MEMORANDUM

DATE: October 26, 2005

TO: Michael J. Aguirre, City Attorney, City of San Diego

FROM: Richard C. Solomon and Ellen Peck

SUBJECT: Ethical Issues Involved in San Diego City Attorney Filing Litigation Without City Council Approval

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ISSUE:

You have asked us for our opinion on whether your office may file civil lawsuits, under the City Charter and applicable ethical rules, without prior City Council approval. You have also asked us to comment on Mr. Kehr's October 11 memo to the City Council.

Our analysis depends on the language of the City Charter governing the duties of the City Attorney and the Rule of Professional Conduct for lawyers licensed in California. More specifically if your office does, indeed, have the authority to file civil lawsuits without City Council approval, the issue becomes whether you can do so consistently with your ethical obligations under the Rules and other relevant law.

SUMMARY OF OPINIONS:

Our brief responses are: your reading of Section 40 to give you discretion in the filing and defense of lawsuits without prior Council consent is both plausible and correct; and, you may do without violating applicable ethical rules if the City's confidential information is protected and if the ability of your attorney staff to properly function is not undermined by having to represent conflicting interests with consequent divided loyalties.

ANALYSIS:

I. ABILITY OF THE CITY ATTORNEY'S OFFICE TO INDEPENDENTLY INITIATE CIVIL LITIGATION

Section 40 of the San Diego City Charter specifies that "[t]he City Attorney 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. . . ." [para. 3 of Section 40]. More specifically, paragraph 5 states, in part:

> It shall be the City Attorney's duty . . . 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 . . .; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; [and] 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. . . .

Finally, paragraph 8 contains a significant, and express, limitation on the City Attorney's authority which sheds light on the scope of your authority under paragraph 5. Under paragraph 8, the City Attorney "shall" sue for injunctive relief "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," but may do so only "upon order of the Council." The same limitation applies to the City Attorney's duty to seek a court order requiring City officials to properly perform their duties (mandamus). Thus, in cases of official wrongdoing, where the relief being sought in court is an order enjoining the wrongdoing or directing the wrongdoers to lawfully perform their duties, the City Attorney must have prior Council authorization.

You will note that except for a request to put an opinion in writing, paragraph 5 is silent about Council's authorization. In contrast, the language of paragraph 8 explicitly and clearly requires prior Council authorization in the limited, but important, circumstances described. It stands to reason, therefore, that the broad authority given to your office in paragraph 5 is not similarly limited by the need for prior Council consent as required for lawsuits seeking injunctive or mandamus relief to remedy alleged official wrongdoing.

The Charter's broad grant of authority with respect to prosecutions of alleged crimes is routine ("to prosecute for all offenses . . ."). It is well accepted in our legal tradition that prosecutors enjoy unfettered discretion in making prosecutorial decisions and that, in doing so, they act in the public interest. It would be inappropriate, indeed extraordinary, for local government authorities to claim the power to direct the prosecutorial function in specific cases, such as insisting that the prosecutor file charges against one alleged wrongdoer or refrain from doing so with respect to another. The Charter appears to explicitly confer the same discretion on your office with respect to civil matters. The language pertaining to your authority over criminal and civil cases is virtually the same, and nothing in the text of paragraph 5 appears to constrain the City Attorney's authority to act independently when it comes to litigation.

It could be argued that paragraph 5 merely recites that the listed functions are to be provided by the City Attorney's office and not by another department of the City and does not address the issue of control. If so, and if the City Attorney must obtain Council consent for initiating any civil litigation, the text of paragraph 8 would be rendered unnecessary ("surplusage" to use the common law term). A well-accepted principle of interpreting statutes, however, counsels against any interpretation which makes one provision in a statute meaningless. *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 52 ("The court is required to give effect to statutes

according to the usual, ordinary import of the language employed in framing them. ("If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose[]" [citation]; "a construction making some words surplusage is to be avoided." [Citation.] "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." [Citations.]) Mr. Kehr's interpretation of Section 40 renders paragraph 8 meaningless because if Council consent is needed for all litigation, there is no reason to single out mandamus or injunctive relief actions as requiring Council consent.

Therefore, it appears that your reading of Section 40 to give your office discretion in determining if and when to initiate civil litigation is not only plausible but correct. The issue remains as to whether you may do so consistently with applicable ethical requirements.

II. ETHICAL CONSTRAINTS

As members of the State Bar, you and your attorney staff must conform your practice to the ethical rules contained in the Rules of Professional Conduct [hereafter "RPC" or "Rules"] promulgated by the California Supreme Court, to various ethical rules contained in statutes enacted by the California legislature, and both as judicially interpreted. The most significant duties are the duty to protect the City's confidential information and the duty to avoid representing conflicting interests or constituencies within the City. The conflict of interest rules are particularly aimed at preventing "divided loyalties" which create an undue risk of the lawyer favoring one client over the interests of the other by, for example, using a department's confidential information to its detriment in favor of another department. As analyzed below, California's ethical rules have been interpreted pragmatically when the context involves government lawyers.

Rule 3-600 of the RPC applies to organizational or entity clients such as corporations, partnerships, and governmental bodies. Clearly, the City of San Diego is an "organization" within the meaning of this rule and all staff lawyers must comply with its terms in providing legal advice or other legal representation to City officials and staff. Its fundamental premise is that "the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement." Rule 3-600(A). First, this means that the City's lawyers represent the City as an entity and not the City Council, individual City Council members, or department heads (there is one major exception to this principle B when a City official or employee is sued in their official capacity B which, however, is not pertinent to the present discussion). Second, Rule 3-600 is premised on the notion that someone has to "oversee" each particular engagement. Its drafters assume that someone within the entity B usually the City Council as the highest body for the City B "speaks" for it and directs the City Attorney's office on any given matter or engagement, such as the drafting of a proposed ordinance, the "bottom line" when negotiating a particular contract, or the desired goal of a specific lawsuit.

So far, this analysis suggests that regardless of the language in Section 40, the San Diego City Attorney does not have discretion to initiate civil litigation because whether to do so must reside with the City Council as the "highest authorized . . . body . . . overseeing the particular engagement." Mr. Kehr reaches this conclusion, which, given his two starting premises, is not surprising. His starting premises are that some official or group of officials of the City must oversee each engagement and that "oversee" means the right or power to determine whether civil lawsuits are to be filed or defended. This is certainly an accurate reflection of how the traditional lawyer-client model operates, but it is a mistake to transfer it to government lawyering mechanically and without the necessary context.

A proper analysis of the City Attorney's authority must take into account the fact that you are an elected official and, as such, have a constituency and a public policy role to fulfill, just as do members of the City Council. The problem, then, becomes how to square your public policy obligations (and the power given to you regarding civil litigation by Section 40 of the Charter) with your ethical obligations under Rule 3-600.

Preliminarily, it is a mistake to uncritically import the traditional lawyer-client model into the governmental lawyer context. Rule 3-600 was obviously drafted with the traditional model in mind. The Discussion following the rule, for example, focuses exclusively on the problems which can arise in representing private business entities such as closely held corporations and partnerships. If the traditional model applied without modification to government lawyers, it would be difficult to explain judicial opinions that, for example, insist that a government lawyer representing a public entity in an eminent domain case "has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to . . . bring about unjust settlements or results." *City of Los Angeles v. Decker* (1977) 18 Cal. 3d 860, 871. A lawyer representing a private party (corporate or otherwise) has no such corresponding duty under prevailing law.

Similarly, in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal. 3d 740, a city hired a private attorney on a contingent fee basis to bring an abatement action against an adult bookstore, the kind of lawsuit that would normally be handled by the City's full-time lawyers. The court held that the lawyer had to be disqualified because the fee arrangement B entirely proper in the private sector, traditional model B undermined the lawyer's neutrality because it created an artificial incentive for the attorney to seek the highest possible fine without regard to the factors counseling a different, more just and/or efficient outcome:

> Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. *Id.* at 746.

Mr. Kehr does not appear to consider these important nuances. He does not acknowledge that "defining precisely the identity of the client and prescribing the resulting obligations of such

[government] lawyers may be more difficult in the government context." Comment para. 6 to Rule 1.13 of the American Bar Association's Model Rules of Professional Conduct; California Standing Committee on Professional Responsibility and Conduct, Formal Opinion no. 2001-156 ("Although attorneys in the public sector are governed by the same conflict of interest rules as in the private sector, the application of the rules must take into account factors peculiar to the government context" [Heading 1]; *In re Lee G.* (1991) 1 Cal. App. 4th 17, 34 (the conflict "rules developed in the private sector . . . do not squarely fit the realities of public attorneys' practice.") On the other hand, our analysis does not mean that government lawyers "represent" the public interest or that the public at large is the lawyer's "client." Indeed, the Supreme Court has rejected such notions. *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 380 n. 5. It does mean that,

> the priorities that a lawyer should attach to each of his responsibilities to various government entities depends, not on some vague and misleading notion about the identity of his 'real' client, but rather on how his performance of these responsibilities will affect the obligation of the *government* to serve the public interest. . . . The notion of 'government in the public interest' that is implicit in nearly all conflict-of-interest rules for government attorneys requires the maximization of three values in government: fairness, effectiveness, and public confidence. *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1414-15 (1981) (emphasis in original).

The key to harmonize these respective obligations resides in the phrase "overseeing the particular engagement." Civil lawsuits differ in their need for oversight by a public entity's governing authority. For example, a lawsuit brought by an alleged victim of City police misconduct, in order to effectively settle, needs the Council's vote to appropriate the necessary funds (usually over a threshold amount, below which the City Attorney might have authority to settle on his own). Here, oversight in the form of agreeing to settle the action and funding the settlement amount would be essential. Another similar example might involve a civil rights suit against the City in which the plaintiffs seek some structural reform of a department, such as in hiring or promotion practices. The implementation of a settlement incorporating some or all of the requested structural relief would, again, require the Council's oversight.

In contrast, lawsuits which do not involve appropriations or other affirmative activities or which pose no appreciable risk of adverse fiscal impacts need no immediate oversight by the Council. Such oversight is provided, at the first level and pursuant to Section 40 of the Charter, by the City Attorney him or herself. Indirectly, oversight is also provided by the City Council through the budget process and by the voters who can throw out a City Attorney after his or her first term (because the City Attorney can serve a maximum of two terms, his or her performance will only be at issue once). The voters, in passing the Charter, made the basic policy decision to give their City Attorney the discretion to file civil lawsuits, as well as criminal prosecutions, subject only to the limits in paragraph 8 of Section 40 (see discussion in Part I, above). They provide the ultimate "oversight" in determining whether the civil litigation caseload of the City Attorney serves the public interest. For example, if an offshore oil spill fouls City property, the decision to seek damages in a civil lawsuit against the responsible parties could be made by the City

Attorney alone because no oversight, as a practical matter, would be necessary. If, later, the City Attorney decided to settle too cheaply, he or she would be just as accountable to the public as a City Council member who might have cast the same vote if the settlement decision was made by the Council. In such cases, therefore, oversight is provided initially by the City Attorney and ultimately by the voters at the appropriate election or, in egregious situations, by a recall.
Other kinds of cases might be more difficult to resolve. In these instances, the City Attorney and Council should be encouraged to find a way to work together in defining the public interest to be served by the proposed litigation and, as in any partnership, find an agreeable middle ground.

Finally, the City Attorney, in planning and implementing civil litigation must comply with all applicable ethical rules. The three essential rules that must be complied with include the duty of competency in pursuing the City's legal business, the duty to preserve the client's confidences, and the duty to avoid conflicts of interest. We discuss each of these duties in turn.

First, the duty of competency requires staff attorneys "to apply the (1) diligence, (2) learning and skill, and (3) mental, emotional and physical ability reasonably necessary for the performance of such service." RPC, Rule 3-110(B). There is no reason to expect a lower level of performance from a government lawyer than from an attorney in private practice for the simple reason that the client in both contexts is entitled to competent representation, and the City Charter allows the retention of outside counsel with special expertise on specific matters. This duty also requires the City Attorney to advance the Council majority decisions with respect to litigation he or she has chosen not to pursue unless such litigation was frivolous or illegal. Therefore, even though you might disagree with the City Council's decision to sue, for example, a zoning law violator, you must nevertheless proceed with the litigation if the action is not frivolous, illegal, or otherwise prohibited by applicable professional standards. We have not been informed that this is an issue in the present controversy, so it will not be further explored here.

Second, all lawyers associated with the City Attorney must preserve the City's confidential information as mandated by Business & Profession Code section 6068(e) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets of his or her client"). This has a number of important implications. Information subject to this duty includes all information asked to be kept confidential or which might cause the City harm (broadly defined) if released without authorization. The City is the "client" to which the duty is owed, and the Council is the body to determine, expressly or by implication, whether release of otherwise confidential information is in the best interests of the City. One consequence of this principle would prevent the City Attorney from publicly releasing confidential information based on the belief that disclosure would be in the public interest. A corresponding rule, the attorney-client privilege, also requires you to assert the privilege to prevent the release of confidential communications between the City and its legal staff when sought by a third party.

Another consequence of this duty arises if City Attorney staff obtains confidential information from, e.g., a City Council member regarding that member's compliance with the Political Reform Act. If this occurs, the City Attorney's office would be disqualified from later prosecuting that

member for non-compliance. 71 Op. Cal. Att'y Gen. 255, 265, 1988 Cal. AG Lexis 29 (1988). This is in sharp contrast to a lawyer's representation of a private corporate client. There, even though corporate counsel has received confidential information about individual directors while representing the corporation, the lawyer can nevertheless represent the corporation against that director. *La Jolla Cove Motel and Hotel Apartments, Inc. v. Jackman* (2004) 121 Cal. App. 4th 773, 785.

And, third, the City Attorney must avoid representing conflicting interests which undermine his duty of loyalty to the City and/or threaten to use the City's confidential information on behalf of an adverse party. In *The People ex rel. George Deukmejian v. Brown* (1981) 29 Cal. 3d 150, Attorney General staff lawyers advised a state agency with respect to a lawsuit filed to compel the State and its constituent agencies to literally ignore the recently enacted State Employer-Employee Relations Act. Later, a newly elected Attorney General filed his own action against the Governor and state agencies seeking the same relief that was being sought in the first lawsuit. The issue before the California Supreme Court was "whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy." *Id.* at 155. The Court ruled that the Attorney General could not do this because of Article V, section 1 of the California Constitution which states, "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." The Court reasoned:

> The constitutional power is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest; the Attorney General may act only 'subject to the powers' of the Governor. *Id.* at 158.

This language in the California Constitution is in marked contrast with the text of Section 40. San Diego has chosen a different model, as analyzed in Part I. Indeed, the Court acknowledged the importance of the language in Article V, section 1 by not finding opinions from other states persuasive because their statutes or constitutions "permit their attorneys general to sue any state officer or agency, presumably without restriction." *Id.* Mr. Kehr's reliance on *Deukmejian*, therefore, appears to be misplaced because the basis of the Court's opinion B the constitutional language which clearly gives the Governor oversight authority over all civil litigation B is not applicable to San Diego.

In contrast with the *Deukmejian* opinion, the courts have pragmatically modified the conflicts rule by sanctioning the dual representation of adverse parties in limited circumstances where there was no danger of divided loyalties or misuse of confidential information. For example, Los Angeles County's creation of a non-profit law office to provide representation to both children and their parents in dependency court proceedings was upheld in *Castro v. Los Angeles County Board of Supervisors* (1991) 232 Cal. App. 3d 1432, because the law office had taken important precautions to prevent the disclosure of confidences or otherwise undermine their respective

clients' interests. The parties would be represented by different lawyers who were not from the same physical office, had no contact with each other regarding that matter, and had no access to each other's files, computers or secretaries (i.e., a strict screening program).

Even though this clearly would not be sanctioned for a private law firm, the court's ruling reflects a pragmatic recognition of the fiscal realities, the actual organization of the law office, and the presumption that "[government] lawyers take their ethical responsibilities seriously." *Id.* at 1444. The *Castro* opinion is part of a broad trend applying the conflicts rules in a way that is sensitive to the interests that are truly at stake, rather than mechanically. *See also, Howitt v. Superior Court* (1992) 3 Cal. App. 4th 1575 (different lawyers in a county counsel's office may represent a county department before the County Employment Appeals Board and advise the Board if they are properly screened); Committee on Professional Responsibility and Conduct, Formal Opinion no. 2002-158 (allowing lawyers with a public law office to defend indigents jointly charged in criminal cases, if properly screened). Nevertheless, when the existence of a conflict poses a legitimate threat of misuse of confidential information or of undermining the lawyer's ability to properly function because of divided loyalties, the representation must be avoided.

In conclusion, your office may independently file and defend civil lawsuits in which the City, its employees, officials and departments are named parties, and, at the same time, you may do so only if you safeguard the City's confidential information and you avoid representing conflicting interests which threaten the misuse of that confidential information and/or to undermine your staff lawyer's ability to properly function due to divided loyalties.