

File No. 101212

Committee Item No. 7
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Rules

Date September 30, 2010

Board of Supervisors Meeting

Date _____

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OTHER

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Completed by: Linda Wong

Date September 24, 2010

Completed by: _____

Date _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Outside Counsel for Mayoral Succession Issues]

2
3 **Resolution approving the retention of outside counsel to advise the City, in place of the**
4 **City Attorney's Office, on legal issues relating to Mayoral succession.**

5
6 WHEREAS, City Attorney Dennis Herrera has informed the Board of Supervisors that
7 on August 26, 2010, he took the first steps to raise funds as a possible candidate for Mayor,
8 and by memorandum dated August 27, 2010, City Attorney Herrera set forth protocols for
9 legal advice on matters concerning the Mayor's race during the campaign period for Mayor, a
10 copy of which memorandum is on file with the Clerk of the Board of Supervisors in File No.
11 101212, which is hereby declared to be a part of this Resolution, as if set forth fully herein;
12 and,

13 WHEREAS, Under those protocols City Attorney Herrera advised the Board of
14 Supervisors that his Office would not handle legal questions that directly involve the Mayoral
15 election or campaign during the campaign period and that the City should select outside
16 counsel in advance to advise or assist them in those matters, consistent with past practices;
17 and,

18 WHEREAS, The Chief Assistant City Attorney issued a memorandum dated
19 September 7, 2010, to the Board of Supervisors and the Mayor, recommending that
20 consistent with City Attorney Herrera's August 27, 2010, memorandum, the City retain outside
21 counsel to advise the City, in place of the City Attorney's Office, on legal issues relating to
22 Mayoral succession and further recommending that we hire the Office of Santa Clara County
23 Counsel, which is prepared to provide such legal representation without charge to the City
24 under the reciprocal relationship that the City Attorney's Office has with the Santa Clara
25 County Counsel's Office, a copy of which September 7, 2010, memorandum is on file with the

1 Clerk of the Board of Supervisors in File No. 101212, which is hereby declared to be a part of
2 this Resolution, as if set forth fully herein; now, therefore, be it

3 RESOLVED, That the City retain _____ to advise
4 the City, in place of the City Attorney's Office, on legal issues relating to Mayoral succession
5 for such period as City Attorney Herrera continues to take steps as a possible Mayoral
6 candidate or while he is a Mayoral candidate; and, be it

7 FURTHER RESOLVED, That the Clerk of the Board take such actions as are
8 necessary or appropriate to retain _____ for such purposes; and, be
9 it

10 FURTHER RESOLVED, That the City Attorney's Office assist the Clerk of the Board,
11 as appropriate and consistent with City Attorney Herrera's August 27, 2010, memorandum, in
12 finalizing such arrangements with outside counsel and facilitating the transition for such
13 advice, all in furtherance of this Resolution.

Biography of Miguel Márquez

As the County Counsel, Miguel Márquez oversees all aspects of the Santa Clara County Counsel's Office and serves as the chief legal advisor to the Board of Supervisors. More than 60 attorneys work in the office, divided into nine busy practice areas. Márquez formerly served as an Assistant County Counsel under prior County Counsel Ann Ravel, who now heads the Tort Division and the Office of Consumer Affairs in the U.S. Department of Justice upon her appointment by President Obama.

Márquez has overseen impact litigation on behalf of County residents—from helping to draft and then defending a menu labeling ordinance that inspired a law to list nutritional information on the menus of all chain restaurants throughout the State, and overseeing a suit against ten major pharmaceutical companies for overcharging public hospitals and other County-operated medical facilities for outpatient drugs (*County v. Astra*), to successfully objecting to a proposed settlement agreement between the federal government and a set of plaintiffs (*Martínez v. Astrue*), thereby achieving stronger notice provisions for thousands of beneficiaries nationwide. He also oversaw the filing of an amicus brief in the recent *St. John's Well Child and Family Center, et al. v. Schwarzenegger* case challenging the Governor's so-called blue-pencil budget cuts to vital health and social safety-net programs.

In addition to overseeing the normal heavy workload of the office—for example, in FY 2009 the Litigation Team handled 78 new cases and Workers' Compensation handled 217 new cases—Márquez has led several innovative initiatives. For example, the General Government Section has been working to develop environmentally-oriented ordinances for the County, focusing on issues such as regulating single-use bags, requiring greener building standards, and addressing climate change. The Health and Hospital Section has worked with the County's Environmental and Public Health departments to develop an innovative drug take-back system. The Probate Department has teamed with the County's Adult Protective Services, Public Guardian, and District Attorney's Office to identify, investigate, and prevent elder financial abuse. Márquez also has supervised the transfer of court facilities to the State and has overseen the County's efforts in the ongoing Coleman prison litigation in which the State has been ordered to reduce its prison population by more than 40,000 inmates.

Márquez also has given trainings for public agencies on major issues arising under conflicts of interest and ethics rules, areas in which he is a recognized expert, and has taken the lead, along with the County Executive and the Finance Agency, with regard to redevelopment issues and other public finance matters of statewide concern.

Márquez's prior work in both public sector and private sector law in the Bay Area, as well as in management consulting, trained him well for his current role addressing issues ranging from general government, workers' compensation, and health and hospitals to education, redevelopment, and finance.

Immediately before joining the Santa Clara County Counsel's Office, Márquez served as General Counsel for the San Francisco Unified School District (the District), where he managed a multimillion dollar budget and was responsible for all of the District's legal matters, including providing advice and counsel to the Board of Education, the Superintendent of Schools, and the District's 35 child development centers; he also had overall responsibility for the District's Labor Relations Department, managing labor relations with 17 bargaining units representing approximately 9,000 employees. As a major accomplishment in this position, he led the legal effort to pass a large parcel tax to increase teachers' salaries, especially for those who choose to work in hard-to-staff schools or in

hard-to-fill subject areas. He also initiated the process now underway to redesign student assignment policies in order to desegregate schools in the District and decrease the resulting achievement gap.

Before being appointed General Counsel for the District, Márquez served as a Deputy City Attorney in the San Francisco City Attorney's Office, working on the General Government and Ethics & Elections teams. This position followed his service as a Deputy County Counsel for San Mateo County, where he was the primary legal counsel for the County's three community colleges, the Controller's Office, and the Special Education Local Plan Area, in addition to representing nine school districts and the San Mateo County of Education. One of the many cases he worked on resulted in a major recovery of fees for the County's Inmate Welfare Trust Fund. Before joining San Mateo, Márquez worked at Cooley Godward LLP as a transactional lawyer. He also worked on constitutional law and policy matters at Remcho, Johansen & Purcell, including the 2001 post-Census redistricting of Senate, Assembly, Congressional, and State Board of Equalization seats.

Prior to law school, Márquez worked as a Management Consultant at KPMG Peat Marwick in Sacramento, California, where he was part of a national financial and organizational consulting practice.

Márquez received his J.D. from

the University of California, Berkeley's Boalt Hall School of Law, his Masters in Public Policy from Harvard University, and his B.A. degree in Public Policy from Stanford University.

Born in California, Márquez's commitment to public service in part grows out of his early public school experiences. His parents had immigrated to the United States from Mexico, with his mother holding only two months of formal education and his father four years. Spanish was Márquez's first language. Head Start programs, therefore, were critical to his early education. These formative experiences gave impetus to his early career as a school lawyer and more generally inspired his commitment to providing opportunities and a safety net to those who need them.



DENNIS J. HERRERA
City Attorney

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MEMORANDUM

TO: MAYOR GAVIN NEWSOM
MEMBERS, San Francisco Board of Supervisors
MEMBERS, San Francisco Elections Commission
MEMBERS, San Francisco Ethics Commission
ANGELA CALVILLO, Clerk of the Board of Supervisors
JOHN ARNTZ, Director of Elections
JOHN ST. CROIX, Executive Director, Ethics Commission

FROM: DENNIS J. HERRERA DJH
City Attorney

DATE: August 27, 2010

RE: Legal Advice on Matters Concerning the Mayor's Race

Yesterday I took the first steps to raise funds as a possible candidate for the Mayor of San Francisco. During the campaign, I will continue to serve as the City Attorney for the City and County of San Francisco. This memorandum explains the City Attorney's Office's policies regarding representation of the City during the Mayor's race. Following a short period of administrative transition, the policies described in this memorandum will apply during the period (the "Campaign Period") beginning September 10, 2010 and ending at the conclusion of the campaign, which I anticipate will be the day the Board of Supervisors (the "Board") declares the results of the November 8, 2011 election.

Summary

Under the San Francisco Charter, the City Attorney's Office provides a range of legal advice and representation to the City's officers, departments, boards and commissions, including advice regarding elections and campaign finance. Due to my decision to be a candidate in the Mayor's race, I intend to limit involvement of the City Attorney's Office and not personally participate in legal advice about matters related to elections and campaign requirements during the Campaign Period. To avoid even the appearance of any conflicts of interest, the City Attorney's Office has implemented the following protocols.

First, when a legal question directly involves the election or campaign for Mayor, the City Attorney's Office will not handle the matter. Instead, the City will retain outside counsel for advice and assistance, preferably from other public law offices. The City Attorney's Office has already made preliminary arrangements with three local public law offices to advise City departments about the limited range of issues directly involving the election and campaign for Mayor. This arrangement is consistent with past practices; my Office has a standing reciprocal agreement with other local law offices to provide legal support at no cost in situations like this.

Second, when a legal question involves elections or campaigns but does not directly involve the election or campaign for Mayor, the City Attorney's Office will handle the matter, but I will not participate in the matter during the Campaign Period. Within the next week, the Office will establish a screen so that I will not be involved in any legal advice regarding the

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November 2011 election or campaigns, nor for that matter will I be involved in any legal advice about the upcoming November 2010 election or campaigns.

Third, for all other matters, the City Attorney's Office will continue to represent the City with my full involvement. Except in the two circumstances described above, I will remain actively involved in decisions regarding litigation, legislation, contracts, legal advice, investigations and claims.

Discussion

I. The Role of the City Attorney

As described in Charter section 6.102, the City Attorney is the legal counsel for the City. In that capacity, the City Attorney oversees an Office that represents the City, including its officers and employees, in litigation; drafts and approves legislation and contracts; and provides legal advice to the City and its commissions, officers and employees. See S.F. Charter § 6.102. The Office regularly advises the Department of Elections, the Elections Commission, the Ethics Commission, the Board and the Mayor's Office, each of which plays a role in funding, oversight and administration of local elections. The City Attorney's Office regularly advises those agencies on a range of matters, some that are specific to elections or campaigns and others that relate to general administrative matters that all City departments face. The general administrative advice includes legal advice about notice and agenda requirements for public meetings, responses to public records requests, the City's contracting process, contract administration, personnel issues, and other similar sorts of matters.

The Office's advice and representation on election- and campaign-related matters varies depending on the circumstances, and typically include the following:

- *Department of Elections and Elections Commission:* The Office provides advice regarding federal, state and local elections laws; represents the City in election-related litigation; and assists in drafting materials for publication in the Voter Information Pamphlet.
- *Ethics Commission:* The Office advises on the application and interpretation of local and state laws regarding campaign finance regulation, and drafts ordinances and regulations governing campaign finance and campaign conduct. In administrative enforcement proceedings alleging violations of campaign laws, the Office provides advice to the Commission and its staff. The Office also represents the City in litigation regarding campaign finance matters.
- *Board of Supervisors and Mayor:* The Office drafts legislation and advises on legal issues raised by proposed legislation regarding campaigns and elections, including amendments to the City Charter, the City's Campaign Finance Reform Ordinance ("CFRO") and the City's Municipal Elections Code ("MEC"). The Board has the authority to place measures on the ballot, and this Office usually drafts or approves those measures as to form and advises the Board and the Mayor regarding that process. Also, the Mayor or four or more individual members of the Board may submit a policy measure or ordinance to the voters, and this Office sometimes drafts those measures and advises the Mayor and Board about them, though we do not approve them as to form. This Office also provides advice on budgetary matters relation to the adoption of the budget and the City's funding of the Department of Elections and Elections Commission and the Ethics Commission.

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- *City Attorney's Office:* In addition to its role advising and representing City departments, the City Attorney's Office also has independent obligations regarding certain matters impacting elections and campaigns. For instance, the City Attorney drafts a title and summary for each proposed local measure circulated in an initiative petition (Cal. Elec. Code § 9203); prepares the ballot question for most local measures that appear on the City ballot (MEC § 510); reviews proposed formal opinions from the Ethics Commission and determines whether to concur in their conclusions (S.F. Charter § C3.699-12); and determines whether to investigate and prosecute complaints of campaign finance violations (S.F. Charter § C3.699-13(a); CFRO § 1.170(b)).

II. The City Attorney's Office and the 2011 Election

As City Attorney, I am responsible for ensuring that every City officer, department, board and commission receives the highest quality legal representation, and my mayoral candidacy will not interfere with that goal. During the Campaign Period, I will take the following steps to ensure that the City continues to receive that highest quality legal representation and to avoid even the possible appearance of conflicts of interest.

A. Matters That Directly Involve the Mayoral Election or Campaign.

During the Campaign Period, the City Attorney's Office will not handle legal questions that directly involve the mayoral election or campaign. As section IV of this memorandum explains further, the affected departments should select outside counsel in advance to advise or represent them in those matters, consistent with past practices.

The following examples illustrate when an affected department should rely on outside counsel. These examples, and each of the examples listed in the remaining sections of this memorandum, are for illustration purposes only, and are not intended as an exhaustive list of possible issues.

Example 1 – Election questions regarding Mayoral candidates. The Department of Elections has a legal question concerning the ballot designation, candidate qualification statement, nomination documents or electioneering activities of a candidate for Mayor. Because this question pertains specifically to the election or campaign for Mayor, the City Attorney's Office will not handle the matter.

Example 2 – Campaign finance questions regarding Mayoral candidates. The Ethics Commission has a legal question regarding the application of campaign finance laws to a particular candidate for Mayor, such as: (a) whether the candidate qualifies for the City's partial public financing program; (b) whether a particular mailer supports or opposes the candidate, potentially increasing the candidate's spending limit; (c) whether a political expenditure was independent or was coordinated with the candidate's campaign; or (d) whether the candidate used public funds for a lawful purpose. Because these questions pertain specifically to the election or campaign for Mayor, the City Attorney's Office will not handle the matters.

Example 3 – Complaints filed with Ethics Commission alleging violations in the mayoral campaign. The Ethics Commission receives a complaint alleging a violation of the local campaign finance laws by a candidate for Mayor or by a committee supporting or opposing a candidate for Mayor. The Commission's staff seeks legal advice regarding how to prosecute the complaint. Because these questions pertain specifically to the election or campaign for Mayor, the City Attorney's Office will not handle the matter.

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For these matters where the City Attorney's Office will not be providing legal advice, outside counsel will handle the matter during the Campaign Period. In each such instance, the outside counsel may contact the City Attorney's Office to inquire whether this Office has any existing materials, such as previously-issued memoranda or research files, that could be relevant to the issue at hand. Neither outside counsel nor my staff will involve me in any of these informational inquiries and exchanges.

Also, if any such matter is still pending after the Campaign Period ends, this Office will re-evaluate whether use of outside counsel is still needed. That determination will depend on whether the acts alleged in the complaint involved or affected my campaign.

B. Matters Involving Elections or Campaign Conduct That Do Not Directly Involve the Mayoral Election or Campaign.

When a legal question does not *directly* involve the election or campaign for Mayor, use of outside counsel is not necessary. In those circumstances, the affected City department will consult as usual with the City Attorney's Office. But to avoid even an appearance of a conflict of interest, I will not participate in matters involving elections or campaigns during the Campaign Period. The City Attorney's Office will adopt a screen, memorialized in writing, so that the deputies handling general election and campaign matters regarding the November 2010 and 2011 elections do not communicate with me about these matters. The screen will also apply to the Office's Managing Attorney, Marisa Moret; Chief Assistant Jesse Smith will supervise the deputies handling the matters and will have final authority for the Office's decisions.

The following examples illustrate when the Office will screen me from participating in advice about elections or campaign conduct during the Campaign Period:

Example 1 – Election law questions. The Department of Elections has legal questions concerning (a) the qualifications, nomination documents or electioneering activities of a candidate for another City office, (b) the process for qualifying, withdrawing or resubmitting ballot measures, or (c) operational issues such as certification of the City's voting system, operation of satellite voting locations for early voting, or implementation of laws regarding voter registration. These questions do not pertain specifically to the election or campaign for Mayor, so the City Attorney's Office will handle the matters without my participation during the Campaign Period.

Example 2 – Campaign finance questions. The Ethics Commission has a legal question about interpretation of campaign finance laws like the City's contribution limits or disclosure rules, or about the effect of a pending appeals court case on the City's public financing system. The question is not related to any particular candidate or race. This question does not pertain specifically to the election or campaign for Mayor, so the City Attorney's Office will handle it without my participation during the Campaign Period.

Example 3 – Tasks related to ballot measures. The City Attorney's Office is responsible for preparing the title and summary for proposed ballot measures and for preparing ballot questions for measures that have qualified for the ballot. A designee of the City Attorney's Office also sits as an *ex officio* member of the Ballot Simplification Committee and prepares an initial draft digest for each measure that the Committee considers. These tasks do not pertain specifically to the election or campaign for Mayor, so the City Attorney's Office will handle them without my participation during the Campaign Period.

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Example 4 – Litigation regarding elections or campaign finance. A lawsuit is filed against the City challenging the City's voting system, ballot materials, or the application of the City's campaign finance laws. The litigation does not specifically pertain to the election or campaign for Mayor, so the City Attorney's Office will handle it without my participation during the Campaign Period.

Example 5 – Elections or campaign finance legislation. The Board or the Mayor seeks assistance drafting legislation to amend the Charter, the CFRO, or the MEC in a way that would affect local campaigns or elections, or seeks legal advice about such legislation while it is pending. Or, similarly, the Ethics Commission seeks assistance drafting regulations to interpret the CFRO. These questions do not pertain specifically to the election or campaign for Mayor, so the City Attorney's Office will handle them without my participation during the Campaign Period.

Example 6 – General advice to Department of Elections, Elections Commission and Ethics Commission. The Department of Elections, Elections Commission or Ethics Commission has a legal question concerning one of the general laws that govern all City agencies, such as a law governing public meetings, public records, contracting, or personnel. In most circumstances, because this advice could impact the City departments responsible for oversight of local elections and campaigns, the City Attorney's Office will handle it without my participation during the Campaign Period.

C. Matters That Do Not Involve Elections or Campaign Finance

Most of this Office's legal work is unrelated to our advice regarding elections and campaigns. When a legal question does not involve the November 2010 or November 2011 election or campaign and election issues in those years, the affected City departments will consult as usual with the City Attorney's Office. I will continue my involvement and remain the final decision-maker for the Office. For example, for all such matters, the Office will continue to draft legislation and approve it as to form, provide legal opinions upon request, represent boards and commissions in public meetings, represent the City in litigation, and provide advice to officers, departments, boards and commissions on a wide variety of matters. The following examples illustrate the type of matter that the Office will handle without any screen.

Example 1 – Legislation. A member of the Board requests that the City Attorney's Office draft legislation on a matter unrelated to elections or campaign finance. The legislation will address a controversial topic that could be a matter of policy debate in the campaign for Mayor. Because the legislation does not involve elections or campaign conduct, the City Attorney's Office will handle the matter with my involvement. This approach is consistent with past practice in campaigns where my predecessors or I ran for re-election as City Attorney. Though a sitting City Attorney may state personal policy positions during a campaign, those positions do not interfere with the City Attorney's Charter role in approving legislation or my professional responsibilities as City Attorney.

Example 2 – Litigation. A lawsuit is filed against the City, or my Office files a lawsuit, on a matter unrelated to elections or campaign finance. The litigation will address a controversial topic and I may refer to it in the course of my campaign. Because the litigation does not involve elections or campaign conduct, the City Attorney's Office will handle the matter with my involvement.

Example 3 – Redistricting. Following the publication of the 2010 Census, the Department of Elections or the Elections Task Force seeks legal advice regarding the apportionment of Supervisorial districts. Because this advice will not affect elections or

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campaigns in November 2010 or November 2011, I will continue to be in charge of the City Attorney's Office's handling of the matter.

Example 4 – Post-election determinations regarding conflicting measures. The voters adopt two measures in a single election addressing the same subject matter. The City Attorney's Office must review the two measures to determine which provisions of the two measures conflict, if any, and how they should be codified. Because this task involves statutory interpretation rather than elections or campaign conduct, the City Attorney's Office will handle the matter with my involvement.

Example 5 – General advice to City departments. A City department that does not regulate campaigns or elections has a legal question a law governing public meetings, public records, contracting, or personnel. Because this advice does not involve elections or campaign conduct, the City Attorney's Office will handle the matter with my involvement.

III. Determination to Use Outside Counsel or to Screen the City Attorney from Participation

It may not always be clear which of the categories described above applies to a particular legal question. During the Campaign Period, the determination about whether a particular matter should be referred to outside counsel, handled by the City Attorney's Office without my participation, or handled by the City Attorney's Office under my supervision will depend on the facts and circumstances of the situation. Chief Assistant Jesse Smith, or any deputy city attorney designated by him for particular matters, will be responsible for making these determinations, in consultation with the department seeking the advice or representation and the City Attorney's Office's Ethics and Elections Team.

IV. Hiring Outside Counsel

As I mentioned above in this memorandum, it is likely that the Ethics Commission, and possibly the Department of Elections or Elections Commission, will require outside counsel. From time to time, our Office calls on other public law offices to serve as outside counsel in particular matters. In return, my Office has occasionally acted as outside counsel for other localities when their in-house attorneys were unavailable. This arrangement has proven effective in ensuring that the City receives high quality legal advice with a minimal expenditure of City resources. We have utilized this arrangement in past elections with success. For example, in 2009, the Department of Elections and the Elections Commission retained the Santa Clara County Counsel's Office to advise them about legal matters directly affecting the City Attorney's election when I was the incumbent candidate. I recommend taking the same approach during the Campaign Period.

My Office already has contacted the Oakland City Attorney, Santa Clara County Counsel, and San Mateo County Counsel, and all three offices have offered to serve as the City's outside counsel on the issues discussed in section II(A) of this memorandum. These agencies will not charge the City for their time. Because of their expertise and the cost savings, I encourage each of the affected departments to retain one of these agencies as their outside counsel. My Office will work closely with you to facilitate those arrangements. The Ethics Commission and the Department of Elections and Elections Commission finalize these arrangements as soon as possible to ensure that the City receives timely advice from qualified counsel when the need arises.

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If any department chooses to seek outside counsel other than from the public law offices listed above, the department should be guided by the Charter sections that set criteria for outside counsel when the City Attorney has a conflict of interest. Those sections require the City to "give preference to engaging the services of a City attorney's office, a County counsel's office or other public entity law office with an expertise" regarding the subject matter of the representation. S.F. Charter §§ 6.102(1), 13.104.5. When private counsel is necessary, the attorney retained by the City "must be a member in good standing with the Bar of California" and must have "at least five years experience" in the subject matter of the representation. *Id.* The cost of outside counsel must be covered by the budget of the department requesting the legal advice or representation. *Id.* Charter section 13.104.5, which addresses the use of outside counsel by the Elections Commission and the Department of Elections when the City Attorney is standing for election, also provides that the outside counsel must comply with specific conflict of interest rules designed to minimize the risk of political influence. I recommend that any outside counsel retained to advise the City on matters directly involving the election or campaign for Mayor should comply with the same rules.


I am making every effort to ensure that the City receives the best possible legal representation during this period. If you have any questions about the policies set forth in this memorandum, feel free to contact me, or Jesse Smith or the general counsel assigned to work with your department.



DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: ALL ELECTED OFFICIALS
ALL BOARD AND COMMISSION MEMBERS
ALL DEPARTMENT HEADS

FROM: DENNIS J. HERRERA 
City Attorney

DATE: September 3, 2009

RE: Political Activity By City Officers and Employees

As the November municipal election approaches, the City Attorney's Office would like to take the opportunity again to remind City officers and employees of the laws that restrict their use of City resources for political activities. To this end, I am providing to you this updated memorandum, which outlines the basic rules and principles governing the political activities of City officers and employees. These materials are intended as a general guide and are not a substitute for legal advice. Please contact the City Attorney's Office with any questions related to these materials or participation in political activities. Please note that this memorandum updates and replaces previous memoranda on this topic that we have issued before City elections.

This memorandum is divided into five main parts, addressing some of the most common issues that come up in advance of elections. Part I discusses restrictions on the use of City resources and personnel for campaign activities. Part II discusses the rules that apply to City employees and officers engaging in political activities while off duty. Part III discusses the prohibition on using public funds for non-political mass mailings featuring an elected official. Part IV addresses the prohibition on elected officials soliciting or accepting campaign contributions from certain City contractors. And Part V discusses the prohibition on appointed officials soliciting or accepting political contributions from parties and participants in proceedings before City commissions.

I. Misuse of City Resources and Personnel

State law prohibits government employees from using City resources to support or oppose a ballot measure or the election or defeat of a candidate at the federal, state, or local level. Local law also prohibits City officers and employees from engaging in political activity during working hours or on City premises.

- **What is a misuse of City resources?**

Any use of City resources or personnel for political activity is prohibited. This ban prohibits any use of City e-mail, telephones, copiers, fax machines, computers, office supplies or any other City resources for political purposes. City personnel's time and attention may not be diverted from their City duties for political purposes. Addressing envelopes for campaign mailers, circulating ballot petitions, making campaign telephone calls, or engaging in similar types of campaign activity on City time or on City property is prohibited.

Example: On his lunch hour, a City employee uses his City computer to send invitations to a fundraiser for a candidate. The

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TO: ALL ELECTED OFFICIALS
ALL BOARD AND COMMISSION MEMBERS
ALL DEPARTMENT HEADS

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employee has misused City resources by using his City computer for political activity. The fact that he was on his lunch hour does not matter.

- **May a Board or Commission take a position on a ballot measure?**

The prohibition on use of City resources for political activity also means that City officers and employees may not use their official positions to influence elections. Thus, appointed boards and commissions may not vote to endorse a measure or a candidate.¹ Nor may City officials distribute campaign literature at City events or include campaign literature in official mailings to employees or members of the public.

Example: Members of a City Commission feel strongly about the merits of a measure appearing on the ballot that relates to matters within their jurisdiction. The Commission may not vote on a resolution to support or oppose the ballot measure. The Commission may ask staff for information about the impact of the ballot measure on the City and individual commissioners may support or oppose the measure on their own time using their own resources.

- **May City officers and employees analyze a ballot measure's effects?**

City officers and employees may lawfully use City resources (where budgeted for such a purpose) to investigate and evaluate objectively the potential impact of a ballot measure on City operations. The analysis must be made available to the public.

Example: A City Department wants to inform its Commission about the potential impacts on the Department if a ballot measure passes. If the Department has money budgeted for the purpose, the Department may research the potential impact of the measure and present objective information to the Commission. The analysis must also be made available to the public.

- **May City officers and employees respond to inquiries about a measure?**

City officers and employees may respond to public requests for information, including requests to participate in public discussions about ballot measures, if the officer's or employee's statements are limited to an *accurate, fair, and objective* presentation of relevant facts to aid the voters in reaching an informed judgment regarding the measure.

Example. A City Department wants to prepare a PowerPoint presentation about a ballot measure explaining the Department's view that the measure could have a significant negative impact on the City. Any such presentation must be limited to an accurate, fair, and objective presentation of the relevant facts.

¹ In contrast to appointed commissions and boards, the Board of Supervisors, acting as a body, may take a position on behalf of the City on a ballot measure, and the Mayor may take a public position on a measure.

Memorandum

TO: ALL ELECTED OFFICIALS
 ALL BOARD AND COMMISSION MEMBERS
 ALL DEPARTMENT HEADS

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RE: Political Activity By City Officers and Employees

- **What is an objective and impartial presentation?**

Courts will evaluate materials prepared or distributed by a public entity in terms of whether they make a balanced presentation of facts designed to enhance the ability of the voters intelligently to exercise their right to vote, or whether the communications resemble campaign materials for or against a ballot measure. In its analysis of the effect of a proposed measure, a department should present factual information, avoid one-sided rhetoric or campaign slogans and not urge a vote in one way or another. The department should make its analysis public and distribute or publicize it consistent with the department's regular practice. So if a department regularly issues a newsletter to interested City residents, it can include the ballot measure analysis in that newsletter, but the department should not create a special, one-time-only constituent newsletter to distribute its presentation. City officers and employees who are considering providing the public with an informational presentation regarding a ballot measure should consult in advance with the City Attorney's Office.

- **What are the penalties for violating the law?**

Courts may impose considerable penalties for violating these laws. Under State law, misappropriating public funds is a felony punishable by imprisonment and a ban on holding public office in the State. Under local law, use of City funds for political or election activities also may be official misconduct that justifies removal of a public officer, or cause to fire a public employee. The misuse of public funds to support or oppose a ballot measure may also result in personal liability, requiring a City officer or employee to repay any public funds that have been improperly spent. The conduct of City officers and employees also may risk liability for the City. For example, the Fair Political Practices Commission ("FPPC") fined the County of Sacramento \$10,000 for failing to report the use of public funds to prepare and distribute pamphlets on pending ballot measures.

II. Off-Duty Political Activities By City Officers and Employees

City officers and employees have a First Amendment right to engage in political activities while off duty and outside of City property. As a general rule, City officers and employees may take public positions, as private citizens, on electoral races or ballot measures. Federal law imposes some restrictions on the political activities of local employees whose principal employment is in connection with federally-funded activity. San Francisco also restricts the off-duty political activities of certain officers and employees, including the Ethics and Election Commissions and their employees, and the City Attorney. Finally, local law imposes some off-duty restrictions on all City officers and employees.

- **May City officers and employees use their official titles in campaign communications?**

As long as they are not otherwise using City resources to do so, City officers and employees may use their official titles in campaign communications. But it must be clear from the tenor and nature of the communication that the City officer or employee is making the communication in his or her personal capacity and is using the title for identification purposes only.

Memorandum

TO: ALL ELECTED OFFICIALS
 ALL BOARD AND COMMISSION MEMBERS
 ALL DEPARTMENT HEADS

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- **May City officers and employees solicit campaign contributions from other City officers and employees?**

No. City officers and employees may not directly or indirectly solicit campaign contributions from other City officers or employees or from persons on City employment lists. A City officer or employee can request campaign contributions from other City officers or employees only if the request is part of a solicitation made to a significant segment of the public that may include officers or employees of the City and the requestor does not use City resources in making the solicitation.

Example. An incumbent City officer sends an invitation to a fundraiser to a list of all graduates from the local college she attended. A number of City employees, who also happened to attend that college, receive invitations. Although the officer sent the solicitation to some City employees, the solicitation is lawful because it was made to a significant segment of the public that included some City employees.

- **May City officers and employees engage in political activities on City premises?**

City officers and employees may not participate in political activities of any kind while on City property, other than property that is made available to the general public to use for political purposes (such as a public plaza or sidewalk).

Example. A City employee seeks endorsements for the employee's candidacy for a political party's central committee in the hallways of City Hall. This activity violates the ban on political activity on City premises because it is being done inside City Hall, which is City property that is not made available to the general public for political purposes. Conversely, if the City employee engages in this same activity on the steps outside City Hall, the employee would not violate the ban on political activity because the steps outside City Hall are made available to the general public to use for political purposes.

- **May City officers and employees engage in political activities while in uniform?**

No. City officers and employees may not participate in political activities of any kind while in uniform. City officers or employees are in uniform any time they are wearing all or any part of a uniform that they are required or authorized to wear when engaged in official duties.

- **What are the penalties for violating these laws?**

A knowing or willful violation of these laws is a misdemeanor, which could result in fines of up to \$10,000 per violation and incarceration in the county jail for up to one year. Violations of these laws may also subject an individual to civil and administrative penalties of up to \$5,000 per violation.

III. Mass Mailings at Public Expense

In addition to the general prohibition against using public resources or personnel to engage in political activity, City officers and employees cannot use public money to print or send

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non-political newsletters or mass mailings that feature or make reference to an elected official. A non-political newsletter or mass mailing is prohibited if all of the following four requirements are met:

- **Sent or delivered.** The item is sent or delivered by any means to the recipient at a residence, place of employment or business, or post office box.
- **Features an elected official.** The item sent either features an elected officer affiliated with the agency that produces or sends the mailing, or includes the name, office, photograph, or other reference to an elected officer affiliated with the agency that produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.
- **Paid for with public funds.** Any of the cost of distribution is paid for with public moneys or costs of design, production, and printing exceeding \$50 are paid with public money, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.
- **More than 200 items in a single month.** More than 200 substantially similar items are sent in a single calendar month.

Certain types of mailings are exempt from the mass mailing prohibition. For example, the prohibition does not apply to press releases, meeting agendas and intra-office communications. Please check with the City Attorney's office if you have any questions about the mass mailing rule.

IV. Campaign Contributions to Elected Officials and Candidates

Local law prohibits City elected officials from soliciting or accepting contributions from any person or entity seeking to enter into a contract or grant worth \$50,000 or more with the City, if the contract or grant must be approved by the City elected official. This restriction applies to the party seeking the contract or grant, the party's board of directors, chairperson, chief executive officer, chief financial officer, chief operating officer, any person with an ownership interest greater than twenty percent, and any political committees controlled or sponsored by the party, as well as any subcontractors under the contract. The law both prohibits the donor from giving contributions and prohibits the elected official from soliciting or accepting them.

- **May a City contractor give a campaign contribution to a public official who approves the contract?**

Local law restricts the ability of a person or entity that contracts with the City to make a campaign contribution to an elected official if the contract would require approval by that officer, a board on which the officer serves, or a board of a state agency on which an appointee of the officer sits. These people and entities listed in the preceding paragraph may not make a campaign contribution to the officer at any time from the commencement of negotiations for the contract until either: (1) negotiations are terminated and no contract is awarded; or (2) six months have elapsed since the award of the contract.

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RE: Political Activity By City Officers and Employees

- **May a City official solicit or accept a campaign contribution from a City contractor?**

Local law also prohibits a City official from soliciting or accepting a campaign contribution from a business or entity seeking a contract with the City, including all of the associated people and entities listed above, if that City official, a board on which the official serves, or a board of a state agency on which an appointee of the official sits must approve the contract. This prohibition applies to the officer at any time from the formal submission of the contract to that official until either: (1) negotiations are terminated and no contract is awarded; or (2) six months have elapsed since the award of the contract.

V. Campaign Contributions Solicited or Accepted By Appointed Officials

Section 84308 of the California Government Code prohibits appointed officials from soliciting contributions of more than \$250 – for any candidate or campaign – from any party or participant in a proceeding pending before the appointed official's agency or from anyone with a pending contract subject to the appointed official's approval. It also prohibits an appointed official from participating in a decision that involves a person who contributed \$250 or more to the appointed official's campaign within the past 12 months.

- **May appointed officials solicit contributions from persons in a proceeding pending before them?**

Appointed officials may not solicit, accept or direct campaign contributions of more than \$250 from any party to or participant in certain proceedings before the official's agency. This prohibition applies during the proceeding and for three months after the final decision is rendered in the proceeding.

This rule applies whether the contributions are sought for the official or for someone else, and whether the contributions come directly from the party or participant, or are made by an agent acting on behalf of the party or participant. The prohibition applies to contributions for candidates or ballot measures in federal, state, or local elections.

An official does not violate this rule if the official makes a request for contributions in a mass mailing sent to members of the public, to a public gathering, in a newspaper, on radio or television, or in any other mass medium, provided the solicitation is not targeted to persons who appear before the board or commission. An official does not engage in a solicitation solely because the official's name is printed with other names on stationery or letterhead used to ask for contributions.

- **Who is an "appointed official" prohibited from soliciting or accepting contributions?**

An appointed official is a member of an appointed board or commission, or an appointed department head. Although the Board of Supervisors is an elected body, the prohibitions of Section 84308 apply to members of the Board of Supervisors when they sit as members of an appointed body.

- **What proceedings are covered by this prohibition?**

Section 84308 applies to any "use entitlement proceeding," which is an action to grant, deny, revoke, restrict or modify a license, permit, or other entitlement for use. Examples of the

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types of decisions covered by the law include decisions on professional license revocations, conditional use permits, rezoning of property parcels, zoning variances, tentative subdivision and parcel maps, cable television franchises, building and development permits and private development plans. It also includes all contracts other than labor or personal employment contracts and competitively bid contracts where the City is required to select the highest or lowest qualified bidder.

The law does not cover proceedings where general policy decisions or rules are made or where the interests affected are many and diverse, such as general building or development standards and other rules of general application.

- **Who is a "party," "participant," or "agent"?**

A "party" is a person, including a business entity, who files an application for, or is the subject of a use entitlement proceeding. A "participant" is any person who is not a party to a proceeding but who: (1) actively supports or opposes a particular decision (*i.e.*, lobbies the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the decision of the officers of the agency); and (2) has a financial interest in the decision. An "agent" is an individual who represents a party or participant in a proceeding. If an individual agent is also acting as an employee or member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents.

- **When is an appointed official disqualified from proceedings involving a contributor?**

An appointed official may not participate in any use entitlement proceeding involving a party or participant (or the party's or participant's agent) from whom the official received a contribution of more than \$250 in the 12 months before the proceeding. The \$250 threshold applies to the combined total of all contributions from the party or participant and from an agent of the party or participant. Disqualification is required only if the official received a contribution to that official's campaign in the 12 months before the proceeding. Soliciting contributions before a proceeding begins does not, by itself, require disqualification, if the official has not received contributions as a result of the solicitation.

An appointed official may avoid disqualification if the official returns the contribution (or the portion in excess of \$250) within 30 days of learning of the contribution and the pendency of a proceeding involving the contributor.

Whether the appointed official is disqualified as a result of the contribution, the official always must disclose on the record all campaign contributions totaling more than \$250 received in the preceding 12 months from parties to or participants in the proceeding. If there is a public hearing, the official must make the disclosure on the public record at the beginning of the hearing. If no public hearing is held, the disclosure must be included in the written record of the proceeding.

Additional Information

For more information about these rules, see City Attorney's Good Government Guide at: [http://www.sfgov.org/site/uploadedfiles/cityattorney/GGG_2007-08\(1\).PDF](http://www.sfgov.org/site/uploadedfiles/cityattorney/GGG_2007-08(1).PDF). If you have any questions, please contact the City Attorney's Office.



DENNIS J. HERRERA
City Attorney

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MEMORANDUM

TO: MAYOR GAVIN NEWSOM
MEMBERS, San Francisco Board of Supervisors
ANGELA CALVILLO, Clerk of the Board of Supervisors

FROM: Jesse Capin Smith
Chief Assistant City Attorney JCS

DATE: September 7, 2010

RE: Retention of Outside Counsel for Mayoral Succession Issues

Consistent with City Attorney Dennis Herrera's August 27, 2010 memorandum to you regarding legal advice on matters concerning the Mayor's race while he is taking steps as a possible candidate for Mayor, I recommend that you retain outside counsel to advise the City, in place of this Office, on legal issues relating to Mayoral succession if Mayor Newsom is elected as California Lieutenant Governor.

As mentioned in section IV of the August 27 memorandum, we have a reciprocal relationship with three public law offices with expertise in municipal law. I recommend that you hire the Office of Santa Clara County Counsel Miguel Marquez, who is prepared to provide this legal representation without charge to the City. I understand that Mr. Marquez will himself handle these questions for you, or will directly oversee a senior deputy on his staff who will do so, or a combination of the two, depending in part on time demands.

The contact information for the Santa Clara County Counsel is as follows: Miguel Marquez, Santa Clara County Counsel, 70 W. Hedding Street, 9th Floor, San Jose, CA 95110, Phone: (408) 299-5901.

cc: Miguel Marquez, County Counsel, Santa Clara County