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Public Ethics Commission
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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: January 5, 2009

RE: A Report And Action To Be Taken Regarding The Office Of The City Attorney's Objection To The Commission's Proposed Amendments To O.M.C. Section 2.24.090 (Legal Assistance For The Public Ethics Commission)

At its regular meeting of December 1, 2008, the Commission considered a staff report discussing and analyzing the objections submitted by the Office of the City Attorney to a Commission-proposed amendment to the Commission's enabling ordinance [O.M.C. Chapter 2.24]. Specifically, the Office of the City Attorney objected to the Commission's proposed amendment to Section 2.24.090:

2.24.090 LEGAL ASSISTANCE

A. The City Attorney is the Commission's legal advisor and shall provide the Commission with legal assistance. In the event of an actual or potential conflict that would substantially affect the City Attorney's representation of the Commission, the City Attorney shall provide written disclosure to the Commission of the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the Commission if the City Attorney represented the Commission in any particular matter.

B. After the City Attorney provides the Commission with a written disclosure, the Commission may 1) vote to consent to the City Attorney's representation in the particular matter in spite of the conflict or 2) request the City Attorney to recuse himself or herself in the particular matter and direct the Executive Director to agendize for City Council approval the retention of outside counsel by the Commission at City expense.

The City Attorney's Office objected to the above language on grounds that 1) the term "potential conflict of interest" is too broad and undefined; 2) the City Charter prohibits the Commission from having separate counsel when there is no actual conflict of interest; and 3) the City Charter does not give the Commission the option to select outside counsel. These arguments were further explained and analyzed in a Commission staff memorandum dated December 1, 2008. At the request of Commission staff, the Office of the City Attorney proposed an alternative amendment to Section 2.24.090 to address its concerns:

2.24.090 LEGAL ASSISTANCE

The City Attorney is the Commission's legal advisor. The City Attorney shall provide the Commission with legal assistance, to the extent such assistance does not constitute a conflict <u>under the California Rules Of Professional Responsibility or state ethics law. The City Attorney shall provide any disclosures required by the California Rules of Professional Responsibility or state ethics law to the Commission.</u> In the event of a conflict, the City Attorney shall retain outside counsel.

After consideration and comment, the Commission concluded that the likelihood of an actual conflict of interest requiring outside counsel was very low, and that any attorney retained by the Office of the City Attorney to represent the Commission would owe a professional duty of loyalty to the Commission as a client. Thus it was not necessary that the Commission be able to select its own attorney but be able to consult with the Office of the City Attorney prior to the retention of outside counsel. Accordingly the Commission directed staff to develop alternative language to provide that the City Attorney shall consult with the Commission before retaining outside counsel in the event of a conflict.

Based on the Commission's direction, Commission staff and the Office of the City Attorney have developed the following language for the Commission's consideration, based on the City Attorney's most recent proposal:

2.24.090 LEGAL ASSISTANCE

The City Attorney is the Commission's legal advisor. The City Attorney shall provide the Commission with legal assistance, to the extent such assistance does not constitute a conflict <u>under the California Rules of Professional Responsibility or ***[insert:*** "applicable"***]*** state ***[strike:*** "ethics"***]*** law. The City Attorney shall provide any disclosures required by the California Rules of Professional Responsibility or ***[insert:*** "applicable"] state [***strike:*** "ethics"***]*** law to the Commission.</u> In the event of a conflict, the City Attorney, ***[insert:*** after consultation with the Commission,***]*** shall retain outside counsel.

If acceptable to the Commission, the Office of the City Attorney will execute the Commission's proposed set of amendments for "form and legality." Commission staff will forward the amendments to the City Council for consideration in early 2009.

Respectfully submitted,

Daniel D. Purnell
Executive Director