CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: Mayor-Elect Newsom

FROM: Dennis J. Herrera
City Attorney

DATE: December 12, 2003

RE: Client of the City Attorney

This memorandum addresses the role of the Office of the City Attorney in relation to the many City employees, officials, departments, and related City agencies that the Office advises and represents. In general, the City Attorney has a single client – the City and County of San Francisco – and does not owe a distinct duty of loyalty to individual constituent entities of the City. Because the City Attorney has only a single client, neither the Office, nor individual attorneys, have a conflict of interest in advising multiple persons or departments, who often may have conflicting policy views about the issues giving rise to the need for legal advice.

This legal principle stems from two authorities: San Francisco's Charter and the California Rules of Professional Conduct, which govern all lawyers in the State. Charter section 6.102 designates the elected City Attorney as the legal representative of the City. The Charter requires the City Attorney, upon request, to provide advice or a written opinion to any officer, department head or board, commission or other unit of government of the City and County and authorizes the City Attorney to bring legal actions in which the City has an interest. The purpose of creating an elected City Attorney was to ensure that the City Attorney would owe his or her loyalty to the people of San Francisco. "Made appointive by either a Mayor or Chief Administrative Officer, [the City Attorney] would be exposed to the possibility of conflicting allegiances." Francis V. Keesling, *San Francisco Charter of 1931*, at 41 (1933). In addition, a single City Attorney allows the City to speak with one voice on legal issues, and avoids the chaos, as well as tremendous taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests.

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The Rules of Professional Conduct provide that when representing any organizational client, whether a corporation or a municipality, the lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent part overseeing the particular issue. (Rule 3-600(A), Cal. Rules of Prof. Cond.; *see also* Rule 1.13, ABA Model Rules of Prof. Cond.) Because the City is the client of the City Attorney, the City Attorney, with two limited exceptions, does not have a conflict in representing multiple persons and entities. Thus, for example, the State Bar has explained in a formal opinion that a City Attorney asked to advise both a Mayor and a City council regarding the power to adopt an ordinance, where the two City actors disagreed on the legality and appropriateness of the action, does not have a conflict of interest and may advise both the Mayor and the City council. Both have a role, at different times, in speaking for the City on the legislation, and neither may sue each other over the dispute. (*See* Cal. State Bar Ethics Op. 2001-156).

In two exceptional circumstances the City Attorney may have clients who are separate from the City: (1) when the City represents an officer or employee in his or her individual capacity; and (2) when the City represents an independent governmental entity. Where the City represents an officer or employee in his or her individual capacity, as required under the California Tort Claims Act, the City Attorney represents a client whose interests are separate and distinct from the City. While the City Attorney can and does represent both the City and such individual clients when they are both defendants in a case, because the individual is a distinct client, the City Attorney must address potential or actual conflicts of interest between that client and the City, for example, by obtaining a waiver of the conflict of interest. When it is not possible to reconcile the conflicts, the City may provide outside counsel for the individual in accordance with the California Tort Claims Act.

The second exception involves the City Attorney's representation of certain entities that are potentially distinct from the City because they have the independent ability to sue and be sued. In *Civil Service Commission v. Superior Court* (1985) 163 Cal.App.3d 70, 84, the court opined that the County's Civil Service Commission was such an entity because it was created to provide an independent ruling on employment matters that the City could overturn only by

suing the Commission. Because the Civil Service Commission, and potentially other entities such as the School District, are, or may be deemed to be, separate clients, the City Attorney may have obligations to those clients that are distinct from the City Attorney's obligations to the City. When those obligations conflict and the conflict is not waived or addressed through an ethical screen, outside counsel may be required, although as a practical matter, this rarely occurs.

Finally, while the City is the client of the City Attorney, it does not follow that the City Attorney shares with every member of the organization the information discussed with a single constituent entity, officer, or employee. In general, the City Attorney affords confidentiality to officials when they seek legal advice regarding their policy ventures. This practice allows each officer to freely obtain the legal advice the officer needs to perform his or her organizational function, without concern that the discussions will be shared with someone with whom they have a policy disagreement.

But the ability to obtain confidential legal advice does not entitle the officer to have the City Attorney withhold that same advice from constituent entities who speak for the City on a particular matter. For example, if an individual member of the Board of Supervisors requests that the office draft legislation the Office considers likely illegal, the City Attorney will advise the individual supervisor of the legislation's legal problems, and will also give the same advice to the other members of the Board of Supervisors, and ultimately the Mayor, in an appropriate manner if the individual supervisor wants to pursue the legislation. Thus, *after* a constituent entity or official chooses publicly to pursue an issue on which it has sought advice (e.g., legislation), the City Attorney will advise others who will play a role in the decision-making process in a manner consistent with the advice previously provided to the entity or official.

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ating the Commission. Because the Civil Service Commission and police or other entities, such as the School District, may or may be deemed to be separate clients, the City Attorney may have obligations to those clients and are distinct from the City Attorney's obligations to the City. When those relationships conflict and the conflict is not resolved or addressed through [illegible] outside counsel may be required, although as a practical matter this rarely occurs.

Finally, while we are City's the client of the City Attorney, it does not follow that the City Attorney shares with every member of the organization the information discussed with a single employee, official, or employee. In general, the City Attorney's [illegible] confidentiality to officials when they seek legal advice regarding their policy [illegible]. This practice allows each official to obtain the legal advice the officer needs to perform his or her organizational function, without concern that the discussions will be shared with someone with whom they have a conflict or disagreement.

But the ability to obtain confidential legal advice does not preclude the office of the City Attorney with [illegible] advice from [illegible] entities who [illegible] the City on a particular matter. For example, if an individual member of the Board of Supervisors requests from the Office of the Attorney [illegible] the Office [illegible] the City Attorney [illegible] the individual supervisor and the legislative's legal problems, and will [illegible] the [illegible] to the members of the Board of Supervisors [illegible] [illegible] in an appropriate manner if the individual supervisor [illegible] the [illegible]. [illegible] certain [illegible] officials [illegible] or pursue an issue on behalf of the [illegible] the City Attorney will advise other officers no will play a role in the decision-making process or [illegible] consistent with the advice previously provided to the [illegible] officials.