
OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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Item Number: # 203

Proposed City/County Memorandum of Understanding Relating to Mutual Assistance of Legal Services

OVERVIEW

At the City Council meeting on April 20, 2009, the City Attorney presented a proposal for the City and the County to enter into a five-year Memorandum of Understanding (MOU) to provide for mutual assistance of legal services. The shared goal of the MOU is to provide an option for avoiding expensive outside legal costs for certain cases whenever possible. These services would be discretionarily requested and provided in instances where the City Attorney or County Counsel might be precluded from providing legal services to their respective clients and constituent clients due to 1) conflicts of interest or 2) a lack of unique legal expertise. While the City Council generally expressed interest in the proposal, questions were raised about the details of how such an arrangement would be accounted for and what liabilities or considerations, if any, should be discussed prior to a vote on the proposal.

The City Council requested the IBA to work with staff from the City Attorney's Office to better understand the proposal and comment on questions raised by Councilmembers. Having reviewed and further discussed this proposal with the Office of the City Attorney, this report comments on the proposal and provides information in response to some of the questions posed by the City Council.

FISCAL/POLICY DISCUSSION

The Proposal for Mutual Assistance of Legal Services

As discussed in the City Attorney's report to the City Council, the Offices of the City Attorney and County Counsel are periodically precluded from providing legal services to their respective

clients and constituent clients due to the California Rules of Professional Conduct governing conflicts of interest. Examples of such conflicts of interest might include instances where the City Attorney/County Counsel 1) need to recuse themselves from defending the City/County because of prior affiliations or 2) advise a Board or Commission that is subsequently sued along with the City/County and it would be a conflict to defend both. There will also be instances where the Offices of the City Attorney or County Counsel possess unique legal expertise (labor, environmental, intellectual property, etc.) that could benefit the other agency.

In an effort to develop a unique public partnership that would allow for mutual assistance of legal services in civil law matters and avoid the need for expensive outside legal counsel, the City Attorney and County Counsel developed a MOU that would allow for sharing legal resources. The decision to share resources would be determined on a case-by-case basis subject to limitations specified within the MOU. The proposed MOU would need to be authorized by City Council ordinance. The City Attorney has opined that Charter Section 40 does not preclude the City from utilizing other Counsel due to a conflict of interest or a lack of special expertise. Charter Section 26 provides "... that any function of the City may be performed by the County or that any function of the County may be performed by the City, provided the respective legislative bodies authorize and approve such transfer and assumption of function."

Costs for the City to Hire Outside legal Counsel

Based on recent experience, the hourly billable rate that outside legal counsel charges the City ranges from a low of \$200 per hour to a high of \$565 per hour. On average, the City Attorney's Office estimates the average cost for outside legal counsel to be approximately \$300 to \$400 per billable hour.

Balancing and Accounting for the Costs of Services Provided/Received

The City Attorney mentioned a difference in billable rates charged by the City and County for legal services. This comment raised questions regarding the methodology for ensuring an equitable exchange of services. In discussing billable rates with City Attorney staff, the IBA learned that the City and the County consider different factors in calculating their billable rates. Irrespective of the calculation differences, the County bills at approximately \$207/hour and the City would bill at approximately \$128/hour for the proposed arrangement

After reviewing the proposed MOU and discussing it with City Attorney staff, the IBA does not believe that hourly rate differences between the City and the County need to be an important consideration in evaluating this proposal. Section 8 of the proposed MOU (including sections 8.1 and 8.2) states that it is the intent of the parties "... to strive for an approximate parity in the number of hours of legal services provided by both the City Attorney's Office and the County Counsel's Office to the County and City, respectively." MOU Section 8.2 does offer an option to pay off hourly deficits; however, another option within the section allows for hourly deficits to be worked off by the deficient agency.

The intent appears to be focused on balancing hours rather than tallying billable hours for the purpose of settling up. The City Attorney has confirmed this intent for the IBA and stated that he does not envision any payments being made between the two agencies. In light of this understanding, the IBA recommends that Section 8.2 of the proposed MOU be amended to either 1) eliminate to option to pay off hourly imbalances or 2) establish an identical hourly billing rate for both agencies (i.e., \$200 per hour) to ensure an equitable arrangement. Additionally, we

would recommend that the City Attorney agree to apprise the City Council mid-year in the event that hourly imbalances (for either the City or the County) grow above what might be perceived to be reasonable levels in the first year (i.e., 1,000 hours).

Limitations/Protections within the Proposed MOU

The MOU has been structured to allow either agency to use the others legal services without charge at the discretion of the City Attorney and the County Counsel. Neither agency is required to use legal services from the other agency for a particular case or circumstance. The use of outside counsel remains an option for each agency to consider. Additionally, certain limitations and protections are provided within the proposed MOU:

- Section 2 of the proposed MOU stipulates that each engagement of legal services requires "mutually agreed-upon provisions normally utilized by each Office in the retention of outside counsel, including provisions regarding: (a) the right of each party to be reimbursed for reasonable and necessary expenses associated with the performance of legal services (these expenses are typically approved in advance and include expenses such as: court costs, expert witnesses, investigators, etc.), (b) the rights and obligations of each party with respect to indemnification and insurance, and (c) applicable government immunities. Section 2 further requires that each agreement for legal services comply with all applicable charter provisions, codes, and regulations of the City and County.
- Section 3 of the proposed MOU provides for shared legal services "... so long as the legal services to be retained or provided concern a matter in which there are no actual or potential adverse interests with respect to that matter between the City and the County." Potential adverse interests would be assessed by the professional judgment of the City Attorney and County Counsel.
- Section 5 specifies that provisions of the proposed MOU would be applied to any engagement of either City Attorney or County Counsel to provide services to independent decision-making bodies of the City and County (e.g., civil service commission, planning commission, and other similar type bodies).
- Section 6 of the proposed MOU specifies that "... legal representation shall not be used in any manner to limit or disqualify such Office (City Attorney or County Counsel) from continuing its legal representation of its main client entity, ...".
- Section 6.1 of the proposed MOU indicates that the City Attorney can authorize the County Counsel's performance of legal services for the City "... so long as the scope of legal services concerns a matter in which there are no actual or potential adverse interests with respect to that matter between the City and County." Actual or potential adverse interests would be assessed by the professional judgment of the City Attorney and County Counsel.
- Section 7.2 of the proposed MOU provides "The County Counsel agrees to maintain the confidentiality and not disclose to others any confidential information concerning the City that was obtained in the course of providing legal services to the City pursuant to

this MOU, nor utilize any such confidential information in any other matter or proceeding without the City Attorney's consent on behalf of the City."

- Section 9 of the proposed MOU specifies "Either party may terminate this MOU for convenience, for any or no reason, at any time by giving at least (10) business days written notice and specifying the prospective date of the termination."

Action Taken by the County Board of Supervisors

On April 21, 2009, the County Board of Supervisors unanimously approved item #14 on their consent agenda regarding the proposed agreement between the City and County authorizing the mutual assistance of legal services. In their comments before the vote, a few Supervisors voiced support for the proposal citing the opportunity to share experienced attorneys and avoid using more costly outside legal counsel which would inure to the benefit of taxpayers.

CONCLUSION

The proposed MOU between the City and the County for mutual assistance of legal services is limited to civil matters where there is either a conflict of interest or a lack of unique legal expertise. To the extent that the City Attorney, at his discretion, can rely on the County Counsel for legal assistance in lieu of expensive outside counsel, the City will save money. The City Attorney does not anticipate a large number of cases requiring legal assistance by or from County Counsel.

With regard to ensuring accountability for the proposed reciprocal legal service MOU with the County, the City Attorney has committed to use his professional judgment and report annually on the status of the arrangement to the City Council. In order to ensure equity and apprise the City Council of large, unanticipated service deficits (with potentially adverse fiscal or legal service implications), the IBA recommends the City Attorney: 1) strive to balance exchanged hours between the agencies; 2) eliminate the option to pay for legal services rendered (preferred) or establish an identical hourly billing rate for both agencies (i.e., \$200 per hour) to ensure an equitable arrangement; 3) agree to apprise the City Council mid-year in the event that hourly imbalances (for either the City or the County) grow above what might be perceived to be reasonable levels in the first year (i.e., 1,000 hours); and 4) brief the City Council at the end of each fiscal year to discuss the arrangement and associated cost savings.

As noted in this report, the proposed MOU appears to contain appropriate limitations, protections and assurances for the City and County. Given these governing conditions for the sharing of legal resources and the opportunity to reduce legal costs for the City, the IBA believes it is reasonable to rely on the professional judgment of the City Attorney to effectively manage a collaborative arrangement with County Counsel.

[Signed]

Jeff Kawar
Fiscal & Policy Analyst

[Signed]

APPROVED: Andrea Tevlin
Independent Budget Analyst