# COUNSEL AND COUNCIL:





A Guide for Building a Productive Employment Relationship





### VISION

To be recognized and respected as the leading advocate for the common interests of California Cities.

### **MISSION AND CORE BELIEFS**

To restore and protect local control for cities through education and advocacy to enhance the quality of life for all Californians.

#### WE BELIEVE:

Local self-governance is the cornerstone of democracy.

Our strength lies in the unity of our diverse communities of interest.

In the involvement of all stakeholders in establishing goals and in solving problems.

In conducting the business of government with openness, respect, and civility.

The spirit of public service is what builds communities.

Open decision-making that is of the highest ethical standards honors the public trust.

Cities are vital to the strength of the California economy.

The vitality of cities is dependent upon their fiscal stability and local autonomy.

The active participation of all city officials increases the League's effectiveness.

Focused advocacy and lobbying is most effective through partnerships and collaboration.

Well-informed city officials mean responsive, visionary leadership, and effective and efficient city operations.

### **ABOUT THE LEAGUE**

Established in 1898, the League of California Cities is a member organization that represents California's incorporated cities. The League strives to protect the local authority and autonomy of city government and help California's cities effectively serve their residents.

In addition to advocating on cities' behalf at the state capitol, the League provides its members with professional development programs and information resources, conducts educational conferences and research, and publishes *Western City* magazine.



# **COUNSEL AND COUNCIL:**

## A GUIDE FOR BUILDING A PRODUCTIVE EMPLOYMENT RELATIONSHIP

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The League thanks the following individuals for their work on this publication:

Valerie J. Armento City Attorney, Sunnyvale

Helene Leckman Leichter City Attorney, Morgan Hill

**Richard S. Whitmore** Partner, Liebert Cassidy Whitmore

Kathi Bailey Secretary to the City Attorney, Morgan Hill

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## Introduction

This booklet is intended to assist city council members and city attorneys in defining the structure of their employment relationship.

#### Among the issues addressed by this booklet are:

- The nature of the employment relationship.
- The recruitment and selection of a city attorney and defining his or her role.
- Defining the parameters of the city attorney-city council employment relationship.
- Maintaining a viable employment relationship.
- Effectuating an amicable and enforceable conclusion to the employment relationship.
- Suggested employment agreement provisions for both contract and in-house city attorneys.

This booklet should serve as a starting point for discussions about how the relationship should be viewed. It offers practical suggestions on structuring the employment relationship in an effort to achieve both parties' objectives and expectations.

This booklet evolved from a survey given to all city attorneys, both contract and in-house, in March 2001. The survey asked about such issues as:

- Particulars about the employment relationship between city attorneys and their councils.
- The city attorney hiring process and whether there was an employment agreement.
- How the city attorney's job performance was evaluated, and what role the city attorney played in the organization and community.

Attorneys were asked to provide copies of employment agreements and other documents governing their employment, such as charter provisions, municipal codes, resolutions, and civil service rules and regulations.

A total of 148 surveys were completed and returned. The results were tallied and the agreements and other documents analyzed. The goal of this booklet is to put the results into context by exploring the basic aspects of the relationship between a city attorney and his or her council.

## I. Nature of the Relationship



The traditional attorney-client relationship is often viewed as pre-defined and static - the client asks for legal advice and/or representation and the attorney provides it. However, due to the integration of the city attorney into the management structure of the public entity, and the need to address challenging and evolving public policy issues, the nature of the relationship between city attorneys and their employers is a very dynamic one. Yet, despite this dynamism, many aspects of the relationship are defined by more stable and long-standing issues, including the duty owed by an attorney to his or her client, as well as broader ethical obligations owed by the attorney.

This section explores current issues underlying and defining the relationship between a city and its attorney. It includes a discussion of management trends and offers some practical tips for achieving a positive working relationship for everyone.

#### A. VARIED APPOINTMENT STRUCTURES CREATE DIFFERING RELATIONSHIP DYNAMICS

Some city attorneys are city employees, and some are members of private law firms. Some are elected, a few are appointed by the city manager and most are appointed by the city council. Some serve for a specified term, and some serve at the pleasure of the appointing authority.

City councils directly appoint the city attorney in 464 of California's 478 incorporated cities. Of those, approximately two-thirds are contract city attorneys from outside firms; the remaining one-third are hired as in-house city attorneys. Voters directly elect their city attorney in eleven charter cities and city managers appoint the city attorney in three charter cities.<sup>1</sup>

Attorneys appointed by the city manager or elected by the voters may have a different relationship with the city council than those appointed by the city council. Appointment by the city council may create a more traditional employer-employee relationship and, at times, loyalties and reporting obligations may become blurred. Regardless of how a city attorney takes office or his or her classification, he or she remains the chief legal officer of the city. The city attorney's job is to provide legal advice to minimize the city's liability and promote compliance with the law. The relationship between the city council and city attorney is a critical component in ensuring that the city functions as a well-managed organization and in accomplishing the public policy objectives of elected officials.

#### B. WHO IS THE CLIENT AND WHOM DOES THE CITY ATTORNEY REPRESENT?

Who does the city attorney represent? Is it a corporate "city" client? Are individual "public officials" clients? Is the "public" the client? Is it some combination of all of these? California courts have not provided much guidance on this subject. However, the courts have made it clear that government lawyers are governed by the ethical standards of the profession. In California, these standards are contained in the Rules of Professional Conduct of the State Bar of California. Not all duties are in the Rules, however, nor do the Rules supersede case law.

#### Lawyers' Obligations and Relationships to Clients and the Legal System

Lawyers have two sets of obligations and relationships: to their clients, on the one hand, and to the courts and the rule of law, on the other. In some instances, a duty can be understood as being owed primarily to the client. An example of this is the lawyer's duty to represent clients competently. In other instances, the duty primarily is to the legal system, such as the lawyer's duty not to mislead the courts. Regardless of whether a duty is owed primarily to the client or primarily to the system, however, the performance of a lawyer's duty generally redounds to the benefit of the legal system.<sup>2</sup>

The Rules of Professional Conduct define an attorney's role and responsibilities in representing an organization. They say, in part, that:

In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.<sup>3</sup>

So, in response to the question, "Who is the client?" this rule states that for a city attorney, the client is the city – the municipal corporation as a whole. For purposes of giving advice, receiving direction, and providing representation, however, the question remains, "Who is the city?"

In general terms, the city attorney takes direction from a majority of the council. He or she cannot take any action requested by an individual council member contrary to the desires of the city as expressed by the council majority. However, given the nature of legislative entities, which may often be split with a consistent "majority" and "minority," the city attorney must provide balanced legal advice to both sides.

The Rules of Professional Conduct recognize that a city may be embodied in various constituent parts. The rule goes on to state that a city attorney's dual representation of the entity as well as its directors, officers, or other constituents in a given matter may only occur with the city council's consent.

Under rule 3-600 of the Rules of Professional Conduct, an individual council member or other city official (such as the city manager) is not the client. There is no attorney-client confidentiality in these communications. Advice may only be given to an individual in his or her capacity as an officer of the city. Such advice is subject to disclosure to the city council. For example, if a city council member has a conflict of interest that could result in the invalidation of the council's decision under state conflict of interest laws, the city attorney must advise the council of the consequences of the conflict if the council member fails to disclose the conflict and abstain.

Even though the city attorney's client is the city itself, there are times when the city attorney owes a duty of defense to an individual employee under the California Government Tort Claims Act.<sup>4</sup> If a lawsuit alleges an act or omission that arose out of the course and scope of public employment, the entity has consented to dual representation by operation of law. For the limited purpose of the lawsuit, the city attorney has a relationship with both the city and employee. A city may refuse to undertake a joint defense if a specific conflict of interest would result, but the city must pay costs of a separate defense attorney.

#### For More Information:

The League's *Municipal Law Handbook* provides practical advice on the Tort Claims Act and other areas of municipal law. The handbook can be found on the League's website in the Muni Law Research Center at www.cacities.org/munilaw. This publication is available for purchase through CityBooks by calling (916) 658-8257

or online at www.cacities.org/store.

#### C. PRESERVING CONFIDENCES – WHO DECIDES?

In *Roberts v. City of Palmdale*,<sup>5</sup> the California Supreme Court recognized that an attorney-client privilege exists in the public arena. Communications between the city attorney and the city council may be kept confidential. However, it is important to be clear as to who holds the confidentiality privilege. Because the city attorney's client is the city – as embodied by the city council – it follows that the city council holds the privilege. As the holder of the privilege, the city attorney's communications to the general public. This should be a decision made by a majority of the council expressly stated on the public record. It should not be the decision of an individual council member.

Another aspect of the attorney-client privilege is that the city attorney's communications on substantive matters with staff members cannot be kept confidential from supervisors. Communications with individual council members on city business cannot be kept confidential from the full city council. It is important for each city official to understand this principle in order to avoid misunderstandings.

#### Example:

The city attorney learns an employee is not complying with a statute or regulation that could expose the city to liability and if speaking with the employee is not feasible or fails to rectify the situation, the city attorney must report the matter to the employee's superior and up the chain of command, if necessary. If the problem continues, the city attorney must report it to the city manager, and ultimately, to the city council if the issue is not resolved. Failure to do so constitutes a violation of the Rules of Professional Conduct and can be a basis for attorney discipline by the State Bar.

#### D. DUTIES OWED TO THE PUBLIC

In addition to acting as an advisor or advocate for the city, the city attorney owes two duties directly to the public: to act as a check on governmental action in certain limited circumstances, and to accurately advise the public when called upon to do so. In addition, the city attorney may have the direct authority to enforce certain laws.

#### 1. Legality of the City's Conduct

The city attorney's advice as to the legality of the city's conduct also appears to be intended to act as a check on illegal city conduct. This may occur where the city attorney has the duty to review claims or contracts or to provide written consent prior to a given action, such as the destruction of records.<sup>7</sup> In other contexts, the city attorney's only duty is to the public, such as when he or she prepares a true and impartial title and summary of an initiative measure.<sup>8</sup> State law also grants city attorneys the right to bring certain civil enforcement actions in the name of the People, such as the abatement of nuisances or violations of the Unruh Civil Rights Act.<sup>9</sup>

#### 2. Protecting the Public Interest

The city attorney is also called upon to advise the city to follow laws designed to protect the public interest. These duties include giving advice during hearings to ensure not only that the public entity follows the law, but also that the applicant receives due process. The city attorney may also be called upon to determine whether the public has the right to access the city's records under the Public Records Act.<sup>10</sup>

#### 3. Ethical Duty

At times, the question arises as to whether city attorneys have a higher ethical duty to the public than exists for attorneys representing private parties. The Rules of Professional Conduct provide no distinction between public and private attorneys when handling civil matters. The American Bar Association's standards (which do not have binding effect in California) suggest public lawyers may have a higher duty:

A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.<sup>11</sup>

#### 4. Prosecutorial Duties

City attorneys deal mainly with civil legal matters. In some cities, the city attorney also has prosecutorial duties for certain criminal matters. In such instances, the city attorney represents the People of the State of California, not the city. Case law holds that a prosecuting attorney is a public officer and not an "attorney" who represents a "client."<sup>12</sup> As a result, the city attorney is not subject to taking direction from the city council with respect to prosecuting criminal matters. Instead, the prosecuting attorney is vested with the discretionary power to determine whether to prosecute.<sup>13</sup>

The fact that the city attorney does not represent the city when prosecuting a criminal case can mean two things:

- An attorney-client privilege will not protect city attorney communications and documents prepared for a criminal case from disclosure when such information is later sought by parties in a civil case in which the city is not a defendant.
- The city council cannot require the city attorney to bring a criminal action or in any other way interfere with the city attorney's discretion with respect to the disposition of a case.

The United States Supreme Court has held attorneys prosecuting criminal matters to a higher standard than when conducting civil actions or administrative proceedings.

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>14</sup>

In California, this higher standard has been applied to city attorneys prosecuting criminal and nuisance abatement cases. It is important that city officials be mindful of these particular duties owed by the city attorney to the public so they can work cooperatively with the city attorney to resolve situations where a perception exists that prosecution (or non-prosecution) of the case conflicts with the city's interests.

#### E. WHO DEFENDS THE CITY'S ATTORNEY?

As a public official, the city attorney is entitled to defense and indemnification with regard to acts or omissions arising out of the course and scope of his or her employment.<sup>15</sup> If charges are filed with the State Bar against a city attorney, the city does not have a duty to provide the attorney with a defense, but it has the discretion to do so. A city attorney is acting in his or her capacity as an employee when making a request for representation in such a proceeding. The city should seek legal advice from independent counsel with regard to the legality or propriety of providing the city attorney with such representation.

Most contract city attorney agreements include a discussion of these issues and many reverse the duty – under these agreements the attorney defends and indemnifies the city. Virtually all contract city attorneys provide malpractice insurance to protect not only themselves, but the city as well.

#### For More Information:

The Institute for Local Self Government produces several publications offering practical ethics advice to local officials. The publications can be found on ILSG's website at www.ilsg.org/trust. ILSG publications are available for purchase through CityBooks by calling (916) 658-8257 or online at www.cacities.org/store.

## II. Recruitment / Selection Process



Recruitment and selection of city attorneys is a complex decision-making process. It is usually conducted in one of three ways:

- (1) Through in-house personnel specialists;
- (2) Through a professional recruiter; or
- (3) By the council members themselves.

Whatever method is used, there are issues of concern that are common to all. This section discusses the various types of recruitment methods with a special discussion regarding contract attorneys.

#### A. CONTRACT OR IN-HOUSE CITY ATTORNEY?

The first task in any recruitment and selection process for a city attorney is to determine whether to have a contract or in-house attorney. The city council needs to fully analyze the relative merits of each option from both a fiscal and administrative standpoint in making its decision.

From a fiscal standpoint, whether an in-house office is the most prudent alternative depends on a number of factors. These include the volume of work to be performed and whether one person can efficiently do the job, whether support staff will be necessary or if the office will require assistance from outside counsel, and whether it is more cost effective

#### **CONTRACT OR IN-HOUSE?**

Public agencies often struggle with whether to have an in-house or contract city attorney. Here are some considerations to keep in mind when making such a decision:

- 1. How any hours of legal work do you have per week?
- 2. How much of the work is specialized, such as redevelopment, personnel, and utilities?
- 3. How much litigation do you have? Do you need litigation specialists or generalists?
- 4. How much office time does staff need for day-to-day matters?
- 5. Should the attorney be part of a management team, or is a consultant role sufficient?
- 6. Is it more economical to have a salaried employee or to pay hourly rates?

simply to retain a full-service outside law firm. A thorough review of current legal costs, and a comparison of those costs with other cities with similar needs, should be performed.

An administrative analysis should include whether city staff and council members need a large amount of daily, informal legal advice. If not, perhaps the council will be more comfortable with an attorney who provides more limited coverage. In large part, this depends on the volume and urgency of legal questions that need to be answered. In addition, councils should evaluate whether they want the city attorney to be a fully integrated member of the management team. If so, this objective may be best achieved by having the attorney be a city employee rather than retained on a contract basis.

#### **B. RECRUITMENT ISSUES**

#### 1. Needed Skills

One of the primary concerns in recruiting a city attorney is what experience and skills should be required of the applicants. Expertise in relevant legal fields is a given - few councils are interested in candidates who need on-the-job training. Moreover, because the city attorney's role is becoming increasingly more important in the day-to-day functioning of city government, many councils are placing a greater emphasis on managerial skills, including law office administration. City attorneys are often members of the city's management team. They are involved in the decisions made by their executive teams and not just as legal consultants. This growing emphasis on managerial expertise means that city attorney applicants who possess experience in areas such as budget administration and personnel supervision make attractive candidates.

#### 2. Finding Applicants

Some city councils may seek to recruit a sitting city attorney with several years' experience, whether in-house or contract. Beyond that, viable candidates include practicing assistant or deputy city attorneys, and attorneys practicing in law firms that specialize in municipal law. However, these candidates may not possess the breadth of subject matter or administrative experience councils are looking for. Given the increasing complexity of municipal law, hires from outside this limited applicant pool are rare.

#### 3. Candidate Concerns

Practical concerns of the candidates, such as relocation and moving expenses, need to be addressed. This is especially true if the city is in an area with high housing costs. Candidate recruitment is also becoming more difficult from the attorney's perspective. Candidates today are more likely to want explicit assurance of control over the legal affairs of a city to avoid conflict with department heads.

#### 4. Using Recruiters

The use of recruiters appears to be on the rise for practical reasons. While some cities still turn the recruitment process over to their in-house human resources professionals, some may not have the resources to conduct the kind of in-depth, statewide recruitment efforts necessary to create a viable pool of candidates.

Recruiters often maintain contact with a variety of city attorneys with varying skill levels and expertise. They are in a good position to judge the available candidates in the job market and how those candidates fit the profile the council has of its desired city attorney. Because of their knowledge of the job market, recruiters are also able to advise city councils as to what compensation and benefit package may be necessary to entice the best candidates.

#### C. SELECTION FACTORS

A successful selection process depends on large part on the thoroughness of the recruitment process in finding viable candidates. There should be a recruitment process that identifies potential candidates through both targeted recruitment efforts and through the use of job announcements in *Western City* Magazine, professional journals and other media. After an initial screening of resumes, the recruiter or human resources director should conduct telephone or in-person interviews. Finally, interviews with the city council should follow.

Although rare, a citizens' advisory panel may conduct interviews. However, this process may raise some problems. It could create the perception that the selection of the city attorney will turn on political issues rather than professional abilities. Such panels also eliminate the city's ability to ensure that candidate applications will be kept confidential. This is important because some candidates request confidentiality in order not to have a negative impact on their current employment, especially if not ultimately selected for the position. There should be a recruitment process that identifies potential candidates through both targeted recruitment efforts and through the use of job announcements in Western City Magazine, professional journals and other media.

> Selection criteria should be tightly controlled at the initial screening phase. Candidates who do not meet the minimum qualifications should be rejected. Selection of candidates to attend council interviews should also be based on objective criteria. These may include specialization in needed practice areas, or years of service in a commensurate sized agency. The adoption and uniform application of objective criteria at this stage may assist in defending the selection process or outcome. It may be used to counter any claims of bias or inconsistency in the process.

> The interview with the city council usually involves set questions asked of each candidate. Some type of free-form discussion often takes place. This discussion should be memorialized. Each council member should record his or her impressions and/ or scores of each candidate. Following the interviews, the recruiter or human resources director may assist the council in ranking the candidates.

### D. CONTRACT CITY ATTORNEYS

Although portions of the above discussion relate both to in-house and contract city attorneys, there are specialized concerns relative to contract city attorneys. One difference is that, for contract city attorneys, requests for proposals are generally sent out to prospective firms or individuals to provide legal services, as opposed to targeted recruitment efforts.

In evaluating contract city attorney candidates, the council should examine the following factors:

- The depth of a candidate's (or their firm's) legal knowledge and experience in municipal law.
- The availability of the attorney.
- Whether the person selected will perform the work or whether another member of the firm will perform it.
- The billing structure. For example, will the city be billed on a flat rate or hourly basis? Particular attention should be paid to "add-ons," legal costs for matters billed in addition to the basic retainer amount, such as code enforcement actions.

## III. Defining the Parameters of the Employment Relationship



The relationship between a city and its attorney is defined by two primary governing boundaries:

- 1. Externally through state and local regulations; and
- 2. Internally through the job description, job announcement, and performance evaluation forms.

This section examines the parameters that establish the skills, experience, and character traits needed by a particular agency in its city attorney, and form the basis of the employment relationship.

#### A. STATE AND LOCAL REGULATIONS

California law pays sparse attention to defining the relationship of the city attorney to the rest of the city government. The few provisions of the law that address the subject consist of the following:

- 1. The city attorney shall advise the city officials in all legal matters pertaining to city business.<sup>16</sup>
- 2. The city attorney shall frame all ordinances and resolutions required by the legislative body.<sup>17</sup>
- 3. The city attorney shall perform other legal services required from time to time by the legislative body.<sup>18</sup>
- 4. With the consent of the district attorney of the county, the city attorney of any general law city or chartered city within the county may prosecute any misdemeanor committed within the city arising out of violation of state law.<sup>19</sup>

- 5. Whenever the city attorney is acting as a prosecutor in a criminal case pursuant to any provision of law or under a city charter, the city attorney shall have the power to issue subpoenas in a like manner as the district attorney.<sup>20</sup>
- 6. The city attorney shall receive compensation as is allowed by the legislative body.<sup>21</sup>
- A city may limit or prohibit the private practice of any attorney it retains or employs.<sup>22</sup>

Many municipal codes and city charters use these concepts in describing the position and responsibilities of the city attorney. Such descriptions may provide further detail as to whom the attorney provides advice and enumerate the types of documents the attorney will handle. They may describe the city attorney's duties to represent the city in various kinds of litigation and administrative proceedings. They may state that the city attorney advises certain boards and commissions or performs general counsel services when the city council functions in another capacity, such as the redevelopment agency. In some cities, they may assign the city attorney risk management responsibilities.

### For More Information:

Links to online city charters and municipal codes can be found

on the League's website at www.cacities.org/municodes

and www.cacities.org/charters.

## The following are general statements found in various city charters and municipal codes regarding the responsibilities of city attorneys:

- The City Attorney's Office is committed to represent, support and provide legal advice to the Mayor and City Council, department heads and staff members of the various City departments; to aggressively defend its client in litigation; to initiate litigation at the direction of the City Council; to render timely legal advice to City boards, commissions and committees; to research and provide information on legal issues; to prepare legal documents, including ordinances, resolutions and contracts; and to review and prepare amendments to the City Charter and Municipal Code to maintain consistency with current state and federal laws. (*City of Bakersfield*)
- The City Attorney's Office provides legal advice to City government to minimize liability and ensure conformance to legal constraints. The City Attorney determines the merits of claims and defends against suits filed, while also filing suits on behalf of the City. (*City of Berkeley*)
- The City Attorney is responsible for providing legal services to the City, including the City Council, the various City boards and commissions, as well as City departments and officers. The City Attorney is responsible for representing the City in all litigation to which the City is a party, either as a plaintiff or defendant; preparing and/or approving as to form all City ordinances, resolutions, and contracts; rendering legal opinions to the City Council, City departments, and City officers; and prosecuting violations of the Municipal Code. (City of Chico)
- The City Attorney's Office represents and advises the Mayor, City Council, certain City boards and commissions, and City officials and departments in legal matters pertaining to their office and City operations, and prepares legal opinions, ordinances, resolutions, contracts, and other documents requested by Council and City organizations; and, implements the legal aspects of various policies and programs established by the City. The City Attorney's Office serves as counsel and represents and appears for the City and certain boards, commissions, and agencies of the City in civil and administrative proceedings. The City Attorney's Office also handles criminal litigation as part of the Office's code enforcement responsibilities. The City Attorney's Office also serves as counsel for the Redevelopment Agency, and performs, often in conjunction with special counsel, the legal work involved in financing transactions for

the City and the Agency. The City Attorney's Office monitors cases assigned to contract legal counsel and ensures timely reporting to the Council on these cases as well as those handled in-house. (*City of Fresno*)

- The City Attorney is the chief legal officer of the City and is appointed by, and responsible to, the City Council. The City Attorney's Office represents the City Council and the City's boards, commissions, officers and employees in legal proceedings in which the City is concerned or is a party. It is also the responsibility of the City Attorney's Office to advise the City Council and all boards, commissions, officers and employees of the city regarding their official duties. The City Attorney's Office prepares and approves ordinances, resolutions, contracts and other legal documents and prosecutes all violations of the Municipal Code. (*City of Modesto*)
- The City Attorney is appointed by the City Council as the Attorney for the City and legal advisor to the City Council. The City Attorney hires subordinate attorneys to assist in the discharge of assigned responsibilities. The City Attorney's Office defends and prosecutes or retains counsel to defend and prosecute all civil actions and proceedings to which the City is a party and prosecutes all criminal actions involving the City Code. The Office represents and advises the Council, boards, commissions, departments, and all City officials in matters of law related to the conduct of City business. (City of Mountain View)
- The City Attorney's Office provides legal advice to City officials and employees; drafts legal documents in order to protect the City's interests and advance its goals; represents the City and its officers and employees; enforces City laws; and encourages compliance with and respect for the law. (City of Santa Barbara)
- The City Attorney is appointed by the City Council. By law, the City Attorney advises City officials in all legal matters pertaining to City business, drafts or approves all ordinances and resolutions of the City Council, and prosecutes violations of City ordinances and regulations. The City Attorney may perform other legal services required or authorized from time to time by the City Council, including representation of the City in litigation and preparing agreements or other documents involving complex transactions. (*City of Vista*)

#### B. JOB DESCRIPTIONS AND JOB ANNOUNCEMENTS

### 1. Job Descriptions –

**Outlining Basic Expectations** The primary purpose of a job description is to outline the basic skills and qualities necessary for the city attorney to perform his or her duties effectively. A secondary purpose is to outline the general performance standards the city attorney will be expected to meet. In addition, the job description outlines any needed physical or mental abilities, serving as the blueprint for compliance with the Americans with Disabilities Act.

Job descriptions for city attorneys are normally broken down into four components:

- A brief definition of the job.
- Minimum qualifications needed to enter and/or retain the job.
- Skills and characteristics necessary to perform the job at an acceptable level.
- A descriptive list of typical tasks the city attorney will perform.

These components share many of the same qualities, but a city may give different emphasis to various components reflecting the differing desires of that city.

Cities considering revising their job descriptions should, at a minimum, include these four components. Thought and care should be used in writing the job description since it is often the first document the city uses to communicate with applicants about the particularities of the position. The job description should also be the basis for an integrated evaluation system.

#### a. Brief Job Description

A city attorney's position is often defined in fairly nebulous language. However, most job descriptions define the position by emphasizing the broad range of generalist legal services the city attorney is expected to provide, including:

- Legal services to the city council, city departments, and various boards and commissions; and
- Professional and administrative work as the chief counsel and legal representative of the city.

Job descriptions often also say that the city attorney is responsible for representing the city in litigation, and for drafting all applicable ordinances, resolutions, and legal documents.

**b.** Minimum and Preferred Qualifications The purpose of the qualification section is to clearly describe the basic minimum qualifications needed for the position. Minimum qualifications for city attorneys always include a juris doctorate degree (usually from an educational institution approved by the American Bar Association) and membership in the California State Bar. Many cities also require a minimum amount of time practicing law, ranging from three to ten years.

Beyond these basic requirements, various agencies may indicate that they prefer the city attorney to have experience in particular subject areas, such as land use, personnel, or redevelopment law.

One area of controversy is whether cities can, or should, include the requirement that the city attorney live within the city limits. Currently, cities cannot legally require that their employees do so,<sup>23</sup> but they can require that employees live within a certain response time from the city.<sup>24</sup> (This distinction is based on the need for personnel to respond to work in the case of an emergency.) Although such a concern cannot be phrased as a requirement in the job description, it can be a matter of contractual negotiations between a public entity and its city attorney.

Finally, the job description should specifically state that these are minimum qualifications only, in order to prevent applicants and/or employees meeting these minimum requirements from asserting that they are fully qualified for the position and are therefore entitled to the job.

#### c. Job Skills

The job skills component of the job description should be drafted with two thoughts in mind:

- What are the basic, day-to-day working skills expected of the city attorney; and
- What are the council's expectations for communication skills, not only with the council, but also with the public and staff.

The skills listed in the job description should reflect those that the council believes its ideal city attorney should be capable of performing. It should articulate those skills through language that is precise enough to communicate the skill required, yet broad enough to encompass the many facets of that particular skill set.

Some job descriptions require that city attorneys possess only a general knowledge of legal precepts and research skills. Many job descriptions go beyond a basic skill set common to all attorneys and require specific knowledge and even "mastery" of certain municipal law subjects, such as redevelopment, personnel and labor relations, and real estate transactions.

A growing number of job descriptions also emphasize interpersonal and communication skills. Some job descriptions simply require the ability to "maintain constructive relationships" with others, while some require the more outgoing "ability to engage" individuals or groups. The manner in which communication and interpersonal skills are described helps communicate the council's expectations.

Another frequently included skill is keeping the council informed of significant developments. Finally, many job descriptions require the attorney to be a part of the management team, yet retain the objectivity and independence that the city council relies on.

Unlike minimum qualification requirements, desired skills are sometimes qualified by language that a "combination" of some skills is required, or some skills may be designated as "preferred" versus "helpful." Cities should avoid characterizing skills as necessary, preferred, or merely extraneous. The needs of a city – and the needed skills of the city attorney – may change over time.

### The "Ideal" City Attorney: A City Council Perspective

- Has experience in the broad range of municipal law including land use, redevelopment, public safety, and employment law/labor regulations.
- Stays current in municipal law, is well versed in "the art of the possible" and is not risk adverse in terms of problem solving or approaches to best meet the city's needs.
- Views the city attorney's role as being more than providing legal opinions; views the role to be an advisor, sounding board, confidant, and a resource; is easy to talk with, recognizes the importance of retaining trust and confidence and, typically, is accessible rather than being "too busy now."
- Is not naïve about politics, but doesn't "count the votes" prior to making a recommendation; can be counted on to provide his/her best professional advice on all legal issues; is politically astute, but not political.
- Will recognize what the council and/or staff are trying to achieve and helps them reach their objective as closely as possible.
- Is bright and a critical thinker who is both analytical and creative; understands details as well as concepts and is a quick study regarding issues new to him/her.
- Is confident and not afraid to assert himself/herself when necessary and has the courage of his/her convictions.
- Knows when to argue and when to settle without unnecessarily giving away city resources, and also knows when and who to ask for specialized legal assistance.
- Is an excellent communicator, including speaking, writing and listening, who can make legal issues and options understandable to lay people.

#### d. List of Tasks

Finally, the tasks section of a job description should outline the essential physical functions of the position. This satisfies the Americans with Disabilities Act's requirements to articulate, in advance, the employer's expectations for performance.<sup>25</sup> Many city attorney job descriptions are focused on sedentary activities, including the ability to perform computer and desk jobs in a repetitious manner and the ability to sit for long periods of time.

#### 2. Job Announcements-Advertising Desired Qualifications and Qualities

Job announcements placed in professional journals and flyers are a city's primary opportunity to describe what type of city attorney is being sought. Because the language in the job announcement may be used to legally define the employment relationship between a public agency and its attorney, any pronouncements or guarantees in these documents should be carefully phrased to avoid unrealistic expectations.

#### C. PERFORMANCE EVALUATIONS

Within the last ten years, many cities have instituted formal evaluation systems for their city attorneys. This trend appears to be consistent with the increasing use of formal employment contracts between cities and attorneys. It may also be attributable to the rise in litigation by public employees against their employers.

Historically, performance evaluations were rarely given to city attorneys. When they were, they were done informally, usually without the use of an outside expert. Performance feedback generally occurred only when a crisis arose or when performance shortfalls reached the level where council intervention was required. Feedback was more situational in nature and seldom geared to pre-established performance standards or encompassed within a job enhancement strategy.

Evaluation processes vary widely, from informal discussions to structured facilitated sessions that rely on feedback from department heads, especially the city manager, in evaluating the city attorney's performance.

The advantages of a formalized performance evaluation process are many. When hired, a city attorney may receive only general direction from the council regarding performance expectations. The lack of direction may stem from the inherent structure of the attorney-client relationship (how can the client tell the attorney how to accomplish the legal result?). A formal performance evaluation system can help the council set the legal goals it wants its attorney to achieve and direct, to some extent, how those goals are to be accomplished. Performance evaluations may also set the stage for wage and salary adjustments.

If council members are reluctant to discuss performance expectations and whether those expectations are being met, a formal evaluation process may make those discussions easier. It may also help improve communication between the council and city attorney. Performance evaluations and periodic reviews are invaluable in assisting the city council to refine its priorities.

Finally, a formalized evaluation process helps to protect the city from potential liability. It sets out what the expectations are for the city attorney and helps avoid surprises for both sides. If done correctly, it creates a paper trail documenting the city attorney's performance that may be helpful should a question of adequate performance ever arise.

#### 1. Evaluation Forms

A performance evaluation form is the starting point for any evaluation system. It should reflect the elements of the position as outlined in the job description and it should be tailored to accommodate any particular goals and standards that have been established between the council and the city attorney.

Formats for performance evaluation forms vary widely from agency to agency. Some stress a narrative system where comments on performance areas (such as "ability to interact with peers") are entered. All of the comments may be given to the attorney or condensed to form a "consensus" opinion. Other formats have a highly rigid pointbased system for specifically articulated goals, such as "number of municipal code provisions amended."

Ideally, the evaluation form and job description should be drafted at the same time. Both documents define the attributes and type of attorney the council desires. The best time to think about those characteristics is before any candidate is interviewed. Drafting the evaluation form prior to hiring also allows the potential candidates to have a more in-depth sense of the council's needs and expectations for a city attorney. A drawback in drafting the evaluation form prior to hiring the attorney, however, is that the successful candidate is not allowed input into the process. For this reason, the form should be somewhat flexible to accommodate suggested changes from the successful candidate.

#### For More Information:

Sample city attorney evaluation forms can be found on the

League's website at www.cacities.org/evaluations.

#### 2. Evaluation Process

One approach to the evaluation process is to have the city attorney and each council member complete an evaluation form. A meeting would then be held to review the comments and assessment of the city attorney's performance. This process works well where a good relationship exists between the council and attorney. If, however, there are serious performance deficiencies and/or tension between the attorney and one or more council members, this process could be problematic and unproductive.

City councils may wish to consider the use of an outside facilitator, both in the creation of the performance standards and in the actual evaluation. City councils may feel/believe that they do not possess the management tools or time to properly evaluate the city attorney, especially according to current industry standards. It may be difficult to understand exactly what attorneys do on a day-to-day basis. Even those council members who are attorneys may be hard-pressed to describe what a municipal law specialist should be doing and how. The services of a neutral, knowledgeable third-party may assist the council in articulating reasonable expectations for city attorney performance and in determining whether the attorney has met industry standards for such expectations.

Finally, the services of a neutral third-party may serve to focus the performance evaluation discussion that may otherwise be charged with personal or political agendas. For these and other reasons, many city attorney contracts now contain a clause requiring the retention of a third-party to assist in the evaluation process.

#### 3. Performance-Based Management in the Evaluation Process

Finally, a word about performance-based management and its impact on the city attorney evaluation process. As discussed in detail below, performance-based management is a method by which performance is gauged by goals with specifically measurable outcomes. It has achieved wide acclaim in public sector management circles and many agencies now require each department to establish measures and track outcomes.

Applying such principles to the work of the city attorney's office can be a challenge. This is because the city attorney plays a unique role in the city's organizational structure. His or her job is primarily to give advice and counsel, not to turn out a certain identifiable number of memoranda or win a certain percentage of cases. While such numerically definable goals may provide useful input in the evaluation process, attainment of such goals should not be the defining element of the process. It is difficult to encapsulate the factors that go into a successful attorney-client relationship into a performancebased management system and, therefore, into evaluation processes.

With these concerns in mind, councils should consider whether moving towards a numericallybased system of achievement, and incorporating that into the performance evaluation system, is at odds with the more traditional attorney-client relationship, and whether such systems are true indicators of an attorney's performance.

It is difficult to encapsulate the factors that go into a successful attorney-client relationship into a performance-based management system and, therefore, into evaluation processes.

#### D. CITY ATTORNEYS AND "PERFORMANCE MEASURES"

#### 1. The Goal of Performance Measures

Accountability is important in local government. The public has a right to expect that local resources will be carefully managed, that services will be provided efficiently, and that local programs will live up to their promises. Elected leaders and managers in local government seek to reassure their constituents that these expectations are being met. Performance measurement – the documentation of departmental and program accomplishments – has become a key method of providing that reassurance and demonstrating accountability.

Local governments concerned about managing and improving employee productivity use performance measurement – also known as "benchmarking" – as a management tool. In theory, performance measures of a department or program reflect the array of services provided. A good set of measures should reveal three things:

- The quality of the services;
- The efficiency with which they are delivered; and
- Their effectiveness in achieving their intended purposes.

#### 2. Types of Performance Measures

There are three types of performance measures:

Workload Measures: Workload measures - also called output measures - provide information on how many units of service were provided. Such measures tell how many calls were received, how many cases were processed, how many opinions were issued, how many training programs were offered, and so on. Workload measures do not address the efficiency with which these services were provided or the quality or effectiveness of the services. Only the number of services provided is measured. Workload measures typically do not relate to the difficulty of a task – a simple case and a complex case are both counted as one.

- <u>Efficiency Measures:</u> Efficiency measures relate to outputs produced in relation to resources consumed. For example, local public agencies that report unit costs for handling cases or cases concluded per staff hour combine workload information (number of cases) with resource consumption information (costs or staff hours) to create a measure of efficiency. Other measures included in this category address efficiency by focusing on turnaround time or other aspects of process efficiency.
- <u>Effectiveness Measures:</u> Effectiveness measures – also called outcome measures – gauge the extent to which objectives are being met. Typically, this category includes measures of service quality.

### **3.** The Difficulty of Applying Performance Measures to Law Offices

Performance measures are not universally supported in the legal arena. This stems from several factors. First, attorneys are more comfortable practicing law rather than engaging in the administrative tasks of performance measurement and tracking. Another significant factor is that much of what an attorney does consists of research, analysis, and consultation. These activities are not easily quantifiable and often do not fit within these various performance measures. In addition, the quality of legal work performed is difficult to measure in either abstract or general terms. The guality of an attorney's performance is defined in great part by the formal as well as informal ethics by which attorneys perform their professional work. Ethics is not easily reducible to number-crunching.

At times, it may be difficult to fully understand what a city attorney does on a daily basis. Some of his or her activities are publicly visible, such as advocacy at formal hearings. Day-to-day activities, such as legal counseling, risk management, and legal assistance provided to city employees are often played out behind the scenes.

While some legal departments may not have a formal mechanism in place to determine whether their clients' needs are being met, all of them are evaluated on some level. In a proactive manner, and believing that it is better to know the good and the bad - and sooner than later - many legal departments have established a mechanism to monitor whether city staff needs are being met. Such monitoring systems are more effective when

they encourage specific comments rather than simply relying on numerical ratings. While the quality of legal services delivered is important, it is often defined in different ways. Some clients define quality as speed at which legal services are provided - often at the expense of quality or effectiveness. But most clients would arguably prefer that the legal services provided be accurate and responsive to their needs.

City attorneys are sometimes faced with the situation of providing quality legal work when faced with a short deadline. At times like these, city attorneys must be careful not to sacrifice their ethical responsibilities in the name of expediency. Attorneys must continue to make their choices wisely and advise their clients of the risks inherent by accepting what could be defined by the attorney as less than "quality" work. Due to the significant time demands of a particular project, quality may be defined in part by speed: the best work one can provide within the time frame one has been given.

Effective performance measures cannot be established in a vacuum. The city attorney with the assistance of the city council must define what is valued by the organization in terms of legal services. It is important to clearly define what is being measured. It is critical to create a system that can be managed. The system must not be time or labor intensive, and it must be easy for staff to track. Any measures adopted should be significant within the organizational culture.

#### For More Information:

Performance-Based Management: A City Official's Guide to Achieving Results-Oriented Government offers an easy to follow approach to goal-setting, implementation, measurement, and evaluation of a performance-based program. This publication is available for purchase through CityBooks by calling (916) 658-8257 or online at www.cacities.org/store. It may be helpful to think about performance measures this way:

- Things for show: Measures can justify a program and draw public attention to, and build public confidence in, performance.
- Things for dough: Measures can signal the importance of an activity to the organization or help to establish its value when competing for financing.
- Things to know: Measures of performance can be helpful to the internal management of a city attorney's office.

<u>Things For Show:</u> Producing information about the workload and related performance conveys information about what the city attorney's office does. An example is the number of code enforcement cases currently being handled by the office. Providing information on the breadth and quantity of the workload helps all city departments understand the services provided by the city attorney.

Some performance measures may create false expectations of what is meaningful in evaluating the city attorney's performance, however. One example is the number of cases that are "won" by the office. For the most part, city attorneys do not get to pick and choose their cases. It's possible to do an excellent job, but still lose the case.

Things For Dough: One of the most difficult jobs for a city attorney is to explain to funding authorities why legal services are just as necessary and important as police and fire protection and other public services. Special interest groups and public employee unions generally do not appear at council meetings to speak in favor of the city attorney's budget. At times, a city attorney's budget may be lost in the annual budgetary fracas or targeted for reduction.

### Some performance measures may create false expectations of what is meaningful in evaluating the city attorney's performance.

Measuring quantity is a simple device that can reflect trends. Some measures fall neatly within the description of output or outcome. Others reflect important information related to past and future workloads (demands) and costs (inputs). Coupled with information that shows proportionality with activities of the government, this information can be used to project and justify increased costs associated with the expansion or addition of services. Increased services and personnel additions in other departments translate into increased demands on legal services and ultimately the need for greater law office funding.

One of the more useful tools in the law office involves comparing matters handled. For example, in litigation the number of active cases carried by each attorney is a measure that potentially allows relative caseload comparisons within the office. These can be compared with the caseloads of other city attorney offices of a similar size. The comparisons may then be used to justify increased funding requests. Numbers alone often do not paint the full picture, however. While one lawyer might carry three times the caseload of another attorney, the nature of the cases may differ. The attorney handling fewer cases may actually be handling more complex and time consuming matters, or may have additional duties to perform in the office. Also, this statistic may be of little use in a city with minimal litigation.

<u>Things To Know:</u> Having relevant legal information can help to more effectively manage individuals, programs or budgets. This may be information that is not appropriately distributed publicly, even in the form of a performance measure. Oftentimes, measures based on transmission of legal information are too technical to be relevant to the public.

One of the most effective tools used to measure performance is that which measures individual performance. Providing staff and the public with an opportunity to give feedback on services helps in improving the accessibility and responsiveness of lawyers. When considered on a case-by-case basis, the information is critical to the legal office manager's ability to monitor and help improve the performance of individual staff. Specific data is much more useful than global statements.

#### 4. Summary

Performance measures may be of assistance in assessing and improving city attorney's office performance. The information may be used to support decision-making, planning, and to justify resource requests. The information can inform the public and decision-makers about the city attorney's office's activities, service demands, and performance. The activities of the city attorney's office do not always receive the highest public visibility, but identifying missions, goals, and performance objectives can serve to increase public awareness and support for the city's legal operations. The actual provision of legal services, however, should not be overshadowed by administrative or other aspects of performance measurement.

Providing staff and the public with an opportunity to give feedback on services helps in improving the accessibility and responsiveness of lawyers.



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## IV. Negotiating the Employment Relationship

Once a preferred candidate has been identified, the city council should determine how the employment relationship will be memorialized. An employment contract has the advantage of providing both parties with assurances as to length of employment, salary, benefits, and working conditions.

Many agreements are simply modeled after preexisting city attorney or city manager agreements. Few cities and city attorneys obtain independent legal advice regarding these agreements.<sup>26</sup> As a result, problems with employment agreements may arise. When problems arise, they often involve the interpretation of benefit provisions, enforcement of regular performance evaluations, and the establishment of specific goals and objectives.

Some councils prefer to operate without an employment contract. City attorneys in this situation often have the terms and conditions of their employment addressed through other documents, including municipal codes, resolutions, city charters, personnel rules, and/or job descriptions. Some attorneys may rely on memoranda from the council to outline some of the terms of their employment. In any case, the basic terms and conditions of employment need to be determined by the council and then negotiated with the candidate.

There is a wide divergence among cities as to who negotiates with the successful candidate. Unless the city council negotiates with the primary candidate though a subcommittee, the recruiter or human resources director should establish parameters with the city council as to what salary and benefits the council is willing to pay to obtain the services of a particular individual. The recruiter or human resources director should also determine any other working conditions the council is willing to negotiate, such as flexible work schedules or support staff. After receiving direction from the city council, the recruiter or human resources director should put the city council's initial offer in writing. The letter should state that the offer is not final until the employment contract (if there is to be one) is executed, and the candidate has successfully completed all necessary background checks and/or medical examinations.

#### For More Information:

Sample employment agreement provisions for both full-time, in-house city attorneys and part-time, contract city attorneys can be found in Appendices A and B, respectively.



## V. Maintenance of the Employment Relationship

An employment relationship between a city attorney and a city council may exist on several levels – that of attorney and client, that of employer and employee, and that of public official and advisor. Councils and city attorneys should spend time at the outset of the relationship – and periodically throughout – to analyze the relationship and determine what can be done to improve and maintain positive relations.

This section considers several aspects of the employment relationship that should be considered by the parties in order to maintain a positive working relationship.

#### A. UNDERSTANDING WHAT THE CITY ATTORNEY ACTUALLY DOES

Many city attorneys believe that their day-to-day activities are not fully understood by others. Misperceptions are understandable. For some councils and staff, their primary contact with the city attorney occurs at meetings, not through observation of the day-to-day routine of the city attorney's office.

Numerous city actions require the input and guidance of the city attorney. The plethora of rules, court decisions, and administrative regulations that govern city activities is such that city councils and staff must often consult with the city attorney for assistance on accomplishing a task. For example, a land use matter may involve some or all of the following legal issues: conflict of interest questions, annexation issues, inverse condemnation, civil rights, slander, or the drafting of a development agreement.

The plethora of rules, court decisions, and administrative regulations that govern city activities is such that city councils and staff must often consult with the city attorney for assistance on accomplishing a task. A city attorney's role may be expanded because he or she is the individual who must devise a method to legally reach the goals sought by the council.

It is important to remember that most city attorneys are generalists in municipal law. Although municipal law used to be considered a specialized area of knowledge, it has increasingly become a field of law composed of a great number of sub-specialties. The city attorney, as chief corporate counsel for the municipality, cannot be an expert in all these areas. Rather, the city attorney should be a competent generalist with the willingness to consult with specialists when specific legal needs arise to help effectively and efficiently advance and protect the city's interests.

Thus, as a generalist, the city attorney may need to contract out some work. Situations may arise where the city needs the services of a specialist in such areas as personnel, finance, or redevelopment matters. Also, because a city's legal workload may temporarily increase, it may make financial sense to outsource overflow work to outside counsel rather than hire fulltime, long-term staff. In addition, litigation can be very consuming of both attorney and support staff time. This is another instance when it can be more cost-effective to hire outside counsel to handle litigation rather than hire additional in-house staff.

As chief counsel, the city attorney typically attends all city council meetings to provide on-the-spot advice. The city attorney or staff attorney also often attends meetings of the planning commission and other city advisory bodies. The city attorney also may serve as the parliamentarian for these bodies.

Another important aspect of the city attorney's job is to give opinions on specific legal issues. These opinions may be either formal (in writing) or informal (oral advice). Some cities require that all requests for advice be communicated in writing through department heads to ensure coordination and avoid duplication of effort. Another benefit of a request system is that it aids in tracking requests for advice for purposes of achieving performance management objectives. Whenever there is advance notice that a legal question may be coming, the city attorney should be advised as soon as possible, even if all factors giving rise to the question are not fully known. Doing so promotes the process of giving and receiving legal advice and keeps the lines of two-way communication open. There is a reason a synonym for attorney is counselor.

City attorneys must often analyze several sets of statutes and numerous reported cases in order to render informed opinions on important legal questions. The sheer volume of law affecting cities has increased greatly during the last several decades. A reasonable amount of time should be provided to analyze any particular question, especially if the issue is novel or complex.

Along with providing counsel to the city, the city attorney is also responsible for the drafting and/or review of important legal documents, such as ordinances or contracts. The city attorney must also review ordinances that have been adopted by another agency and are suggested for consideration by the council. An ordinance that answers the needs of one agency does not necessarily fit the needs of another. Review and customization by the city attorney's office is imperative before the council gives final consideration to the adoption of a "sample" ordinance.

In the event civil litigation must be pursued or defended, the city attorney represents the city's interests. In some cities, the city attorney may also participate in criminal prosecutions of state law offenses. Many city attorneys prosecute violations of city ordinances.

Particularly in cities with full-time, in-house city attorneys, the city attorney is also a department head, responsible for the management of the city attorney's office. The role played by a city attorney as a manager often varies from city to city, with some councils placing emphasis on this and some not.

Many city attorneys view themselves not only as attorneys, but also as project managers, problem resolvers, and strategists. Many city attorneys are considered as members of the city's senior management team, although with a separate role and responsibilities. This means the city attorney is expected to attend and participate in management functions, and is sometimes turned to for advice that is more "practical" than "legal" in nature. Often, city attorneys are fully integrated members of the management team and are expected to attend and participate in management activities. Many city attorneys view themselves not only as attorneys, but also as project managers, problem resolvers, and strategists. At times the overarching role of the city attorney may conflict with these management functions. The city attorney may need to recommend a different direction despite the need to participate in and foster management relationships.

#### B. STICKY SITUATIONS – QUESTIONABLE LEGAL BEHAVIOR, LEGAL MANDATES, AND COUNSELOR VERSUS ADVOCATE

There are times when proposed city action may not fit within applicable legal constraints. When faced with an objective that is plainly unlawful, the city attorney must deliver the news as diplomatically as possible. Adherence to clear legal guidelines is not optional; they must be followed. Most legal guidelines are imposed to further the public good, and public officials need to conform their actions because it is their ethical duty.

The city attorney's job is complicated by the fact that the law is not always clear in a given area. When this occurs, the city attorney must give his or her best judgment on the probable and possible legal consequences of a proposed course of action. The city attorney cannot make the law clear when it is not. As a result, city attorneys may often take what appears to be a narrow view of the city's prerogatives in a given situation. As the city's legal counselor, the city attorney's primary task is to provide the city council and staff with the best analysis and dispassionate evaluation of what the law requires or permits in a given situation. However, when dealing with third parties, the city attorney should step into the role of advocate and vigorously argue one perspective of the law and the facts at hand.

#### C. QUESTIONING THE ATTORNEY'S ADVICE

From time to time, others may question the city attorney's advice. It may be tempting to seek a second or even third opinion. This temptation should be resisted. The city attorney is the individual the city has hired (or the voters have selected) to advise the city on legal matters. The city attorney is the legal advisor who is most familiar with the laws bearing on the city's actions, particularly local ordinances, internal procedures, any charter provisions, and other internal situations that may affect a given analysis.

If the city is sued, it is the city attorney's responsibility to defend the city. If the need arises for a second opinion, the council as a whole should authorize the action. If a second opinion is authorized, it is valuable to have the city attorney and outside counsel each review the other's opinion so that both may be fully informed.

#### D. EFFECTIVE COMMUNICATION WITH THE ATTORNEY

Effective communication between city officials, city staff, and the city attorney is critical to the smooth operation of the city. Early and frequent communication about proposed city action can avoid frustration on the part of everyone and save the city money in the long run.

#### 1. Shared Information

The city attorney must be kept informed of the city's activities. If not, he or she cannot give good and timely legal advice. Being "kept informed" means that the city attorney receives complete information in a prompt manner. The city attorney must be given notice of later changes in facts and policy direction, as well as potential ramifications, along with a clear explanation of the city's objective.

#### 2. Preventive Legal Advice

The city attorney is there to give the city preventive legal advice. If he or she is unable to do this because of poor communications, the city and its taxpayers are not getting their money's worth. Worse yet, the city may end up having to spend more money on litigation and adverse judgments – money that could be better spent on other public programs.

In order to protect the city's rights and interests, the city attorney has the obligation to provide professional opinions based on the full and unbiased facts of the given situation. The city attorney's obligation to communicate includes the responsibility to say to the client what the client may not want to hear. One noted scholar and judge put it this way, "As in private practice, the attorney is never the mere hireling of government or of anyone else. He is an independent professional and must stand on what he thinks is right."<sup>27</sup>

#### 3. Avoiding Policy Advice

One subset of communication issues for city attorneys to consider is when they are asked to opine on policy issues. One of the axioms of local government is that councils make policy and city attorneys advise on the law. At times, there is a fine line between making policy and advising on the law. For example, when a council wants to know "can we do this and if so, how," which is policy and which is law? Increasingly, the two are not distinct.

Another local government axiom is that city attorneys deal with legal issues and city managers deal with operational issues. Again, there is often a fine line between these two issues. Employee disciplinary matters, for example, are not susceptible to clear differentiation. Questions of what is policy or an operational matter and what is law are often intertwined. Councils and staff need to be sensitive to situations when the city attorney is asked to step out of the attorney role and instead provide policy advice. When these situations occur, the attorney should refrain from providing the requested advice, or, at least, clearly state that the matter is one of policy and not of law.

### Ten Tips For Effective Use of City Attorneys

- 1. Remember the city is the client. Only the entire council can speak on behalf of the municipality.
- 2. Remember everyone is on the same team. When the city attorney identifies potential legal problems, it is to protect the city.
- 3. Consult the city attorney sooner rather than later on issues so that legal input can be meaningful.
- 4. Do your homework; be prepared when you speak with the city attorney so the time is well-spent.
- 5. Be clear about expectations and priorities.
- 6. Give the city attorney adequate time to research issues and answer questions.
- 7. Provide the legal staff with the necessary tools to do the job requested.
- 8. Always disclose all pertinent facts and objectives.
- 9. Recognize that a concrete answer is not always possible when the law is not clear-cut.
- 10. Understand the city attorney is an independent and objective legal advisor and not a politician.

### The "Ideal" City Council Member: A City Attorney's Perspective

- Has experience in local government through service on commissions and/or committees at the city/county level. General experience is the key, not necessarily experience in a specific jurisdiction. Has management experience – understands how to give direction and how to delegate effectively. Is committed to developing relationships with a broad range of community groups and adjoining jurisdictions.
- Recognizes the complexity of running a city and, therefore, accepts the reality of a learning curve for a new city attorney – sometimes a long one. Focuses on establishing well-grounded policies that are communicated to the public and staff clearly and consistently. Respects and acts within the legal process.
- 3. Takes time to read staff reports and other materials in order to be well informed on particular issues. Does not make "snap" judgments without taking the time to become educated about policy issues. Understands the roles of the city council, staff, and the community. Is issue-oriented, does not take policy differences personally and is open to compromise. Makes decisions after considering and weighing the legitimate competing interests of all potentially impacted parties.
- 4. Conducts him/her self professionally. Is respectful of fellow council members, staff, and public, both in and out of council meetings; questions the facts and rules and explores options, but does so without personalizing the issues and attacking others. Does not criticize staff in public.
- 5. Retains an open mind regarding issues and facts. Puts aside personal feelings to achieve the common good. Listens to and respects all points of view, even though contrary to personal points of view. Is willing to make the politically difficult decisions if the best interests of the city require; doesn't bow to the "tyranny of the minority."

- Recognizes a city's core mission is to deliver basic municipal services; makes policy decisions with this concept in mind. Allows the professional city staff to assume responsibility for the implementation of policy decisions.
- 7. Values needs of community over grandstanding and political expediency. Recognizes there is a tension between serving the needs of the community and enhancing revenue and is willing to make hard choices. Is a leader, not a follower. Has both a heart and a brain. Listens.
- 8. Understands that the city attorney represents the city as a whole and not just a member/agent of a political team; asks for and values legal advice; listens to advice before deciding whether to heed it. Is intellectually honest. Does not act arbitrarily and beyond the appropriate legal process.
- 9. Provides understandable and carefully considered direction on legal issues. Reads and digests attorney-client communications and asks clarifying questions of attorney about legal advice. Is able to decide difficult legal issues with integrity, considering the best interests of the city and with the courage to cope with a vocal opposition. Bases decisions on the law and not on politics. Makes an effort to appreciate the difficulty and complexity of the duties of the city attorney and the city attorney's office; gives credit where due.
- 10. Respects city attorney for legal opinion and appreciates that sometimes reasonable people may differ. Informs city attorney of potential conflict of interest issues before a meeting. Respects city attorney staff and does not seek to debate city staff at a public forum. Seeks counsel before "going public" with his/her views or policy. Does not take personal dissatisfaction with the legal system as a license to beat up the city attorney in public.

## **VI. Separation From Employment**



Every employment relationship comes to an end. Some end because of resignations to take a position with another agency and some end because of retirement. Others end through dismissals or negotiated resignations. While many city attorneys leave their prior employment on amicable terms, some do not. Those who don't are often surprised by the decision to terminate the employment relationship.

Employment relationships that end in dismissal have usually been under stress for some time. This stress can be due to performance deficiencies on the part of the city attorney. There can be interpersonal problems between the city attorney and council members or staff. Stress may also be attributable to a number of external political factors affecting legal issues in the community either through direct challenge to the city attorney by community activists or by a more indirect challenge through pressure on council members.

Regardless of how or why the decision to end an employment relationship is made, it is often an emotionally charged development that must be addressed with respect and decorum. An employment termination played out in the press or in the courts benefits no one.

#### A. PUT IT IN WRITING

The issues involved in terminating the employment relationship should be anticipated and dealt with in the employment contract or written conditions of employment. Potential performance issues should be addressed well in advance of the termination. These include setting out specific reasons that may lead to termination – such as the inability to perform the functions of the position or the conviction of a crime.

> The issues involved in terminating the employment relationship should be anticipated and dealt with in the employment contract or written conditions of employment.

At a minimum, the employment agreement should clearly set out the notice requirements for a termination action. For instance, how many days' notice is required before the termination is effective? Is there a hold on any termination action following an election? What form of notice is required? Written? Oral? All of these issues should be outlined in the employment agreement.

When a process is in place to deal with these issues, the termination process is likely to proceed much more smoothly.

#### **B. SEVERANCE PAY**

Employment contracts should be reviewed by a lawyer well-versed in employment law to determine what severance pay might be due to terminated employees. State law limits severance pay to the monthly salary of the employee multiplied by the number of months remaining on the unexpired term of the contract.<sup>28</sup> This amount is subject to an eighteen-month cap. For example, if an employee is terminated with six months remaining on a contract, but the contract provides for twelve months' severance pay, state law may prohibit payment for the additional six months. In addition, severance pay may be limited to salary<sup>29</sup> and health benefit payments, but human resources professionals should be consulted regarding payment of specific benefits.<sup>30</sup> Cities with charters may have unique provisions as well.

#### C. THE TERMINATION AND THE MEDIA

When it is determined that a city attorney's services should be terminated, all procedures regarding personnel closed sessions must be followed. In general, if the termination is based on performance issues, it is acceptable to simply notice a closed session on employee performance.<sup>31</sup> If the termination is based on specific complaints and charges brought by another person or employee, the city attorney is entitled to twenty-four hours notice of the closed session to hear the complaints and charges.<sup>32</sup> He or she may, however, request a public session. Remember, whatever is said in the closed session must not be disclosed to the public. Any press or public statement about the termination should be carefully prepared. An employment law attorney should preferably review any such statements. The city should designate one media contact person to minimize misstatements. Following these protocols not only protect both parties legally, but also help to diffuse potential jousting in the media for the upper hand.

Although a termination may be warranted, the actual separation will probably have an impact not only on the employee, but also on city staff. Be sensitive to staff perception of how the termination is handled.

#### For More Information:

Open & Public III, A Guide to the Ralph M. Brown Act, 2000, provides information on the open meeting laws for local governments. This publication is available for purchase though CityBooks by calling (916) 658-8257 or online at www.cacities.org/store.

## **VII. Conclusion**



Building a productive employment relationship between the city attorney and the city council takes everyone's effort. The key is to understand the unique attorney-client relationship the parties share. By clearly defining the parameters and goals of this relationship in the job description and by reinforcing these standards through annual, meaningful performance appraisals, the parties can work together to provide the quality of legal service the public expects and deserves.

### **Endnotes**

- <sup>1</sup> Voters elect city attorneys in Albany, Compton, Huntington Beach, Long Beach, Los Angeles, Oakland, Redondo Beach, San Bernardino, San Diego, San Francisco, and San Rafael. The city manager appoints the city attorney in Berkeley, Folsom, and Shafter.
- <sup>2</sup> Committee on Professional Responsibility and Conduct of the State Bar of California, Report and Recommendation on AB 363.
- <sup>3</sup> State Bar Rules Prof. Conduct, rule 3-600.
- <sup>4</sup> California Government Code section 900 and following.
- <sup>5</sup> Roberts v. City of Palmdale, 5 Cal.4th 363, 20 Cal.Rptr.2d 330 (1993).
- <sup>6</sup> State Bar Rules Prof. Conduct, rule 3-600.
- <sup>7</sup> California Government Code section 34090 provides, in part, that:

Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may destroy any city record, document, instrument, book or paper, under his charge, without making a copy thereof, after the same is no longer required.

Cal. Gov't Code § 34090.

Also, California Government Code section 34090.6 provides for the destruction of recordings of routine video monitoring and recordings of telephone and radio communications maintained by a city department with the approval of the legislative body and the written consent of the agency attorney.

<sup>8</sup> California Election Code section 9280 provides, in part, that:

Whenever any city measure qualifies for a place on the ballot, the governing body may direct the city elections official to transmit a copy of the measure to the city attorney, unless the organization or salaries of the office of the city attorney are affected. The city attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure.

- Cal. Elec. Code § 9280.
- <sup>9</sup> California Civil Code section 52 (c) provides, in part, that:

Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint.

Cal. Civ. Code § 52 (c).

- $^{\scriptscriptstyle 10}$  California Government Code section 6250 and following.
- <sup>11</sup> American Bar Association Model Code of Professional Responsibility, Ethical Consideration 7-14.

- <sup>12</sup> Shepard v. Superior Court, 17 Cal.3d 107, 122, 130 Cal. Rptr. 257 (1976).
- <sup>13</sup> Id.
- <sup>14</sup> Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).
- <sup>15</sup> California Government Code sections 825(a), 995 and 995.2.
- <sup>16</sup> California Government Code section 41801.
- <sup>17</sup> California Government Code section 41802.
- <sup>18</sup> California Government Code section 41803.
- <sup>19</sup> California Government Code section 41803.5(a).
- <sup>20</sup> California Government Code section 41803.7.
- <sup>21</sup> California Government Code section 41804.
- <sup>22</sup> California Government Code section 41805.
- <sup>23</sup> California Government Code section 50083 provides:

No local agency or district shall require that its employees be residents of such local agency or district.

- Cal. Gov't Code § 50083.
- <sup>24</sup> Article XI, section 9 of the state Constitution provides:

A city or county, including any charted city or charter county, or public district, may not require that its employees be residents of such city, county, or district; except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location.

- Cal. Const., art. XI, § 10, subd. (b).
- <sup>25</sup> See 42 U.S.C. § 12102 and following.
- <sup>26</sup> While the Attorney General has issued oral advice that a city attorney may re-negotiate a contract without violating Government Code section 1090, it is advisable that the city attorney retain a third party to conduct negotiations with the public entity.
- <sup>27</sup> Weinstein, Some Ethical and Political Problems of a Government Attorney, 18 Maine L. Rev. 155, 162 (1966).
- <sup>28</sup> California Government Code section 53260.
- <sup>29</sup> Id.
- <sup>30</sup> California Government Code section 53261.
- <sup>31</sup> California Government Code section 54957. See also 67 Ops. Cal. Atty. Gen. 215 (1980).
- <sup>32</sup> California Government Code section 54957.

## **Employment Agreement Provisions** Full-Time (In-House) City Attorney



The following is a compilation of provisions that have appeared in city attorney employment agreements. Employment agreements vary greatly in their level of detail, in the order of articles, and in their degree of formality. The following compilation is not intended to stand alone as an ideal contract. Rather, it should be adapted to each city's particular arrangement with its city attorney.

Both the city council and the attorney should consider seeking independent advice before entering into an employment agreement.

### A. RECITALS

[COMMENT: It is not clear that these introductory provisions have any particular legal consequence. But they are commonly found in city attorney employment agreements. They may contribute some clarity to the substantive provisions that follow. Some of these provisions may appear in introductory language before the actual articles of the agreement.]

**Model 1.** THIS EMPLOYMENT AGREEMENT is made and entered into in the City of Simi Valley on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the CITY OF SIMI VALLEY, a municipal corporation of the State of California, hereinafter referred to as "CITY", and \_\_\_\_\_\_, an individual, hereinafter referred to as "ATTORNEY" for employment beginning \_\_\_\_\_\_.

(City of Simi Valley, 1998)

**Model 2.** WHEREAS the Municipal Code of the city of Moreno Valley provides that the City Attorney of Moreno Valley, California ("City Attorney"), shall be appointed by and serve at the pleasure of the City Council of the City of Moreno Valley ("Council"), and

WHEREAS the Council desires to employ Employee as City Attorney, and

WHEREAS Employee desires to serve as City Attorney; and

WHEREAS it is the desire of the parties hereto to provide the terms and conditions by which City shall receive and retain the services of Employee and to provide for him to remain in such employment, to make possible full work productivity by assuring his morale and peace of mind with respect to future security; to act as a deterrent against malfeasance or dishonesty for personal gain on his part and to provide for terminating his services at such time as he may be unable to fully discharge his duties or when Council may otherwise desire to terminate his employ.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties agree as follows: *(City of Moreno Valley, 1994)* 

#### B. DUTIES

[COMMENT: This section may also be titled Scope of Duties, Services to be Performed, Duties and Obligations, or some other similar title. This section often incorporates by reference those portions of the city's municipal code or charter that set forth the duties of the city attorney. The following are examples of itemized duties and limitations.]

*Model 1.* Duties: Attorney agrees to diligently and faithfully perform the duties of the Danville City Attorney and Danville Community Development Agency General Counsel. Specific duties include, but are not limited, to the following:

- (a) Attendance at Town Council/Community Development Agency meetings and other meetings as required;
- (b) Research, preparation and review of ordinances, resolutions, agreements, contracts, leases, written opinions
  and other documents of legal nature necessary or requested by the Town Council;
- (c) Provision of all legal advice on behalf of the Town to the Town Council/Community Development Agency, Town Manager, and other Town officers and employees;
- (d) Representation of the Town/Community Development Agency, members of the Town Council and other Town officers and employees in litigation as necessary;
- (e) Selection, retention, supervision and monitoring of outside counsel as required;
- (f) Commencement and prosecution of all criminal actions and civil abatements necessary and appropriate to enforce the Town's ordinances;
- (g) Monitoring and advising the Town Council and Town staff regarding legislation and case law affecting the Town.

(Town of Danville, 2000)

**Model 2.** Employee will focus his professional time, ability, and attention to City business during the term of this Agreement. Employee shall not engage in any other business duties or pursuits whatsoever or, directly or indirectly, render any services of a business, commercial, or professional nature to any other person or organization, whether for compensation or otherwise, without prior consent of Council, except that:

- (1) The expenditure of reasonable amounts of time not in conflict with the City's needs and interests, for educational, charitable, community, and professional activities, shall not be deemed a breach of this Agreement and shall not require prior consent.
- (2) This Agreement shall not be interpreted to prohibit Employee from making passive personal investments or conducting private business affairs if those activities do not materially interfere with the services required under this Agreement.
- (3) All data, studies, reports and other documents prepared by Employee while performing his duties during the term of this Agreement shall be furnished to and become the property of the City, without restriction or limitation on their use.

(City of Banning, 2001)

#### C. TERM

[COMMENT: The two most common provisions regarding a city attorney's term in office are reflected below. Pleasant Hill has a fixed term with automatic extension. Los Gatos has a fixed starting date but an indefinite expiration, subject only to the termination/separation provisions of the agreement. These two provisions are mutually exclusive.]

**Model 1.** Term. Employee shall be retained in this position of the City Attorney from the effective date of this Agreement through \_\_\_\_\_\_. This Agreement, in its entirety, will be automatically extended annually for an additional one-year period unless the City Council specifically takes action by three-fifths vote to not renew this Agreement at least one year prior to its date of expiration.

(City of Pleasant Hill, 2000)

*Model 2.* Term. This Agreement shall commence \_\_\_\_\_, and extend indefinitely until terminated as provided hereinafter.

(Town of Los Gatos, 1997)

#### D. SALARY

[COMMENT: The following sample salary provisions reflect alternative approaches to city attorney compensation. Bakersfield utilizes a traditional step system and ties future increases to those given other city management personnel. Napa links future salary increases to performance evaluations. Rancho Mirage ties future adjustments to the Consumer Price Index. And Salinas guarantees that the city attorney will maintain the same salary differential relative to certain other management employees.]

Model 1. EMPLOYEE'S base salary shall be established within the range of the following salary schedule:

- Step 1 \$\_\_\_\_\_
- Step 2 \$\_\_\_\_\_
- Step 3 \$\_\_\_\_\_
- Step 4 \$\_\_\_\_\_

Step 5 - \$\_\_\_\_

EMPLOYER agrees to pay EMPLOYEE for services rendered as provided herein a beginning annual base salary at Step 4, payable in installments at the same time as other employees of the City are paid. In addition, EMPLOYER agrees to adjust said salary schedule and/or other benefits of EMPLOYEE in such amounts and to such extent as the Council may determine to adjust, across the board, the salary schedules of the employees in the City's Management Group.

(City of Bakersfield, 1998)

#### Model 2. SALARY

- (a) City agrees to pay Employee \$\_\_\_\_\_ in salary per annum for his services, payable in installments at the same time as other employees of the City are paid and subject to customary withholding.
- (b) Thereafter and subject to an evaluation of performance on the anniversary date hereof, City may increase Employee's salary by minute order.

(City of Napa, 1993)

Model 3. The salary for the City Attorney for the Fiscal Year \_\_\_\_\_ will be \$\_\_\_\_\_.

<u>Annual Adjustment</u>: In each year of employment, the City Attorney shall receive, in addition to the salary set forth above, a salary adjustment of no less than 50% of the cost-of-living index applicable to this geographical area, together with the right to be considered for a merit step increase as set forth in the Personnel Rules and Regulations, or a merit bonus as approved by the City Council. Said index shall be described as the "all Urban Consumer's Index", and said geographic area shall be described as the "Los Angeles-Anaheim-Riverside" area. The annual compensation review of the City Attorney shall be made at the same time or at such other time as agreed to between the parties, as similar consideration is given other employees generally of the Council.

(City of Rancho Mirage, 1998)

Model 4. Base Salary/Evaluation:

\$\_\_\_\_\_\_ initial salary with subsequent evaluations at six and twelve months after appointment. Salary to be increased two and one-half (2.5%) percent after satisfactory evaluation at twelve months. Performance will be evaluated annually thereafter with all future salary adjustments based on performance.

(City of Salinas, 1998 Amendment)

#### E. HEALTH INSURANCE

[COMMENT: The most common provision addressing health or medical insurance in city attorney employment agreements guarantees the city attorney the same benefits as other management employees.]

**Model 1.** EMPLOYER agrees to provide EMPLOYEE with the same health, dental, optical, and life insurance coverage as is provided other employees in the City's Management Group.

(City of Bakersfield, 1998)

*Model 2.* Health Insurance: For Employee and his eligible dependents. A choice of PERS Plans and the City will contribute an amount equivalent to the highest contribution rate established for other City employees.

(City of Folsom, 2000)

**Model 3.** HEALTH INSURANCE: EMPLOYER agrees to pay all costs of medical, dental, vision, life and long-term disability insurance for EMPLOYEE and his dependents in accordance with the plans provided by the EMPLOYER. In addition to other insurance and benefits, EMPLOYER agrees to pay four (4) calendar months of salary in the event of the EMPLOYEE'S non self-inflicted death or disability.

(City of Vacaville, 1998)

#### F. RETIREMENT

[COMMENT: Many retirement provisions state that the city attorney will receive the same retirement benefits and city contributions as are provided other management employees. Some set out the benefits and contribution explicitly. While some retirement provisions include deferred compensation, others set it out in a separate section.]

*Model 1.* [City Attorney] will receive the same benefits such as, but not limited to, dental insurance, health care, retirement (PERS) contribution and plan, workers compensation provided to other executive management level employees.

(City of Thousand Oaks, 1985)

Model 2. Retirement:

- (1) City will pay seven (7) percent of the Employee's base salary and other compensation, as required by State law to the P.E.R.S. as the Employee share, plus the normal matching Employer's share. Such amounts will be applied to the Employee's individual account in accordance with Government Code Section 20615.
- (2) City shall pay the employer's portion of the One Year Final Compensation and Full Formula Plus Social Security PERS retirement plan.
- (3) Employee shall be eligible for 2% @ 55 PERS retirement formula.

(City of Banning, 2001)

**Model 3.** EMPLOYER agrees to pay for the EMPLOYEE'S portion of the contribution seven percent (7%) to the Public Employees Retirement System. EMPLOYER agrees to contribute, into a deferred compensation plan, an amount up to 5% of salary up to the maximum allowed by the Internal Revenue Service.

(City of Bakersfield, 1998)

#### G. DEFERRED COMPENSATION

[COMMENT: Deferred compensation often supplements retirement and frequently appears in the same contract section as retirement. As with retirement, deferred compensation is often provided on the same basis as for other management employees.]

**Model 1.** Deferred Compensation. City shall provide to EMPLOYEE the same deferred compensation plan and CITY contributions as provided to other Management and Confidential employees.

(City of Modesto, 1997)

*Model 2.* Deferred Compensation. There are currently two plans of Deferred Compensation offered and the City will contribute an equal amount to that invested by the Employee to a maximum allowed by State and/or Federal Tax laws.

(City of Folsom, 2000)

#### H. VACATION

[COMMENT: Many agreements simply provide vacation leave equal to other management employees.]

**Model 1.** Sick Leave, Vacation and Holidays. Employee shall receive the same sick leave, vacation and holiday benefits as employees in the management unit, appropriately prorated. Any accrued hours existing on the effective date of this Agreement shall be credited to Employee.

(City of Rocklin, 1996)

Model 2. Vacation Leave.

- A. City agrees, effective July 1, 1998, and each subsequent July 1st thereafter, to credit to and vest in [City Attorney] 218 hours of vacation leave.
- B. City agrees that [City Attorney], without penalty, may carry forward up to 480 hours of vacation leave as of January 1, 1999 and each January 1st thereafter.

C. City agrees that during July of each year, [City Attorney] may redeem up to 178 hours of vacation leave then credited to and vested in [City Attorney]. City also agrees that, upon request of [City Attorney] at any time and with approval of the City Manager, [City Attorney] may redeem vacation leave hours then credited to and vested in [City Attorney].

(City of Oxnard, 1999)

*Model 3.* The City of Walnut Creek shall include [City Attorney] in its General Leave Program and provide him with an annual allotment of 28 days of General Leave. During the first year of employment, [City Attorney] shall be credited with 28 days on his first day of work. Should he leave the City during the first year, the payment to [City Attorney] or repayment to the City for such leave shall be on a prorated basis. Following the first year, General Leave shall be earned by [City Attorney] according to the terms of the General Leave Program. [City Attorney] may accumulate General Leave year to year to limit of 600 hours. [City Attorney] shall have the right, at any time or from time to time, to receive payment for all or any part of his accumulated General Leave at his then existing hourly rate. He may direct any such sums be paid in cash or in the form of deferred compensation.

(City of Walnut Creek, 1988)

#### I. MANAGEMENT/ADMINISTRATIVE LEAVE

[COMMENT: In lieu of overtime or compensatory time off - generally not available to city attorneys - many cities agree to provide time off in the form of Management or Administrative Leave. Such leave is typically in addition to vacation.]

*Model 1.* [City Attorney] shall receive eighty (80) hours of administrative leave per calendar year. [City Attorney] shall not have the right to accrue administrative leave from year to year. [City Attorney] shall not be entitled to any compensation, or compensatory time off, for overtime.

(City of Newport Beach, 2000)

*Model 2.* Employee shall receive 48 hours of administrative leave per year in recognition of the time Employee must work outside normal office hours. Employee shall use a minimum of 80 hours of leave time, in any combination of vacation or administrative leave, per year. Failure to do so will result in those hours less than 80 being subtracted from the Employee's accumulated vacation hours.

(City of Madera, 1993)

#### J. HOLIDAYS

[COMMENT: Most city attorney employment contracts equate city attorney holiday time off with that afforded other management employees.]

**Model 1.** Other Benefits. All actions taken by Council relating to fringe benefits for employees in the Executive Management classifications shall be considered actions granting the same benefits to Employee. As used herein, fringe benefits include but are not limited to vacation, sick leave, holidays, retirement (PERS) benefits and payments, the City's management package, deferred compensation, health insurance, dental insurance, long-term disability insurance, life insurance, and administrative leave. City shall also pay Employee's annual State Bar of California fees and other customary professional association fees.

(City of Moreno Valley, 1994)

#### K. SICK LEAVE

[COMMENT: City attorney agreements may provide for a designated amount of sick leave or a city attorney's sick leave with that of other management employees.]

**Model 1.** Sick Leave. City agrees, effective July 1, 1993, and each subsequent July 1st thereafter, to credit to and to vest in City Attorney 96 hours of sick leave. *(City of Oxnard, 1992)* 

**Model 2.** Leave Benefits. Except as modified herein, CITY ATTORNEY shall be entitled to all monetary and other benefits, including, but not limited to holidays, sick leave, vacation, disability insurance, and workers' compensation, as other executive management receive.

(City of San Pablo, 1990)

#### L. DISABILITY INSURANCE

[COMMENT: In addition to other types of health insurance, agreements often provide for short term or long term disability insurance, either by designating coverage or providing the same benefits as those received by other employees. For a separate discussion of provisions addressing the consequences of a city attorney becoming disabled, see Section L below.]

**Model 1.** Disability Insurance. The City will pay the premium for a disability insurance policy, provided you qualify, that will pay sixty-six and two-thirds percent (66 2/3%) of your salary during disability of greater than sixty days up to age sixty five.

(City of Burbank, 1996)

#### M. DISABILITY OF CITY ATTORNEY

[COMMENT: Although not a common provision, some agreements provide contractual protection for the city attorney in the event of a disability.]

**Model 1.** Disability. Employer shall be obligated to provide reasonable accommodation to Employee as may be required by the Americans With Disabilities Act, or to provide Employee with such unpaid leave as may be required by the Family Medical Leave Act or other applicable state or federal laws. After fulfilling such obligations, Employer shall have the option to terminate this Agreement, subject to the severance pay requirements of Section 3.

(City of Folsom, 2000)

#### N. AUTOMOBILE ALLOWANCE

[COMMENT: Cities often provide a designated vehicle allowance or provide a vehicle for the city attorney.]

*Model 1.* The City of Walnut Creek will provide the City Attorney with a monthly vehicle allowance in the amount of \$\_\_\_\_\_. The amount will be evaluated annually to consider any change in the cost of ownership, insurance and maintenance of the vehicle.

(City of Walnut Creek, 1988)

**Model 2.** In lieu of a vehicle allowance, the City Attorney may elect to allow the City to lease on behalf of Employee a standard size vehicle on general terms and conditions commercially available. In this case, the City shall be responsible for all lease payments, maintenance and operational costs except that Employee shall be responsible for maintenance costs when out of town on overnight or longer non-City purposes. Employee shall keep and maintain in full force and effect personal liability and property damage insurance in the minimum amounts of \$250,000 per person and \$500,000 per occurrence and property damage of \$100,000, and shall name the City of Carlsbad as additional insured.

(City of Carlsbad, 1996)

## 0. RELOCATION/MORTGAGE ASSISTANCE

[COMMENT: A city attorney hired from outside the city may seek some form of reimbursement or stipend for the costs of moving or assistance in obtaining a residential loan.]

**Model 1.** Moving Expenses. ATTORNEY shall be eligible for reimbursement from the CITY for relocating his personal residence to the City of Simi Valley. Said reimbursement, as verified by written documentation, shall not exceed a maximum of Four Thousand Dollars (\$4,000.00).

(City of Simi Valley, 1998)

*Model 2.* Mortgage Assistance. City Attorney's participation in the City of Sunnyvale's Mortgage Assistance Program for Newly Appointed Charter Officers and Directors, as set forth in Resolution No. 125-89, as amended by Resolution no. 160-96, shall continue.

(City of Sunnyvale, 1997)

### P. INDEMNIFICATION

[COMMENT: In addition to a general provision covering reimbursement of expenses incurred in performing the job, many contracts include a guarantee that the city will indemnify the city attorney for any liability he or she may incur for actions occurring within the scope of employment.]

**Model 1.** INDEMNIFICATION. City shall defend, save harmless, and indemnify Employee against any tort, professional liability claim or demand or other legal action, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of Employee's duties as City Attorney. City will compromise and settle any such claim or suit and the amount of any settlement or judgment rendered thereon. Said indemnification shall extend beyond termination of employee as described herein, for any acts undertaken or committed in her capacity as City Attorney, regardless of whether the notice of filing of a lawsuit for such tort, claim, demand, or other legal action occurs during or following Employee's employment with City.

(City of Pacifica, 1997)

## Q. PROFESSIONAL DEVELOPMENT

[COMMENT: Many contracts provide for reimbursement of expenses incurred by the city attorney for training, attendance at conferences and similar efforts for professional improvement. Some may also include a tuition reimbursement clause.]

Model 1. PROFESSIONAL DEVELOPMENT

- A. Employer hereby agrees, to the extent it is financially able, to budget for and to pay for travel and subsistence expenses of Employee for professional and official travel, meetings, and occasions adequate to continue the professional development of Employee and to adequately pursue necessary official functions for Employer.
- B. Employer also agrees, to the extent it is financially able, to budget for and to pay for travel and subsistence expenses of Employee for short courses, institutes and seminars that are necessary for his professional development and for the good of the Employer.

(City of Madera, 1993)

**Model 2.** Tuition Reimbursement. Tuition reimbursement will be in accordance with current City policy that provided for seventy-five (75%) reimbursement for eligible expenses up to fifteen hundred dollars (\$1,500) annually subject to a citywide limit of \$25,000.

(City of Burbank, 1996)

## R. BAR DUES

[COMMENT: Payment of California State Bar Association dues is required to practice law in California. Cities commonly pay such dues on behalf of the city attorney. Less common are provisions for the payment of voluntary dues for the American Bar Association or local bar associations.]

**Model 1.** Professional Associations. City shall pay Employee's annual dues for membership in the California State Bar, the American Bar Association and the Placer County Bar Association. *(City of Rocklin, 1996)* 

### S. BONDING

[COMMENT: Cities may seek a provision requiring a fidelity or surety bond covering the city attorney. Cities generally pay the bond costs.]

*Model 1.* Bonding. CITY shall provide for the bonding of EMPLOYEE in an amount satisfactory to COUNCIL and shall pay the costs of such bonding.

(City of South Lake Tahoe, 2001)

## T. ANNUAL PHYSICAL

[COMMENT: A provision for an annual medical examination may be sought by the city attorney as a benefit or mandated by the city.]

*Model 1.* Annual Physical. The City will reimburse you for an annual physical examination not to exceed \$500.00.

(City of Burbank, 1997)

*Model 2.* [City Attorney] shall, at City's expense, undergo an annual physical examination similar to the extent such examinations are made available to other management employees.

(City of Newport Beach, 2000.)

## U. NO REDUCTION OF BENEFIT

[COMMENT: While not common, the city attorney may seek protection against a reduction of his or her salary or benefits.]

**Model 1.** NO REDUCTION OF BENEFITS. Employer shall not at any time during the term of this agreement reduce the salary, compensation or other financial benefits of Employee, except to the degree of such a reduction across-the-board for all employees of the Employer.

(City of Madera, 1993)

## V. PERFORMANCE EVALUATIONS

[COMMENT: City attorney contracts vary greatly in the level of detail for performance evaluations. Some may describe the procedure, but say little about the substance of the evaluation. Others set forth the specific components of the evaluation.]

*Model 1.* Performance Evaluation. Council shall annually review and evaluate the performance of Employee during the preceding year.

(City of Pleasant Hill, 2000)

Model 2. PERFORMANCE EVALUATION PROCEDURES

- A. The EMPLOYER shall evaluate the performance of EMPLOYEE at least once per year. The first evaluation will be written and will be completed by the EMPLOYER by July 15, 1994. EMPLOYEE'S evaluation will be based on the duties and responsibilities of the City Attorney as set forth in the Charter and as assigned by the EMPLOYER.
- B. A copy of the written evaluation shall be delivered to EMPLOYEE. EMPLOYEE shall have the right to respond orally or in writing to the evaluation. Within thirty (30) days of the delivery of the written evaluation to EMPLOYEE, the EMPLOYER shall meet with EMPLOYEE to discuss the evaluation.
- C. The EMPLOYEE will be responsible to EMPLOYER for providing annual written notice to EMPLOYER of the need to complete the evaluation and for the scheduling of meetings at a mutual time for such purpose.

(City of Mountain View, 1994)

### W. AT WILL EMPLOYMENT

[COMMENT: Contractual provisions can imply that the city attorney has a property right in his or her employment. It is not clear whether such a property right would contradict the professional definition of the attorney-client relationship. Many contracts resolve such doubts with an explicit statement that the attorney serves at the pleasure of the city council.]

**Model 1.** Nature of Relationship; Termination. It is understood by and between the parties to this agreement that [City Attorney] in providing legal services to the City of Thousand Oaks, serves at the pleasure of the City Council, and [City Attorney] shall have no right to a termination hearing, or to any vested right to his position other than as contained in this agreement.

(City of Thousand Oaks, 2000)

**Model 2.** Miscellaneous Provisions. Neither this agreement, not any provision of state statute or local ordinance, rule or resolution create any property right in favor of [City Attorney] in her employment as City Attorney.

(City of Solano Beach, 1999)

### X. TERMINATION/SEVERANCE

[COMMENT: The termination clause of a city attorney agreement is often the most detailed provision in an employment agreement. City councils may be concerned about creating a property right in employment while city attorneys may be concerned about summary dismissal. The following provisions are alternative approaches addressing these concerns.]

**Model 1.** Termination. In the event of involuntary termination of Employee, City shall pay Employee or her estate in a lump sum or in installments or other manner as Employee or the executor of her estate may demand, an amount equal to one time the then current annual salary. Involuntary termination as used in this Paragraph 5 means Employee's discharge or dismissal by the City, or Employee's resignation following a salary reduction greater in percentage than across the board reduction in salary for any other group of City employees, or her resignation following a request by the City Council, approved by majority vote, that she resign. "Involuntary termination" does not include Employee's death, incapacity due to injury, or illness (physical or mental), dismissal for willful misconduct, malfeasance, dishonesty for personal gain, or following conviction of a felony or misdemeanor involving moral turpitude, nor Employee's resignation for any reason other than that so stated in this subparagraph C.

(City of Rocklin, 1996)

### Model 2. RESIGNATION AND TERMINATION.

- (b) Employee serves at the pleasure of the City and nothing herein shall be taken to prevent, limit or otherwise interfere with the right of City to terminate the services of Employee with or without cause; provided, however, the City Council shall take no action to terminate the services of Employee within ninety (90) days after any election at which one or more members are elected to the City Council. There is no express or implied promise made to Employee for any form of continued employment. This Agreement is the sole and exclusive basis for an employment relationship between Employee and City.
- (c) If the Employee is terminated by the City Council while still willing and able to perform the duties of the City Attorney, the City agrees to pay Employee a single lump sum payment made on the effective day of the termination, an amount equivalent to six months aggregate salary and an amount equivalent to six months aggregate medical insurance benefit allowance. Any such payments will release City from any further obligations under this Agreement. Contemporaneously with the delivery of the severance pay herein above set out, Employee agrees to execute and deliver to City a release releasing City of all claims that Employee may have against City.

(d) Notwithstanding paragraph 3(c) above, the City shall not be obligated to pay, and shall not pay, any amounts or continue any benefits under the provisions of paragraph 3(c), if Employee is terminated because of a crime of moral turpitude or a violation of statute or law constituting misconduct in office. Further, City shall not be obligated to pay, and shall not pay, any amounts or continue any benefits under the provisions of paragraph 3(c), in the event Employee voluntarily resigns without affirmative action by City to terminate, initiate termination proceedings or request resignation, for example a resignation to pursue other employment or professional opportunities.

(City of Pacifica, 1997)

### Model 3. TERMINATION.

- A. Notwithstanding Section 2, above, CITY may terminate this agreement without notice or cause at any time. It is agreed that the relationship established hereby shall be "at will," except, however, that termination of this agreement by CITY is recognized by CITY to create the potential for hardship and monetary loss to CITY ATTORNEY and that such damages are, at the inception hereof, incapable of calculation. Therefore, as liquidated damages, and not as a penalty, any termination pursuant to this subsection shall require the payment by CITY of six months of CITY ATTORNEY's monthly salary and benefits. Payment of said liquidated damages shall be in lieu of any and all other remedies of CITY ATTORNEY, whether legal or equitable in nature, nor shall CITY ATTORNEY institute or assist in filing or prosecution of any complaint, charge, or accusation against CITY, its officers, or employees with any state of federal fair employment, equal employment, or similar board or commission.
- B. Should CITY terminate this agreement pursuant to A, above, CITY ATTORNEY shall have the option of payment of compensation in one lump sum or bi-weekly over the appropriate period, or some combination thereof. Compensation shall include the extension of non-salary benefits, or the monetary equivalent of CITY's cost of such benefits. (City of San Pablo, 1990)

(City of San Pablo, 1990)

## Y. RESIGNATION

[COMMENT: Provisions covering a city attorney's resignation typically set forth a notice period. The consequences of a failure to provide such notice, however, is rarely specified.]

**Model 1.** VOLUNTARY RESIGNATION OR RETIREMENT: NOTICE OF INTENTION TO SEEK OTHER EMPLOYMENT: NO SEVERANCE: Nothing in this agreement shall prevent, limit or otherwise interfere with the right of the EMPLOYEE to resign at any time from his position as CITY ATTORNEY or to retire from public service. In the event that EMPLOYEE voluntarily resigns his position, or retires, prior to the expiration of the term of the agreement, EMPLOYEE shall give CITY three (3) months notice in advance, unless the parties agree otherwise. Further, should EMPLOYEE begin to actively seek other employment, EMPLOYEE will notify EMPLOYER forthwith of EMPLOYEE'S intention to seek other employment. In the case of a voluntary resignation or retirement, no severance will be paid to EMPLOYEE.

(City of Vacaville, 1998)

# Z. CONFLICTS/OUTSIDE EMPLOYMENT

[COMMENT: Conflict of interest provisions are common in contracts with part-time city attorneys or private firms that serve as city attorney. Some contracts also address outside employment.]

*Model 1.* Outside Employment: Attorney shall not engage in outside employment without the prior approval of the Town Council.

(City of Danville, 2000)

Model 2. DUTIES.

(c) Employee shall not engage in any activity that is or may become a conflict of interest, prohibited contract, or which may create an incompatibility of office as defined under California law. Prior to performing any services under this Agreement and annually thereafter, the Employee must complete disclosure forms required by law.

(City of Napa, 1993)

**Model 3.** CONFLICT OF INTEREST PROHIBITION. It is further understood and agreed that because of the duties of the City Attorney within and on behalf of the City of Pacifica and its citizenry, the Employee shall not, during the term of this Agreement, individually, as a partner, joint venturer, officer or shareholder, invest or participate in any business venture conducting business in the corporate limits of the City of Pacifica, except for stock ownership in any company whose capital stock is publicly held and regularly traded, without prior approval of the City. For and during the term of this Agreement, Employee further agrees, except for a personal residence or residential property acquired or held for future use as her personal residence or residential property acquired or held for future use as her personal residence, not to invest in any other real estate or property improvements within the corporate limits of the City of Pacifica, without the prior consent of the City Council.

(City of Pacifica, 1997)

# AA. RESOLUTION OF DISPUTES

[COMMENT: Dispute resolution procedure provisions are common in city attorney agreements, notwithstanding the risk of contradicting the at-will nature of the employment. Some procedures are limited to a review of the narrow issue of whether there was "cause" to terminate because of the issue of severance pay.]

**Model 1.** ARBITRATION. Any controversy or claim arising out of or pertaining to this Agreement, or the breach thereof, shall be settled by binding arbitration in accordance with the rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrator(s) may be enforced as provided by California law and shall constitute Employee's sole remedy for any claim arising out of his employment relationship with the City.

(City of Concord, 2000)

Model 2. Suspension and Termination

- (2) In the event Employee is terminated for cause, he shall not be entitled to any severance pay or benefits. "Cause" shall include, but not be limited to, the following reasons:
  - (a) Willful breach of this Agreement as interpreted pursuant to Labor Code Section 2924.
  - (b) Habitual neglect of the duties required to be performed as City Attorney as interpreted pursuant to Labor Code Section 2924 which reads as follows: An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the courts of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform.

- (c) Any acts of dishonesty, fraud, misrepresentation or other acts of moral turpitude.
- (d) Commission of any act which would constitute a crime, whether misdemeanor or felony, or which would bring disrespect to the office of the City Attorney or City.
- (e) Willful or serious violations of City policies.
- (f) Upon termination for cause, the city shall deliver to the Employee a written specification of the charges or other reasons upon which "Cause" is alleged. Employee shall then have five (5) business days to challenge such termination for cause by delivery of a written response to such specifications. Within such five (5) day period, the Employee may also demand a hearing upon the specifications. Failure to submit a written response or demand a hearing with the five (5) business day period shall constitute a waiver of such right, and the Council's determination shall be final. If a hearing is demanded, such hearing shall be held before an independent hearing officer to be mutually agreed between the parties, or if no agreement can be reached, the hearing officer shall be selected from a list provided by the State Mediation and Conciliation Services (SMCS). If a written response is submitted, but no hearing is demanded, the Council shall review its decision based upon the Employee's written response. However, any determination by the Council after reviewing such a written response (where no hearing has been demanded) shall be final and without right of appeal. The mutual selection of a hearing officer shall be accomplished within ten calendar days following notice of Employee's request for a hearing. If the parties cannot mutually agree on a hearing officer within the requisite time period, then the parties shall request a list of five hearing officers from SMCS. The parties shall then take turns eliminating names from the list until one remains. The remaining name shall (sic) will (sic) then be the selected hearing officer. The fees of the hearing officer shall be advanced, in full, by the City. However, upon a finding of "cause" by the hearing officer, Employee shall reimburse the City and be responsible for payment of fifty percent (50%) of such fees. The decision of the hearing officer shall be binding and without right of appeal. The issues to be determined in the hearing shall be whether the specifications are supported by substantial evidence. The parties acknowledge that a requested hearing for cause shall be held at the earliest possible date, and to that extent, they shall cooperate in selecting a date for the hearing which shall be no later that (sic) sixty (60) days following the City's notice of termination for cause. In the event the hearing officer concludes in favor of Employee that no cause exists, Employee shall be entitled only to the appropriate amount of severance pay and benefits as he would have received if terminated without cause pursuant to Section 4, above. It is understood and agreed that this section constitutes Employee's sole right to a hearing in connection with the termination of his employment, and he hereby waives any rights to notice, cause, or hearing otherwise provided for by City Rules, Ordinances, Resolutions or other legal authority.

(City of Banning, 2001)

### **BB. GENERAL/MISCELLANEOUS PROVISIONS**

Model 1. GENERAL PROVISIONS

14.1 This Agreement sets forth the entire agreement between the parties and supersedes all other oral or written representations. This Agreement may be modified only in a writing approved by the CITY Council and signed by all parties.

14.2 The failure of any party to enforce against another a provision of this Agreement shall not constitute a waiver of that party's right to enforce such a provision at a later time and shall not serve to vary the terms of this Agreement.

14.3 This Agreement shall be binding upon and inure, where applicable, to the benefit of the heirs at law and executor of EMPLOYEE.

14.4 This Agreement shall not be assigned or subcontracted by either party without the consent of the other party. Consent may be denied for any reason or no reason at all.

14.5 Should any provision, section, or subsection of this Agreement be declared invalid or unenforceable by any court of competent jurisdiction, such ruling shall not affect any other provision hereof, and the unaffected provisions shall remain in full force and effect.

14.6 This Agreement may be amended only in writing.

(City of Bakersfield, 1998)

*Model 2.* In the event of any mediation, arbitration or litigation to enforce any of the provisions of this Agreement, each party shall bear its own attorney's fees and costs.

(City of Pacifica, 1997)

**Model 3.** If any section, subsection, sentence, clause or phrase of this resolution is for any reason held to be invalid or unconstitutional by the decision of a competent jurisdiction, such decision shall not affect validity of the remaining portions of the resolution. The City Council of the City of Rancho Mirage hereby declares that it has passed this resolution, and each section, subsection, clause, sentence or phrase thereof, irrespective of the fact that any one or more other sections, subsections, clauses, sentences or phrases may be declared invalid or unconstitutional.

(City of Rancho Mirage, 1998)



# **Employment Agreement Provisions** Part-Time (Contract) City Attorney

The following sections cover representative provisions from actual employment agreements between cities and part-time city attorneys and, in some cases, with the law firms selected to represent the city. While many agreements contain the same provisions found in the employment agreements described in Appendix A, there are provisions that are unique to part-time city attorneys.

# A. INDEPENDENT CONTRACTOR/AT WILL STATUS

[Comment: Many part-time city attorney employment agreements contain provisions defining the nature of the employment relationship.]

Model 1. Independent Contractor.

No employment relationship is created by this Agreement. The Firm shall, for all purposes, be an independent contractor to the City.

(City of La Habra Heights, 1993)

**Model 2.** Tenure and Status. Attorney shall serve at the will and pleasure of the City Council and expressly waives and disclaims any right to any pre-termination or post-termination notice and/or hearing, except as hereinafter provided. In providing services pursuant to this Agreement, Attorney is an independent contractor, and not an employee of City.

(City of Blue Lake, 2000)

## B. DESIGNATION OF CITY ATTORNEY

[COMMENT: If a city council is contracting with a law firm for city attorney services, it may be desirable to identify which member of the firm will serve as the city attorney.]

**Model 1.** Designation of City Attorney. [Name] is designated as City Attorney and General Counsel to the Redevelopment Agency. The parties understand and agree that the Firm may, from time to time, utilize other attorneys within the Firm to assist [Name of City Attorney] in the performance of this Agreement. [Name] is designated as Assistant City Attorney. In [Name of City Attorney's] absence, [Name of Assistant City Attorney] shall have full authority to sign documents or otherwise to act on behalf of the City.

(City of Barstow, 2001)

Model 2. Services of Assistants and Paralegals

- A. The City Attorney may delegate some of his duties to other competent attorneys, paralegals, or law clerks employed by him or his law firm, provided that the City Attorney shall be personally responsible for all work performed by such assistants, and shall ensure that all work is performed in a competent and professional manner.
- B. The City Attorney, with prior notice to the City Council, may select another person or persons to act as City Attorney in representing the City in cases where the City Attorney is unable to act due to illness, vacation or other reason, or when the City Attorney requires such assistance. Such representatives will be compensated at the City Attorney's own expense. The City Council shall have the right to reject the City Attorney's choice of representative in its discretion.

(City of Campbell, 1994)

# C. SCOPE OF SERVICES

[COMMENT: One of the most important provisions in a part-time city attorney agreement is a clear delineation of the services the city attorney will and will not provide. There is a direct link between the compensation and what work the city attorney agrees to perform.]

Model 1. SCOPE OF SERVICES. Attorney shall provide the following services to CITY:

- (a) Represent and advise the City Council and all City Officers in all matters of law pertaining to their offices.
- (b) Represent and appear for any City Officer and/or employee or any former City Officer and/or employee, in legal proceedings in which any such officer or employer is entitled by law to representation furnished by the CITY.
- (c) Attend all regular meetings of the City Council (2nd and 4th Tuesdays or each calendar month) and give advice or opinion in writing whenever requested to do so by the council or any of the boards or commissions of the CITY or by the City Manager.
- (d) To be promptly available for telephone consultation and to render written opinions on given issues related to CITY business in a timely manner.
- (e) Approve the form and content of all contracts made by and all performance bonds, insurance of certificates and like documents tendered to the CITY.
- (f) Prepare/review all Ordinances, Resolutions, Contracts, Deeds, Leases, and all other legal documents as requested by the City Manager.
- (g) Provide recommendation and advice when requested by the City Council pertaining to the retention of and employment of outside law specialists in complex and important cases in which the CITY may be involved.
- (h) Investigate all claims and complaints by or against the CITY and prepare civil cases and act as trial counsel as required and requested by City Manager.
- (i) Review citations for violations of City ordinances in accordance with criminal/civil law and procedures; prepare and try infractions, misdemeanors, and ordinance violations as required and requested by the City Manager.
- (j) Prepare extended legal opinions of a complex nature for the City Council, officers, boards, commissions and the City Manager as required and requested.
- (k) Generally to oversee and manage the legal affairs of the CITY and to insure that the policies, programs, and activities of the CITY and its employees and agents are carried out in compliance with all applicable law and that the best interests of the CITY are otherwise protected to the fullest extent possible.

(l) Attend all regular agenda meetings of the City staff and to be available on agenda meeting day to provide full range of normal City Attorney services to City Manager, the staff, and the council, such as meeting with City management in preparation and/or review of routine regulations, ordinances, rules and resolution regarding general City matters and to render other service as required and agreed.

ATTORNEY shall provide the full normal range of services of the City Attorney as described above. ATTORNEY may use the City's facilities and/or staff on a mutually agreed basis to accomplish his commission. ATTORNEY shall establish and maintain services to the CITY in case of his unavoidable absence through temporary Attorney services satisfactory to the CITY. ATTORNEY will provide the CITY with education and in-service seminars as mutually agreed upon to maintain a level of education among the City Council members, staff and management in order, to the fullest extent possible, to reduce liability and (sic) increase knowledge on the part of the CITY pertaining to any and all legal matters.

### (City of Dinuba, 1989)

**Model 2.** Quarterly Reports. To keep the Council and City Manager informed of the status of litigation involving the City, the City Attorney will submit a quarterly status report briefly outlining the status of each litigation, including code enforcement litigation. The City Attorney shall advise City Council and City Manager of significant developments in litigation involving the City as they occur. The status report shall be submitted between the first and fifteenth of the following months (April, July, October, and January).

(City of Los Altos, 2001)

Model 3. Limitation of Duties. Attorney shall not be required to provide the following services:

- a. Administration and legal representation of workers' compensation claims and litigation, except for general legal advice in the area of workers' compensation and review of settlements recommended by the CITY's contract administrators;
- b. Negotiation and interpretation of M.O.U.'s and other labor related matters, including disciplinary proceedings, except to provide general legal advice on personnel matters related to the CITY's Personnel Rules & Regulations, and at the request of the CITY, review recommendations of the CITY's contract labor attorneys; and
- c. Legal services related to the issuance of municipal bonds, certificates of participation, or other types of capital improvement financing and assessment proceedings, and specialized redevelopment proceedings, including updates and/or major amendments to the Agency Plan.

(City of Menlo Park, 1993)

**Model 4.** If ATTORNEY determines that the best interest of CITY would be served by retaining outside counsel ("COUNSEL") to represent CITY on a particular matter, ATTORNEY shall so inform CITY and request authorization to retain such COUNSEL. ATTORNEY shall only retain COUNSEL with prior authorization from CITY. [Name] will bill CITY for the services provided by any COUNSEL without adding on any additional markup. [Name] may charge CITY for ATTORNEY'S time spent supervising and coordinating with COUNSEL.

(City of Saratoga, 1999)

## D. PRIVATE PRACTICE/CONFLICTS OF INTEREST

[COMMENT: Since the part-time city attorney typically has clients other than the city, many agreements address the issues presented by such outside work.]

**Model 1.** Private Practice. The City Attorney may continue a limited private practice from the office located in Cupertino provided that such practice shall not interfere with his obligations to the city. Such private practice may include representation of other public agencies, teaching, judgment on a pro tem basis, advising and representing individuals and businesses provided that such representation does not involve any real or apparent conflict of interest.

(City of Cupertino, 1993)

*Model 2.* Conflict of Interest. [Name of Law Firm] and [Name of City Attorney] hereby covenant that they have no interest not disclosed to CITY and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services or confidentiality obligation hereunder, exceptas such as CITY may consent to in writing prior to the acquisition by [Name of Law Firm] or [Name of City Attorney] of such conflict.

(City of Saratoga, 1999)

**Model 3.** RESTRICTIONS ON FUTURE REPRESENTATION. In addition to the proscriptions regarding conflicts of interest imposed on LAW FIRM by the Business and Professions Code and by the California Rules of Professional Conduct, LAW FIRM represents that no member of LAW FIRM shall appear before any board, commission, committee, or agency of CITY for the purpose of representing any other client of LAW FIRM's for a period of six months from the date of termination of LAW FIRM's employment as City Attorney.

(City of Pismo Beach, 1998)

### E. COMPENSATION

[COMMENT: Most part-time city attorney agreements contain a combination of a flat retainer amount for designated city attorney work and an hourly rate for work beyond the basic work. The amounts vary greatly depending on the definition of the scope of basic services.]

Model 1. Compensation. Attorney shall be compensated by Client for legal services as follows:

3.1. Retainer Services. For a monthly retain of \$\_\_\_\_\_(Dollars/Cents) (the "Retainer"), Attorney shall render the following legal services on behalf of Client:

- 1. Attendance at regular meetings of the City Council and Agency.
- 2. Attendance at the monthly regular meeting of the Planning Commission.
- 3. Attendance at occasional meetings of the City Manager/Department Head staff on an "as needed" basis.
- 4. Provision of up to five (5) hours of formal and/or informal legal advice and opinions to Client or such other legal services up to the five (5)-hour maximum set forth hereinabove as requested by the City Manager.
- 3.2. Non-Retainer Services.

3.2.1. Except as provided in Section 5, all other services rendered by Attorney (hereinafter "Non-Retainer Services") shall be payable at the rate of \$\_\_\_\_\_ per hour for partners and associates of Attorney. Legal assistants shall be billed at their normal hourly rates which presently range from \$\_\_\_\_\_\_ to \$\_\_\_\_\_ and may be changed from time to time. Client shall receive notice of such change in hourly rates for legal assistants.

3.2.2. Unless the parties otherwise agree, the hourly rate charged to Client shall be increased by an amount which will not exceed the annual percentage of increase, if any, in the compensation granted to City employees in general. In other words, if the City Council were to increase the salaries of City employees by five percent (5%) in 1993-1994, Attorney's hourly rate would be increased to

\$\_\_\_\_\_.

3.2.3. Non-Retainer Services shall include, but not be limited to, rendition of legal advice to Client, preparation/review of resolutions, ordinances, contracts and agreements, prosecution of violations of City codes and ordinances and the representation of Client in civil litigation matters.

3.2.4. Non-Retainer Services shall not be rendered to Client by Attorney unless and until first authorized by the City Manager or his designee. A prior written statement of the estimated cost of such services shall be rendered upon request of the City Manager.

(City of Fillmore, 1992)

*Model 2.* General services will be billed to the City and Redevelopment Agency at the rate of \$\_\_\_\_\_\_ per month, for up to seventy five (75) hours during any month. Any time expended on general services beyond seventy five (75) hours will be billed at the rate of \$\_\_\_\_\_\_ per hour. General services include routine non-litigation city attorney and agency attorney services and criminal prosecutions. Special projects and general litigation services will be billed at the regular hourly rate of the individual working on the matter, currently in the range of \$\_\_\_\_\_\_ per hour for attorneys and from \$\_\_\_\_\_\_ to \$\_\_\_\_\_ for legal assistants. A determination of whether a particular matter is a special project would be made jointly by you, as the City Manager and I, as City Attorney. General litigation services include time spent on any lawsuit filed by, on behalf of, or against the City, excluding criminal prosecution matters and major case litigation. In the event that specialized legal services are required for items such as major case litigation or specialized legal matters which involve the Firm's most senior and experienced lawyers or its legal specialists, the actual rates billed may exceed \$\_\_\_\_\_\_ per hour if approved by the City Manage and the firm in advance.

(City of Monrovia, 1992)

**Model 3.** Overhead. Except as expressly provided in this Agreement, Attorney shall pay all overhead incurred in providing legal services to CITY including but not limited to reasonable and necessary office facilities, equipment, books, supplies, secretarial services, word processing, faxes, telephone usage, insurance, office supplies, copying, telephone, etc., (except for CITY stationery and CITY business cards, which shall be provided by CITY).

(City of Menlo Park, 1993)

**Model 4.** Travel Time. The Town will not be billed for time spent in travel to and from the Town of Yountville. Travel time to and from places other than the Town of Yountville will be billed at the foregoing rates. *(City of Yountville, 2001)* 

**Model 5.** Multiple Matter Discount. Preferred rates shall be given CITY by LAW FIRM in public entity specialty litigation matters when CITY qualifies for a "Multiple Matter Discount." Services of LAW FIRM shall be compensated by CITY at the rates of the legal personnel rendering the services as indicated in the "Multiple Matter Discount" column of the Public Entity Specialty Litigation Rate Schedule attached when the discount is applicable. A "matter" is defined based upon an actual controversy arising out of the same transaction or occurrence between the same parties, without regard to whether the controversy results in multiple lawsuits. The term "multiple" is defined as 3 municipal law specialty litigation matters or 5 litigation matters total. Code Enforcement litigation matters shall not be counted to reach the "multiple matter" threshold.

(City of Pismo Beach, 1998)

## F. BILLING STATEMENTS

[COMMENT: Since part-time city attorneys are not typically treated as employees in the payroll system, many agreements spell out the billing method of billing for their services.]

Model 1. Billing Procedures and Monthly Statements

- A. The Firm shall submit to the City, within thirty (30) days after the end of each calendar month, an itemized statement of the professional services provided and the time expended providing those services in the form customarily submitted by the Firm to clients which are billed on an hourly basis. The parties acknowledge that payment of all monthly statements is expected to be made within thirty (30) days of the billing date.
- B. The Firm will bill the City for items such as, but not limited to, long distance telephone calls, filing fees, document duplication, computerized legal research, and similar out-of-pocket expenditures. These items will be separately designated on the Firm's monthly statements as "disbursements," and will be billed in addition to the fees for professional services.
- C. Time will be charged by the Firm in increments of 1/10 of an hour (i.e., six-minute units). The rate structure in general, or the rates of particular attorneys, may be increased from time to time, after written notice to the City. To the extent feasible, such adjustments will be made so as to coincide with the beginning of the City's fiscal year.

(City of La Habra Heights, 1993)

## G. FEE DISPUTES

[COMMENT: Disputes over the legal fees may be addressed in varying ways, ranging from informal consultation to lawsuits.]

**Model 1.** Objections to Billings. LAW FIRM encourages CITY to advise LAW FIRM promptly of charge which appears to be incorrect. LAW FIRM will assume all charges are acceptable if CITY does not express any concerns regarding a billing within thirty (30) days of its mailing. Failure to question a billing or request an adjustment within thirty (30) days from the statement will be deemed agreement by CITY that the stated charges are correct and payable in full.

(City of Pismo Beach, 1998)

**Model 2.** Dispute Resolution Regarding Retainer/Non-Retainer Services and/or Billings. In the event of any question or dispute regarding whether or not a specific legal service is covered by the CITY retainer, either the City Manager or the City Attorney may request that such matter be referred to the City Council for resolution. The determination of the City Council or a sub-committee authorized by the City Council to review such matters shall be final and binding.

(City of Menlo Park, 1993)

**Model 3.** Resolution of Fee Disputes. The City is entitled to require that any fee dispute be resolved by binding arbitration in Los Angeles pursuant to the arbitration rules of the Los Angeles County Bar Association for legal fee disputes. In the event that City chooses not to utilize the Los Angeles County Bar Association's arbitration procedures, City agrees that all disputes regarding the professional services rendered or fees charged by the Firm shall be submitted to binding arbitration in Los Angeles to be conducted by the American Arbitration Association in accordance with its commercial arbitration rules.

(City of La Habra Heights, 1993)

**Model 4.** LEGAL ACTION UPON DEFAULT. If Client does not pay the balance when due or breaches any other terms of this Agreement, [Firm Name] may demand that the entire unpaid balance be paid immediately and, as provided by law, commence any legal action for collection of the balance due. Client and [Firm Name] agree that all legal proceedings related to the subject matter of this Agreement shall be maintained in courts sitting within the State of California, County of Sacramento. Client and [Firm Name] consent and agree that the jurisdiction and venue for proceedings relating to this Agreement shall lie exclusively with such courts. Further, the prevailing party in any such dispute shall be entitled to reasonable costs, including attorneys' fees.

(City of Elk Grove, 2000)

### H. BENEFITS

[COMMENT: Some agreements provide for medical insurance and other traditional employee benefits for the part-time city attorney. At times, the only benefit provided may be city paid participation in the retirement program. NOTE: CalPERS may no longer allow this for new enrollees.]

**Model 1.** Benefits. The City Attorney, Assistant City Attorney, and Deputy City Attorneys shall be employees of the City. As such, the City Attorney, and only the City Attorney, shall be full time and entitled to full time membership in the Public Employees' Retirement System based upon the allocation of salary to the City Attorney set forth herein. The City shall take all steps necessary to provide said PERS benefits prospectively and to assure the provision of said benefits from July 1, 1983 to the date of termination hereof, as previously agreed, or provide comparable benefits. The City Attorney shall be entitled to receive the same health, life insurance and disability benefits on the same terms and conditions available to any other management employee of the City.

(City of Poway, 2000)

**Model 2.** PERS. The parties recognize that ATTORNEY may be eligible for and may elect membership in the Public Employees' Retirement System, hereinafter referred to as "PERS", as provided in Government Code Section 20361. In the event that ATTORNEY notifies CITY of [his] election of membership in PERS, CITY shall contribute the employer share of required PERS contributions based on compensation for hours billed by ATTORNEY. Total monthly contributions by the CITY to PERS shall be shown as a credit against billing by [Firm] on the bill issued in the month following the contribution.

(City of Saratoga, 1999)

### I. INSURANCE AND INDEMNITY

[COMMENT: Most cities require all consultants, including contract city attorneys, to maintain insurance covering their acts and omissions. Most cities also require that the consultant indemnify the city for any liability, regardless of whether insurance coverage is applicable.]

#### **Insurance Requirements**

<u>Commencement of Work.</u> CONSULTANT shall not commence work under this Agreement until it has obtained CITY approved insurance. For automobile insurance policies, CONSULTANT shall provide CITY, prior to commencement of work, with a separate endorsement which states that the policy contains the following language:

- The CITY, its elected officials, officers, employees, agents and representatives are named as additional insureds; and
- the insurer waives the right of subrogation against CITY and CITY'S elected officials, officers, employees, agents, and representatives; and
- insurance shall be primary non-contributing.

CONSULTANT shall furnish CITY with copies of all policies or certificates subject to this Agreement, whether new or modified, promptly upon receipt. No policy subject to this Agreement shall be canceled or materially changed except after thirty (30) days' notice by the insurer to CITY by certified mail.

<u>Workers Compensation Insurance</u>. CONSULTANT and all subcontractors shall maintain Worker's Compensation Insurance, if applicable.

<u>Insurance Types and Amounts.</u> CONSULTANT shall maintain general commercial liability and automobile insurance against claims and liabilities for personal injury, death, or property damage, providing protection of at least \$1,000,000 for bodily injury or death to any one person for any one accident or occurrence and at least \$1,000,000 for property damage. CONSULTANT shall also maintain a claims-made professional liability insurance in an amount of \$1,000,000 per claim.

<u>Acceptability of Insurers.</u> All insurance required by this Agreement shall be carried only by responsible insurance companies licensed to do business in California. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII.

<u>Provision of Agreement to Insurers.</u> CONSULTANT represents and warrants that they have provided a copy of this Agreement to their respective insurers, and the insurers are aware of all obligations pertaining to CONSULTANT as stated in this Agreement.

#### Indemnification

CONSULTANT agrees to protect, and hold harmless CITY and its elective or appointive boards, officers, agents, and employees from any and all claims, liabilities, expenses, or damages of any nature, including attorneys' fees, for injury or death of any person, or damage to property, or interference with use of property, arising out of, or in any way connected with performance of the Agreement by CONSULTANT, CONSULTANT'S agents, officers, employees, subcontractors, or independent contractors hired by CONSULTANT. The only exception to CONSULTANT'S responsibility to protect, defend, and hold harmless CITY, is due to the sole negligence of CITY. This hold harmless agreement shall apply to all liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by CONSULTANT.



# NEW LEAGUE PUBLICATION Counsel and Council

A Guide For Building A Productive Employment Relationship

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