April 11, 2003

SDEC Formal Advice Letter No. FA03-04

Advice Provided to:

Leslie J. Girard
Assistant City Attorney
Office of the City Attorney
City of San Diego
1200 Third Avenue, Suite 1620
San Diego, CA 92101

Re: Request for Advice Regarding Provision of Pro Bono Services by Law Firm

Dear Mr. Girard:

This advisory opinion is in response to your letter to the City of San Diego Ethics Commission dated April 1, 2003. You have requested an advisory opinion from the Ethics Commission concerning the legality of the City accepting *pro bono* services from Len Simon and the law firm of Milberg Weiss Bershad Hynes & Lerach [the Firm] under Government Code section 1090, the Political Reform Act and its guidelines, and the City's Ethics Ordinance. Your questions and the Commission's response, based on the information provided in your recent letter, as well as your previous request for advice dated March 6, 2003, are detailed below.

QUESTION

1. Do the Ethics Ordinance, the Political Reform Act, and/or Government Code section 1090 prohibit the City from accepting *pro bono* services from Mr. Simon and the Firm in connection with litigation arising out of the delivery of a Renegotiation Notice to the City by the Chargers pursuant to the terms of the City/Chargers contract?

BACKGROUND

Len Simon, a former partner and now "of counsel" to the Firm, was a member of the City's Citizens' Task Force on Chargers Issues [Task Force]. The Task Force was established in June of 2002, and began its work in approximately September of 2002. According to your letter dated March 6, 2003, the purpose of the Task Force was to advise the City Council on issues pertaining to the Chargers, including issues arising out of the 1995 agreement between the City and the Chargers. Mr. Simon was reportedly the vice-chair of the Contracts Committee, and the primary author of this Committee's report, which was forwarded to the City Council for review and consideration on November 14, 2002. After submission of this Committee report to the Council, the Task Force continued to meet and consider its recommendations for the final report, which was issued on March 6, 2003.

According to your letter dated March 6, 2003, you first spoke to Mr. Simon in September of 2002, inquiring about his and the Firm's interest in being retained "to represent the City in any litigation that might arise between the City and the Chargers as a result of the Reopener provisions of the Agreement." Mr. Simon reported back to you that he and the Firm were interested and available. You both subsequently agreed that any further discussions or specific retention proposals should wait until the Task Force had concluded its work and Mr. Simon was no longer a member.

In your letter, you point out that Mr. Simon recused himself from the Task Force discussion and vote in February 2003, concerning the recommendation that no member of the Task Force be retained by the City as a consultant on matters relating to the Chargers. As you know, the Task Force ultimately decided to refer this issue to the Ethics Commission. On February 28, 2003, the Task Force submitted a request for advice to the Ethics Commission, and asked whether the City was permitted to hire any member of the Task Force to provide services in connection with negotiations and/or litigation with the Chargers.

On March 6, 2003, you submitted your first request for advice to the Ethics Commission. In this letter, you asked whether the City could retain Mr. Simon and the Firm to provide legal services in connection with "any litigation that may arise between the City and the Chargers arising out of the work of the Task Force or the provisions of the Agreement." Your request focused on paid retention of Mr. Simon and the Firm, but also asked about a *pro bono* arrangement. Shortly after submitting your request, you informally asked that the request be withdrawn (your formal request for withdrawal was not submitted until approximately March 21, 2003).

In response to the request from the Task Force, the Ethics Commission issued Informal Advice Letter 2003-03 on March 17, 2003 (a copy is attached for your review). In this letter, the Commission advised against the City hiring any member of the Task Force if the member was in any way involved in preliminary discussions regarding the retention of private consultants for purposes of negotiations or litigation with the Chargers.

On March 18, 2003, the City Council voted to retain the services of Procopio Cory Hargreaves & Savitch. In your recent letter, you indicate that this firm was retained to "provide the necessary

legal services." The Council action is further described in the Council minutes as "authorizing and directing the City Attorney to retain the law firm of Procopio, Cory, Hargreaves and Savitch, LLP to provide legal services to the City in connection with the receipt of the Renegotiation Notice" from the Chargers.

On April 1, 2003, you submitted a second request for advice, based solely on the retention of Mr. Simon and the Firm on a *pro bono* basis. In your letter, you indicate that Mr. Simon desires to offer his services without any compensation to work on "litigation arising out of the delivery of a Renegotiation Notice to the City by the Chargers pursuant to the terms of the City/Chargers contract," and that he will be performing such services with the Procopio law firm and the Office of the City Attorney. You contend that these services are separate and distinct from the consulting team assembled to negotiate with the Chargers pursuant to the Task Force recommendations or otherwise.

The City's Ethics Ordinance sets forth the following prohibitions concerning financial interests in contracts:

(a) It is unlawful for any *City Official* to be financially interested in any contract made by them in their official capacity.

(b) It is unlawful for any contract to be made by the *City* Council or any board or commission established by the *City* Council if any individual member of the body has a financial interest in the contract.

(c) For purposes of the prohibitions set forth above in subsections (a) and (b), the term financial interest means any interest, other than a remote interest as prescribed in California Government Code section 1091 or a non-interest prescribed in California Government Code section 1091.5, which would prevent the *City Officials* involved from exercising absolute loyalty and undivided allegiance to the best interests of the *City.*

(d) Any *City Official* with a remote interest in a prospective contract of the *City* must disclose the existence of the remote interest to the body of the board which the *City Official* is a member if that board has any role in creating, negotiating, reviewing, or approving the contract; and the *City Official* must abstain from influencing or participating in the creation, negotiation, review, or approval of the contract.

San Diego Municipal Code [SDMC] section 27.3560.

This local law is based on Government Code section 1090, which provides that:

> Members of the legislature, state, county, special district, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

ANALYSIS

The Ethics Commission has jurisdiction to enforce the City's Ethics Ordinance. Although the Ethics Commission does not have jurisdiction to enforce those state laws and regulations which are not codified in local law, the subject provision of the Ethics Ordinance concerning financial interests in contracts is modeled on Government Code section 1090. Accordingly, it is appropriate to look to previous decisions concerning 1090 for guidance in interpreting local law.

You have asked the Commission to address any issues raised by the Political Reform Act [PRA], but you have not specified any particular provisions you believe are applicable to the instant situation. Although the Commission does not have jurisdiction to enforce the PRA, there are certain sections of the Ethics Ordinance that are modeled on the PRA; however, none of these sections seem to apply to the subject at hand. As you know, there is a provision in the Ethics Ordinance (which is based on a similar provision in the PRA and related state regulations) that addresses disqualification of city officials from municipal decisions that might affect their economic interests (SDMC section 27.3561). You have asked about the potential retention of Mr. Simon and the Firm, not about the requirements for disqualification applicable to Mr. Simon while he served as a member of the Task Force. Moreover, as you know, the Commission can only provide advice with respect to contemplated future conduct, and not regarding actions that have already taken place. Therefore, this letter will not include an analysis of the PRA or any PRA provisions incorporated in local law.

As discussed above, the Ethics Ordinance prohibits city officials from having a financial interest in any contract made by them in their official capacity. In order to address your question, I have looked at the key elements in this provision of the Ordinance: City Official, financial interest, and the making of a contract. The definition of *City Official* set forth in the Ethics Ordinance includes the members of any board, commission, committee or task force required to file a statement of economic interests (SDMC section 27.3503). As a member of the Task Force required to file a statement of economic interests, Mr. Simon is a City Official subject to the provisions of the Ethics Ordinance.

With respect to the term "financial interest," the courts have consistently ruled that the term cannot be narrowly construed with respect to 1090 restrictions. In *People v. Honig,* (1996) 48 Cal. App. 4th 289, the Court opined as follows:

> . . . the term "financially interested" in section 1090 cannot be interpreted in a restricted and technical manner. The law does not require that a public officer acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute, nor does it require that the officer share directly in the profits to be realized from a contract in order to have a prohibited interest in it. [Citations.] Rather, "[t]he instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [state]." (*Stigall v. City of Taft, supra,* 58 Cal. 2d at p. 569.)

> The fact that the officer's interest "might be small or indirect is immaterial so long as it is such as deprives the [state] of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." (*Terry v. Bender* (1956) 143 Cal. App. 2d 198, 207-208.) And, "[w]e must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts." (*People v. Watson, supra,* 15 Cal. App. 3d at p. 37) . . . .
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> Moreover, prohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence. Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances.

People v. Honig, supra, 48 Cal. App. 4th at p. 315.

To apply the logic of this case to the instant situation, Mr. Simon does not have to realize any actual profits in order to have a financial interest in the proposed contract with the City. In fact, the court in *Honig* cites various examples of prohibited financial interests, including the following:

- In *Moody v. Shuffleton* (1928) 203 Cal.100, a county supervisor sold his business to his son and took a promissory note secured by a chattel mortgage in payment. The son then obtained a contract with the county. The Supreme court held that, because the contract could serve to enhance the value of the business, and therefore the security of the promissory note, the supervisor had a conflict of interest with respect to the contract.

- In *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal. App. 3d 201, a member of the county board of supervisors was a partner and shareholder of an insurance agency that procured insurance for the county. Although the county supervisor did not share in the commissions from the County's business and the commissions were not used to offset the agency's overhead, the court found that the supervisor had a financial interest because he had an interest in the agency, and the financial success of the agency inured to his benefit.

In addition, California Government Code section 1091.5 sets forth various exceptions to the financial interest prohibitions of 1090. These exceptions include a nonsalaried member of a nonprofit corporation, as well as a noncompensated officer of a nonprofit, tax-exempt corporation, and apply only if the interest is disclosed to the body or board at the time the potential contract is first considered (Gov't. Code § 1091.5(a)(7) and 1091.5(a)(8)). The fact that these exceptions are tied to nonprofit, tax-exempt organizations is telling of the legislative purpose.

Among the most valuable assets of an attorney and/or a law firm is a client list. Were Mr. Simon or the Firm to be able to list the City on its client list and mention the litigation with the Chargers, it would serve as a declaration to other potential clients that they have expertise in this area and are to be trusted. Therefore, although Mr. Simon might agree to work for the City without compensation, he and the Firm's value will be enhanced because they will both be able to identify the City as a client. In fact, in this instance, the highly public nature of the potential litigation with the Chargers would ensure that the general public, other municipalities, and other sports franchises would be well aware of Mr. Simon's and the Firm's representation of the City. It is a well-established marketing practice for all types of businesses to offer services at no charge or at a discounted rate in order to attract future business. Therefore, although a *pro bono* arrangement does not contemplate the payment of fees to Mr. Simon or the Firm, it is very likely that the proposed contract would inure to the financial benefit of both Mr. Simon and the Firm as it would enhance Mr. Simon's and the Firm's value.

As discussed above, according to the Court in *Honig*, prohibited financial interests are not limited to express agreements for benefit; instead, benefit may be inferred from the circumstances. (*Honig, supra,* 48 Cal. App. 4th at p. 315.) In this case, it seems reasonable to infer that the proposed arrangement will financially benefit both Mr. Simon and the Firm. In addition, as discussed above, the Court in *Honig* opined that Government Code section 1090 is concerned with any interest, other than a remote or minimal interest, even if the interest is small or indirect. (*Honig, supra,* 48 Cal. App. 4th at p. 315.) In this case, it appears that both Mr. Simon and the Firm have a direct (not an indirect) financial interest in the proposed arrangement, and that the interest is neither remote nor minimal.

With respect to the making of a contract, the California Supreme Court has ruled that taking part in the planning, preliminary discussions, compromises, drawing of plans, etc., qualifies as the making of a contract for purposes of Government Code section 1090. (*Stigall v. City of Taft*, (1962) 58 Cal. 2d 565.) In that case, a member of the city council was involved in the preliminary stages of the planning and negotiating process but resigned from the council prior to its vote on the contract; nevertheless, the court found that the councilmember was still involved in the making of the contract. In other words, if Mr. Simon merely discussed the issue of the City assembling a team of private consultants, he was involved in the making of one or more contracts, even if he was not involved in the ultimate award of any contracts.

The California Attorney General has issued various opinions which serve to clarify the scope of Government Code section 1090. For example, the Attorney General concluded in an informal opinion that a former member of a city planning commission would violate section 1090 if he were to enter into a contract with the city to be a consultant with respect to the city's general plan revision since, while he was a commission member, the commission adopted a policy to use consultants instead of staff members for the plan revision. (Cal.Atty.Gen., Indexed Letter, (Jan. 26, 1993) No. IL 92-1212.) The Attorney General opined that "the former commissioner was an active participant in the overall city policy decision to 'contract-out' much of the general plan revision. Accordingly, he cannot now benefit from such participation." (*Id.*) In addition, the Attorney General clarified that this conclusion did not mean that members of all boards and commissions may never be hired as consultants after leaving public service. Instead, the

Attorney General explained that, "if the officials were instrumental in proposing 'contracting-out' services, they may not later be the beneficiaries of their proposals." (*Id.*)

In the case at hand, Mr. Simon was admittedly the principal author of the Contracts Committee report, which was distributed to the City Council in November of 2002. In this report, the Committee suggested that experts and consultants may need to be retained, and recommended that the Mayor, City Council, City Attorney "and any outside consultants" begin preparation immediately "for the crucial 90 day renegotiation period by identifying in advance any informational, legal or political challenges which will be presented in negotiating and, if necessary, litigating, in this crucial time period." This recommendation was incorporated into the Task Force's Final Report to the Mayor and City Council. It appears therefore that Mr. Simon contemplated the hiring of outside consultants (presumably attorneys) to assess legal issues generated by the delivery of the renegotiation notice. In addition, Mr. Simon actively participated in the Task Force discussions (which were televised) concerning the hiring of outside consultants to assist the City with negotiations and/or litigation with the Chargers. Although your letter indicates that Mr. Simon recused himself from the discussion and vote on February 20, 2003, concerning the Task Force recommendation that no member be retained by the City as a consultant on matters related to the Chargers, your letter does not indicate that he recused himself from any discussions concerning the draft recommendation that the city assemble a team to include expert consultants and immediately commence negotiations. The foregoing factors indicate that Mr. Simon was involved in the making of one or more contracts for purposes of Government Code section 1090 and the Ethics Ordinance.

In another opinion, the Attorney General rejected the suggestion that an official must intend to contract with the agency after leaving office for section 1090 to be violated. The Attorney General contended that the statute has never been so rigorously construed, and stated that the test is whether the official had the opportunity to and did participate in the policy decision to create the governmental program under which the contract would later be executed. (81 Ops. Cal. Atty. Gen. (1998) 317.) In that opinion the Attorney General concluded that a city councilmember who participated in the planning and discussions regarding the creation of a city loan program for developing businesses could not leave the council and subsequently apply for a loan under the program. To apply this reasoning to the matter at hand, even if Mr. Simon did not intend to contract with the City for consultant services at the time he was a member of the Task Force, the prohibitions of section 1090 would still apply.

Although you contend that the proposed *pro bono* arrangement is outside the scope of the consulting contracts contemplated by the Task Force, it appears that the suggested role of Mr. Simon and the Firm is sufficiently related to the issues addressed by the Task Force to invoke the prohibitions of 1090 and SDMC 27.3560. As you know, the Task Force was formed for the purpose of advising the City Council on a myriad of issues related to potential negotiations and/or litigation with the Chargers, including the possible delivery of a Renegotiation Notice by the Chargers. Moreover, the City Council minutes indicate that, on March 18, 2003, the Council: accepted the Final Report of the Task Force; designated a negotiating team to include attorneys, consultants and/or experts; directed the team to meet with the Chargers pursuant to the Task Force recommendations and in response to the Renegotiation

Notice delivered by the Chargers; authorized the retention of attorneys and consultants for the purpose of being members of the negotiating team; and authorized the hiring of the Procopio, Cory firm to provide legal services in connection with the receipt of the Renegotiation Notice (a copy of the minutes is enclosed for your reference). In your recent letter, you deny that Mr. Simon would be a member of the City's negotiating team, yet you admit that he would be working with the Procopio firm and your office on any litigation that may arise out of the delivery of the Renegotiation Notice. In light of the foregoing, it is difficult to distinguish the role contemplated for Mr. Simon from those issues addressed by the Task Force.

CONCLUSION

SDMC section 27.3560 prohibits City Officials from having a financial interest in any contract made by them in their official capacity. As a result of the foregoing analysis, I believe that Mr. Simon was a City Official, that he was involved in the "making" of a contract during his tenure on the Task Force, and that he has a financial interest in the potential contract with the City for legal services. Although I am not aware of any authority that specifically addresses whether or not a *pro bono* arrangement can generate a prohibited financial interest, I believe that the opinions cited above lend themselves to an interpretation that the agreement you have contemplated with Mr. Simon and the Firm would likely constitute a violation of state and local law. In addition, as you may know, the Attorney General intends to issue an opinion within the next few months that will address this issue. Therefore, while I am not prepared at this time to unequivocally opine that the contemplated *pro bono* arrangement is prohibited by state and local law, I would advise against such a retention for the reasons outlined above.

Sincerely,

Charles B. Walker
Executive Director

CBW:sf

Enclosures