to form, but not legality, because it cannot confirm the facts as presented by City staff.
- It is not practical or reasonable to require Municipal Counsel to review and approve all purchase orders, which are contracts. This antiquated language should be amended. It otherwise adds unnecessary bureaucracy to the City’s contracting processes.
- Municipal Counsel must prepare and approve all “other instruments in which the City is concerned.” The term “other instruments” should be defined or deleted.

N. Municipal Counsel’s Record Retention Practices

Proposed Text - Section 40.2 (e): The Municipal Counsel shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and, upon a receipt therefor, may demand and receive from any officer of the City any book, paper, documents, or evidence necessary to be used in any suit, or required for the purpose of the office.

Analysis: This is existing Charter language.

Council Controls All City Records. Under the existing Charter, where the City Attorney is both general counsel and the City’s prosecutor, the existing language makes sense. However, separation of power issues may arise if Municipal Counsel, who answers to the Council, has unfettered access to all City records, including those of the Mayor and his staff. How would a conflict be resolved if, for instance, a Councilmember demands that Municipal Counsel obtain Mayoral records and the Mayor refuses?

²² Chair Elo-Rivera suggested at Rules Committee on July 26, 2023, that Council control over civil litigation would yield better litigation results, yet provides no basis for his claim.

Gender Neutral. The language regarding Municipal Counsel should be gender neutral. The Office would address gender-specific language in any resulting ballot measure.

O. Municipal Counsel’s Inability to Address Abuse of Power Without Council Permission

Proposed Text - Section 40.2 (f): The Municipal Counsel shall apply, upon order of the Council, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption.

Analysis: Under the current Charter, the elected City Attorney, as the City’s chief legal counselor and prosecutor, may refer potentially criminal conduct to law enforcement or regulatory agencies without permission from the Council or the Mayor. This is essential to protecting the interests of City taxpayers. Under the Proposed Measure, Municipal Counsel would:

- Need permission from the Council to refer suspected criminal conduct, fraud, or corruption involving the City to law enforcement.
- Need Council authority to hire consultants or outside counsel to assist with workplace investigations involving City officials and employees.

Municipal Counsel should be empowered to protect the City’s interests without seeking Council approval to act, particularly when holding elected officials and City employees accountable for misapplication of funds, abuse of power, or suspected fraud or corruption.

P. Municipal Counsel’s Inability to Compel the Performance of a Municipal Officer Without Council Permission

Proposed Text - Section 40.2 (g): The Municipal Counsel shall apply, upon order of the Council, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.

Analysis: Under the current Charter, the elected City Attorney, as the City’s chief legal counselor and prosecutor, may hold accountable City officials and employees who fail to perform responsibilities without permission from elected officials.

- Under the Proposed Measure, Municipal Counsel would need permission from the Council to seek court intervention to hold accountable City officials and employees who fail to perform mandated responsibilities.
- The Council would be empowered to direct Municipal Counsel to compel the performance of Mayoral employees, which may create separation of power issues and violate other Charter language.

Q. Municipal Counsel’s Affirmative Obligation to Defend City Officials and Employees in Criminal and Quasi-Criminal Matters

Proposed Text - Section 40.2 (h): The Municipal Counsel shall perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State, including without limitation defense of criminal or quasi-criminal matters brought against the City or those acting on its behalf, other than those duties this Charter entrusts to the City Attorney.

Analysis:

Criminal Conduct. The existing Charter language does not require the City Attorney to defend “without limitation” City officials and employees accused of criminal conduct. Such language would have required the City to defend “without limitation” and at taxpayer’s expense former Mayor Filner when he was criminally prosecuted by the Attorney General for falsely imprisoning and battering three women, or former San Diego Police Officer Anthony Arevalos, who was convicted in 2011 on multiple felony counts of sexual battery, assault, and asking for bribes while in uniform.²³

Generally, a public entity must provide an employee or former employee with a defense to a civil action or proceeding brought against them in their official or individual capacity or both, on account of an act or omission in the scope of employment. Cal. Gov’t Code § 995. However, a public entity can refuse to provide a defense on specific statutory grounds. Cal. Gov’t Code § 995.2(a). For instance, a public entity is not required to provide an employee or former employee with a defense of a criminal action or proceeding, although it may do so if the defense is in the public entity’s best interests. Cal. Gov’t Code § 995.8(b).

This Office advises against unconditionally agreeing to defend current and former City employees in criminal actions using taxpayers’ funds. Rather, Municipal Counsel should review the facts and law associated with any request for a defense and recommend a course of action to the Council. The Proposed Measure does not protect the City’s interests and may lead to costly ramifications that run afoul of both sound public policy objectives and Municipal Counsel’s ethical obligations as a licensed attorney.

Note, too, that the California Supreme Court has held that a city attorney with prosecutorial responsibilities may not defend persons accused of crimes. *People v. Rhodes*, 12 Cal. 3d. 180, 186-87 (1974). As discussed below, the Proposed Measure includes language that requires the Municipal Counsel to “prosecute,” language we have suggested removing.

²³ The City had to settle 14 lawsuits resulting from Arevalos’s criminal behavior totaling \$8,000,000.

R. Council’s Authority to Hire Legal Counsel in Addition to Municipal Counsel; Council’s Ability to Select Attorneys with Whom it Will Work

Proposed Text - Section 40.2 (i): The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments for such assistance or advice necessary to investigate or prosecute matters connected with the departments of the City. The Council may designate Assistant Municipal Counsel or another legal counsel, as the Council may choose from time to time from the attorneys employed by the office of Municipal Counsel, to attend Council meetings and to advise Council deliberations.

Analysis:

Hiring Outside Counsel. Charter section 40 as it currently exists provides, in part, that “[t]he Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith.” This language has long been interpreted to mean that the City may hire outside legal counsel only if the City Attorney determines that the office lacks sufficient resources, lacks the skill set necessary to accomplish the contemplated work, or has a conflict of interest. Op. City Att’y 2020-1 (Sept. 9, 2020). The proposed language suggests that the Council may employ outside legal counsel whenever it wants, including when Municipal Counsel does not render the legal advice it desires. This raises several concerns.

- **Unnecessary Taxpayer Expense.** Even if Municipal Counsel has sufficient resources, the skill set necessary to accomplish the contemplated work, and does not have a conflict of interest, Council may unilaterally hire additional attorneys at taxpayer expense for a second opinion and may freely disregard Municipal Counsel’s opinion.
- **Pressure to Provide Desired Advice.** Municipal Counsel may feel pressured to provide the Council with the desired legal advice to protect their employment status or to avoid being overruled by outside legal counsel.
- **Conflicting Advice.** If legal advice rendered by Municipal Counsel and outside counsel conflict, there is no process for determining whose advice should be followed, nor does the language address whether Municipal Counsel must defend advice it did not render and with which it does not agree. It also does not address potential conflict issues or the sharing of confidential materials between legal counsel.

Conflicting Language with Regard to Prosecution. The Proposed Measure states that Municipal Counsel shall “prosecute matters connected with the departments of the City.” The reference to prosecution made sense under the existing Office structure because the City Attorney is both general counsel and the City’s prosecutor. However, this language contradicts

language in the Proposed Measure which states “[n]o person may simultaneously serve as the Municipal Counsel and City Attorney.” The reference to prosecution should be removed.

Designating Who Can Advise Council at Meetings. The Proposed Measure allows the Council to “designate Assistant Municipal Counsel or another legal counsel, as the Council may choose from time to time from the attorneys employed by the office of Municipal Counsel, to attend Council meetings and to advise Council deliberations.”

- The language implies that the Council directly supervises attorneys employed by Municipal Counsel.²⁴ Under the existing Charter, the City Attorney assigns work to DCAs and ACAs.
- This language is subject to bargaining because it would impact the terms and conditions of a DMC’s employment. When determining promotions, the Office considers high-profile assignments, such as sitting with the Council during deliberations, yet Council may, without reason, exclude DMCs from attending Council meetings or deliberations.
- Decisions that exclude DMCs or ACAs from participating at Council meetings must not be based on unlawful criteria, such as gender, race, or age. The Council would need to exercise caution when selecting who it wishes to work with to avoid allegations of discrimination, favoritism, and other prohibited conduct.
- This new standard does not address the process Municipal Counsel would use when assigning a DMC to a Council meeting. Must Municipal Counsel clear an assignment with the Council President? Must the Council docket an item to designate the DMCs with whom it is willing to work?

S. Municipal Counsel Vacancy

Proposed Text - Section 40.2 (j): Whenever a vacancy exists in the office of the Municipal Counsel, an Assistant Municipal Counsel, previously designated by the Municipal Counsel to fulfill duties in the event of a vacancy and whose name has been recorded with the City Clerk as the Interim Municipal Counsel in the event of a vacancy, shall fulfill the duties of the Municipal Counsel as the Interim Municipal Counsel until a replacement can be appointed or elected as provided by this Charter. The Interim Municipal Counsel shall have the full authority of the Office.

²⁴ If the Council retains this language, this Office will need to perform additional research to determine if this reporting arrangement is permissible under applicable law.

Analysis: It would be unusual for an appointed position to record the name of an interim replacement with the City Clerk. That language exists in the current Charter for an elected position but does not make sense in the case of Municipal Counsel who is appointed by the Council. Presumably, the Council would appoint an interim, which happened recently with the City Clerk, IBA, City Auditor, and Interim Executive Director of the Housing Commission, and that person would serve until the Council appoints a replacement. Accordingly, we suggest removing this language.

In addition, the Proposed Measure states that Municipal Counsel shall serve “until a replacement can be appointed or elected as provided by this Charter.” The reference to an elected Municipal Counsel is erroneous since this would be an appointed position.

T. Municipal Counsel Resources

Proposed Text – Section 40.3 (a): Within budgetary limitations established by the City Council consistent with this section, the City Attorney may appoint Assistant City Attorneys and other assistants, who serve at the pleasure of the City Attorney, and the Municipal Counsel may appoint Assistant Municipal Counsel and other assistants, who serve at the pleasure of the Municipal Counsel. The City Council may budget no more than a total of five assistant attorneys and no more than a total of four other assistants, to be divided between the Office of the City Attorney and the Office of Municipal Counsel as the City Council from time to time determines. Section 117, subdivision (a)(10) of this Charter shall be deemed to refer collectively to those appointed under this subdivision.

Analysis:

- **Meet and Confer.** The City negotiated the Charter provisions identifying the number of ACAs with the DCAA in 2010. The proposed language presents a substantive change to previously negotiated terms and would reduce promotional opportunities for DCAA members.
- **Allocation of Resources.** The Council would allocate resources “within budgetary limitations established by the City Council” between Municipal Counsel, which reports to them, and the City Prosecutor, who is accountable to the People of California. The Council must ensure that the City Prosecutor has the resources necessary to perform their Charter-mandated duties. Courts will not uphold budget cuts that infringe on that ability. *Scott v. Common Council of City of San Bernardino*, 44 Cal. App. 4th 684 (1996).

U. For Cause Protections for City’s In-House Legal Counsel

Proposed Text – Section 40.3 (b): No Deputy City Attorney or Deputy Municipal Counsel who has served continuously in either position for the City for one year or more shall be terminated or suspended without good cause, except that any deputy may be subject to layoff due to lack of work or insufficient appropriation to meet the salary requirements necessary

to maintain existing personnel in the respective offices.

Analysis: This language is consistent with the existing Charter language that applies to the City Attorney as the City’s general counsel and prosecutor. Its impact changes if the office is divided, as the Council is not obligated to provide the City Prosecutor with any level of resources (i.e., “[t]he City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council...”). Thus, the Council could reduce the budgets of the City Prosecutor or Municipal Counsel, resulting in layoffs. In addition, it is unclear whether six months as a DCA and six months as a DMC would constitute one year, entitling the impacted attorney to “for cause” protection. If, for instance, a DCA with five months of experience working for the City Prosecutor applies for a position with Municipal Counsel, and is selected, would that attorney have “for cause” protection after working for seven months for Municipal Counsel? Or would that attorney need to work one year for Municipal Counsel to have such protection? This language has meet and confer implications.

V. Compliance with the California Rules of Professional Conduct

Proposed Text – Section 40.3 (c): To ensure that Deputy City Attorneys and Deputy Municipal Counsel conduct their legal work with the highest level of integrity, honesty, and professionalism, good cause for purposes of termination or suspension includes, but is not limited to, failure to comply with the California Rules of Professional Conduct.

Analysis: This language is consistent with the existing Charter language and is not problematic. However, the DCAA represents DCAs assigned to all divisions of the Office. It is unclear whether the DCAA would continue to serve as the Represented Employee Organization for both the elected and the appointed legal offices.

W. Cross-References to Charter Sections Impacted by Amendments

Proposed Text – Section 40.4 (a)-(c):

- (a) References to the City Attorney in the following sections of the Charter shall be deemed to refer to the Municipal Counsel: Article V, Sections 41(a), (c) and (d); Section 45; and Article VIII, Section 117(a)(13).
- (b) References to Deputy City Attorneys in Article V, Section 30 shall be deemed to refer both to Deputy City Attorneys and to Deputy Municipal Counsel.
- (c) All other provisions in this Charter referencing the City Attorney in the context of a criminal matter (other than a criminal or quasi-criminal matter brought against the City or those acting on its behalf) shall refer to the City Attorney, and all other provisions in this Charter referencing the City Attorney shall refer to the Municipal Counsel.

Analysis: It is not best practice to cross-reference other Charter sections as proposed. For instance, if those other Charter sections are deleted or renumbered in the future, then the cross-reference in section 40.4 to those other Charter sections would become incorrect. The referenced sections should be amended.

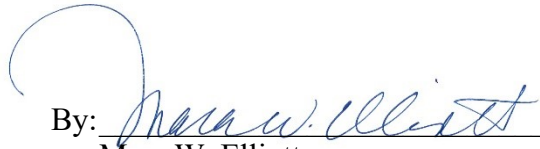
CONCLUSION

Good governance demands a robust and public discussion with local citizens, who should understand what this proposal intends to address, whether the proposal is likely to achieve the desired outcome, and how the proposed changes will impact the lives of San Diegans. Those impacted by this proposal, particularly the voters, represented employee organizations who work in and with this Office, and stakeholders and community partners, including the Mayor and the District Attorney, deserve a seat at the City's table and a meaningful opportunity to offer input on a proposed substantial reorganization of a legal office that has existed since 1931. Finally, the Proposed Measure must include safeguards that protect the City's interests, instead of language that pits the executive and legislative branches against one another and threatens to shift the balance of local political power sharply in favor of the Council, particularly the Council President.

Again, this Report offers initial observations. It is intended to be read with a separately issued memorandum that identifies what the City could do to fill the void left by elimination of a taxpayer watchdog position. We look forward to the upcoming Rules Committee meeting and the receipt of needed policy direction.

Sincerely,

MARA W. ELLIOTT, CITY ATTORNEY

By: 
Mara W. Elliott
City Attorney

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Doc. No. 3421230