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CHARTER REVIEW ADVISORY COMMITTEE MEETING SEPTEMBER 22, 2022

I.4 DISCUSSION AND POSSIBLE ACTION REGARDING ARTICLE XI, SECTION 11.2, CITY ATTORNEY

- *COUNSEL AND COUNCIL: A GUIDE TO BUILDING A PRODUCTIVE CITY ATTORNEY-CITY COUNCIL RELATIONSHIP*
- CITY OF SAN BERNARDINO CHARTER COMMITTEE – AGENDAS 2015 (discussions relative to City Attorney are in the July/August timeframe)
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Counsel and Council:

A GUIDE TO BUILDING A PRODUCTIVE
CITY ATTORNEY-CITY COUNCIL RELATIONSHIP



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Introduction

This guide is intended to assist city council members and city attorneys in establishing and maintaining sound and productive professional relationships.

Among the issues addressed are these:

- The role and function of a city attorney.
- The recruitment, selection, and terms of engagement of a city attorney.
- Understanding the nature and parameters of the city attorney-city council relationship.
- Best practices for maintaining constructive city attorney-city council relations.
- Effectuating an amicable and enforceable conclusion to the relationship.

This guide is intended to give both city attorneys and city council members a common understanding of the nature of their relationship, with practical suggestions on structuring and maintaining that relationship in a positive way. In the end, both parties have a common goal: work together to help the city effectively and lawfully achieve its objectives.

Originally conceived in 2001 and produced in 2004, this guide was substantially revised and republished in 2022.



Chapter I

I. Nature of the Relationship

The traditional attorney-client relationship may be viewed as static and one-dimensional: The client asks for legal advice, which the attorney provides. When a city attorney advises a public agency client, however, the attorney-client relationship is typically dynamic and multi-dimensional. A city attorney must be responsive to the legal needs of many individuals within the public agency's management and operational structure, and the policies, priorities, and laws that govern city conduct are frequently in flux. Despite this dynamism, many aspects of this important relationship are defined by stable, long-standing principles — primarily the ethical duties owed by the city attorney to the public agency client and the profession.

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

1. Externally through state and local regulations.
2. Internally through the job description and performance evaluation forms.
3. The employment or legal services agreement.¹

This chapter explores current issues underlying and defining the relationship between a city and its attorney. It begins — as attorneys often do — by looking at the underlying law and facts, and then by summarizing the basic roles and functions of the city attorney. It then presents some unique issues that may arise based on whom the city attorney is advising, the particular role the city attorney is fulfilling, the applicable rules of professional conduct, and even how the city attorney was selected to serve in the first place.

A. State and Local Regulations

1. State Law

California Government Code sections 41801 through 41805 set basic parameters for the city attorney's role and duties under state law. These provide for the city attorney to: (1) advise city officials in all legal matters; (2) frame all ordinances and resolutions required by the city council; (3) perform other legal services required by the city council; and (4) receive compensation as allowed by the city council. In addition, with the consent of the district attorney of the county or if the city's charter so allows, the city attorney may prosecute any misdemeanor committed within the city arising out of violation of state law. (See below for a discussion of a city attorney's prosecutorial role and duties.)

¹ See Chapter III and Appendices B and C for discussion and sample provisions of employment and legal services agreements.

2. Local Regulations

The city council and city attorney should also review their city's charter (if one exists) and municipal code to ascertain the job duties set forth by local legislation. Many city charters and municipal codes build upon state law concepts in describing the position and responsibilities of the city attorney. In some cases, a charter provision may even contravene the Government Code provisions, in which case the charter may control when pertaining strictly to a municipal affair. Such charter and municipal code descriptions may provide further detail as to whom the attorney provides advice and counsel and enumerate the types of documents the attorney will handle.

Local regulations 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 housing authority or successor agency. In some cities, they may assign the city attorney risk management responsibilities.

B. What Does a City Attorney Do?

Many city attorneys believe the extent and scope of their duties are not fully understood by the public or elected officials. Since city council members primarily interact with the city attorney at formal council meetings, and not through observation of the day-to-day work of the city attorney's office, this is understandable.

Simply stated, the city attorney's job is to serve as the chief legal advisor for the city. What this entails on a day-to-day basis can be wide-ranging. It can also vary from city to city, depending upon the size of the city, the range of services the city provides to its residents and constituents, and whether the city attorney is an employee of the city or under contract. Many cities have provisions in their charter or municipal code specifying the city attorney's powers and duties. Although not an exhaustive list, typical powers and duties shared across the profession include the following:

- Attending and providing legal advice at meetings of the city council and appointed commissions.
- Providing oral and written advice or opinions to the city council and staff.
- Reviewing or drafting and, ultimately, "approving as to form" all city contracts.
- Reviewing or drafting city ordinances, resolutions, and policies.
- Representing and appearing on behalf of the city in legal or administrative proceedings in which the city is concerned or is a party.
- Prosecuting violations of the municipal code.
- Representing and appearing for city officers or employees in legal proceedings in which they are a party for an act arising out of their employment or by reason of their official capacity.
- Managing the operations and services provided by the city attorney's office.
- When necessary, selecting and managing legal services provided by a special counsel.
- Performing such other duties as may be delegated from time to time by the city council.

1. City Attorney as "General Counsel"

The role of a city attorney may be likened to that of "general counsel" for a corporation. Cities are, in fact, "municipal corporations" in the "business" of providing public facilities and services to their residents and constituents. In this sense, city councils are the corporate equivalent of their cities' "boards of directors."

The plethora of rules, court decisions, and administrative regulations that govern city activities are such that city council members and city staff must often consult with their city attorney for assistance. As general counsel of the municipal corporation, a city attorney must have a broad understanding of the wide range of laws governing the equally wide range of city activities. These areas of law and their corresponding practice areas are summarized below:

Contracts. Most cities enter into a wide variety of contracts involving public works, consulting services, and public/private partnerships. The city attorney's office provides legal services at all stages of contract formulation, implementation, and enforcement, including negotiation, drafting, administration, and dispute resolution. Most city attorneys develop and maintain standardized city contracts and actively participate in negotiations and the structuring of complex transactions, such as the finance and implementation of major capital projects, design/build agreements, and energy, telecommunications, and solid waste disposal franchises.

Land Use/Environmental. City attorneys provide legal counsel to the city council, development services department(s), and planning commission on "land use" issues including general plans, zoning, subdivisions, growth management, special use permits, statutory development agreements, environmental impacts, hazardous materials, preservation of historic properties, impact fees, exactions, and assessment districts for open space, parks, and other public facilities.

Economic Development and Real Estate. The city attorney advises the city council, city manager, and various city departments in connection with a wide range of economic development and real estate issues. Typical matters include property acquisition and disposition, leasing, development agreements, affordable housing transactions, economic development assistance programs, and public/private partnerships.

Employment/Labor. With various employee types and bargaining units, the personnel and labor issues facing cities are complex and diverse. In conjunction with the city's human resources/personnel department, the city attorney is responsible for advising on employee policy development, federal and state labor laws, disciplinary matters, and dispute resolution, including civil service and arbitration proceedings, and for some cities, labor negotiations.

Local Government Law. The city attorney provides legal advice on diverse aspects of local government law, such as municipal finance, budgeting, taxation, and inter/intra-government relations. The city attorney also advises regarding state conflicts of interest laws (e.g. the Political Reform Act and Government Code section 1090), open meeting laws (e.g. the Brown Act), and public records retention and disclosure requirements (e.g. the Public Records Act). The city attorney also frequently advises the city clerk on applicable state and local elections laws.

Litigation and Risk Management. The city attorney is responsible for both defending and filing lawsuits on the city's behalf, either directly or through oversight of outside counsel. These can range from minor matters to multi-million-dollar claims. Most actions against cities involve allegations of dangerous conditions on city property or misconduct by city employees, including alleged civil rights violations. Many city attorneys also handle or advise on the processing and disposition of administrative claims against the city. They also advise on how to improve policies and procedures that mitigate risk. If the city is a member of a joint risk pool, litigation and risk management can involve interactions with risk pool staff and directors.

Code Enforcement. The city attorney assists with the enforcement of city code provisions related to building standards, zoning requirements, neighborhood preservation, and other conditions or conduct affecting public health, safety, or welfare. Violations are addressed by using the various legal enforcement tools available to the city: administrative actions, civil actions, or criminal prosecution. The city attorney provides further assistance by obtaining legal orders for the abatement or demolition of substandard properties.

Specialty Areas. There also are specialty legal areas that will sometimes arise. These include federal and state securities laws, bankruptcy, annexation, hazardous materials matters, trademarks/copyright, and workers compensation, to name just a few. In these areas and others, where the city attorney does not have subject area expertise, it is often appropriate to engage outside "special counsel" on behalf of the city.

2. Contracting Out for Legal Work

Given the range and complexity of laws that apply to city conduct, the need will undoubtedly arise from time to time for the services of outside “special counsel.” In addition — particularly for an in-house city attorney — because a city’s legal workload may increase from time to time to a point where legal demands exceed the city attorney’s in-house capacity to respond, it can make financial sense to contract with outside counsel on a stand-by or temporary basis rather than hire full-time, long-term staff. Litigation in particular can be very time and resource-consuming for both attorneys and support staff. Rather than put other pressing legal matters on hold, it can be in the best overall interests of the city to hire outside counsel to handle major litigation cases. In such instances, it is usually appropriate for the city attorney to select, hire, and manage the work performed by outside counsel. As a check and balance, most cities impose monetary limits on a city attorney’s authority to hire outside counsel.

3. The City Attorney as a Member of the Executive Team

Many city attorneys also are considered 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. In this capacity, many city attorneys serve not only as legal advisors, but also as project managers, problem solvers, policy advisors, and strategists. When serving in this role it is extremely important for city attorneys to be clear to distinguish between when their input constitutes legal advice versus when they are offering more of a policy- or process-related recommendation. Chapter 3 discusses this potentially sticky situation in more detail.

4. Giving and Getting Legal Advice

An important aspect of the city attorney’s job is to give opinions on specific legal issues. These opinions may be either formal (in writing with full legal citations and analysis) or informal (summary legal conclusions/recommendations presented via email or verbally). Different circumstances may suggest one form is better than another. Here are some thoughts and practical advice on making sure all parties’ interests are served in this important interaction:

Consider a Formal Request/Response System. Some cities require that all requests for legal advice be communicated in writing through department heads to ensure coordination and avoid duplication of effort. Any formal request system should be designed to encourage full disclosure of underlying, relevant facts since many laws apply differently depending upon the facts. Formal request systems also help with tracking and accountability. Referrals made at city council meetings also should be memorialized and tracked.

Give Early Notice of Legal Issues. 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 timely, high-quality legal advice. Similarly, when the city attorney’s office hears of policy initiatives that raise legal issues, the city attorney should communicate this immediately to the involved policymakers. City interests are not well served when city staff or council members invest a lot of time in policy initiatives that present major legal issues without the benefit of upfront legal guidance.

Recognize Some Issues Take Time. City attorneys must often analyze several sets of statutes and numerous reported cases 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.

One Size Doesn’t Always Fit All. City attorneys are often asked by council members, or they might themselves suggest, that ordinances adopted by another agency or “model” ordinances be considered as a possible approach to address a city issue. This can save a lot of time and mitigate risk, particularly if the “model” ordinance has already been legally tested. All should be aware, however, that an ordinance that works for one agency does not necessarily

address the needs or meet the requirements of another. Review and customization by the city attorney's office are imperative before the city council gives final consideration to the adoption of a "model" ordinance.

C. Who Is the City Attorney's Client?

Determining who the city attorney's client is and to whom they owe duties is not as obvious as it might seem. Is the client always the city as a legal entity? Or are individual public officials or staff members also clients? Is the public ever the client? Or is it a combination of some or all of these? The best answer may be, as with so many answers in the law, "it depends." This section explores the core principles and variables in the city attorney-client relationship and the associated duties.

1. Ethical Standards and the City as the Client

Regardless of the complex relationships between a city attorney and the many facets of the client, rule makers and courts have made it clear that in all instances city attorneys are governed by the ethical standards of their profession. In California, the core of these standards is contained in the Rules of Professional Conduct of the State Bar of California. Case law supplements such rules.

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.²

In response to the question "who is the client?" the Rules of Professional Conduct state 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?"

On major policy issues subject to city council direction and approval, the city attorney takes direction from a majority of city council members. Contrary direction from an individual council member or less than a majority cannot be followed. That said, with city councils often being split on major policy issues, the city attorney must take special care to provide the same, balanced legal advice to "all sides."

On city business subject to the authority and oversight of a strong mayor or city manager, the city attorney's direct relationship is with the individual serving as the city's lead executive or the appointed staff. Part of this relationship may involve helping define and preserve where proper authority resides between the city council and staff. This line can be blurry. Just as individual council members should not be directing administrative staff on matters within their purview, city staff should not be taking actions where city council approval is first required. In all cases, it is a best practice — and encouraged by the Rules of Professional Conduct — for the city attorney to provide advice "up the chain" to the ultimate decision-maker with respect to each matter.

Regardless of who is being advised, city council members and staff should recognize that another overarching duty of the city attorney is to the integrity of the legal system itself. A city attorney's primary duty to their city client is to be a competent and zealous advocate for the city's interests. In performing such duties, however, the city attorney must not mislead the courts or advise or condone conduct that clearly violates the law. If a city attorney is ever put in a position of being asked to violate this principle, at a minimum the city attorney must strongly object up the chain of command and decline to act. In extreme circumstances, the city attorney may be required to resign.³

² State Bar Rules Prof. Conduct, Rule 1.13.

³ State Bar Rules Prof. Conduct, Rules 1.13(d), 1.16.

2. Advising Individual Staff or Council Members

Under Rule 1.13 of the California Rules of Professional Conduct, an individual council member or other city officials (such as the city manager) is not the client. Advice may only be given to an individual in the individual's capacity as an officer of the city. There is no attorney-client privilege in these communications flowing to the benefit of the individual. Such communications are likely to be subject to disclosure to the city council, or other members of the organization, as may be necessary for the furtherance of the city's overall interests. For example, if a council member has a conflict of interest that could result in the invalidation of the city council's decision under state conflict of interest laws, the city attorney must advise the city council of the consequences of the conflict if the council member fails to disclose the conflict and recuse from any participation in the decision.⁴

3. Defense of Employees

Even though the city attorney's client is the city itself, there are times when the city owes a duty of defense to an individual employee under the California Government Claims Act.⁵ 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 the employee. A city may refuse to undertake a joint defense if a specific conflict of interest would result, but the city must pay the costs of a separate defense attorney. If the employee is found to have acted criminally or otherwise beyond their lawful authority, the city's obligation to defend may be relieved. Decisions regarding how or if to represent a council member or any employee are sensitive matters. Some cities have formal policies to help guide this process.

► FOR MORE INFORMATION:

The California Municipal Law Handbook provides practical advice on the Government Claims Act and other areas of municipal law. This publication is available for purchase through CEB at <https://store.ceb.com/the-california-municipal-law-handbook>.

4. Attorney-Client Confidences

In *Roberts v. City of Palmdale*,⁶ 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 — with the city council having ultimate authority to act on the city's behalf — it follows that the city council holds the privilege. As the holder of the privilege, the city council may decide to waive the privilege and disclose the city attorney's communications to the general public. This must be a decision made by a majority of the city council expressly stated on the public record. It cannot be the decision of an individual council member. These same principles apply to confidential information exchanged in closed sessions. While state law generally prohibits the disclosure of confidential information out of closed session by individuals,⁷ such information can be shared with designated third parties or the general public with the prior approval of a majority of the city council.

4 Council members should be aware that advice from their city attorney provides no immunity to them if they are ultimately found to be in violation of conflict-of-interest laws. Limited immunity can be obtained by obtaining a formal advice letter from the FPPC. Many city attorneys aid in this process, while others advise the council member to seek the assistance of private legal counsel. For more information regarding the FPPC and conflicts of interest rules, please see the FPPC website (<https://fppc.ca.gov>), and the useful materials provided by the Institute for Local Government (www.ca-ilg.org/ethics-transparency).

5 Cal. Gov. Code § 900 et seq.

6 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

7 Cal. Gov. Code § 54963(a).

Another aspect of the attorney-client privilege is that while the city attorney's communications on substantive matters with staff members can be kept confidential from them public, they cannot be kept confidential from supervisors or other key decision-makers. Similarly, 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:**

If the city attorney learns an employee is not complying with a statute or regulation that could expose the city to liability, and 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.⁸

D. The City Attorney's Duties to the Public

As discussed above, the city attorney's client is generally viewed as the city itself, not any one individual within the city. This same principle applies to members of the public. As a result, the city attorney's office cannot and should not provide direct legal advice to private individuals. That does not mean, however, that the city attorney owes no duties to the public. This section explores such duties and some of the particular contexts in which they arise.

1. Assuring the City Complies with the Law

The city attorney's duty to advise on the legality of the city's conduct acts as a check on illegal city conduct for the benefit of the public. This occurs in many contexts, both in public and in private. The most obvious public example occurs when the city attorney provides advice at city council meetings. Privately, this occurs when the city attorney reviews the legality of claims or contracts, advises regarding the fair and non-discriminatory application of city laws, or provides written consent prior to a given action, for example, a decision to destroy public records.⁹

2. Protecting the Public Interest

The city attorney is also called upon to advise the city to follow laws designed specifically to protect the public interest. These duties include advising during a city council meeting that the public has the right to comment,¹⁰ that the city council typically cannot discuss an item not on the agenda, or that an applicant receives due process during a public hearing. 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.¹¹ The city attorney may also be called upon to determine whether the public has the right to access city records under the Public Records Act.¹²

8 State Bar Rules Prof. Conduct, Rule 1.16.

9 Cal. Gov. Code § 34090 provides, in part: 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 the department head's charge, without making a copy thereof, after the same is no longer required." 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.

10 Cal. Gov. Code § 54954.3, subd. (a).

11 Cal. Elec. Code § 9280 provides, in part: 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.

12 Cal. Gov. Code § 6250, *et. seq.*

3. Ethical Duty

Do city attorneys have a higher ethical duty to the public than 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 Model Code of Professional Responsibility, (which has no binding effect in California), however, does 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.¹³

Moreover, Cal Cities' City Attorneys Department has adopted Ethical Principles, discussed further in Chapter II and available in Appendix A. Regardless of the applicability of any particular rule, among the many reasons city attorneys are drawn to the profession — and take special pride in their role — is the sense of a higher ethical duty to seek justice, to stand against abuses of power, and to uphold the rule of law.

4. Prosecutorial Duties

While city attorneys deal mainly with civil legal matters, mostly in defense of allegations against the city, in some cities, the city attorney also has prosecutorial duties for certain civil or 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."¹⁴ As a result, the attorney is not subject to taking direction from the city council with respect to prosecutorial matters. Instead, the prosecuting attorney is vested with the discretionary power to determine whether and how to prosecute.¹⁵ As with any other prosecutor, a prosecuting city attorney's obligation and ethical responsibility is to do justice for the people.

Types of Prosecutorial Responsibilities. City attorneys may be vested with prosecutorial responsibilities in the following areas:¹⁶

- » Criminal violations of local laws (i.e., violations of the city's municipal code).
- » Criminal violations of state laws that are infractions, misdemeanors, and wobblers (violations that could be prosecuted as a misdemeanor or a felony, such as Grand Theft [Penal Code Section 487], Sexual Battery [Penal Code Section 243.4], or Assault with a Deadly Weapon [Penal Code Section 245]).
- » Certain state law violations where civil prosecutions are authorized (e.g., Unfair Business Competition violations pursuant to Business and Professions Code Section 17200).
- » Certain civil enforcement actions in the name of the People, such as the abatement of nuisances or violations of the Unruh Civil Rights Act.¹⁷

¹³ American Bar Association Model Code of Professional Responsibility, Ethical Consideration 7-14.

¹⁴ *Shepard v. Superior Court* (1976) 17 Cal.3d 107, 122.

¹⁵ *Ibid.*

¹⁶ Whenever acting as a prosecutor, the city attorney shall have the power to issue subpoenas in a like manner as the district attorney.

¹⁷ Cal. Civ. Code § 52, subd. (c) provides, in part: 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.

City attorneys have the exclusive authority to prosecute misdemeanor criminal cases to enforce city ordinances.¹⁸ In general law cities, the council may authorize (or not authorize) the city attorney to prosecute violations of state laws.¹⁹ In addition to council authorization, in a general law city the city attorney must further obtain the consent of the district attorney before undertaking such prosecutorial work.²⁰ In charter cities, Government Code section 72193 provides an additional avenue of authorization. When section 72193 is implemented by a charter city (i.e., through a charter amendment), the city attorney has the primary duty of prosecuting state misdemeanors within the city, with the district attorney acting in a subsidiary or backup role.²¹

Carrying out Prosecutorial Responsibilities. When the city attorney carries out prosecutorial responsibilities, whether civil or criminal, the city attorney, like the district attorney or the attorney general, represents and brings the action in the name of the People of the State of California, not the city or the city council.

Accordingly, a number of critical concepts are presented:

- » The attorney-client privilege will not protect city attorney communications and documents prepared for a prosecutorial case; however, the work-product privilege may still be invoked.
- » Because council members are not clients in any prosecution, they are generally not entitled to obtain information beyond what is accessible to members of the public. This is particularly critical given prosecutors' general obligations to protect certain information (e.g., criminal history) from public disclosure.
- » The city council cannot require that the city attorney bring or dismiss a prosecutorial action or in any other way interfere with the city attorney's discretion with respect to the disposition of a case.

The prosecutor's obligation to provide the defense potentially exculpatory evidence is paramount,²² and may require a city prosecutor to disclose information damaging to the city.

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.²³

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.

18 Cal. Gov. Code §36900, subd. (a); 79 Ops.Cal.Atty.Gen. 221 (1996); 65 Ops.Cal.Atty.Gen. 330 (1982); 20 Ops.Cal.Atty.Gen. 234 (1952).

19 Cal. Gov. Code § 41803; *Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, 667-668 ["[T]he city attorney of a general law city has 'prosecutorial responsibilities' only when 'required' by the city council to perform them."].

20 See Cal. Gov. Code § 41803.5.

21 79 Ops.Cal.Atty.Gen. 46 (1996).

22 *Brady v. Maryland* (1963) 373 U.S. 83.

23 *Berger v. United States* (1935) 295 U.S. 78.

► PRACTICAL ADVICE

Should the city attorney's office prosecute a case involving a council member defendant?

Generally, no. If the city attorney is a subordinate officer of the city council, then recusal is recommended to avoid at least the appearance of a conflict.

Should a city attorney's office create ethical walls to wall-off prosecuting attorneys from the rest of the office?

Yes. While there is no controlling authority requiring such an approach,²⁴ creating separation could be helpful in dealing with the many conflicting ethical issues that arise between the office's prosecutorial work and traditional city attorney work.

E. Varied Appointment Structures and Different Relationship Dynamics

The vast majority of city attorneys are appointed by city councils. In larger cities, city attorneys are frequently city employees; however, many city attorneys, particularly in smaller cities, are members of private law firms under contract with the city. A small number of city attorneys are elected to their positions, with an even smaller number appointed by the city manager.²⁵ Some city attorneys serve for a specified term, but most serve at the pleasure of the appointing authority.

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.

Elected city attorneys are likely to have a greater sense of duty to the public, who they "serve" and who elected them. In practice, this can take many forms. For example, elected city attorneys are much more likely to conduct public forums, issue public opinions or reports on matters of community interest, and provide information connecting residents and constituents to pro bono legal services. The relative "independence" of the elected city attorney from the city council (who, after all, cannot fire them) can also lead city attorneys to be more direct and emphatic in communicating their legal advice. That said, essentially all of the duties and requirements applicable to appointed city attorneys apply to elected city attorneys. Although the elected city attorney is *accountable* to the public through elections, the "city" (not the public) is the city attorney's client.

Regardless of how city attorneys take office or are classified, they remain the chief legal officers of their respective cities. 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 the city attorney is critical to ensuring that the city functions as a well-managed organization and accomplishes the public policy objectives of elected officials.

²⁴ See e.g., *People v. Byars* 77 (1978) Cal.App.3d 294.

²⁵ City councils directly appoint the city attorney in 469 of California's 482 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 ten charter cities (Compton, Chula Vista, Huntington Beach, Long Beach, Los Angeles, Oakland, Redondo Beach, San Diego, San Francisco, and San Rafael) and city managers appoint the city attorney in two charter cities (Folsom and Shafter).

II. Defining The Job, Recruitment And Selection Process²⁶

Appointing a city attorney is the beginning of a new professional relationship between the city council and the city attorney. That is true whether the city council is promoting a trusted employee from within the organization or appointing a lawyer new to the entity following a recruitment. Like all relationships, how it is formed affects how the relationship develops. A city's recruitment and selection process for its city attorney communicates expectations about the role of the city attorney, sets a tone for the relationship, and shows the community an example of how the council applies the city's values to decision-making. This chapter discusses some of the preliminary decisions regarding the role of the city attorney that the city council should consider before a recruitment, explains the various types of recruitment methods commonly employed, and provides some practical information, including a few pieces of practical advice, to aid cities in the appointment of a new city attorney.

A. Job Descriptions

The primary purpose of a job description is to outline the basic responsibilities and qualities necessary for the city attorney to perform duties effectively. The job description is frequently used in the recruitment of a city attorney, but a secondary purpose is to outline the general performance standards the city attorney will be expected to meet.

Job descriptions for city attorneys are normally broken down into four components: (1) a brief definition of the job; (2) minimum qualifications needed to enter or retain the job; (3) skills necessary to perform the job at an acceptable level; and (4) a listing of essential functions or list of typical tasks the city attorney will perform. These job 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 put into writing the job description since it is often the first document the city uses to communicate with applicants about the specifics of the position. The job description should also be the basis for an integrated evaluation system.

1. Defining the Job

A city attorney's position is often defined in general terms. Many job descriptions start by defining the position in its broadest sense, such as:

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

²⁶ The recruitment and selection portions of this chapter do not apply to elected city attorneys.

Job descriptions often also state that the city attorney is responsible for representing the city in litigation, and for drafting all applicable ordinances, resolutions, and legal documents, and performing related work as assigned.

2. Minimum Qualifications

The purpose of the qualifications section is to clearly describe the basic minimum qualifications needed for the position. Minimum qualifications for California city attorneys 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 of five years practicing law.

Beyond these basic requirements, many cities require extensive knowledge of principles and procedures of civil law as it relates to municipal government, as well as state and federal laws, including constitutional laws affecting municipal operations. Some cities may indicate that they prefer the city attorney to have experience in particular subject areas, such as land use, personnel, or finance, depending on the particular needs of the city.

One area of controversy is whether cities can, or should, include the requirement that the city attorney lives within the city limits. Currently, cities in California cannot legally require employees to do so,²⁷ but they can require that employees live within a certain response time from the city.²⁸ (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 job requirement, it can be a matter of contractual negotiations between a public entity and its city attorney in exchange for financial considerations, such as moving expenses or financial assistance. Recent technological advances and practices may suggest that a greater amount of remote work is possible and can be considered by each city in drafting or updating its job description for the city attorney.

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

Finally, the tasks section of a job description should outline the essential physical functions of the position. This will assist the city in complying with state and federal legal requirements related to disability accommodation, which require an employer to articulate, in advance, the employer's expectations for performance.²⁹ Many city attorney job descriptions focus on the ability to perform computer and desk jobs in a repetitious manner and the ability to sit for long periods of time.

3. Necessary Skills

The job skills component of the job description should be drafted with two thoughts in mind: (1) what are the basic, day-to-day working skills expected of the city attorney, and (2) what are the council's expectations for communication skills, not only with the city council, but with the public and staff.

The skills listed in the job description should reflect those that the city 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, or reference only a basic knowledge of municipal law subjects like the Brown Act, Public Records Act, and conflict of interest laws. Many job descriptions go beyond these basic skills and require specific knowledge and even "mastery" of certain municipal law subjects that are particularly relevant for the agency, such as personnel and labor relations, finance, land use, or real estate transactions.

27 Cal. Gov. Code § 50083 provides: "No local agency or district shall require that its employees be residents of such local agency or district."

28 Cal. Const. art. XI, § 10, subd. (b) provides: A city or county, including any chartered 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.

29 See e.g. 42 U.S.C. § 12102 et seq.

A growing number of job descriptions also emphasize interpersonal and communication skills, including excellent written and verbal 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 city council’s expectations. Many job descriptions also include knowledge of administrative principles and methods, such as goal setting, program and budget development, and the ability to administer, train, and motivate staff.

Another frequently included skill is keeping the city 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 only 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:**

- Has excellent communication and analytical skills and excels in a fast-paced and dynamic environment.
 - Has experience in the broad range of municipal law including, but not limited to open government, land use, public safety, finance, and employment law/labor relations.
 - Stays current in municipal law, is well versed in “the art of the possible” and is willing to engage in creative problem solving to best meet the city’s needs.
 - Views the city attorney’s role as being more than providing legal opinions; views the role to also be an advisor, sounding board, confidant, and a resource; is easy to talk with, recognizes the importance of retaining trust and confidence and, is responsive and accessible.
 - Acts as an advisor to council and staff, rather than a policymaker.
 - 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 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 laypeople.
-

4. Essential Functions

What is considered essential will vary from city to city, but the following items usually are among the functions considered essential to a city attorney position.

1. Attends meetings of and provides advice to the city council and its boards and commissions.
2. Provides legal advice to city executives and managers on a wide range of laws and regulations.
3. Provides day-to-day leadership and works with staff to ensure a high performance, customer service-oriented work environment which supports achieving city objectives and service expectations.
4. Represents the city in hearings before administrative bodies and state and federal agencies.
5. Plans, organizes, controls, manages, and evaluates the work of the city attorney's office and its staff.
6. Drafts and reviews ordinances, resolutions, contracts, leases, deeds, and other legal documents and instruments.
7. Keeps abreast of developments in the law and makes recommendations for changes in city policies, practices, and ordinances in order to comply with legal requirements.
8. Directs or conducts research and writes or reviews opinions on issues of concern.
9. Enforces city ordinances and regulations.
10. Manages all legal services, including litigation.

B. Recruitment

Different cities have different needs for legal services, and a city's need for legal services may change over time. Accordingly, each time a city faces a vacancy in the city attorney position, it is worthwhile for the city council to consider whether the city attorney should be full-time or part-time and whether the city attorney should be a city employee or an independent contractor. Once the city council agrees on the nature of the position it wishes to fill, the search for the right candidate can begin. There is no one right way to conduct a successful recruitment or to select a city attorney. There are a few tried-and-true methods, however. These are the three most common: (1) through in-house personnel specialist; (2) through a professional recruiter; or (3) by the council members themselves. Discussed below are some issues common to all methods as well as a discussion of each.

1. Define the post: What type of city attorney position? Full-time or Part-time? In-House or Contract?

There are two main models for city attorneys in California: the city attorney can be either a full-time or part-time city employee (similar to the city manager) or the city may contract with an individual lawyer through a law firm to serve as city attorney, in which case the city attorney is an independent contractor.

Before initiating the recruitment of a city attorney, the city council should consider the position in light of the city's specific need for legal services. Whether a city is replacing an in-house city attorney or a city attorney appointed through a contract with a municipal law firm, the city council has the option of changing the type of city attorney arrangement based on what would best serve the city at that time. Each model has merits.

One obvious consideration is cost. The best way to assess the cost differences between the two models (in-house and contract) is to understand the city's requirements for legal services. No city attorney can provide every type of legal advice a city may require. The legal profession includes areas of specialty, such as water rights, bond counsel, bankruptcy, real estate, criminal prosecution, and litigation. While city attorneys concentrate on general municipal law (and individual city attorneys may have expertise in additional specialized areas), it is common for a city occasionally to require the services of a lawyer who specializes in a particular area. Indeed, the California Rules of Professional Conduct governing the legal profession prohibit lawyers from giving advice outside their area of competence. The city attorney budget generally will

include funds for specialists, depending on the current activities of the city. The scope and type of legal services are key factors in evaluating costs.

The other item that drives the cost of city attorney services is the council's meeting habits (does the council generally conduct business at regular meetings or does it hold numerous special meetings) and the number of city commissions and boards that require legal attention. With an understanding of the amount of daily general work and the city's demand for specialized services, the council is better able to determine which model of city attorney services makes sense for the city.

An in-house office requires more than salaries and benefits for the lawyer(s). City attorneys need access to legal research tools (subscriptions to codes and online platforms), clerical assistance, office and electronic equipment, bar dues, and registration for mandatory continuing legal education courses. Many such costs are typically borne by the city. These overhead costs should be considered in light of the volume of work to be performed by the city attorney(s). For some cities, a full-time city attorney and deputies make economic sense. For other cities, considering these same factors leads to the conclusion that it is more cost-effective to retain a full-service law firm to provide city attorney services.

Cost is not the only factor to consider. City 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 because that arrangement affords the benefit of a full-time presence in city hall. Some contract attorneys maintain office hours in city hall, which can provide some of the informal contact associated with an in-house office. The flip side of integration can be greater independence. The city attorney can serve as a check on city administration. While the relationship between the city attorney and the city manager/administrator should be cooperative, each still functions independently. Other considerations with respect to which model is best for the city include assuring that the city has adequate backup for when the city attorney is on vacation or otherwise out of the office, the availability of the city attorney on quick notice, and the community's expectations of the city attorney's functions.

Once the city council determines which model is best for the city and what are the priority characteristics of a city attorney, the city is ready to recruit for the position.

2. Recruitment: How to Get the Right Applicant Pool

Hiring any professional (doctor, accountant, lawyer, etc.) is tricky because you need the professional to know things you do not. This makes it hard to determine whether the candidate is the right professional to hire. When it comes to appointing a city attorney, city councils face this same dilemma to one degree or another.

If there is one reliable indicator of a good candidate, it is this: active participation in the Cal Cities City Attorneys Department. The municipal law practice area is a distinct profession. The City Attorneys Department has developed Ethical Principles — grounded in an attorney's professional responsibilities — to address the proper conduct of a city attorney.³⁰ The City Attorneys Department provides plentiful and relevant continuing legal education for city attorneys to keep them abreast of developments in the field of municipal law. The City Attorneys Department has developed numerous resources covering virtually every aspect of municipal law to assist one another as colleagues. Practitioners that actively participate in the City Attorneys Department have access to those resources required to provide cities with quality legal services.

a. Needed characteristics

- » Licensed and competent to practice law in California.
- » Familiarity with the specific issues facing the city.

³⁰ The Ethical Principles adopted in 2005 are attached as Appendix A. The Ethical Principles annotated with the updated Rules of Professional Responsibility adopted in 2018 can be found here: <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring-Montes-Ethical-Principles-for-City>.

- » Able to provide understandable legal advice (both orally and in writing) that apprises city decision-makers of the legally available options and risks.
- » Relevant experience which generally means at least five years of municipal law experience.
- » For in-house city attorneys, managerial skills, including budgeting, law office administration, and supervision of staff.

b. Additional Considerations

- » Rapport with the council and staff.
- » Commitment to serving the city without favoritism or a personal agenda.
- » Litigation experience (either in the courtroom or as a supervisor).
- » Areas of legal specialties.

c. Finding Applicants

- » For an in-house position, the typical pool of qualified applicants includes experienced city attorneys, assistant or deputy city attorneys, county counsels and their assistants and deputies, and attorneys practicing in law firms that specialize in municipal law. There are a number of standard places where such job announcements are placed including the City Attorneys Department's City Attorney Community,³¹ *Western City Magazine*, and publications focusing on government jobs. A job announcement is often also promoted on social media.
- » For a contract city attorney position, typically a request for proposals (RFP) is prepared and sent to qualified firms and otherwise posted in the places the city usually posts solicitations for professional services. Unlike other professional services, however, a specific provision of the Brown Act allows the city council to interview and consider the proposals in closed session when appointing a person through a law firm to serve as the city attorney (a city official).³²

C. Managing the Process

As mentioned above, there is no required approach to recruit for a city attorney; although, any approach used must be mindful of the Brown Act constraints discussed below. City councils have chosen methods that make the most sense for their cities, generally taking into account the cost, custom, available resources, and desired level of control. This discussion item may be placed on a meeting agenda and discussed at an open and public meeting. The key components of a recruitment process are:

- Prepare a job announcement with a description of the position.
- Publicize the vacancy and solicit applications.
- Vet applications and identify those candidates recommended for interviews. (Sometimes this includes a screening interview by phone.)
- Liaison with candidates to arrange for interviews.

The three most common approaches are:

1. **In-House Human Resources/Personnel.** Most city recruitments are handled by the in-house human resources/personnel department and a city attorney recruitment can be handled in the same way.
2. **Using Recruiters.** Professional recruiters can be used when the in-house department may not have the resources to conduct the kind of in-depth, statewide recruitment efforts a city council requires to create a robust pool of candidates.

³¹ Available to City Attorneys Department members at communities.calcities.org.

³² Cal. Gov. Code § 54957, subd. (b)(1).

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 city 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 benefits package may be necessary to entice the best candidates.

City Council Subcommittee. Some city councils prefer a hands-on approach for their direct hires and use a council subcommittee to perform some or all of the management tasks required for the recruitment process. Once a subcommittee of the city council has been appointed to perform recruitment duties, the subcommittee generally works with the city manager or human resources/personnel department to complete the recruitment process.

► **PRACTICAL ADVICE:**

Courts narrowly construe closed session exceptions, allowing only discussion and action directly related to the purpose of the exceptions. The purposes of the personnel matters exception to the open meeting requirements of the Brown Act are (1) to protect the employee from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body. Case law directly supports closed session discussion about the method of conducting an individual employee's evaluation. The courts have not considered the application of this exception to the method of recruitment. The city council may only discuss such matters if necessary to permit free and candid discussion of a personnel matter.

► **PRACTICAL ADVICE:**

Sometimes a city will use a preliminary interview panel — which can be composed of city executive staff or city attorneys from other cities — to provide feedback to the city council or to limit the number of candidates for the city council to interview. Although rare, a constituent's advisory panel may conduct interviews. However, this process may raise problems. It could create the perception that the selection of the city attorney will turn on political issues rather than professional abilities. Such panels eliminate the city's ability to ensure that candidate applications will be kept confidential. This is important because some candidates request confidentiality to avoid a negative impact on their current employment, especially if not ultimately selected for the position.

C. The Brown Act: Navigating the procedural rules

The recruitment of a city attorney often presents an additional challenge because the city attorney is usually responsible for assisting the city in satisfying the procedural requirements of the Brown Act. In some circumstances, no city attorney is available for that function. The requirements are straightforward, though, and summarized here. Two provisions of the Brown Act address the types of discussions and decisions that may occur in closed session.

1. Brown Act section 54957(b)(1): closed sessions to appoint or employ

The Brown Act allows the city council to meet in closed session to consider the appointment or employment of a city attorney. Any action taken to appoint or employ must be reported in the public session and the report must include the vote cast by every member present in the closed session.³³

Under this rubric, a city council may in closed session:

- » Decide which questions to ask and how to conduct an interview.
- » Decide which candidates to interview.

33 Cal. Gov. Code § 54957.1.

- » Conduct interviews of candidates.
- » Discuss the candidates.
- » Decide which candidate to appoint.

Discussions and actions that cannot be done in closed session include:

- » Consider requests for proposals from recruiters, interview potential recruiters, and approve a contract with a recruiter. Such activities must be done in open session if done by the city council.
- » Designate an ad hoc committee to oversee the recruitment.
- » Discuss or negotiate salary or other compensation directly with candidates. Such discussion or negotiations could be done through a surrogate/designated labor negotiator (e.g. the human resources director, recruiter, city council subcommittee).

Discussions and actions that should be done in open session, unless the city council determines an exception applies in consideration of specific facts:

- » Which method of recruitment it wants to use.
- » What the ideal characteristics of a candidate would be.

► PRACTICAL ADVICE:

Some recruiters propose to speak individually to each council member in order to develop the profile of an ideal candidate. This procedure likely violates the Brown Act because it uses the recruiter as an intermediary to form a council decision. A discussion of an ideal candidate can be had with the recruiter in open session as part of the posted agenda.

► PRACTICAL ADVICE:

A contract city attorney is considered an “employee” for purposes of the Brown Act because the individual functions as a city official. Contract city attorneys are still independent contractors for the purpose of employment law. The application of the Brown Act is expressed in the statute.³⁴ Other independent contractors or special counsel hired by cities do not function as appointed officials and are not “employees” for the purposes of the Brown Act provisions relating to personnel closed sessions.

► PRACTICAL ADVICE:

The contract between the city and the new city attorney — whether it is an employment contract for an in-house lawyer or a contract with a law firm that designates a city attorney — must be considered and acted upon in open session. Because of this, appointments made in closed session should be “subject to an acceptable agreement between the parties.” Alternatively, the appointment action can occur in conjunction with contract approval as part of the open session agenda.

³⁴ Cal. Gov. Code § 54957(b)(4).

► **PRACTICAL ADVICE:**

An interim city attorney may be appointed in closed session. The same rules apply, including that the contract with the interim city attorney must be approved in open session.

2. Brown Act section 54957.6: closed session to instruct council's designated negotiator regarding salary and benefits

Once a leading candidate is identified, the city should negotiate the terms of the proposed employment or engagement contract before making an appointment. The Brown Act allows the city council to meet in closed session to review its position in negotiations and give instructions to its labor negotiator. The Brown Act authorizes closed sessions for this purpose for unrepresented employees as well as unions. This is the only method that a city council may use to negotiate with a city attorney candidate.

Under this section, a city council may discuss in closed session:

- » Salaries, salary schedules, and compensation paid in the form of fringe benefits.
- » City's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the city's designated negotiator.
- » The instructions to the designated negotiator, including reviewing the city's position in the negotiation.

City councils may not in closed session:

- » Designate a representative to negotiate on behalf of the city; the city's representative must be listed on the meeting agenda.
- » Take final action on the proposed compensation for the successful city attorney candidate.
- » Discuss the city's general financial situation or make decisions unrelated to the salary and compensation to be offered to the city attorney candidate.

E. Interviews

As discussed from various vantage points throughout this publication, the relationship between a city's council and its legal counsel is rooted in trust. A successful professional relationship between a city council and a city attorney depends on the council members' confidence in their attorney. While these bonds are forged over time, the interview is one important way that council members can assess the likelihood that the candidate has the skills to command confidence and earn trust.

Candidates often are already employed, and therefore, the confidentiality of the process will increase the chances of good candidates applying. Initial interviews may (and should) be held in closed session. The degree of formality of the interview is up to the city council. Many city attorneys are chosen following one interview and sometimes the city council wants to hold follow-up interviews with one or two (or more) top candidates.

Some interview questions that may solicit responses helpful to evaluating candidates:

- Describe your view of the city attorney's role with respect to the city council.
- Describe your view of the city attorney's role with respect to the staff, the city's appointed commissioners, and the community.
- How do you keep abreast of changes in the law?
- What do you do when an individual council member's actions may be in violation of local, state, or federal law?
- What areas of law are you most comfortable advising on and what are the areas where you would seek the assistance of other lawyers besides yourself?

It is helpful for the city council to meet in closed session to discuss potential interview questions and designate standard questions to ask each candidate. It is useful to be able to compare responses. Less structured discussions often take place, but this usually occurs after the standard questions have all been asked. Council members should record their impressions and some cities use a numerical score for each candidate. Following the interviews, the recruiter or human resources/personnel director may assist the city council in ranking the candidates or the city council may deliberate on its own.

F. Selection Factors

1. Which applications to consider

Selection criteria include both the minimum criteria and ideal characteristics. Experience suggests the minimum criteria should be carefully determined and then strictly adhered to at the initial screening phase. Part of the challenge of hiring a new city attorney is that the city council won't be familiar with all of the technical skills or necessarily able to assess whether a candidate has skills that may compensate for weaknesses. All things considered and in light of the consequential nature of the appointment decision, basic threshold qualifications tend to produce a qualified pool of applicants. Typical minimum criteria for a city attorney:

- » A member in good standing of the California State Bar.
- » No history of discipline by any state bar.
- » Law degree from an accredited law school.
- » At least five years of relevant (preferably increasingly responsible) experience doing work comparable to a city attorney.

2. Which applicants to interview

The selection of candidates to attend council interviews should be based in part on objective criteria. These may include specialization in practice areas that are in high demand in the city (e.g., land use, employment and labor, public works, coastal, and ethics/conflicts of interests), or years of service in a comparably sized city (large and small cities tend to have different roles for the city attorney), or familiarity with the region. As is true for all hiring decisions, time spent defining criteria and then relying on the criteria to make decisions creates a fairer selection process, which leads to better outcomes. The goal is to avoid bias or inconsistency in the process.

While a city council is free to interview any number of candidates it wishes, ordinarily the three to five candidates the majority of council members are most interested in learning more about will provide a sufficient candidate pool to draw from. A careful consideration of all applicants should proceed the decision to narrow down the field to those who will be offered initial interviews. It also is worthwhile to identify one or two candidates the city council would add to the pool should one of the initial group of candidates withdraw from consideration or, if after the interviews, the city council is still uncertain about who it wishes to appoint.

It is common, but not routine, for the city council to hold a second interview of its top one or two candidates before making a final decision. The second interview is usually less formal and provides an opportunity to follow up with questions that may have arisen during or after the interviews.

3. Which candidate to appoint

The right city attorney makes a big difference for any city. A professional city attorney is trained to assist the city council in understanding the legal risks and options for the decisions it makes. No doubt the city council will be looking for the candidate that is the right fit for the city at the time of appointment. Not every city council gets the chance to appoint a city

attorney. Longevity and stability are the rewards to a community when a city council makes a good choice. Some abilities a city council might consider valuable are these:

- » Interpret and apply various state codes, federal law, and local ordinances.
- » Conduct legal research; prepare sound and practical legal opinions.
- » Analyze and prepare a wide variety of legal documents, including ordinances, resolutions, and contracts.
- » Handle stressful or sensitive situations with tact and diplomacy.
- » Communicate effectively in both oral and written form with city officials, the court, representatives of outside agencies, and the public.
- » Complete varied assignments within a narrow time frame.
- » Establish and maintain effective working relationships with those contacted in the performance of required duties.
- » Inspire confidence and respect for legal advice.
- » Present legal advice skillfully and professionally to staff and city council and be able to work as part of a team to advance the city's objectives and interests.

Certainly, the depth of a candidate's legal knowledge and experience in municipal law must be a factor in choosing a new city attorney, but the city council also should consider the ability to communicate advice clearly, the availability, and work style of the candidate, and the candidate's demonstrated commitment to the values of the city such as local control, government transparency, inclusive government, and fair decision-making. Such a candidate will most likely be able to reflect the city council's values in the manner in which he or she performs the functions of a city attorney.

► **PRACTICAL ADVICE:**

There are some differences between in-house and contract city attorneys with respect to appointment considerations. For example, the city council should consider the supervisory skills for an in-house city attorney who will be supervising the work of others. For a contract city attorney, the council would consider the candidate's time-management practices and firm resources. The contracts are different between the two as well. See Appendices B and C for sample contracts.

G. Negotiating the Employment Relationship

Once a preferred candidate has been identified, the city council and the selected city attorney candidate should determine how to memorialize their employment relationship. A negotiated employment agreement has the advantage of providing both parties with an up-front, mutual understanding as to the length of employment, salary, benefits, and working conditions.

Some cities have provisions for the terms and conditions of the city attorney's employment addressed in the city charter, municipal code, council resolutions, personnel rules, or even in the job description. As a result, the city council may prefer to rely on these documents instead of having an employment agreement with the city attorney. Even in those situations, however, an employment agreement acknowledging, clarifying, or supplementing the provisions in those other documents may assist both the city council and the city attorney in reaching a better mutual understanding about their relationship.

One of the biggest challenges for both the city council and the city attorney is deciding who should negotiate an employment agreement on behalf of the city. The city council may consider utilizing the services of one of the following to assist in the negotiations: one of its members, a council subcommittee, the city manager, human resources/personnel director, recruiter, or an outside employment attorney.

The city council should base its decision on who has the requisite experience in such negotiations and who will best represent its interests in defining its relationship with the new city attorney. If the council selects a non-attorney to negotiate the agreement on its behalf, it should consider having an independent attorney well-versed in public employment law review the agreement before it is finalized and executed.

The city attorney also has to decide on who and how to negotiate the employment agreement. The city attorney may choose to negotiate the agreement on their own behalf or hire a third party. If representing themselves, however, the city attorney may find it helpful to consult with a knowledgeable outside advisor before — and maybe during — the actual negotiations.

City attorney employment agreements vary greatly as to the substantive provisions they include. Whether the city attorney is in-house (i.e., an actual employee of the city) or an independent contractor will greatly affect what the employment agreement should cover. Sample provisions for both in-house attorneys and contract attorneys are set out in Appendices B and C.

III. Maintaining an Effective City Council/City Attorney Relationship

The relationship between a city attorney and a city council exists on several levels, which could include — attorney and client, employee and employer, and advisor and policymaker. Councils and city attorneys should spend time at the outset of the relationship — and periodically throughout — to ensure role alignment, clear expectations, and open communication.

This chapter considers several aspects of the relationship that should be considered by the parties to maintain and strengthen the attorney-council relationship and the quality of legal services provided, whether by in-house or contract city attorneys.

A. Starting the Relationship

Whether it involves a new city attorney or a new council member there is a transition period for both parties during which it is important to establish clear and common understandings of roles and expectations for interactions with individual council members and the council as a whole.

1. New City Attorney

When transitioning to a new city, or even a new role within a city, a city attorney will naturally have many questions about the city council and its expectations of the city attorney. The answers to some of these questions may be learned by a careful review of key city documents, often found on the city's website. Depending upon the city, such documents may include:

- » Charter and municipal code provisions referencing the role of the city attorney (appointed or elected; supervised directly by the council or by the city manager).
- » The city attorney department web page (mission statement, budget, organizational and departmental structure, and staffing levels and assignments).
- » City council policies or procedures regarding the city attorney's role in legal administration, interpretation, or compliance.
- » Council adopted priorities, major city goals, projects, platforms, or objectives.
- » Adopted financial plan or budget documents.

Once publicly available information has been reviewed, a new city attorney may glean additional information by talking with members of the city council or city staff and observing council meetings or other city public forums or meetings.

Attached as Appendix D is a list of issues broken down by typical city departments and issue areas that may be useful as a city attorney roadmap to use during orientations with department heads, as well as the city council. This may be helpful to council members in understanding the breadth of issues in which the city attorney will be involved.³⁵

► PRACTICAL ADVICE:

Questions a new city attorney may want to ask directly of the council members and city manager shortly after being hired include:

- What are the city council's priorities? This allows the city attorney to understand the direction the city council, as a body, wishes the city to go and seek additional context or refinement that could be important for the city attorney in advising council and staff.
- Are there areas where individual council member priorities have significantly diverged, or are in conflict with majority direction? Along with getting to better know the individual council members, this allows the city attorney to understand where an individual council member may differ from the city council as a whole and manage expectations surrounding individual objectives versus majority direction.
- Are there any relationship issues between council members? With the city council and the city manager? This helps the new city attorney navigate potential areas of tension between council members and or with the city manager. It also sets expectations about the city attorney's role in ensuring neutrality and equitable treatment of all parties.
- What is the best mode of communication with council members? Do all members look at email regularly? Are there differing preferences for verbal or written communications? On any city council, there will likely be some members who prefer written communications to verbal, and vice versa; some who prefer short discussions of options and others who prefer to get into all the details; and some who have a deeper background about legal processes and issues than others. For a city attorney to effectively communicate with individual council members, their message needs to be heard and understood, which is facilitated by the city attorney tailoring their method of communication to best suit the specific situation or council member, while ensuring that all members have access to complete and consistent information.
- Does the city council have rules of procedure? Does the city council look to the city attorney as the meeting parliamentarian? Each city has its own set of unique procedural rules; knowing what they are and preparing in advance helps minimize the possibility of getting tripped up at a meeting.
- How often has the city council been receiving written updates or status reports from the city attorney, if at all, and is the city council satisfied with past practices or would like to see changes? The city attorney's predecessor may have set a series of expectations about communicating information to the city council, and knowing those expectations allows the new city attorney to determine whether to maintain, enhance, or alter existing practices.
- Do any of the council members have a unique conflict of interest issues? Are there maps showing where they each live and lease/own property, or have they received prior FPPC advice on particular issues? Related, what is the city council's expectation of the city attorney in identifying potential conflicts (e.g., does the council expect the city attorney to proactively monitor the agenda and conflict maps for council members to identify potential conflicts, or do individual council

³⁵ The Department would like to acknowledge retired San Pablo City Attorney and past City Attorneys Department President Lynn Tracy Nerland for compiling the checklist provided for reference here with input from city attorneys Sheryl Schaffner and Hilda Cantu Montoy. This list is meant to evolve so City Attorneys Department members are urged to make it their own and to share their insights with the City Attorney Community.

members assume that primary responsibility)? Knowing potential conflicts of interest issues in advance helps the city attorney ensure that council members do not inadvertently participate in an item on which they are precluded from doing so and that the city attorney has inadequate time to analyze and advise on potential conflicts.

- Do all council members have a baseline familiarity and comfort with fundamental California municipal law concepts (i.e., the Brown Act; California Public Records Act; Political Reform Act; and Government Code section 1090)? If this familiarity and comfort is not present, the city attorney should determine any training or legal support needs

Given different city council member communication preferences, the city attorney may wish to prepare an executive summary or bullet points as a cover sheet to a more detailed discussion of a particular issue.

2. New Council Member

A different transition occurs when there is a new city council member. For the new city council member, particularly one who is new to municipal government, the transition includes learning about the city and, for our purposes, the city attorney, both as an individual and as to their role in the organization. (See Chapter I.)

There are many city attorneys who find themselves working for a city council with no members who initially hired them. This means that a majority of their city council may not know much about the city attorney or their representational role in the organization. Thus, anytime there is a transition in council members, it is important that the city attorney ensure that all council members have a sufficient baseline understanding of legal issues and their consequences to make knowledgeable and legally defensible decisions.

Many cities have an orientation package for the new council member, which the city attorney can augment.³⁶ The orientation materials often begin with the role of the city attorney, the nature of organizational versus individual legal representation, and the legal and organizational structure of the city, both internally and in relation to other local and regional agencies. Orientation materials should, at a minimum, also include:

- » Introductions to key public transparency and ethics laws like the Brown Act, Public Records Act, public ethics laws, (e.g., AB 1234) and conflicts of interest.
- » Overviews of city council procedures and rules of order.
- » Overviews of confidentiality obligations and closed session rules.
- » A basic overview of the structure of the city's municipal code, and an explanation of ordinances, and resolutions.
- » An explanation of the distinction between legislative and quasi-judicial actions, as well as public hearing and due process requirements.
- » An overview of pending or anticipated litigation, including basic procedures, laws, and defenses governing lawsuits against the city.
- » An overview of significant issues on which the office is advising.

Depending on the new council member(s), it may be best to break these topics into several shorter meetings, rather than one marathon session. It also is very helpful to include links to Cal Cities and other instructive resources in the orientation materials, so that council members can refresh on guidance as issues arise, and explore rules and concepts discussed in greater depth.

³⁶ At the City Attorneys Spring Conference in May 2019, the City Attorneys Department Attorney Development and Succession Committee gave a presentation on developing the City Council-City Attorney relationship. Examples of orientation packages and other useful materials may be found in that presentation, which is available in the City Attorneys Paper Database at <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring-Steiner-Nerland-Essential-Skills-De>.

Providing council members with easy access to the tools to support their success, and encouraging new council members to communicate early and often with the city attorney about any questions or concerns will avoid — or at least reduce — the number of surprises for both parties.

► **PRACTICAL ADVICE:**

At the beginning of each calendar year, Cal Cities holds a New Mayor and Council Member Academy. If budget and time permits, the city attorney and city manager should consider attending the conference with their new council members. Along with reiterating what was said during the city attorney's new council member orientation session, the conference affords an opportunity for the city attorney and new council member(s) to get to know each other outside of a formal meeting or city hall setting and to benefit from subject matter expert presentations, as well as the perspectives and opportunities to develop support networks with other colleagues.

B. Effective Communication

Effective communication between elected officials, the city manager, city staff, and the city attorney is critical to a city's smooth operation. Early and frequent communication about proposed actions, and mutually defining clear expectations of the scope and timing of the city attorney's involvement can avoid frustration and save the city money and wasted staff resources in the long run. The following are examples of ways to promote effective communication.

1. Timely Shared Information and Confidentiality of Communications

Both the city council and city attorney must be kept informed of the other's activities. Council members should be fully advised of the importance of the attorney-client communications privilege and its purpose to advance frank and complete exchanges of information and well-informed and complete legal advice. The city attorney should emphasize, when appropriate, the confidentiality of legal analysis and the fact that no individual council member may waive the privilege held by the city. This emphasis should begin during the new council member orientation sessions, should continue throughout their terms of office, and should be expressly stated in all confidential written communications provided to the city council.

In this context, the city attorney should provide timely updates about legal issues, so the city council has sufficient information to make legally supportable policy decisions. As much as possible, this means all council members should receive the same information, at the same time, from the city attorney. Among other things, this minimizes any appearance that the city attorney is favoring one council member over another and ensures that each member has equal access to the same information, even if the council members choose to utilize or follow up on the information in different ways.

For the city attorney, being kept informed of the city's and city council members' activities is critical for the provision of complete, accurate, and timely legal advice. The city attorney should emphasize early in the relationship with every new council member the value of providing the city attorney with complete facts in a prompt manner, even when those facts may not be favorable to the council member, staff member, or the city generally. The city attorney should focus on the shared objectives of providing the best service to the community and explain how failure to timely provide important information can compromise the city attorney's ability to provide accurate legal advice and legal support for the city council's policy objectives. It is also important that the city attorney and council members reach a mutual understanding of the importance of ongoing communication and the city attorney being given notice of later changes in facts or policy direction, as such changes may alter the original legal advice.

2. Preventive Legal Advice

Among the strengths a city attorney brings to the municipal organization are the practice of preventive law, issue identification, and assistance in identifying or formulating alternatives. In other words, clear communication and certain practices when employed early may minimize costly legal exposure or risk to the city in the future and may provide a better or more defensible foundation for the implementation of the city council's desired policies or actions.

Along with early and understandable communication with the city council, examples of preventive legal advice include adding the city attorney as an initial member of a city development project team, providing staff training on new city or other agency policies and regulations, and the creation of standardized documents and procedures.

3. Communication of Difficult News

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 situation. The city attorney's obligation to communicate includes the responsibility to fully advise their clients of facts or legal implications the clients may not want to hear. This might include the receipt of a new lawsuit, a bad result in an existing lawsuit, or the discovery of an error in a city action that requires correction or results in liability exposure.

Because both the delivery and receipt of difficult news can cause tensions, especially in moments of public scrutiny, it is important to discuss in advance the preferred method of delivery and roles and expectations surrounding the management of difficult legal advice and situations. It also is important for the city attorney to convey effectively and consistently the balance of the ethical obligations of advocacy and adherence to rules of professional conduct. As explained by the preamble to the American Bar Association's model rules of professional conduct: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Nowhere is that truer than in the legal service of the public trust.

4. Distinguishing Between Communication of Legal and Policy/Operational Advice.

One of the unwritten axioms of local government is that city councils make policy, and city attorneys advise on the legality of such policies and provide legal support for the council's lawful policy direction and actions. At times, however, a city attorney may be asked to provide policy advice or advise on an issue that involves a fine line between law and policy. For example, when a city council wants to know "can we do this and if so, how," or "if we legally can't do what we proposed, what are the alternatives to achieve our objectives?" In such cases, the line between policy and law may become increasingly less distinct.

Similarly, another local government axiom is that city attorneys focus on legal issues, and city managers focus on operational issues. Again, there is often a fine line between these two issues. Employee disciplinary matters, for example, lend themselves to closely intertwined legal and operational issues.

As the above examples provide, questions of what is a policy or operational matter, and what is a legal matter are often not easily distinguished. There should be a level of sensitivity by all parties to situations when the city attorney is asked to provide legal advice that has clear policy or operational implications. When these situations occur, the city attorney should approach the issues thoughtfully and with a conscious awareness of the respective roles of all involved. The city attorney should communicate clearly where, and why, legal advice may necessarily cross into areas of policy or operations. Finally, the city attorney should remain sensitive to the perception and be open to feedback from colleagues regarding appropriate boundaries between law, policy, and operations, and should be prepared to calibrate accordingly.

C. Tips for a Successful Relationship

For the city attorney/city council relationship to succeed and grow, each party will need to invest time and work. To make this process easier, the following should be kept in mind by both the city council and city attorney.

- Remember the city is the client. The city attorney may be aided in providing thorough and informed legal advice and alternatives by understanding individual council member motivations and preferences. However, both the city council members and the city attorney must remain constantly mindful that only the majority of the city council can speak on behalf of and direct the actions of the municipality and it is the obligation of all representatives of the city to implement lawfully adopted majority policy. The city attorney must continually convey that they do not represent any one council member, but the council as a body and as the authorized representative of the organization as the client. See Chapter I for a detailed discussion about who is the client.
- Remember everyone is on the same team. When the city attorney identifies potential legal problems, it is to protect the city and to support and ensure defensibility of lawful policy objectives, not to delay or stop the city's goals. (See communication of difficult news.)
- Consult and confer on complex issues sooner rather than later, so that any legal input can be meaningful and well informed by facts known to council members.
- Do your homework. Be prepared when speaking with one another, so that everyone's time is respected and well-spent and the legal advice sought and provided is of the highest caliber possible. It should be noted, however, that there will be times that the city council may not have had the opportunity to review the subject materials, or the matter may be one of first impression for the city attorney, and additional research will be required before a final legal opinion may be issued. Patience is advised in both instances.
- Be clear about expectations and priorities. Remember and acknowledge that the priorities of one council member do not necessarily reflect the priorities of a council majority.
- Given the complexity of many legal issues, the city attorney needs adequate time to research issues and answer questions; conversely, the city attorney must not lose sight of the need to provide timely legal advice on often publicly contentious topics.
- Recognizing the continuing budget challenges faced by local governments, provide the legal staff with the necessary tools to do the job requested. At the same time, the city attorney should be realistic with their budgetary requests and prepared to articulate the need for and benefit of requested resources. It can be difficult to understand the value of preventive law in avoided costs and legal exposure, but the cost of avoided liability and adverse judgments are significant and obvious.
- To ensure the most accurate legal opinions, the city council should disclose to the city attorney all pertinent facts and objectives; incomplete information or undisclosed objectives yield lower quality legal advice and alternatives. (See shared information.)
- Understanding the frustration associated with an "it depends" response to a legal question, recognize that a concrete answer is not always possible when the law is not clear-cut. In responding to questions on complex or ambiguous matters, the city attorney should do their best to explain why a concrete answer in certain instances is not possible and provide their best professional judgment and advice as to potential risks, benefits, and legal vulnerabilities to support informed council decision-making and permit policymakers to accurately assess and balance risk and reward.
- Work together to reinforce the fact that the city attorney is an independent and objective legal advisor, and not a policymaker or manager of operations. Where matters have policy and/or operational implications, council members and the city attorney should agree on the process by which to engage the city manager or appropriate staff in communications, analysis, and decision-making.

- Recognize the complexity of running a city and the unique aspects of the other's job, and therefore accommodate the inevitable learning curves for a new city attorney or council member.
- Conduct oneself professionally, and be respectful of others, both in and out of council meetings. For example, listen to and respect all points of view, even though another's viewpoint may be contrary to one's personal point of view. In short, attack facts and issues, not people.
- Retain an open mind regarding issues and facts and put aside personal feelings in favor of focusing on duties to the public and the purpose of public service to achieve the common good.
- Offer mutual respect for the city attorney's legal opinion and the council's policy objectives and direction, while appreciating that sometimes reasonable people may differ based on their respective roles and risk tolerances.
- Work together to identify and inform the city attorney of potential conflict of interest issues as far in advance of a meeting as possible, so that enough time is available for a thorough analysis.
- Raise concerns about public meeting items in advance if possible and seek informed and respectful public discussion of areas of disagreement or ambiguity. Try to avoid the reality, or even perception, of "ambushing" one another, or staff, with issues that are known or anticipated in advance and try not to "kill the messenger" where the city attorney has an ethical obligation to provide legal advice that might be at odds with a desired policy objective.

Like any relationship, sustaining the one between a city attorney and city council requires an investment of time and commitment by both parties.

D. Performance Evaluations

1. Informal vs. Formal Evaluations

Many cities have instituted formal evaluation systems for their city attorneys, especially in-house city attorneys who are employees of the agency. This trend appears to be consistent with the increasing use of formal employment contracts between cities and in-house city attorneys. It also may be attributable to the rise in litigation by public employees against their employers. Performance evaluations for contract city attorneys appear to vary more widely in their frequency and formality.

► PRACTICAL ADVICE:

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 issues 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. While this is still the case in some cities, more frequent performance evaluations and more formalized evaluations are beneficial to allow sharing of perspectives and expectations, as well as an opportunity to resolve issues before they become a crisis.

An informal approach to the evaluation process is to have the city attorney meet with the city council to discuss performance. This process works well where a good relationship exists between the council and attorney. If, however, there are serious performance deficiencies or tension between the attorney and one or more council members, this process can be problematic and unproductive.

There are many advantages of a formal performance evaluation process, such as a written evaluation, which could include accomplishments in relation to goals, strengths, and weaknesses. When hired, a city attorney may receive only general direction from the city council regarding performance expectations. Council members may feel they are not in a position to tell an attorney how to accomplish a desired legal result. A formal performance evaluation system can help the city

council set the goals it wants its attorney to achieve and direct, to some extent, how those goals are to be accomplished. A formal performance evaluation may also give the city attorney the opportunity to present a list of accomplishments, some of which may not be apparent to the city council. Performance evaluations may also set the stage for wage and salary or billing rate adjustments.

A formal performance evaluation can also be helpful in situations where council members are reluctant to discuss performance expectations and whether those expectations are being met or where council members have different expectations. It also may help improve communication between the city 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 on both sides of the table. If done correctly, it creates a paper trail documenting the city attorney's performance that may be helpful if a question of adequate performance later arises.

► PRACTICAL ADVICE:

The Brown Act authorizes a closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.”³⁷ However, as explained in Chapter 2, section D of this guide, closed session discussions of personnel matters are not without limit. For a more detailed discussion of permissible closed session topics see [Open & Public V: A Guide to the Ralph M. Brown Act \(2016\)](#).

2. Types of Formal Evaluation Processes

Formal evaluation processes vary from the completion of written evaluation forms provided to city council and the city attorney, to structured facilitated sessions that rely on feedback from city council and city management in evaluating the city attorney's performance. Some may even involve what is referred to as a 360-degree performance evaluation, which includes not only council members and department heads, but also a sampling of those who report to the city attorney.

For cities that engage in a more formal evaluation process, the first step is to develop a performance evaluation form. The form should reflect the elements of the position as outlined in the job description and be tailored to accommodate any particular goals and standards that have been established between the council and the city attorney. The city attorney may be encouraged to document achievements of the prior evaluation period or to respond to council questions.

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 point-based rating system.

The next question is who should be involved in the city attorney evaluation. The city council usually participates, and input is often solicited from the city manager, department heads, or other staff who interact frequently with the city attorney. Recently, “360-degree” evaluations have become another tool used by public agencies. In a 360-degree assessment, a questionnaire or survey is provided to multiple individuals, including supervisors, peers, and direct reports or subordinates. For example, in the case of a city attorney, participants in a 360-degree assessment might include council members, the city manager, department heads, and subordinate attorneys/staff in the city attorney's office.

Finally, at the more formal end of the spectrum, some city councils choose to use an outside facilitator, both in the creation of the performance standards and in the actual evaluation of the city attorney. The services of a neutral, knowledgeable third party may assist the council in articulating reasonable expectations for city attorney performance and in determining

37 Cal. Gov. Code § 54957(b)

whether the attorney has met industry standards for such expectations. An effective facilitator can help the council in identifying the appropriate criteria and issues for assessing the city attorney's performance to ensure that the evaluation is productive and useful for both the council and the city attorney. If the evaluation may uncover attorney-client privileged information, the city council should consider retaining an attorney to serve as the facilitator to preserve confidentiality.

An outside facilitator may also be helpful where there are tensions between the city attorney and other city staff or individual council members, or significant concerns about city attorney performance. In this case, the services of a neutral third party may serve to focus a performance evaluation discussion that might otherwise be charged with personal or political agendas. For these and other reasons, in-house city attorney contracts may now contain a clause authorizing or requiring the retention of a third party to assist in the evaluation process.

3. Development and Use of Performance Measures

Some cities use "performance-based management" tools or "key performance indicators" (KPIs) as an assessment tool. "Performance-based management" sets forth specific performance measures or targets for employees or departments to achieve; performance then is gauged by comparing actual outcomes to targets. KPIs similarly create benchmark goals and measure progress towards those goals. These performance measures are more often developed in the budgetary process for measuring output and the allocation of resources.

These quantitative approaches present challenges when evaluating city attorneys and the writers of this guide urge caution in the utilization of performance measures as the primary evaluation tool for city attorneys. The city attorney plays a unique role in the city's organizational structure. The city attorney's job is primarily to give advice and counsel to staff and city council, rather than to turn out a specific number of memoranda or win a certain percentage of cases. While such numerically definable goals may provide useful input in the evaluation process, this type of quantitative measurement fails to assess the quality of an attorney's legal advice. Further, local governments who use performance-based management systems or KPIs as part of a broader evaluation process should also consider the adoption of performance measures that assess the more qualitative aspects of the city attorney position.

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, taking into account the many factors that may be outside the attorney's control. An emphasis should be placed on the attorney's provision of quality and timely legal advice which helps the client understand the potential risks of their actions, rather than quantifiable output or specific outcomes that may not have been entirely within the attorney's control. It is important to clearly define what is being measured and to consider qualitative as well as quantitative factors.

Some performance measures to consider include:

- » **Quality of legal advice:** The extent to which the city attorney is providing advice that is helpful in informing city decision-making. Quality legal advice should be sensitive to its audience — whether expert city staff, city council members, or the public — and should make difficult legal concepts intelligible to a layperson. Where applicable, options may be presented to the policymakers, describing the risks and benefits of each approach. While attorneys cannot always provide the advice that their clients want to hear, advice should be easy to understand and delivered in a helpful manner, whether in writing or when done verbally.
- » **Responsiveness and communication:** The efficiency with which legal advice is delivered, keeping in mind that not all problems are equal in terms of complexity. When an attorney needs more time to research an issue, this should be communicated to the client.
- » **Effectiveness:** While it is important to acknowledge that in most legal disputes there are factors outside the attorney's control, attorneys may be measured based on their effectiveness in achieving their intended purposes, such as reduction in certain types of litigation, budget goals, etc.

- » **Cost:** City attorneys may be evaluated based on cost or budget, especially on the transactional or advisory side. In-house city attorneys may be asked to develop goals with respect to department and outside-counsel costs; contract city attorneys may be evaluated based on the competitiveness of their billing rates, the accuracy of their invoicing, and their ability to staff cases and issues leanly and effectively. In furtherance of performance evaluation, it is helpful to collect data on how the city attorney team spends their time in order to determine whether a particular case or department may be especially demanding of city attorney resources. While litigation is notoriously unpredictable, city attorneys may be evaluated on how well they monitor litigation costs and update the city council.

D. Issues that could affect the relationship

As with any relationship, issues will arise between the city attorney and city council that may impact how they interact. Most of the issues will be minor, but some will be more serious. This section focuses on five areas that could have negative impacts on the relationship.

1. Questionable Legal Behavior

There are times when a proposed city action may not fit within applicable legal constraints. When faced with an implementation of an objective that is unlawful, the city attorney must deliver the news as diplomatically as possible. While development of legal alternatives is strongly advised, adherence to clear legal requirements is not optional; laws must be followed to protect the city from avoidable liability. Most laws and regulations are imposed to further the public good, and public officials are required to conform their actions because it is their legal and ethical duty, and because failure to do so can have costly consequences for the organization.

The city attorney's job is complicated by the fact that the law is not always clear in a particular area. When this occurs, the city attorney must give their best professional 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 options in a particular situation. The city attorney should acknowledge, preferably privately, when that is the case and help the city council understand the risk of other, perhaps less cautious, approaches to legal interpretation.

2. Counselor Versus Advocate

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 specific situation so the city can make an informed decision. However, when dealing with third parties, the city attorney may need to step into the role of advocate and vigorously argue one perspective of the law and the facts at hand.

This approach is consistent with the Preamble of the American Bar Association's Model Rules of Professional Conduct:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

3. Attorney's Advice

From time to time, the city council or staff may question a city attorney's advice, and it may be tempting to seek a second or even third opinion. This temptation should be resisted, unless done in coordination and consultation with the city attorney. 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 representative who is most familiar with the unfiltered facts and laws bearing on the city's actions, particularly local ordinances, internal procedures, any charter provisions, and other internal situations that may affect the 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 city 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.

4. Neutrality

City attorneys should not get involved in city council politics to preserve their role as neutral officers charged with rendering impartial opinions on legal matters. Therefore, council members should not be offended if the city attorney does not attend their fundraisers or other political events.

5. Challenges to City Attorney

From time to time, there may be litigation filed against the city that names the city attorney among others. The city attorney may request representation or indemnification by the city if the challenge is based on matters within the city attorney's scope of employment. A city attorney is acting as an employee when making such a request. The city should consider seeking legal advice from independent legal counsel as to the propriety of providing representation or indemnification.

There may be legal challenges to the city attorney that come from inside the city. If those inside challenges include charges filed with the State Bar, the city has no duty to provide the city attorney with a defense or indemnification but has the discretion to do so.

Most contract city attorneys (see Appendix B) address these issues in their legal services agreements. Some of those agreements provide for the city to indemnify the attorney and some require the attorney to indemnify the city. Most contract city attorneys also agree to provide their own malpractice insurance to cover these kinds of challenges.

IV. Separation From Service

Relationships evolve, and the city council's relationship with a city attorney eventually ends. Sometimes the relationship ends because the city attorney retires or leaves for other career opportunities. Sometimes the relationship ends because the city council wants, for whatever reason, to go in another direction (i.e., terminate the services of the city attorney), sometimes because of the city attorney's performance or because the city attorney has engaged in misconduct. Other times the relationship ends because of a medical condition that cannot be accommodated or because the attorney dies while in office.

Relationships that end in involuntary dismissal usually, but not always, have been under stress for some time. This stress can be due to performance deficiencies on the part of the city attorney or attorney office staff. Sometimes the stress is caused by interpersonal problems between the city attorney and council members or staff. Stress may 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. When new individuals are elected to the city council, a change in city officials may create a desire for separation unrelated to stress or performance.

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

An amicable and uneventful ending of the relationship is fostered by the following:

A. Prepare an Employment or Legal Services Agreement that Clearly Spells out the Parties' Rights and Responsibilities

A well-crafted employment or legal services agreement that anticipates separation scenarios and clearly spells out the rights and responsibilities of both the city council and the city attorney will go a long way toward making the end of the relationship amicable and uneventful. This is particularly true for involuntary separations.

At a minimum, the agreement should clearly set out the notice requirements for a termination on the part of both parties. What form of notice is required? Written? Oral? How many days' notice is required before the termination is effective? Is there a hold on any termination action following an election to ensure that the city attorney has the opportunity to engage at least initially with new council members? All of these topics should be addressed in the agreement.

In addition, what severance pay is owed to the city attorney employee under various separation scenarios should be clearly stated in the employment agreement. Both the city council and the city attorney may each want an independent lawyer who is well-versed in public employment law to guide them through the separation process, and this is especially important for the issue of severance pay if the city attorney is an employee as it is impacted by California law. For example, 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.³⁸ This amount is subject to an eighteen-month cap. If a city attorney 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 salary³⁹ and health benefit payments, but human resources professionals or attorneys with employment law experience should be consulted regarding coverage of specific benefits, especially non-cash benefits.⁴⁰ Cities with charters may have unique provisions as well.

Often there are varying separation provisions, including different provisions for severance pay, depending on whether the involuntary separation is with or without "cause." The distinction should be clearly defined in the employment agreement. Moreover, performance concerns should be addressed well in advance of any termination through a periodic performance review process. Specific reasons that may lead to termination should be identified — such as the inability to effectively perform the functions of the position or misconduct. Performance issues and concerns especially should be documented in writing, ideally in at least an annual performance evaluation, for the sake of communication between the parties and also to assure that protected class or protected activities are not the basis of an involuntary separation. When procedures are in place to deal with these issues, the termination process may proceed much more smoothly.

B. Termination and the Public's Right to Know

When it is determined that a city attorney's services should be terminated, all Brown Act procedures regarding personnel closed sessions must be followed, if the termination is other than at the conclusion of the term specified in the applicable agreement. In general, if the termination is based on performance issues, it is acceptable to simply notice a closed session on employee performance.⁴¹ If the termination is based on specific complaints and charges brought by another person or employee, the city attorney is entitled to a minimum of twenty-four hours' notice of the closed session to hear the complaints and charges.⁴² The city attorney may, however, request a public open 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 and come from the city council as a whole. Individual council members should refrain from issuing their own press releases at any point during the process. An employment law attorney should preferably review the city's statements, and the city should consider designating just one media contact person to assure cohesion and minimize misstatements. Following these protocols not only protects both parties legally, but also helps to diffuse potential jousting in the press 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. If the attorney is an in-house employee and there is an office staff, someone should meet with the staff to assure them of their ongoing services. Where possible, a staff attorney should be designated as the acting or interim city attorney, but in some cases an outside attorney who specializes in providing city attorney services may be suitable or necessary.

► FOR MORE INFORMATION:

Open & Public V: A Guide to the Ralph M. Brown Act (2016) provides information on the open meeting laws for local governments.

³⁸ Cal. Gov. Code § 53260.

³⁹ Cal. Gov. Code § 53260.

⁴⁰ Cal. Gov. Code § 53261.

⁴¹ Cal. Gov. Code § 54957. See also 67 Ops. Cal. Atty. Gen. 215 (1980).

⁴² Cal. Gov. Code § 54957.



Chapter V

V. Conclusion

Building a productive working 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 and communicate on a regular basis. By clearly defining the parameters and goals of this relationship in the job description, covering separation details in an employment or legal services agreement, 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.

Appendix A

Ethical Principles for City Attorneys¹

Adopted October 6, 2005

Preamble

A city attorney occupies an important position of trust and responsibility within city government. Central to that trust is an expectation and commitment that city attorneys will hold themselves to the highest ethical standards. Every effort should be made to earn the trust and respect of those advised, as well as the community served.

The City Attorneys Department of Cal Cities has therefore adopted these ethical principles to:

- Serve as an aspirational guide to city attorneys in making decisions in difficult situations,
- Provide guidance to clients and the public on the ethical standards to which city attorneys aspire, and
- Promote integrity of the city and city attorney office.

City attorneys are also subject to the State Bar's Rules of Professional Conduct. For an explanation of how the rules apply to city attorneys, please see Practicing Ethics, available at <https://www.cacities.org/detail-pages/resource/practicing-ethics>.² These aspirational ethical principles are not an effort to duplicate or interpret the State Bar's requirements or create additional regulatory standards.

The role of the city attorney and the client city varies. Some city attorneys are full-time public employees appointed by a city council; some are members of a private law firm, who serve under contract at the pleasure of a city council. A few are directly elected by the voters; some are governed by a charter. When reflecting on the following principles, the city attorney should take these variations into account.

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- ¹ When used in this document, the term "city attorney" refers to all persons engaged in the practice of municipal law. This includes attorneys in firms that provide legal services to cities on an ongoing basis that are the functional equivalent to services provided by assistant or deputy city attorneys (for example, on redevelopment and personnel issues).
 - ² These Ethical Principles annotated with the Rules of Professional Responsibility adopted in 2018 can be found here: <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring-Montes-Ethical-Principles-for-City>.

The city attorney should be mindful of his or her unique role in public service and take steps to ensure his or her words and deeds will assist in furthering the underlying intent of these principles.

Fundamental Principles

(There is no significance to the order of the list.)

Principle 1 (Rule of Law)

As an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law's purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.

Explanation. The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society. Because the public's business is involved, within the city organization the city attorney should consistently point out clear legal constraints in an unambiguous manner, help the city to observe such constraints, identify to responsible city officials known legal improprieties and remedies to cure them, and if necessary, report up the chain of command to the highest level of the organization that can act on the client city's behalf.

Examples

1. The city attorney should give advice consistent with the law and the policy objectives underlying those laws, but may consider and explain good faith arguments for the extension or change of a legal principle.
2. The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney's good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be "creative" to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city's actions.
3. The city attorney's guiding principle in providing advice and services should be sound legal analysis. The city attorney should not advise that a course of action is legal solely because it is a common practice ("everyone else does it that way"), a past practice ("we have always done it that way"), or because the risk of suit or other consequence for action is considered low.
4. The city attorney's advice should reflect respect for the legal system.
5. If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city's interests.
6. The city attorney should be willing to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.
7. The city attorney should not only explain and advise the city on the law, but should encourage the city to comply with the law's purpose and intent.

Principle 2 (Client Trust)

The city attorney should earn client trust through quality legal advice and the manner in which the attorney represents the city's interests.

Explanation. It is difficult for the city attorney to effectively represent the city if public officials do not trust the city attorney's competence and professionalism.

Examples

1. The city attorney should use available resources to maximize his or her ability to advise knowledgeably on issues of municipal law.
2. The city attorney should be clear with individual council members and staff on the extent to which their communications with the city attorney can and will be kept confidential. The city attorney should be especially clear when confidentiality cannot be lawfully maintained.
3. Sometimes the city attorney will be asked a question during a public or private meeting and the city attorney is unsure of the answer. When time permits, the city attorney should advise that additional time is needed to research the matter and provide an appropriate response. If extra time is not available, then the city attorney should be candid regarding any uncertainty he or she feels about the answer given.
4. When a question is posed and the city attorney knows there is no definitive, clear conclusion, the city attorney should describe the competing legal considerations, as well as inform the city of the legally supportable courses of action, together with an evaluation of the course that is most likely to be upheld.
5. In the event the city attorney is asked in a public forum to provide advice that could undermine the city's ultimate position, the city attorney should seek to meet in closed session, if legally permissible, or, if time permits, provide his or her opinion in a confidential memorandum. If the advice must be given during an open session, then the city attorney must be mindful of the impact that advice given in public may have on the city's ultimate position.
6. When the city attorney has a duty to provide documents or other information to outside law enforcement authorities, he or she should do so in a way to minimize harm to the city consistent with that duty.

Principle 3 (No Politicization)

The city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust.

Explanation. The city attorney and the city attorney's advice need to be trusted as impartial by the entire council, staff and community.

Examples

1. The city attorney should provide consistent advice with the city's overall legal interests in mind to all members of the city team regardless of their individual views on the issue.
2. Each city council member, irrespective of political affiliation, should have equal access to legal advice from the city attorney, while legal work on a matter consuming significant legal resources should require direction from a council majority.
3. The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city's officials, including candidates running for that city's offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm's attorneys.³

³ This example does not affect contributions to Cal Cities or its subsidiary bodies for educational or any other purpose, including any Cal Cities educational programs designed to prepare officials for higher office.

4. When considering whether to become involved in policy advocacy on an issue that may potentially come before the city, the city attorney should evaluate whether such involvement might compromise the attorney's ability to give unbiased advice or create the appearance of bias.

Principle 4 (No Self Aggrandizement)

The city attorney should discharge his or her duties in a manner that consistently places the city's interests above self-advancement or enrichment.

Explanation. The city attorney, by his or her acts and deeds, should demonstrate that his or her highest professional priority is to serve the city's needs.

Examples

1. The city attorney's operating and legal services budget requests should be based on the goal of efficiently serving the client city's realistic legal needs (i.e., avoid "empire building").
2. The city attorney should provide advice without a focus on garnering personal support or avoiding personal criticism.
3. While it is appropriate for a city attorneys to provide both advisory and litigation services, a city attorney should give the city a full range of reasonable options, including alternatives to litigation for resolving issues.

Principle 5 (Professionalism and Courtesy)

The city attorney should conduct himself/herself at all times in a professional and dignified manner, interacting with all elected officials, city staff, members of the public, and the media with courtesy and respect.

Explanation. The city attorney should be a role model of decorum and composure.

Examples

1. The city attorney should provide advice and information to the council and individual council members in an evenhanded manner consistent with city policy governing the provision of legal services to the city.
2. The city attorney should communicate in a way that is sensitive to both the context and audience, explaining the law in a way that is understandable.
3. In interactions with the public, the city attorney's role is to explain procedures and the law, but not engage in debate.
4. The city attorney should show professional respect for city staff, colleagues, the legal system, and opponents. The city attorney should not personally attack or denigrate individuals, particularly in public forums.
5. The city attorney should not seem to endorse, by silence or otherwise, offensive comments made to him/her about others.
6. Sometimes the city attorney will provide advice in public, either because of a city's approved practices or as necessitated during a public meeting. Such advice should be provided in a low-key, dispassionate, and non-confrontational manner.
7. The tone of the city attorney's advice and representation should not give the appearance of a personal attack on an individual, even when it is necessary to explain that a particular official's action is unlawful.
8. The city attorney should be open to constructive feedback and criticism.

Principle 6 (Policy versus Law)

The city attorney's obligation is to understand the city's policy objectives and provide objective legal advice that outlines the legally defensible options available to the city for achieving those objectives.

Explanation. The city attorney must respect policymakers' right to make policy decisions.

Examples

1. The city attorney may offer input on policy matters, but should make clear when an opinion is legal advice and when it is practical advice.
2. The city attorney should not let his or her policy preferences influence his or her legal advice.
3. If a city attorney finds it necessary to advise the city that a particular course of action would be unlawful, the city attorney should strive to identify alternative approaches that would lawfully advance the city's goals.

Principle 7 (Consistency)

The city attorney should conduct his or her practice in a way that consistently furthers the legitimate interests of cities.

Explanation. Consistency in the legal positions taken by city attorneys is vital to city attorneys' credibility with the courts, clients, and the public.

Examples

1. The city attorney should not represent a private client if that representation will necessitate advancing legal principles adverse to cities' clearly recognized and accepted interests.
2. When providing advice, the city attorney should inform his or her city of any far-reaching negative impacts a position may have on the city's own potential future interests as well as cities' interests in general, particularly when establishing legal precedent.
3. The city attorney should carefully consider whether to hire or recommend a firm that advances legal principles adverse to city interests on behalf of private clients.

Principle 8 (Personal Financial Gain)

The city attorney's primary responsibility is to serve the city's interest without reference to personal financial gain.

Explanation. An important aspect of the city attorney profession is public service.

Examples

1. The city attorney should provide the highest possible quality work regardless of the remuneration received.
2. The city attorney's representation should be based on a realistic understanding of the city's needs in light of the city's fiscal and other constraints. However, the city attorney should advise the city when additional resources are necessary to provide the level of legal services the city requires.
3. The city attorney should refrain from providing unnecessary or redundant services to the city.
4. The city attorney should never use the power, resources, or prestige of the office for personal gain.

Principle 9 (Hiring by and of City Attorneys)

The selection and retention of the city attorney and city attorney staff should be based on a fair process that emphasizes professional competence and experience. The process should not include inappropriate considerations such as political, personal, or financial ties.

Explanation. The public's trust in the quality of the city's legal services is undermined if it appears that considerations other than competence affected the decision to hire someone.

Examples

1. The city attorney should engage staff and vendors based on objective standards relating to professional competence and experience.
2. The city attorney should avoid providing gratuities to decision-makers during the pendency of decisions relating to the city attorney's employment.
3. City attorneys must keep employment negotiations separate from the city attorney's role as the city's legal advisor.
4. The city attorney should not undermine the employment of an incumbent city attorney. The city attorney may respond to unsolicited inquiries from a potential client about future representation.
5. The city attorney should maintain an office that is open to employees from diverse backgrounds and remove unnecessary barriers to success in his or her office and in the legal profession.
6. The city attorney should not award or recommend award of litigation or legal services-related contracts if the public could question whether the contract was awarded for reasons other than merit, such as the contractor (or member of the contractor) providing gifts to or participating in political campaigns of (including making campaign contributions to) officials with the power to award the contracts.
7. The city attorney should hire or recommend staff and consultants who adhere to these ethical principles and encourage existing staff and consultants to do likewise.
8. The city attorney should seriously consider refusing to represent cities that do not support the city attorney's adherence to these principles

Principle 10 (Professional Development)

The city attorney should contribute to the profession's development by improving his or her own knowledge and training and by assisting other public agency attorneys and colleagues in their professional development.

Explanation. For city attorneys to remain a vital, positive part of municipal government, members of the profession should take affirmative actions to advance respect for and proficiency by its practitioners.

Examples

1. City attorneys have a strong tradition of assisting their colleagues through formal or informal sharing of their knowledge and expertise, including active participation in Cal Cities, the State Bar and a local municipal attorney group or bar association. This tradition also includes sharing of research and opinions when consistent with protecting client confidences.
2. The city attorney should continually strive to improve his or her substantive knowledge of the law affecting municipalities through presenting or attending appropriate educational programs.
3. The city attorney should keep in mind the dynamic nature of municipal law and update his or her understanding of the law on an issue, rather than relying on past knowledge.

Appendix B:

Employment Agreement Provisions for a Full-time City Attorney

The following is a compilation of provisions from the employment agreements of California city attorneys.

Those agreements vary greatly in terms of their level of detail, order of the articles, and degree of formality, as demonstrated by the multiple alternative provisions set out for each article. In many cases, the alternative provisions set forth are mutually exclusive. Each provision is extracted from an actual employment agreement and its source and year are noted at the end of the provision.

The contract provisions below reflect the verbatim language in the city attorney contract for the city indicated. Gender references are those included in the actual city attorney contract and reflect the preferred pronouns of the city from whose contract the language was excerpted.

This compilation is not intended to stand alone as an ideal contract. Instead, the drafting of a city attorney employment agreement should be tailored to the particular needs of a city attorney and a city council.

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

Article 1

RECITALS

COMMENT: Introductory provisions to city attorney employment agreements — often called recitals — are common, but it is not clear what particular legal significance they have. They may provide some clarity to the substantive provisions that follow. Sometimes this kind of introductory language appears before the actual articles of the agreement.

This Agreement ("Agreement" is made between _____ and the City of Alameda, California (the "City") a California charter city and municipal corporation.

WHEREAS, the City desires to employ the professional services of _____ as City Attorney of Alameda; and

WHEREAS, _____ agrees to serve as City Attorney of Alameda in accordance with the City Charter of Alameda; and

WHEREAS, both the City and _____ wish to set forth in writing the terms and conditions of _____ 's employment as City Attorney of Alameda;

NOW THEREFORE, in consideration of the mutual covenants set forth below, the City and _____ agree as follows:

(City of Alameda, 2019)

THIS AGREEMENT is between the City of Palo Alto, a municipal corporation and chartered city ("City") and _____. It is effective on the latest date next to the signatures on the last page.

This agreement is entered into on the basis of the following facts, among others:

- A. City, acting by and through its duly elected City Council, desires to employ _____ as its City Attorney, subject to the terms and conditions set forth in this Agreement, the Palo Alto Municipal Code and in the Charter of the City of Palo Alto (the "Charter").
- B. The Charter provides, among other things, that the City Attorney shall be appointed by and serve at the pleasure of the City Council.
- C. _____ desires to be employed by the City as its City Attorney, subject to the terms and conditions set forth in this Agreement, the Palo Alto Municipal Code, the Charter, the Palo Alto Merit System Rules and Regulations as they are applicable to Council-appointed officers and all other applicable laws, resolutions and policies.
- D. City and _____ desire to establish specific terms and conditions relating to compensation and benefits, performance evaluations and related matters.
- E. The City Attorney serves on an at will basis, with no expectation of continued employment.
- F. _____ desires a predictable amount of severance pay should her employment with or without cause.

BASED UPON THE FOREGOING, CITY AND _____ AGREE AS FOLLOWS:

(City of Palo Alto, 2011)

Article 2

AT WILL EMPLOYMENT

COMMENT: Contractual provisions can imply that a city attorney has a property right in employment, while most city councils anticipate that the city attorney serves at the pleasure of the city council. Many city attorney employment agreements clarify that city attorney is an "at-will" employee by stating so explicitly, as seen below.

- B. Employee understands that he is an "at will" employee under controlling law and is "at will" serving at the pleasure of the Council pursuant to Chapter 2, Article 4 of the Escondido Municipal Code. Nothing in this Agreement is intended to, nor shall it, prevent, limit or otherwise interfere with the right of Employer, in Employer's discretion, to terminate the services of Employee at any time in accordance with said laws and the provisions of this Agreement.

(City of Escondido, 2017)

G. **At Will Employment.** It is understood by and between the Parties to this Agreement that the City Attorney serves at the pleasure of the Council, and the City Attorney shall have no right to a termination hearing (except as is provided by law), or to any vested right to his position.

(City of San Mateo, 2021)

B. Employee's employment status is at-will. Employee understands and agrees that Employer may terminate his City employment at any time, subject only to the notice and severance provisions of Section 5 of this Agreement and the City Charter. Employee understands and agrees that Employer has made no implied or express oral or written assurances of continued employment with the City. Employee further understands and agrees that he has no property right in City employment and that Employer requires no cause to suspend or terminate his City employment.

(City of Santa Barbara, 2014)

Article 3

DUTIES

COMMENT: The most common city attorney contract provisions regarding duties (or "scope of duties," "obligations," or something similar) contain references to the city's charter, municipal code, or other local authority. Most also describe the duties as including assignments from the city council.

Section 2. Duties and Salary.

A. CITY agrees to employ _____ as full-time CITY ATTORNEY of the City to perform the functions and duties specified in the Charter and Municipal Code and to perform such other legally permissible and proper duties and functions as the COUNCIL may from time to time assign.

(City of San Luis Obispo, 2015)

A. City Attorney Obligations

1. Duties and Authority

The City Attorney shall be the Chief Administrative Officer of the Legal Department and shall have all of the duties, powers, authority, and responsibilities of City Attorney as the same are specifically prescribed and set forth in the City Charter and in particular Section 401 thereof and the ordinances of the City and in particular those provided in the Vallejo Municipal Code Sections 2.10.070 and 2.10.072, resolutions, policies, rules and regulations, as from time to time existing thereunder.

The City Attorney shall also perform those lawful duties and follow those lawful orders and instructions given to her by the Council when sitting at a lawfully convened meeting of the Council.

(City of Vallejo, 2020)

Section 3 – Duties

_____’s employment shall be full time. As City Attorney _____ shall perform the duties and functions of the City Attorney identified in State law, the Antioch Municipal Code, the ordinances, resolutions, policies, rule and regulations thereunder and other duties and functions as the City Council may assign. _____ agrees (1) to perform all duties and functions in a professional and ethical manner to the best of his skill and ability and (2) to use his best efforts to promote and advance the interests and the City Council’s goals and objectives.

_____ understands and agrees that the position of City Attorney is not a part time position and will require _____ to work greater than a customary forty (40) hour week. Although City Hall is generally open to the public during regular working hours, _____ shall perform his obligations as a full time City Attorney during regular work

hours and on such evenings, weekends and other times as are necessary. _____ also acknowledges that the position of City Attorney is a position of high visibility before the public and agrees that he shall conduct himself before the public and City staff, both during and outside of regular working hours, in a manner that reflects favorably on the City.

(City of Antioch, 2019)

Article 4

NONDISCRIMINATION

COMMENT: Many city attorney agreements contain a summary restatement of the law prohibiting discrimination. This language probably does not impose any greater legal obligation than existing law, but it is written evidence that the parties recognize and acknowledge that obligation.

Section 13. Nondiscrimination

Employee agrees that in the performance of Employee's functions and duties, he shall not discriminate on the grounds of race, religious creed, color, national origin, ancestry, age, physical disability, mental disability, medical condition, including the medical condition of Acquired Immune Deficiency Syndrome (AIDS) or any condition related thereto, marital status, sex, genetic information, gender, gender identity, gender expression or sexual orientation.

(City of Riverside, 2017)

11. Nondiscrimination.

Employee agrees not to unlawfully discriminate in the performance of Employee's functions and duties on the grounds of or because of race, color, religion, sex, national origin, age, marital status, physical disability, sexual orientation or any other characteristic protected under applicable law.

(City of Sacramento, 2018)

Article 5

HOURS OF WORK

COMMENT: It is not uncommon for a city attorney employment agreement to set out the city council's expectations of the city attorney in a provision covering work hours. A reference to the Fair Labor Standards Act exemption for a city attorney may clarify those expectations, but probably does not have much legal consequence.

_____ shall devote the time necessary to adequately perform her duties as the City Attorney. The parties anticipate that _____ will work approximately forty (40) hours per week allocated between regular business hours and hours outside of regular business hours including, but not limited to attendance at such community events and CITY functions as the City Council may direct. Toward that end, _____ shall be allowed reasonable flexibility in setting her own office hours, provided the schedule of such hours provides a significant presence at City Hall, reasonable availability to the City Council, City Staff, and member of the community during regular CITY business hours and for the performance of her duties and of CITY business. The position of the City Attorney is an exempt position pursuant to the Fair Labor Standards Act and any other relevant provisions of federal or State law.

(City of South Lake Tahoe, 2018)

- a. The City Attorney is an exempt employee but is expected to engage in those hours of work that are necessary to fulfill the obligations of the City Attorney's position. The City Attorney does not have set hours of work as the City Attorney is expected to be available at all times.
- b. It is recognized that the City Attorney must devote a great deal of time to the business of the City outside of the City's customary office hours, and to that end the City Attorney's schedule of work each day and week shall vary in accordance with the work required to be performed. The City Attorney shall spend sufficient hours on site to perform the City Attorney's duties; however, the City Attorney has discretion over the City Attorney's work schedule and work location, subject to the approval of the City Council.

(City of Vallejo, 2020)

4. Hours of Work

_____ shall be an exempt employee under Fair Labor Standards Act (FLSA). _____ is expected to devote necessary time outside normal office hours to the business of the City. _____'s schedule of work each day and week may vary in response to the requirements of the work to be performed. _____ is expected to be present and available during regular City business hours and in the case of emergencies and spend sufficient hours at Alameda City Hall or other City facilities to perform his duties.

(City of Alameda, 2019)

Article 6

CONFLICT/OUTSIDE EMPLOYMENT

COMMENT: Many city councils desire an explicit provision confirming that the city attorney shall work exclusively for the city with no outside employment. Some go further and prohibit various activities that the council feels might constitute a conflict of interest.

- A. The City Council desires that Employee remain in the exclusive employ of the City and to neither accept other employment nor to become employed by any other employer. The term "employ" shall not be construed to include occasional teaching or writing, or as may be agreed to by the City Council in writing.
- B. Employee shall not engage in any activity which is or may become a prohibited conflict of interest, prohibited contract, or which may create an incompatibility of office as defined under California law. 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 Redwood City 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 a personal residence, not to invest in any other real estate property improvements within the corporate limits of the City of Redwood City without the prior consent of the City Council.

(City of Redwood City, 2016)

2.2. No Conflict. _____ shall not engage in any employment, activity, consulting service, or other enterprise, for compensation or otherwise, which is actually or potentially in conflict with, inimical to, or which interferes with the performance of her duties under this Agreement. _____ acknowledges that she is subject to the various conflict of interest requirements found in the California Government Code and state and local policies and regulations.

(City of Palo Alto, 2011)

Section 4 — No Other Employment. _____ agrees not to undertake any other employment during the term of this Agreement unless such work will not interfere with the accomplishment of his duties herein and is authorized by the

express consent of the City Council, which consent shall not unreasonably be withheld. _____ further agrees to confer with the City Council before undertaking any non-paid projects for organizations other than the City which may require a substantial time commitment by _____ and interfere with the accomplishment of his duties as City Attorney.

(City of Antioch, 2019)

Article 7

TERM

COMMENT: Full-time city attorney agreements may contain a designated term of employment, but usually provide a somewhat open-ended term and/or discretion for the council to end the agreement sooner than full term. The city of San Mateo is unusual in calling for a supermajority vote of the council to remove the city attorney.

This Agreement shall commence January 19, 2016, and extend until terminated as provided hereinafter.

(City of Sunnyvale, 2015)

Section 2 — Term

This Agreement shall start no sooner than March 1, 2019 and shall continue for a period of three years from Smith's first date of employment or until terminated pursuant to this Agreement.

(City of Antioch, 2019)

- B. **Term.** The City Attorney shall be retained in this position from May 17, 2021 through May 16, 2026. This Agreement, in its entirety, will be automatically extended annually for a an additional one-year period unless the Council specifically takes action by four-fifths vote to not renew this Agreement. A decision not to renew this Agreement shall be considered a decision to remove the City Attorney, as provided in Section 2.18 of the Charter.

(City of San Mateo, 2021)

Article 8

SALARY

COMMENT: The salary provisions set forth below designate specific dollar amounts for the city attorneys' annual salary and procedures for possible future raises. As is common in most agreements, they link several aspects of compensation to the treatment of other management employees. The city of Vallejo also provides protection for the city attorney against any future reductions in pay or benefits.

5. Salary. City agrees to pay the Employee for services rendered at rate of \$_____ per year commencing on the Start Date, payable in installments at the same time and in the same manner as other career City employees. City agrees to increase the salary base and other benefits of Employee, by the same percentage and amounts, and at the same time and same manner, as cost of living adjustments granted to other Charter Officers. Additionally, in recognition of Employee's accomplishments and outstanding performance, City Council may grant merit increases and equity adjustments to Employee from time-to-time.

(City of Sacramento, 2018)

Section 3. Salary

The Employer agrees to pay the Employee for services rendered, as provided herein, \$ _____, payable in installments at the same time and in the same manner as other employees of the Employer are paid. Thereafter, Employee's salary shall automatically increase by three percent (3%) annually upon satisfactory evaluation. Along with the automatic increase, beginning in January of each year, Employee shall be entitled to a cost of living increase based on the partnership compensation model consistent with the represented and non-represented employees' agreements.

(City of Riverside, 2017)

(1) Base Salary

- a. The beginning annual salary for the position of City Attorney shall be \$ _____. Thereafter the City Attorney's annual increases, if any shall be based on performance and as determined by the City Council in the exercise of its sole and unfettered discretion.
- b. The City Attorney shall be paid at the same intervals and in the same manner as regular City employees.
- c. The City shall not at time during the term of the Agreement (i) reduce the compensation, leave and/or financial benefits of the City Attorney or (ii) increase the financial obligations to contribute to,, assume the cost of or pay any benefits unless as part of (iii) reduction in the same compensation, leave and/or financial benefits the Unrepresented Management Employees experience or (iv) an increase in the same financial obligations experienced by the Unrepresented Management Employees, respectively, and then in no greater percentage than the (v) average reduction in the relevant compensation, leave and/or benefit or (vi) average increase in financial obligations, as the case may be, experienced by Unrepresented Management Employees.

(City of Vallejo, 2020)

Article 9

VACATION

COMMENT: Many city attorney employment agreements provide vacation leave identical to other management employees, as in the San Mateo excerpt below. The cities of Berkeley and Riverside set out a specific benefit.

Benefits

Except as otherwise provided in this Section D., the City shall provide the City Attorney with the benefits provided the City to the City Attorney and City's Department Heads as described by the City Council resolution. Such benefits include but are not limited to health and life insurance, retirement, sick leave, vacation and holidays and an automobile allowance. If there is a conflict between the resolution adopted by the City Council and this agreement, the City Council shall provide City Attorney the benefits described this agreement. The City Attorney may elect to decline any of these benefits. No additional compensation will be provided if he City Attorney elects to decline any of these benefits.

(City of San Mateo, 2021)

- A. _____ shall be credited with thirty (30) days of vacation as of the commencement of employment as City Attorney and shall receive thirty (30) days of annual vacation leave annually. Annual vacation leave shall be administered in the same manner as vacation is administered for department head employees of the City with regard to timing of credits and buyback policy. Maximum vacation accrual is ninety (90) days including the initial vacation credits and existing vacation accrual balances.

(City of Berkeley, 2021)

Section 8 – Vacation and Administrative Leave

Employee will accrue vacation at the rate of two hundred (200) hours per year of employment accruable and subject to cash out consistent with that provided for the Executive Group (Section 6 and Table 4 of the FBSP).

(City of Riverside, 2017)

Article 10

MANAGEMENT/ADMINISTRATIVE LEAVE

COMMENT: Many employment agreements grant the city attorney extra time off in the form of management or administrative leave. The language below includes a specific number of days for such time off and procedures for cashing out unused leave.

Section 6. Management Leave.

In addition to Employee's entitlement to holiday and vacation leave on the same basis as is available to other management employees generally in accordance with Section 3(c) of this Agreement, Employee shall be entitled to twenty (20) days of management leave annually. Management leave granted pursuant to this provision shall be in lieu of any other management leave available to members of the City management team generally.

Section 7. Conversion of Unused Leave Time to Salary.

In addition to any other provision of the City Code or this Agreement authorizing conversion of unused leave time to salary, Employee shall be entitled, as he may determine at his sole discretion, to convert up to fifteen (15) days of unused leave time (whether vacation, management or reserve time leave) each year during the term of this Agreement to salary. Employee shall exercise his right to convert leave time to salary by giving notice in writing to the payroll staff stating the number of days of leave time, if any, which shall be converted to salary. Such notice shall be given between July 1st and October 1st for each year for the term of this Agreement. Employer shall pay Employee the salary equivalent of the leave time, if any, so converted within thirty (30) days of delivery of such notice. Any such converted leave time shall not be included in computation of severance benefits pursuant to Section 5.

(City of Escondido, 2017)

Section 5. Vacation and Sick Leave

Employee shall be entitled to eighty (80) hours of management leave annually as provided in the Salary and Benefits Resolution for Unrepresented Executive Employees.

Employee shall be entitled to accrue a total of thirty-five (35) days combined leave (i.e., vacation and management leave) annually, and shall take no more than fifteen (15) workdays of vacation or management leave at any one time, exclusive of holidays recognized by Employer, to which Employee shall also be entitled. Upon approval of the Council, leave may be extended beyond the fifteen (15) workday limit established above.

During the term of this Agreement, Employee may cash out up to (120) hours of accrued vacation and/or management leave each fiscal year.

In the event of termination, either voluntarily or involuntarily, employee shall be compensated for accrued sick and vacation time as of the date of termination as provided in the Salary and Benefits Resolution for Unrepresented Management Employees.

(City of Hayward, 2020)

Article 11

HEALTH INSURANCE

COMMENT: Most all employment contracts address health insurance by linking the city attorney's benefits with those of other management employees.

9. Benefits. The City shall provide the City Attorney with health insurance, dental insurance, vision insurance, and disability insurance as provided to the City's executive management employees. Except where inconsistent with this Agreement, the City Attorney shall receive all other benefits provided to the City's executive management employees.

(City of Santa Rosa, 2017)

Section 4. Health, Disability, Life Insurance and Other Benefits

Upon commencing employment, Employer agrees to provide and to pay the premiums for health, hospitalization, surgical, vision, dental and comprehensive medical insurance for Employee and his dependents equal to that which is provided to all Unrepresented Management Employees of Employer.

(City of Hayward, 2020)

Article 12

DISABILITY INSURANCE

COMMENT: Most city attorney employment agreements that provide for disability insurance grant the city attorney the same level of benefit as given to other management employees. Vallejo below allows a somewhat higher maximum for the city attorney.

(5) Life Insurance & Accidental Death & Disability Insurance

The City Attorney shall be provided with life insurance and Accidental Death & Disability Insurance under the same terms as those of the Unrepresented Employee Group, except that the coverage level for the City Attorney shall be increased to a maximum of Five Hundred Thousand Dollars and No Cents (\$500,000.00) for term life insurance and a benefit of sixty percent (60%) of the City Attorney's annual base salary for Accidental Death & Disability Insurance.

(City of Vallejo, 2020)

B. Health and Welfare Benefits.

Employee shall receive the same health and welfare benefits provided to the City's Group 1 Managers ("Executives"), including but not limited to long term disability and life insurance, as set forth in the Management Performance and Compensation Plan. Any future changes in such benefits shall inure to Employee without amendment of this Agreement.

(City of Santa Barbara, 2014)

Article 13

LIFE INSURANCE

COMMENT: Not all city attorney contracts provide the benefit of life insurance. Some equate the city attorney's coverage to that of other managers. The two below specifically address the issue and set out designated coverage.

Section 7. Life Insurance

The Employer agrees to provide Employee, at Employer's expense, with a term life insurance policy equal to twice the Employee's annual salary (Table 9, Section 18-2 FBSP).

(City of Riverside, 2017)

Section 4 Health, Disability, Life Insurance and Other Benefits

Employer shall obtain term life insurance for Employee in an amount equal to Employee's gross annual salary (including all salary increases during the life of this Agreement) or Employer's maximum allowable amount of term life insurance coverage under Employer's contract with its insurer, if said amount is less than Employee's gross annual salary. Employee shall have the right to choose the beneficiary on such policies.

(City of Hayward, 2020)

Article 14

SICK LEAVE

COMMENT: The amount of sick leave granted to city attorneys varies, as demonstrated by the provisions below. Accrual going forward typically reflects how other managers accrue sick leave.

4. Vacation and Sick Leave

- a. _____ shall be credited with fifteen (15) days of sick leave as of the commencement of employment as City Attorney and shall accrue fifteen (15) days of sick leave annually with unlimited accumulation. Sick leave may be used in accordance with policies applicable to department head employees of the City. _____ shall retain such vacation and sick leave balances she has earned by virtue of her employment with the City of Berkeley.

(City of Berkeley, 2021)

(3) Leave allowance

- c. The City Attorney shall be given 80 hours of sick leave effective upon the execution of this agreement and shall accrue on a monthly basis the same as other employees in the Unrepresented Management Employee group. The current rate of accrual is eight (8) hours per month. The City Attorney shall be eligible to accumulate sick leave up to that which can be accumulated in three (3) years or Two Hundred Eighty-Eight hours. The City Attorney shall not accrue annual leave beyond the maximum allowed. Upon retirement from the City, the City Attorney shall not be entitled to cash out any remaining sick leave balance.
- d. The City Attorney may use sick leave for the purpose of bereavement leave up to a maximum of three (3) working days per bereavement on the same basis as other employees in the Unrepresented Management Employee group.

(City of Vallejo, 2018)

5.6. Sick Leave upon Start of Employment.

On the Employment Start Date, _____ will be credited with 96 hours of sick leave, in addition to the standard accruals provided in the Compensation Plan for Management and Professional Personnel and Council Appointees, as it currently exists and may be changed from time to time.

(City of Palo Alto, 2011)

Article 15

RETIREMENT

COMMENT: Retirement provisions in city attorney employment agreements address the main plan covering the city attorney (e.g., Public Employees' Retirement System) and payment of required contributions. They may also cross-reference other retirement savings plans or deferred compensation plans, as seen in the next article, Deferred Compensation.

9. Retirement

_____ will be covered by the City's "miscellaneous" 2% at 55 PERS plan during his employment. _____ will pay both the 7.0% employee contribution for this benefit and an additional 1.868% of the employee's PERSable earnings toward the employer retirement contribution. This 8.868% contribution by _____ shall be in accordance with Section 414(h)(2) of the Internal Revenue Code under which employee contributions shall be tax deferred and not subject to taxation until the time of constructive receipt.

(City of Alameda, 2019)

5. Retirement

The City is a member of the Public Employees Retirement System (PERS) and the City Attorney's retirement formula shall be "2.5% at 55." The percentages of the City's contribution and City contribution shall be as established by City ordinance or resolution for City non-safety employees hired before January 1, 2011. By way of reference, as of the date of this Agreement, non-safety employees hired before January 1, 2011 shall pay the employee's share equal to eight percent (8%) of the employee's gross salary and the portion of the employer's share equal to three percent (3%) of gross salary.

(City of Glendale, 2015)

5.1. Standard New-Tier Pension. _____ shall be enrolled in and shall be a member of the California Public Employees' Retirement System ("PERS"), with benefits as provided under the City's contract with PERS, including the 2% @ 60 miscellaneous formula applicable to new employees. Employee contributions shall be paid as provided in the Compensation Plan for Management and Professional Personnel and Council Appointees, as it currently exists and may be changed from time to time.

5.2. 401(a) Defined Contribution Retirement Plan. The City shall pay \$1,250 per month to a 401(a) retirement plan account established for _____. _____ may make additional contributions to the legal maximum.

5.3. 457 Retirement Plan. _____ shall be eligible, at her discretion, to make voluntary contributions to the City's 457 plan, to the maximum extent allowed under the plan documents or by law.

(City of Palo Alto, 2011)

Article 16

DEFERRED COMPENSATION

COMMENT: If a city grants the city attorney a deferred compensation benefit, it may appear in the same article as retirement. The provisions below treat the subject separately. Like many other benefits, deferred compensation is often provided on the same basis as for other management employees.

Section 4. Deferred Compensation

In addition to the sums otherwise payable to Employee hereunder, the Employer agrees to contribute matching funds to a deferred compensation account in the amount set forth in the Employer's Fringe Benefit and Salary Plan ("FBSP").

(City of Riverside, 2017)

D. Benefits.

1. Deferred Compensation/Retirement Health Savings. The City shall provide to the City Attorney a One Thousand Five Hundred Dollar (\$1,500) monthly contribution to the City's deferred compensation plan.

(City of San Mateo, 2021)

7. -Deferred Compensation (Money Purchase Pension Plan)

_____ is eligible to participate in and receive benefits from the deferred compensation plan (voluntary contributions to a money purchase pension plan) to the same extent as other employees in the Executive Management Compensation Plan. _____ must participate in the deferred compensation plan in order to make or receive (if any) the annual deferred compensation plan contributions described in the Executive Management Compensation Plan and any contributions made by _____ to such plan are voluntary and at _____'s sole discretion.

Additionally, beginning May 13, 2019, the City shall provide to _____ \$6,000 annually (i.e. from May 13 of each year to May 12 of the following year) in a deferred compensation/supplemental retirement plan, which plan shall be as mutually agreed by the City and _____.

(City of Alameda, 2019)

Article 17

HOLIDAYS

COMMENT: As with many other benefits, holidays are typically granted to city attorneys to the same extent they are afforded to other management employees.

(2) Holidays

(a) Declared Holidays - The City Attorney shall be entitled to the same eleven (11) holidays each fiscal year as set by the City Council and under the same terms as provided to the Unrepresented Management Employee group.

(City of Vallejo, 2020)

3.1 General Benefits

» Section 11 Other Benefits: Management Incentive/Education Pay; Tuition Reimbursement and Bi-Lingual Pay; Standard Holidays, Mileage and Business Reimbursement as provided to other administrative employees.

(City of South Lake Tahoe, 2018)

Article 18

FINANCIAL ALLOWANCES

COMMENT: The most common form of financial allowances provided to city attorneys are for automobiles and cell phones. Somewhat less common is an allowance for a gym membership and fitness classes, as appears in the Hayward excerpt below.

13. Transportation Allowance

_____ shall receive \$500 each month as a transportation allowance in exchange for _____ making his personal automobile available for City related business or using public transportation in lieu of using his automobile. _____ will also be entitled to mileage reimbursement at standard rates for trips of over 100 miles taken on City business when such business trips are consistent with City travel policy.

(City of Alameda, 2019)

Section 7 Personal Equipment and Automobile Allowance /Health and Wellness Reimbursement

Employee shall receive a \$450 per month stipend for the use of personal equipment and automobile, payable bi-weekly at the rate of \$207.69 per pay period. Personal equipment includes, but is not limited to cell phone, iPad, laptop, printers, etc. Employee may be reimbursed for mileage expenses incurred for non-routine meetings and conferences if vehicle travel exceeds fifty (50) miles one-way. Non-routine meetings are those that do not occur at a regular interval, i.e.: weekly, monthly, annually, and/or where participation in the meeting is not a requirement of the position. Employer agrees to provide Employee mileage reimbursement for qualified expenses at the same level as provided for Unrepresented Management Employees.

Employer will reimburse Employee the equivalent of a maximum of one hundred dollars (\$100.00) per month for expenses associated with health and wellness programs. This reimbursement may be used for the payment of recurring monthly fees associated with gym or health club memberships, fitness classes, personal trainers, weight loss programs, or other health and wellness related expenses. Requests must be made in writing and submitted with proof of enrollment and receipt(s).

(City of Hayward, 2020)

(3) Cell Phone Allowance

The City Attorney shall be provided a monthly cell phone allowance of \$100.00 in exchange for making a non-City-owned cell phone available for the City Attorney's own use and for City-related business and/or functions during, before and after normal work hours.

(4) Automobile Allowance

The City Attorney shall be provided a monthly automobile allowance of Five Hundred Dollars and No Cents (\$500.00) in exchange for making a non-City- owned vehicle available for the City Attorney's own use and for City-related business and/or functions, during, before and after normal work hours. The City Attorney shall provide auto insurance, fuel and maintenance for this vehicle.

(City of Vallejo, 2020)

Article 19

DISABILITY

COMMENT: City attorney contracts often give the city the right to separate the city attorney in the event of an extended disability and inability to perform job duties. Obviously, such provisions are subject to the constraints of federal and state disability laws.

- e. If, for a period of four (4) successive weeks beyond the expiration of any accrued sick leave and vacation, _____ is disabled or is otherwise unable to perform her duties because of sickness, accident, injury, mental incapacity, or ill health, the City shall have the option to terminate this Agreement. If the City exercises this option, _____ shall nonetheless be compensated for any accrued leave time and other accrued benefits, including, but not limited to, long-term disability insurance benefits for which _____ is eligible; however, _____ shall not receive the severance pay described in Section 3.d. above.

(City of Berkeley, 2021)

(3) Disability or Inability to Practice

(a) In the event the City Attorney becomes mentally or physically incapable of performing the City Attorney's essential functions and duties with reasonable accommodation and it reasonably appears such incapacity will last for more than 6 months, the City Council may, subject to state and federal law, terminate the City Attorney. If the City Council does elect to terminate the City Attorney due to incapacity, the City Attorney shall not receive severance benefits provided in Section 5.0 below.

(City of Vallejo, 2020)

Article 20

RELOCATION/MORTGAGE ASSISTANCE

COMMENT: When a city attorney is hired from outside the city, it is not uncommon to provide individualized financial assistance in the form of moving expenses. Somewhat less common is a provision for mortgage assistance to help with the purchase of a home by the relocating city attorney, as seen in the city of Sunnyvale provision below. Such financial assistance provisions vary greatly depending on the particular needs of the new city attorney.

8. Relocation Expenses. The City agrees to reimburse Employee for moving expenses associated with relocation in connection with City employment. Relocation expenses means the actual cost of relocating Employee, her family and their belongings from Stockton, California to Sacramento, California, as well as incidental expenses associated with the relocation such as storage and insurance. The relocation expenses shall include only those expenses associated with relocation that are approved in writing by the City Manager. Employee agrees to provide original receipts for all reimbursement claims.

10. Repayment of Relocation Expenses. In consideration for the City reimbursing the costs of moving, the Employee agrees to remain employed by City for a period of thirty-six months. If Employee is terminated by City, employee is not obligated to repay relocation expenses. If Employee leaves employment prior to completion of that period, Employee will be liable to City for all moving expenses which City has paid in connection with such expenses on a pro rata basis as follows:

- a. Moving expenses/36 = monthly moving expense (“MME”)
- b. MME x (36— number of months worked) = reimbursement.

(City of Sacramento, 2018)

C. Relocation/Moving Expenses

ATTORNEY shall be allotted Eight Thousand Dollars (\$8,000) for moving and related expenses, which shall be remitted as a lump sum payment in the first pay period following ATTORNEY’S commencement of employment with ANAHEIM.

(City of Anaheim, 2018)

15. Moving and Relocation Expenses

The first week in June of 2019, the City shall pay _____ \$16,000 for expenses associated with moving and relocating _____ from his current residence to the Bay Area, which expenses include packing, moving, storage costs, unpacking and insurance charges. Additionally, the City shall reimburse _____ for mileage costs for moving two personal automobiles from his current residence to Alameda at the current IRS allowable rate of \$0.58 per mile.

(City of Alameda, 2019)

Section 7. Mortgage Assistance

The City Council shall provide Mortgage Assistance to Employee as provided and subject to the terms in Council Resolution No. 712-15. Employee’s eligibility for participation in the City’s Mortgage Assistance Program is conditioned on Employee’s application to participate in the Mortgage Assistance program within two years of commencing employment with the City on January 19, 2016, the purchase of a residence within the City of Sunnyvale within two years of commencing employment with the City on January 19, 2016 (as documented by a purchase and sale agreement and the opening of escrow for the purchase of the property) and the actual and continued residence of Employee in the property within the City of Sunnyvale purchased with City Mortgage Assistance.

(City of Sunnyvale, 2015)

Article 21

INDEMNIFICATION

COMMENT: Commonly city attorney contracts include provisions for the city to defend and indemnify the city attorney for costs incurred in a lawsuit or other legal challenges arising from the performance of city attorney job duties. Typically, there are exceptions if the city attorney is found to have committed a crime or engaged in abuse of office.

Section 9. Indemnification.

In addition to that required under state and local law, CITY shall defend, save harmless, and indemnify _____ against any claims, demands, causes of actions, losses, damages, expenses (including but not limited to attorney’s fees as may be authorized against public entities or officers consistent with state law) or liability of any kind whether stated in or arising from tort, professional liability or any other legal action or equitable theory, whether groundless or otherwise arising out of an alleged act or omission occurring in the performance of _____’s duties as CITY ATTORNEY to the fullest extent permitted by law. CITY may compromise and settle any such claim or suit, and shall pay the amount of any settlement or judgment rendered thereon.

(City of San Luis Obispo, 2020)

E. Indemnification

Except as otherwise provided by law, and provided that City Attorney complies with the provisions of Sections 825 and 825.6 of the California Government Code, as now existing or hereafter amended, City shall defend, hold harmless, and indemnify City Attorney 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 City Attorney's duties in accordance with the provisions of Sections 825 and 825.6, as now existing or hereafter amended. City may conduct such defense reserving the rights of City not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of City Attorney's employment as an employee of City. City is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of City Attorney's employment as an employee of City. Nothing in this Agreement authorizes or obligates City to pay that part of any claim or judgment that is for punitive or exemplary damages. City may compromise and settle any such claim or suit and pay the amount of any settlement or judgment rendered therefrom only to the extent authorized in Sections 825 through 825.6, as now existing or hereafter amended.

If the City Attorney is convicted of a crime involving an abuse of her office or position, as defined in Government Code Section 53243.4, then the City Attorney shall fully reimburse the City for (1) any paid administrative leave salary paid by the City to the City Attorney pending any investigation concerning said crime, (2) funds provided to the City Attorney for her legal criminal defense, and/or (3) any severance pay or cash settlement paid to the City Attorney related to her termination by the City. Said reimbursements are required if such payments are made, even if the payments were made by the City in the absence for any contractual requirement to do so.

(City of Vallejo, 2020)

9. Indemnification

- A. ANAHEIM shall defend, hold harmless and indemnify ATTORNEY against any tort, professional liability claim or demand or other legal action, whether groundless or otherwise, arising out of any alleged act or omission occurring in the performance of ATTORNEY's duties or resulting from the exercise of judgment or discretion in connection with the performance of duties or responsibilities, unless the act or omission involved willful misconduct and/or illegal acts. ATTORNEY may request, and ANAHEIM shall not unreasonably refuse to provide, independent legal representation at ANAHEIM's expense. Legal representation, provided by ANAHEIM for ATTORNEY, shall extend until a final determination of the legal action, including any appeals brought by either party. ANAHEIM shall indemnify ATTORNEY against any and all losses, damages, judgments, interests, settlements, fines, court costs and other reasonable costs and expenses of legal proceedings, including attorney fees, and any other liabilities incurred by, imposed upon or suffered by ATTORNEY in connection with or resulting from any claim, action, suit or proceeding, actual or threatened, arising out of or in connection with the performance of ATTORNEY's duties. Any settlement of a claim must be made with prior approval of ANAHEIM in order for indemnification, as provided for in this Section, to be available.
- B. ANAHEIM agrees to pay all reasonable litigation expenses of ATTORNEY throughout the pendency of any litigation or legal proceeding to which ATTORNEY is a party, witness or advisor to ANAHEIM arising out of ATTORNEY's performance of duties for ANAHEIM. Such expense payments shall continue beyond ATTORNEY's employment with ANAHEIM as long as such legal proceedings are pending. Post employment, ANAHEIM agrees to pay ATTORNEY for reasonable consulting fees and travel expenses when ATTORNEY serves as a witness, advisor or consultant to ANAHEIM regarding pending legal proceedings.

(City of Anaheim, 2018)

Article 22

BONDING

COMMENT: If any fidelity or surety bond is required of the city attorney, the city typically pays the cost of such a bond.

20. Bonds

The City shall pay the full cost of any bonds, fidelity or otherwise, required of _____ under any applicable state or local law or ordinance relative to his performance of his duties as City Attorney

(City of Alameda, 2019)

Section 16. Bonding

Employer shall bear the full cost of any fidelity or other bonds required of Employee under any law or ordinance.

(City of Hayward, 2020)

Article 23

PROFESSIONAL DEVELOPMENT

COMMENT: Many contracts contain provisions to pay or reimburse the city attorney for expenses incurred in joining organizations or attending conferences or taking courses related to professional development.

D. Professional Associations. The City shall pay dues and/or membership fees for Employee for professional associations that are related to the position and duties held by the Employee, subject to budget appropriations.

(City of Sacramento, 2018)

B. City Obligations

.....

- (5) The City agrees to pay the travel and subsistence expenses of the City Attorney to pursue official and other functions for the City, and meetings and occasions to continue the professional development of the City Attorney, including but not limited to national, regional, state and local conferences, and governmental groups and committees upon which the City Attorney serves as a member and as approved by the City Council in the City's annual budget. Any expenditure must be in conformance with any applicable City travel and reimbursement policy.
- (6) The City also agrees to pay reasonable costs for the travel and subsistence costs for the travel and subsistence expenses of the City Attorney for short courses, institutes and seminars that are necessary for the good of the City or for the professional development of the City Attorney and as approved by the City Council in the City's annual budget. Any expenditures must be in conformance with any applicable City travel and reimbursement policy.

(City of Vallejo, 2020)

Section 7. Professional Development

- A. COUNCIL hereby agrees to budget for and to pay for travel and subsistence expenses of _____ for professional and official travel, meetings, and occasions adequate to continue the professional development of _____ and to adequately pursue necessary official functions for the CITY, including but not limited to the

- League of California Cities Annual Conference, League of California Cities City Attorneys Department Conference, and such other national, regional, state, and local governmental organizations, groups and/or committees.
- B. COUNCIL also agrees to budget for and to pay for travel and subsistence expenses of _____ for short courses, institutes, and seminars that are necessary for her professional development and for the good of the CITY.
- C. Other professional development may be agreed upon from time to time between the COUNCIL and _____.
(City of San Luis Obispo, 2015)

Article 24

BAR DUES

COMMENT: Cities commonly pay the city attorney’s California State Bar dues, since membership in the State Bar is a prerequisite to practicing law in California. A provision to pay those dues is often accompanied by an agreement for the city to pay for membership dues in other organizations, as in the Alameda provision below.

3. Compensation and Benefits

-
- D. The City Council agrees to budget for and pay Employee’s annual California State Bar Association dues.
(City of Redwood City, 2016)

14. Membership Dues

Unless provided otherwise in the City’s adopted budget and subject to review and approval by the Mayor, the City shall pay up to a cap of \$2,500 for _____’s State Bar dues as well as other professional dues necessary to ensure _____’s participation in programs that enhance both _____’s standing and the City’s reputation, including national, regional, state and local associations and organizations.
(City of Alameda, 2019)

Article 25

PERFORMANCE EVALUATIONS

COMMENT: Most city attorney employment agreements contain provisions authorizing performance evaluations of the city attorney by the city council. They vary greatly in the level of detail as well as how the goals and criteria for evaluations are set. Some of those differences in approach appear in the sample provisions below.

3. Compensation and Evaluation

Within three months of appointment, the City Council shall jointly establish objective, verifiable measures of her performance to be completed during the first year and the City Council shall provide _____ with a performance evaluation at the end of the first year. During the initial performance evaluation, _____ shall present to the City Council on her goals and priorities for the City Attorney Department. An assessment of salary increase shall be part of the evaluation process. For each subsequent year during the term of this Agreement, the parties shall endeavor to

establish prospective objective, verifiable measures of performance for the ensuing year. As part of the annual performance evaluation, _____ shall present on goals and priorities for the City Attorney Department and key accomplishments over the past year.

(City of Berkeley, 2021)

9. Performance Evaluations of City Attorney

- a. Annual performance evaluations are an important way for the City Council and City Attorney to ensure effective communications about expectations and performance.
- b. The City Council recognizes that for the City Attorney to respond to its needs and to grow in the performance of the City Attorney's job, City Attorney needs to know how the City Council Members evaluate the City Attorney's performance.
- c. To assure that the City Attorney gets this feedback, the City Council shall conduct an evaluation of City Attorney's performance at least once each year. The City and the City Attorney agree that performance evaluations, for the purpose of providing additional input and feedback, may occur quarterly or several times during each calendar year. The Parties may use an outside facilitator paid by City funds to assist them in conducting this evaluation, upon the mutual agreement of the City Council and the City Attorney, to be paid by the City.
- d. During the annual evaluation process, the City Attorney and the City Council will create goals or other outcome measures that will provide the basis for assessing the next year's performance.
- e. The annual review and evaluation shall be in accordance with specific criteria developed jointly by the City Council and the City Attorney. Such criteria may be added to or deleted as the City Council may from time to time determine in consultation with the City Attorney.
- f. The City Council and the City Attorney shall define such goals and performance objectives as they mutually determine are necessary for the proper operation of the City for the attainment of the City Council's policy objectives, and the City Council and City Attorney shall further establish a relative priority among those goals and performance objectives.

(City of Glendale, 2015)

Section 4. Performance Evaluation.

- A. By April 30, 2010, COUNCIL and _____ shall establish mutually agreeable written goals, performance objectives, and priorities for the performance period ending March 30, 2011. Further, Council shall conduct an "interim" evaluation by October 29, 2010. An annual formal Council evaluation will be conducted in March of 2011 in accordance with the City's Appointed Official Evaluation Process. Consistent with the schedule outlined above, based on the Appointed Officials Evaluation Process, and subject to performance as assessed by the COUNCIL, the CITY ATTORNEY compensation shall be reviewed by COUNCIL in April 2011 consistent with the Management Pay-for-Performance System in place at that time.
- B. Each calendar year thereafter, COUNCIL shall review and evaluate the performance and compensation of _____ in accordance with the adopted Appointed Officials Evaluation Process, best management practices, and informed by comparison agency data.

(City of San Luis Obispo, 2015)

Section 8. Performance Evaluations

The City Council shall formally review and evaluate the performance of the Employee by December 31 or each year. Such review and evaluation shall be in accordance with the specific criteria developed by the City Council in consultation with the Director of Human Resources and Employee. The City Council shall provide Employee with their written comments and may discuss the review with Employee, at the choice of either the City Council or the Employee. The Employee shall have the right to respond orally or in writing to the evaluation.

The City Council shall also provide an informal mid-year performance review of the Employee after his first six (6) months of employment and every year thereafter.

(City of Sunnyvale, 2015)

Article 26

RESIGNATION

COMMENT: Resignations provisions in city attorney contracts typically set forth a requirement for the city attorney to give written notice in advance of resignation. The length of such notice varies greatly as can be seen in the provisions below. The consequences of failure to give such notice are not specified. Many resignation provisions make it clear that there will not be any severance payment.

- I. Resignation.* Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the City Attorney to resign at any time from his position as City Attorney or to retire from public service. In the event that the City Attorney voluntarily resigns his position, or retires prior to the expiration of the term of this Agreement, the City Attorney shall give City three (3) months' notice in advance, unless the parties agree otherwise. In the case of a voluntary resignation or retirement, no severance will be paid to the City Attorney.

(City of San Mateo, 2021)

Section 13. Resignation

In the event _____ voluntarily resigns her position with the CITY, she shall give the COUNCIL at least two (2) months advance written notice.

(City of San Luis Obispo, 2015)

10. Termination of Agreement

- a. Voluntary Resignation of City Attorney. City Attorney may voluntarily resign his position as City Attorney after giving the City at least forty-five (45) days written notice prior to the effective date of such resignation, unless such notice is waived in whole or in part by the City Council. In the event the City Attorney resigns from his employment, other than the provisions of this Agreement that are intended to survive termination, this Agreement shall terminate and City Attorney shall not be entitled to any Severance, which is authorized under Section 11 hereof for involuntary terminations.

(City of Glendale, 2015)

Article 27

TERMINATION

COMMENT: City attorney employment agreements often contain detailed provisions covering termination of the employment relationship. The council and the attorney may have competing interests and covering both often take several paragraphs. Most all termination provisions distinguish between a removal at the discretion of the council and termination for cause, clarifying that there is to be no severance pay in the latter case.

Section 4. Termination.

This Agreement may be terminated at any time as follows:

(a) By Employer.

Employer may terminate this Agreement at any time, either with or without cause, by majority vote of the total authorized membership of the City Council. Termination shall be under one or more of the following subparagraphs:

(1) For Cause:

- (A) **Misconduct.** In the event that Employer determines there is good cause to terminate this Agreement due to (1) malfeasance, (2) gross negligence, (3) fraud, or (4) conviction of a crime other than a traffic offense or infraction on the part of Employee, Employer shall give Employee notice of termination, which at the option of the Council shall either be effective immediately, or the notice shall specify the intent to terminate and the date the termination will become final. In either case the notice shall be accompanied by a statement of the basis for the termination. In the case of a termination that is effective immediately, Employee shall have the right to present any rebuttal information to the Council, in writing, no later than ten (10) calendar days after the termination. In the event that the Council gives notice of an intent to terminate at a future date, Employee shall have the right to present any rebuttal information to the Council, in writing, prior to the effective date of the termination. In either case, Employee shall have the right to be represented and to have a hearing before the Council, in open or closed session as authorized by the Brown Act, within fourteen (14) days following termination. The Council shall review any rebuttal information provided by Employee and any other relevant material and shall then determine whether to uphold the termination or to rescind it. The Council's decision shall be final. Any actions of Employer taken under this paragraph shall occur only after the majority vote of the total authorized membership of the City Council.
- (B) **Material Uncorrected Failure to Perform.** In the event that Employer determines there is good cause to terminate this Agreement that does not rise to the level of seriousness addressed above in subparagraph 4(a)(1)(A), such as (1) a repeated material failure to meet stated, reasonable performance objectives that are within Employee's control, or (2) uncorrected, material failure to present a positive image to the Council, staff, public or media on behalf of Employer, Employer may terminate the Agreement for cause provided Employer (1) first gives notice to Employee in writing of the alleged failure in performance and a reasonable opportunity to cure the problem, and (2) gives Employee a reasonable opportunity to present evidence to the Council in rebuttal to any alleged failure in performance or of any extenuating circumstances showing that the failure was beyond the control of Employee. Employer will not terminate for cause under this subparagraph 4(a)(1)(B) unless it is determined in writing that the evidence in support of the grounds for termination is substantial taking into account all of the information available to the Council, including any evidence presented by Employee. Any actions of Employer taken under this paragraph shall occur only after the majority vote of the total authorized membership of the City Council.
- (C) **No Severance Benefits.** In the event that this Agreement is terminated by Employer pursuant to Subparagraph 4(a)(1) for cause, Employee shall not be entitled to any severance benefits under this Agreement or under any other provision

of law or Employer policy or procedure, except for previously accrued vacation and management leave to which Employee is otherwise entitled.

(2) For Convenience:

Employer may terminate this Agreement at any time without cause and for its convenience as Employer shall in its sole discretion determine appropriate provided (1) Employee shall be given thirty (30) days notice and an opportunity to be heard, in open or closed session or in writing, as the Council shall determine consistent with the Brown Act, with respect to the proposed termination before it becomes effective, (2) the Council shall vote by not less than a majority of the total authorized membership of the Council to exercise its termination rights under this subparagraph. Employee shall be offered the severance benefits specified below in Section 5 which he may accept or reject as provided in Section 5.

(b) By Employee.

Employee may terminate this Agreement at any time, with or without cause, by (1) giving Employer forty-five (45) days advance written notice of his intent to terminate, or (2) may terminate sooner by mutual agreement with Employer. In the event that Employee exercises his right to terminate, he shall not be entitled to the severance benefits set forth below under Section 5 or to any other similar termination benefits under law or Employer's rules or regulations, provided however, that Employee shall be entitled to payment for any vacation, management leave and sick leave earned and unused at the time his notice of termination is effective.

(City of Escondido, 2017)

17. Termination of Agreement

The purpose of this Section 17 is to allow the parties to terminate this Agreement as expeditiously and smoothly as possible so that in exchange for the City's providing the severance described in this Section, _____ will release the City from any claims against the City.

The City, through a majority vote of its City Council and in either closed or open session, may terminate this Agreement, at its sole and absolute discretion, with or without cause. The City Council may request _____'s resignation and, if _____ so agrees, the resignation shall be considered a termination of employment without cause. The term "cause" is defined, for the purposes of this Agreement, as set forth in Section 18 below.

If the City terminates this Agreement without cause, _____ shall be paid a severance payment equal only to his then current full salary (Section 6), deferred compensation (Section 7), and medical and dental coverage for a period of six (6) months from _____'s receipt of written notice of termination or his agreement to resign as set forth in the previous paragraph. The severance payment shall be paid within 30 days of the City's termination without cause. In exchange for the payment of severance, _____ shall release the City from all claims against the City, its officials, employees and agents, and, as part of the consideration for _____'s receiving the severance, _____ shall cooperate with and provide assistance to the City in the transition of his duties to an acting, interim or new City Attorney, the terms of such transition to be mutually agreed upon at the time of the transition.

If the City terminates this Agreement with cause, the City shall have no obligation to continue the employment of _____ or to pay any salary, deferred compensation or medical and dental coverage as provided in the preceding paragraph.

18. Cause

For purposes of this Agreement, "cause" shall mean: (1) indictment, conviction or plea of nolo contendere to any felony or other crime involving moral turpitude; (2) material breach of City policy or this Agreement, which breach _____ has not cured, to the extent curable, to the satisfaction of the City Council within sixty (60) days after receiving notice of such breach; (3) fraud, embezzlement, misappropriation of funds or disclosure of confidential information; (4) misconduct

or gross negligence that results, or reasonably could be expected to result, in financial damage to the City; (5) failure to cooperate with an official investigation authorized by the City Council or the City Attorney's Office, or initiated by a governmental authority, in either case related to the City, its business, Council members or City employees; or (6) acceptance of employment from another source which is inconsistent with full time employment as Alameda's City Attorney.

(City of Alameda, 2019)

B. Termination and Removal

- (1) City Attorney is an at-will employee serving at the pleasure of the City Council under the authority of Vallejo Charter Section 401.
- (2) The City Council may remove the City Attorney pursuant to section 407 of the Charter. Notice of termination shall be provided to the City Attorney in writing. Page 8 Termination as used in this section shall also include: (i) a request by the City Council that the City Attorney resign, (ii) a percentage reduction in compensation, leave or other financial benefits of the City Attorney greater than the average percentage reduction experienced by the Unrepresented Management Employees during the same fiscal year in the same benefit, (iii) a percentage increase in the City Attorney's financial obligations to contribute to, assume the cost of or pay for any benefits greater than the average percentage increase in the Unrepresented Management Employees' financial obligations to contribute to, assume the cost of or pay for the same benefits occurring during the same fiscal year or (iv) the elimination of the City Attorney's position. Any such notice of termination or act constituting termination shall be given at or effectuated at a duly noticed regular meeting of the City Council.
- (3) Pursuant to the provisions of Vallejo Charter Section 407(c), an affirmative vote of at least five members of the City Council shall be required to terminate the City Attorney within 60 days after her initial appointment or within 60 days after any election at which members are elected to the City Council.

.....

D. Separation for Cause

- (1) Notwithstanding the provisions of Section 5.B.2, the City Attorney may be terminated for cause. As used in this section, "cause" shall mean only one or more of the following:
 - a. Willful misconduct;
 - b. Malfeasance;
 - c. Dishonesty for personal gain;
 - d. Conviction of a misdemeanor involving moral turpitude or any felony, provided that the City Attorney may be placed on administrative leave without pay should she be charged with a felony;
 - e. Continued abuse of drugs or alcohol that materially affects the performance of the Attorney's duties;
 - f. Repeated and protracted unexcused absences from the City Attorney's office and duties;
 - g. Willful abandonment of duties;
 - h. Acceptance of employment for another source which is inconsistent with full time employment as Vallejo's City Attorney and in violation of Section 6. D of this Agreement;
 - i. Failure to follow the lawful orders or instructions given by the City Council when it is sitting as a body in a lawfully held meeting;
 - j. Death or incapacity due to injury or illness (physical or mental);
 - k. Resignation by the City Attorney for any reason other than described in Section 5.B.2;

- l. Willful violation of any conflict of interest laws or regulations;
 - m. Fraud or dishonesty in securing this appointment;
 - n. Willful violation of State or Federal discrimination laws or any lawful City policies and procedures concerning race, religious creed, color, national origin, ancestry, sexual orientation, physical or mental disability, marital status, sex or age concerning either members of the general public or City employee(s); or
 - o. (a) Willful or unlawful or violation of any lawful City policies and procedures concerning retaliation against any other City official or employee or member of the general public who in good faith reports, discloses, divulges, or otherwise brings to the attention of any appropriate authority any facts or information relative to actual or suspected violations of any law occurring on the job or directly related thereto.
 - p. (b) Suspension of City Attorney's right to practice law by the State Bar of California, or City Attorney's failure or refusal to maintain a California State Bar license in good standing.
- (2) In the event the City terminates the City Attorney for cause, then the City may terminate this Agreement immediately, and the City Attorney shall be entitled to only the compensation accrued up to the date of termination, and such other termination benefits and payments as may be required by law. The City Attorney shall not be entitled to any severance benefits as provided in Section 5(C)(1).
- (3) In the event the City terminates the City Attorney for cause, the City and the City Attorney agree that neither Party shall make any written or oral statements to members of the public or the press concerning the City Attorney's termination except in the form of a joint press release which is mutually agreeable to both Parties. The joint press release shall not contain any text or information that would be disparaging to either Party. Provided, however, that either party may verbally repeat the substance of any such press release in response to inquiries by members of the public or press.

(City of Vallejo, 2020)

Article 28

SEVERANCE PAY

COMMENT: The severance pay provisions below from Escondido and Vallejo complement their termination provisions in the preceding article. South Lake Tahoe references Government Code 53260, which sets out certain constraints on severance pay, the main one of which caps severance pay at a maximum of eighteen (18) months.

C. Severance Pay

- (1) In the event the City Attorney is terminated as defined in Section 5 B (2) by the City Council during such time that the City Attorney is willing and able to perform the City Attorney's duties under this Agreement during the term of this Agreement or any extension thereof, then in that event the City agrees to pay the City Attorney a lump sum cash payment equal to twelve months' base salary, or equal to her monthly salary multiplied by the numbers of months left on the unexpired term of this Agreement, whichever is less. In addition, the City shall extend to the City Attorney the right to continue health insurance as may be required by and pursuant to the terms and conditions of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA). The City agrees to pay half of the premium for the City Attorney's COBRA coverage provided that the City Attorney is not already receiving medical coverage under another plan, for the same number of months for which the City Attorney is entitled to a lump sum cash payment under this Section, or until City Attorney either secures full-time employment or obtains other health insurance, whichever of these three events first occurs. The City Attorney shall notify the City within 5 days of securing new full-

time employment or insurance. The intent of the provisions contained in this section is to comply with Government Code Section 53260.

- (2) In exchange for the consideration provided in paragraph C(I) above, the City Attorney shall execute a release of all claims in a form mutually acceptable to the Parties.

(City Vallejo, 2020)

Section 5. Severance

In the event that Employee's employment is terminated by Employer for convenience pursuant to Section 4(a)(2) above, Employee shall be offered and shall be entitled to the severance benefits stated in this Section 5, as follows:

(a) Computation; Items included.

Employer shall offer to Employee, and subject to Employee's exercise of his right to accept or decline severance benefits as set forth below, to pay salary and benefits but exclude other benefits provided by this Agreement, for a period of three hundred sixty-five (365) days from the date of termination. Such severance benefits shall be paid in addition to payment of any accrued vacation, sick leave, or management leave otherwise payable to Employee.

(b) Separately Negotiated; Waiver.

The parties expressly acknowledge and agree that these severance pay provisions have been independently negotiated. Acceptance by Employee of the severance pay benefits provided by this Section 5 shall operate as a full and complete waiver and release of any and all rights, claims, and/or causes of action which Employee may have, or have had, at any time, in the past or in the future, arising out of Employee's employment by Employer, including but not limited to claims for wrongful termination of this Agreement. If Employee wishes to retain any such rights, Employee must decline to accept the severance benefits provided by this paragraph. Employee shall notify Employer of this election to accept or reject these severance benefits within seven (7) days of notice of termination of this Agreement, or within such other time period as the parties may agree to in writing.

Acceptance of the severance benefits under this paragraph will operate as a general release on the part of Employee as to all claims, known or unknown, and Employee specifically waives the provisions of California Civil Code Section 1542 which provides:

GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

- (c) The severance provisions of this Agreement shall not apply in the event Employee is terminated for cause.
- (d) Regardless of the term of this Agreement, if this Agreement is terminated, any cash settlement related to the termination that Employee may receive from Employer shall be fully reimbursed to Employer if Employee is convicted of a crime involving abuse of Employee's office or position.

(City of Escondido, 2017)

5. Severance Pay

5.1 If the AGREEMENT is terminated without cause, City agrees to provide a severance equal to six (6) times her then current monthly BASE SALARY.

5.2 The severance pay provisions of Section 5.1 are subject to and shall be interpreted to comply with the limitations set forth in Government Code Section 53260. Any severance shall be paid in a lump sum or in equal amounts distributed

over the usual pay schedule, at _____’s option. An election to received severance pay distributed over the usual pay schedule does not extend the period of employment beyond the City-established termination date.

(City of South Lake Tahoe, 2018)

B. Termination by Employer

.....

- 3. Employee shall receive twelve (12) months severance pay consisting of Employee’s base salary, the cash value of twelve (12) months of cafeteria plan and automobile allowance at the effective date of termination and a cash payment of accrued vacation leave. The PERS retirement contribution shall not be included in the severance pay. Nothing in this section shall extend the amount of time served for purposes of receiving any benefit provided in this Agreement.

(City of Santa Barbara, 2014)

Article 29

RESOLUTION OF DISPUTES

COMMENT: Some employment agreements set out dispute resolution procedures which constitute administrative remedies that typically have to be exhausted before accessing court. Presumably, a procedure to address potential violations of the agreement would apply when the attorney disputes whether there was ‘cause’ for separation.

SECTION 9. Dispute Resolution

- (a) Informal Meet and Confer. The parties agree to meet and confer informally as the first step towards resolution of any dispute between them arising out of or related to this Agreement. The Council may be represented by a representative of its choosing, and Employee may be represented as well.
- (b) Council Resolution. If the parties are unable to resolve the matter informally through meet and confer, the matter shall be submitted to the Council for final resolution at a meeting to be held by the Council within thirty (30) days of submittal, and the Council shall promptly make a final decision, unless Employee and the Council mutually agree to a longer period.
- (c) Litigation. Neither party shall commence any litigation, arbitration, or other formal dispute resolution process until the above referenced informal meet and confer session and final Council determination have occurred.

(City of Escondido, 2017)

Section 22 — Mediation of Disputes. In the event that any dispute arises between the parties regarding the interpretation or implementation of any provision of this Agreement, the parties shall first submit the dispute to voluntary mediation prior to the filing of any lawsuit. If the parties cannot agree on selection of a mediator, then the matter shall be

submitted to the Judicial Arbitration and Mediation Services (“JAMS-ENDISPUTE”) office in Walnut Creek, California, with a panelist to be assigned by that office’s administrator.

(City of Antioch, 2019)

Article 30

GENERAL/MISCELLANEOUS

COMMENT: Many city attorney employment agreements conclude with standardized legal language that deals with the agreement itself. Typical samples of such language appear below.

12. General Provisions.

- a. **Entire Agreement.** This written Agreement contains the entire understanding between the parties as to the subject matter hereof and supersedes all prior and contemporaneous oral and written understandings or agreements of the parties and as such, is fully integrated. No promise, representation, warranty or covenant not included in this Agreement has been or is relied on by any party.
- b. **Severability.** If any portion of this Agreement or the application thereof is held unconstitutional, invalid, or unenforceable, the remainder of this Agreement shall not be affected and shall remain in full force and effect to the greatest extent permitted by law.
- c. **Amendments.** This Agreement may be amended only in writing and duly authorized and executed by both parties.
- d. **Governing Law and Venue.** This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of California. Litigation arising out of or connected with this Agreement shall be instituted and maintained in the County of Sacramento.

(City of Sacramento, 2018)

Section 14. General Provisions

This shall constitute the entire agreement between the parties as to the subject matter hereof and supersedes all prior and contemporaneous oral and written understandings or agreements of the parties. No promise, representation, warranty or covenant not included in this Agreement has been or is relied on by any party thereto. If any provision or any portion hereof is held unconstitutional, invalid, or unenforceable, the remainder of this Agreement or portion hereof shall be deemed severable, shall not be affected, and shall remain in full force and effect. This Agreement may only be amended in writing and duly execute by both parties.

(City of Riverside, 2017)

Section 10. General Provisions

- (a) **Governing Law.**
This Agreement shall be interpreted and enforced in conformance with California law.
- (b) **Entire Agreement.**
This Agreement together with the exhibits represents the entire Agreement between the parties and supersedes any prior agreements, written or oral, and any representations, written or oral, not expressly included herein.
- (c) **Venue.**
The venue for any litigation to interpret or enforce this Agreement shall be the San Diego Superior Court, North County Division.

(d) **Integration Clause.**

If any part, provision, paragraph or subparagraph of this Agreement shall be held to be void or unenforceable by a final judgment of a court of competent jurisdiction, then unless that provision is found in such proceeding to be material to this Agreement, said void or unenforceable provision shall be severed from this Agreement and the balance of this Agreement shall remain in full force and effect. In the event that the void or unenforceable provision is found to be material to this Agreement then the entire Agreement shall be voided.

(City of Escondido, 2017)

Appendix C

Legal Services Agreement Provisions for Contract City Attorney

Many cities choose to enter into legal services agreements with an individual or a law firm to serve as city attorney. If a law firm provides services to the city, one individual should be designated as the city attorney.

If a city contracts with an individual to serve as city attorney that person is typically not a full-time employee of the city. He or she may also represent other clients. Many of the sample provisions below differ depending on whether the employment agreement is with a firm or an individual.

The contract provisions below reflect the verbatim language in the city attorney contract for the city indicated. Gender references are those included in the actual city attorney contract and reflect the preferred pronouns of the city from which the contract language was excerpted.

Provisions typically found in legal services agreements for contract city attorneys often are very similar — in some cases identical — to those found in full-time city attorney contracts (See Appendix A). Most of the representative articles listed below differ in whole or in part from the provisions found in most full-time city attorney contracts.

Article 1

DESIGNATION OF CITY ATTORNEY

COMMENT: California Government Code Section 36505 is commonly understood to mean that a specific individual should be designated as the city attorney. If the city is contracting with a law firm, typically an individual from the firm is named the city attorney.

City Attorney Appointment

_____, Esq is assigned as City Attorney. He may delegate City Attorney duties such as research and administrative duties to other attorneys employed by _____ and may designate an Assistant City Attorney and one or more Deputy City Attorneys with City Council prior authorization and approval.

(City of Carmel-By-The-Sea, 2018)

Article 1. Appointment of City Attorney

- 1.1 Pursuant to Government Code Section 36505, City Council of CITY hereby appoints ATTORNEY to provide contract city attorney services for CITY.
- 1.2 _____, a partner with ATTORNEY shall serve as City Attorney for CITY, who shall be primarily responsible to perform or cause to be performed the work described in this Agreement.
- 1.3 The City Attorney shall be entitled to appoint one Assistant City Attorney and Deputy City Attorney as necessary to perform the services referenced in this Agreement. The selection of the Attorney to act in the capacity of Assistant City Attorney and/or Deputy City Attorney shall be subject to the approval of City Council.

(City of Dana Point, 2011)

1. Designation of City Attorney

_____ is hereby retained to provide legal services to the City, as its City Attorney, effective _____. _____ will supervise such other members of his law firm, who shall have at least four years of public/municipal law experience as a California-licensed attorney, to assist him in the performance of this agreement, and to act as City Attorney when _____ is unable to act due to illness, vacation or other reason, or when _____ requires assistance. The parties acknowledge that because the relationship between a client and its attorney is only effective when the client has complete trust and confidence in the attorney, the City Council or the City Manager will have the authority to veto any attorney who _____ selects to assist him in the performance of this Agreement.

(City of San Carlos, 2008)

Article 2

INDEPENDENT CONTRACTOR/AT-WILL STATUS

COMMENT: A contract city attorney is typically designated an independent contractor, rather than an employee. In some cases, he or she can be identified as an ‘at-will’ employee, as demonstrated by the city of Galt below. There may be procedural steps involved in terminating a contract city attorney agreement and those can resemble the provisions found in the Full-Time City Attorney Employment Agreements.

7. Termination of Agreement and Legal Services

This Agreement and legal services to be rendered under it may be terminated at any time upon written notice from either party, with or without cause.

(City of San Fernando, 2012)

3.6 Independent Contractor

_____ shall perform all legal services required under this Agreement as an independent contractor of the Client and shall remain, at all times as to the Client, a wholly independent contractor with only such obligations as are required under this Agreement. Neither the Client, nor any of its employees, shall have any control over the manner, mode or means by which _____, its agents or employees, render the legal services required under this Agreement, except as otherwise set forth.

Except as it relates to services performed by _____ for the Client, the Client shall have no voice in the selection, discharge, supervision or control of _____'s employees, representatives or agents, or in fixing their number, compensation, or hours of service.

(City of Clayton, 2011)

3. At Will Employment

Employee is an "at will" employee who shall serve at the pleasure of the City Council. Accordingly, the City Council may terminate Employee's employment at any time, with or without cause. This provision may not be altered except by a written instrument executed by Employee, and formally approved by the City Council, which specifically references this Agreement and section.

(City of Galt, 2010)

Article 3

SCOPE OF SERVICES

COMMENT: A critically important provision in a legal services agreement is a clear delineation of the services to be provided by the contract city attorney. Such a delineation may vary greatly from city to city. Representation in specific types of proceedings should be identified with particularity. A city council may direct its city attorney to prosecute municipal code violations, like the city of Mission Viejo does below. Any such direction is subject to the ethical obligation of the attorney to independently assess the prosecution of an individual case. A city council may decide that it wants its city attorney to provide bond or financial services, as the city of Bell did below. Before making such a decision, the council should assure that the city attorney and/or law firm has the specialized expertise to provide such services.

2. Scope of Work and Duties

- A. _____ shall perform any and all work necessary for the provision of City Attorney services to City, including, without limitation, the following:
- (i) Attendance at City Council meetings unless excused by the City Manager or his/her designee, and other board and commission meetings on request of the City Manager or his/her designee; and
 - (ii) Provide legal advice, written legal opinions, and consultation on all matters affecting the City to the City Council, City Manager, boards, commissions, committees, officers, and employees of City and as requested by the City Council, the City Manager, or his/her designee, in accordance with such policies and procedures as may be established by City from time to time; and
 - (iii) Be available for telephone consultation with City staff, as needed on legal matters which are within their area of operation and maintain office hours at City Hall as requested by the City Manager at times mutually agreed to by the City Manager and designated City Attorney; and
 - (iv) Prepare or review necessary legal documents such as: ordinances and resolutions; all agreements of any nature; all real property instruments of any nature including purchase agreements and escrows, leases, covenants, deeds, easements and licenses; bond size, amount, and offering terms and conditions; public works construction documents including bid specifications, contracts, bonds, insurance, liens and related documents; memorandums of understanding; franchise agreements; and all similar documents, all as requested by City; and
 - (v) Represent and advise City on pending and potential litigation as requested by City; notwithstanding the foregoing, it is expressly understood that _____ shall not be responsible for any pending litigation matter(s) handled

by attorneys previously or otherwise employed by the City until all files have been transferred to _____ and _____ has specifically appeared in the matter(s) as attorneys of record on behalf of City; and

(vi) Monitor pending and current litigation and case law as appropriate; and

(vii) Supervise outside legal services, if any.

(City of Yuba City, 2018)

Section 1. City Attorney

(a) City hereby retains Counsel to provide and Counsel agrees to provide legal services as City Attorney. The services to be provided shall be in the following categories:

(1) "Regular Services" shall include the following:

- (i) Attendance at all regular meetings of the City Council;
- (ii) Supervision of Assistant City Attorney;
- (iii) Manage litigation matters handled by firms other than _____; and
- (iv) Reviewing of all Agenda reports in connection with City Council meetings.

(2) "Extraordinary Services" shall include the following:

- (i) All representation of the City in litigation matters;
- (ii) All representation of the City in adversarial administrative proceedings such as personnel hearings, permit revocations and the like;
- (iii) Advising, negotiating and/or litigating regarding dissolution of the former _____;
- (iv) Reviewing all City Ordinances, Resolutions and contracts;
- (v) Negotiating and advising the City regarding economic development matters, development agreements or other non-routine or complex agreements and;
- (vi) Review agreements prepared by the assistant City Attorney;
- (vii) Negotiating and advising the City regarding economic development projects of the City, as may, from time to time, be specifically requested by Agency or City. Such services may include, but shall not be limited to, advising Agency, or City, their staff and consultants, preparing legal opinions and other legal documents requested by Agency, City, Financial Authority or Housing Authority, and/or preparing development agreements; and
- (viii) Special assignments not otherwise described in Sections 1(a)(1) and 1(a)(2) hereof.

(City of Lancaster, 2014)

6.6 Legislative/Lobby Services City authorizes firm to provide legislative and government relation services to City as its registered lobbyist in the State of California. Firm shall not charge or invoice City for legislative services under the compensation structure set forth in the Agreement.

(City of Turlock, 2019)

Section 2. Legal Services. The Firm shall perform the following legal services for the City:

.....

E. Undertake prosecution of violation of City ordinances as directed to do so by the City Council or City Manager.

(City of Mission Viejo, 2020)

6. Bond or Financial Services

Bond or Financial Services shall mean those situations where _____ acts as Bond Counsel for City with regard to the issuance of securities by City; after review and accord of the proposed issue by independent review Counsel if selected by City, _____ shall be compensated for Bond or Financial Services on a flat fee non-contingent basis of \$_____ per hour or on a contingent finance option as shown on Exhibit "A". The choice of options shall be solely at the discretion of the City Council.

(City of Bell, 2011)

Article 4

BUDGET AND BUDGETING

COMMENT: Many legal services agreements contain provisions that attempt to maintain fiscal control over the cost of legal services. This may include reference to the city budget as in the excerpt from the Modesto contract below or by requiring budgets for litigation as in the Pasadena provision.

d. Budget

- i. City acknowledges that the total costs of legal services of the City are a result of complex factors, many of which are beyond the control of Attorney. As City Attorney, Attorney will work closely with the City Manager and City Finance Department staff to create new tools to monitor the cost and efficiency of legal services to the City, and to endeavor to manage the City's total legal costs, including fees and costs paid to Attorney, to be within or below City approved budgets. Attorney shall have the authority, in consultation with the City Manager, to reallocate and reassign funds from and among various line items in the City budget for the City Attorney's Office or identified for disbursement to attorneys of the City. Should it become reasonably apparent to Attorney that the actual billings will exceed budgeted funds for the City Attorney's Office estimate of anticipated legal costs and fees, Attorney shall notify City thereof in advance and shall submit a revised written budget estimate and request for City's approval.

(City of Modesto, 2014)

3.0 Budgeting

Associate Counsel handling City matters will be expected to institute and to adhere to budgeting and planning procedures established in the sole discretion of the City Attorney. The general framework of the budgeting and planning procedures is as follows:

3.1 Budget.

- 3.1.1 On request of the City Attorney and on forms as may be required by the City, Associate Counsel shall provide a plan and a budget, or a revision thereof, which will include a projection of recommended steps to be taken in the assigned matter and a range of costs for each step.
- 3.1.2 The budget shall call for an estimate of the attorneys' hours and fees and disbursements during each phase and activity.
- 3.1.3 The budget is not a fixed fee agreement and is subject to revision. However, Associate Counsel understands and agrees that failure to timely submit a budget or major unjustified deviations therefrom may constitute a breach and result in termination of this Agreement with Associate Counsel.

4.0 Litigation Budgeting

Associate Counsel handling City matters will be expected to institute and to adhere to litigation budgeting and planning procedures established in the sole discretion of the City Attorney. The general framework of the litigation budgeting and planning procedures is as follows:

4.1 Case Budget:

- 4.1.1 Associate Counsel shall, on such forms as may be required by the City, if requested by the City Attorney, provide a Litigation Plan and a Case Budget, or revisions thereof, which will include a projection of recommended steps to be taken in the litigation and a range of costs for each step. The Plan and Budget will be reviewed and updated as necessary, at least every twelve months, or as more frequently requested by the City.
- 4.1.2 The Case Budget shall include an estimate of the attorney's hours, fees and disbursements during each phase and activity, including: 1) pre-commencement (legal and factual research for the complaint or answer); 2) pleadings; 3) motions (including research); 4) initial discovery; 5) factual investigation of merits (interviewing clients, employees and third parties); 6) review and abstract City documents; 7) expert (non-medical) investigation and report; 8) medical experts and examinations; 9) legal research on merits; 10) more thorough discovery (including the identify of deponents and expected costs of each deposition and preparation); 11) settlement evaluation and negotiations; 12) trial preparation; and 13) trial. All anticipated expenses must be listed and costs estimated.
- 4.1.3 The Case Budget should include the anticipated cost of each line item, the time allotted to complete it and the professional level of the person handling it.
- 4.1.4 Each line item should be given a code number that can be used in the billing process and in preparation of updated progress reports.
- 4.1.5 The Case Budget is not a fixed fee agreement and is subject to revision. However, Associate Counsel understands and agrees that failure to timely submit a Case Budget or major unjustified deviations therefrom may constitute a breach and result in termination of this Agreement with Associate Counsel.

(City of Pasadena, 2002)

Article 5

PRIVATE PRACTICE/CONFLICTS OF INTEREST

COMMENT: The sample provisions below reflect the concern city councils have about a city attorney representing clients other than the city, in addition to other ethical issues. Those concerns are particularly acute when the law firm providing city attorney services also represents other public agencies and perhaps even private sector clients. Although not common in legal services agreements, some such contracts may include a signed Oath of Office provision from article 20, section 3 of the California Constitution perhaps as an attachment to the Agreement. For an example, see the city of Pomona below.

7. Conflicts

_____ shall comply with all applicable laws and professional rules and standards relating to any known ethical conflict of interest involving the City and matters upon which _____ is providing legal services under this Agreement. _____ shall not reveal confidential information of the City except with the consent of the City Council or as otherwise required by law. _____ shall notify the City Council of any conflict of interest related to matters

upon which it is providing legal services under this Agreement upon discovery of any such conflict. In the event that such conflict is not or cannot be waived or resolved, the City shall retain alternate counsel.

(City of San Marino, 2017)

Absence of Conflicts

In order to avoid conflicts of interest among _____'s clients, _____ maintains a conflict of interest index. _____ will not represent any party with an interest that may be adverse to an indexed person without an examination to determine if a conflict of interest would be created. In connection with the City, _____ has indexed the following name: _____. Please review this list to determine whether any other individuals or entities should be added. Unless _____ hears from the City to the contrary in writing, _____ will assume by its signature on this Agreement that the above listing is accurate and complete.

(City of Beaumont, 2020)

7. Conflicts of Interest

In addition, _____ represents that she abides by the ethical principles adopted by the City Attorney's Department of the League of California Cities, including but not limited to Principle 3, which encourages city attorney conduct in a nonpolitical manner, such as not making political contributions to candidates for offices in cities she represents as city attorney. _____ represents that it also abides by the ethical principles.

(City of Pomona, 2018)

9. Conflicts of Interest

- A. COUNSEL has an extensive municipal and public law practice on a regional basis. COUNSEL represents a variety of public agencies in San Bernardino County, some of whom may interact with the CITY. COUNSEL will not represent the CITY and one of COUNSEL's public agency clients interacting with the CITY unless the CITY and the public agency client have consented in writing to such dual representation.
- B. The CITY and COUNSEL understand and agree that COUNSEL is Legal Counsel for the Local Agency Formation Commission of San Bernardino County. COUNSEL is also General Counsels for Big Bear Area Regional Wastewater Agency ("BBARWA"). This Agreement constitutes the CITY's consent for COUNSEL to represent CITY and the above-mentioned COUNSEL's public agency client interacting with the CITY. The CITY may withdraw such consent by giving written notice of such withdrawal of consent to COUNSEL. COUNSEL will give written notice to the CITY of the non-consent of any of COUNSEL's public clients to such dual representation.

(City of Big Bear Lake, 2016)

Exhibit "B"

OATH OF OFFICE

California Constitution Article 20, Section 3

I _____ do solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

(City of Pomona, 2018)

Article 6

COMPENSATION

COMMENT: Compensation for contract city attorneys varies greatly depending on the services being provided. As reflected in the provisions below, both retainers and hourly rates are used, and sometimes there is a combination of the two. Special rates are often described for particular services like bond or financial services. For example, it is not uncommon to build in rate adjustments to reflect increases in the Consumer Price Index, as the city of Laguna Niguel did below.

Compensation

_____ shall be compensated under the terms of this Agreement as follows:

A. General Legal Services

The City shall pay _____ a retainer of \$_____ per month, which amount will cover all general legal services up to fifty (50) hours per month. General legal services in excess of the 50 retainer hours per month shall be billed at the rate of \$_____ per hour. The retainer shall be prorated for the first partial month of services provided hereunder.

B. Specialized Legal Services/Special Projects

Specialized projects and non-litigation legal services not included within the retainer shall be billed to City at the rate of \$___ per hour. Any special projects billed outside of the retainer require prior approval of the City Council or City Administrator, or designee. Paralegal services shall be billed at the rate of \$___ per hour. All costs and expenses, except those set forth in Section 3.G below shall be deemed included in the foregoing hourly billing rates.

C. Litigation Services

Litigation matters approved by the City Administrator and/or City Council shall not be included in the retainer amount. Litigation legal services shall be billed at the rate of \$___ per hour. Paralegal services shall be billed at the rate of \$___ per hour. All costs and expenses, except those set forth in Section 3.G below shall be deemed included in the foregoing hourly billing rates.

D. City Prosecutor Services

_____ agrees to perform all necessary legal services as Contract City Prosecutor. Fees for code enforcement matters shall be \$_____ per hour. Paralegal services shall be billed at the rate of \$___ per hour. All costs and expenses, except for those as set forth in Section 3.G below shall be deemed included in the foregoing hourly billing rates.

E. Summary of Labor Rates:

Basic Legal Services (First 50 Hours)	\$	Per Month
Basic Legal Services (over the Retainer)	\$	Per Hour
Special Services/Project	\$	Per Hour
Litigation	\$	Per Hour
Paralegal:	\$	Per Hour

(City of Placentia, 2015)

4. Compensation

City and Attorney expect that virtually all time and expenses expected to be incurred in provision of these services will be included in the monthly retainer of \$_____. The monthly retainer is based upon an estimate of 50 hours per month to be spent on "included" services. The parties agree that the monthly retainer will not change if time spent on "included" services exceeds 50 hours. The parties agree to meet and confer at the request of the other on the subject of whether the monthly retainer accurately reflects time spent by Attorney on City included services. Time spent on "excluded services" as described in Attorney's proposal shall be billed at the hourly rate of \$_____

Attorney shall bill City on a monthly basis for services rendered in the prior month. Attorney's invoice shall describe in detail the services rendered and shall include a reference to the Legal Services Request which generated the invoice. Time spent shall be set forth in one-tenth of an hour increments. Work on excluded services shall be approved in advance by City through its City Manager or his or her designee.

(City of Imperial, 2020)

Section 3. Compensation

A. Legal Services shall be compensated as follows:

Retainer	\$ _____	per month (60 hours at \$_____/hr)
Excess Attorney time:	\$ _____	per hour for senior attorney/partners (Attorneys with at least 5 years' experience)
	\$ _____	per hour for junior attorneys
Paralegal:	\$ _____	per hour
Clerk:	\$ _____	per hour

Attorneys shall not be compensated for travel between the Attorneys' office and City Hall. Attorneys will not bill the City for routine copying, telephone, mileage, facsimile, word processing or electronic research within the Attorneys' contract plan. Attorneys will bill the City, without any mark-up, actual expenses for electronic legal research, parking, filing fees, transcripts, delivery charges, extraordinary copying and similar out-of-pocket expenses. These items will be separately designated on Attorneys' monthly statements as "disbursements" and will be billed in addition to the fees for professional services. To obtain reimbursement, Attorneys will submit a summary of these expenses, along with supporting receipts, within 30 days of the expense being incurred.

(City of Moreno Valley, 2020)

Billing Rates

- (1) For General City Attorney Services, City agrees to compensate _____ in the amount of \$_____ per month. The parties agree and understand that the City shall pay _____ \$_____ regardless of the amount of hours billed for General City Attorney Services, in recognition that the City is securing the General City Attorney legal services and availability of _____ during the term of this Agreement. _____ will issue an invoice that outlines the days and total amount of hours billed for "General Legal Services." These general entries will only require that the generalized topic of the legal services be described. For example, "General Legal Services – Office Hours or Administration."

(2) For Additional General and Retainer Services, City agrees to compensate _____ in the annual maximum amount of \$ _____ per Fiscal Year. Additional General Services may be provided by _____ at the sole discretion of the City Attorney or Chief Assistant City Attorney at the following Rates:

Partner -- \$____/hr.

Of Counsel -- \$____/hr.

Senior Associate -- \$____/hr.

Junior Associate -- \$____/hr.

Paralegal/Clerk -- \$____/hr.

Admin. Asst. -- \$____/hr.

Research Analyst -- \$____/hr.

_____ will issue an invoice that outlines the days and total amount of hours billed. These entries will describe the work performed.

(3) Additional Specialized Legal Services shall include legal services described as Additional Specialized Legal Services in Section 2(C) of the Agreement or for any other services not specified, but requested by the City. All such matters may only be compensated after the City Manager or the City Council approves a specific engagement letter outlining the work to be performed. The engagement letter shall identify the staff person requesting the work, the project, and the hourly rates at which the work shall be performed. The rates for Additional Specialized Legal Services shall range between \$____ and \$____ per hour for paralegals and \$____ and \$____ per hour for attorneys, unless a separate legal services agreement between the City and _____ is approved by the City Council.

(4) Reimbursable Services shall include those described in Section 2(D) of the Agreement. The hourly rate for such services will be the applicable private hourly rate of the respective _____ attorney, with or without a discount as negotiated at the time the new matter is approved through a written engagement letter.

(5) Bond and finance fees shall be as set forth in Section 6 of the Agreement and Exhibit A-1 set forth hereto.

(6) Project Participation costs shall be no more than \$_____ per year for public policy and ethics and not more than \$_____ per year for CEQA.

(City of Santa Ana, 2014)

5.2 Adjustment in Rates by change in CPI

Commencing July 1, 2020, and annual thereafter, the hourly rates set forth in Exhibit "A" shall automatically increase by the percentage change in the Consumer Price Index (All Urban Consumers; Los Angeles-Riverside-Orange County). The calculations shall be made using the month of April over the month of April in the prior year. Any such annual adjustment that equals or exceeds three percent (3%), and any other adjustments in the rates, shall require prior written approval of the City Council.

(City of Laguna Niguel, 2019)

D. Non-Billable Time

Attorneys shall not bill for non-productive travel time between the Firm's office in the City of Orange, and City Hall.

(City of Mission Viejo, 2020)

Article 7

BILLING STATEMENTS/INVOICES

COMMENT: It is common in legal services agreements to identify the timing and content of billing statements sent by the contract city attorney to the city. Also, there may be a description of what happens if a bill is questioned, as seen in the city of Menifee example.

c. Billing

- i. Legal Billings shall be submitted to City every thirty (30) days unless otherwise advised.
- ii. Each task shall be distinctly and completely identified. In litigation matters, City will not pay invoices that contain block billing. Each billing entry must contain the initials of the individual performing the task, the nature of the task, the date it was performed, and the length of time it took.
- iii. Costs under \$_____ shall be paid by Attorney and submitted with their normal billing.
- iv. City reserves the right to audit all invoices.
- v. Payments to attorney shall be made within a reasonable time after receipt of Attorney's invoice, generally within sixty (60) days of receipt. Attorney shall be responsible for supplying all documentation necessary to verify the monthly billings to the satisfaction of City. Attorney may add a late payment charge of 1.5% per month to invoices not paid within sixty (60) days.
- vi. In addition to the provision stated elsewhere in this Agreement regarding the payment of fees, billing and budgeting, the following guidelines for billing apply:
 - (1) City expects each individual working on the matter for which Attorney is retained to have the necessary experience to perform the services required to protect or pursue the City's interests in the matter in a cost effective manner, consistent with high professional and ethical standards.
 - (2) City expects Attorney to select an individual suitable for the task required and the specific needs of the matter, and to use the maximum efficiencies available. Billings for services performed by the inappropriate level of personnel will be reduced by City based on rate adjustments for the appropriate level of personnel.
 - (3) City will not pay for unnecessary review of texts, codes, rules of court, or other fundamental references. City will pay the hourly rate for specific legal research which is unique to the matter, assuming that Attorney has used maximum efficiencies and that Attorney has not already recently performed research in the same or very similar areas of law.

(City of Modesto, 2014)

2.1 Invoices. Law Firm shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. Invoices shall contain the following information:

- » Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- » The beginning and ending dates of the billing period;
- » A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion; and
- » The total number of hours of work performed under the Agreement by Law Firm.

2.2 Monthly Payment. Client shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. Client shall have 30 days from the receipt of an invoice that complies with all the requirements above to pay Law Firm.

(City of Willows, 2020)

8. Statements and Payment

_____ shall render to City a statement for fees, costs, and expenses incurred on a periodic basis (generally monthly). Such statement(s) shall indicate the basis of the fees, including the hours worked, the hourly rate(s), and a brief description of the work performed. Separate billing categories can be established to track costs associated with City funding categories or to track project costs, or such other basis as the City may direct. Reimbursable costs shall be separately itemized.

Payments shall be made by City within thirty (30) days of receipt of the statement, except for those specific items on an invoice which are contested or questioned and are returned by the City with a written explanation of the question or contest, within thirty (30) days of receipt of the invoice. Payments made more than thirty (3) days after the due date shall draw interest at the legal rate.

(City of Menifee, 2014)

Article 8

COSTS/EXPENSES

COMMENT: Most legal services agreements identify what costs incurred by the city attorney will be paid or reimbursed by the city. Sometimes there is a cap on the expenses that will be reimbursed without advance authorization, as in the excerpt from the city of Carmel-By-The-Sea below.

Costs

City Attorney will, in addition to fees for general counsel services, incur various costs and expenses in performing Legal Services under this Agreement. CITY agrees to reimburse City Attorney for all actual and necessary costs incurred in performing General Counsel Services and Extraordinary Services. Costs shall include reimbursement to City Attorney for reimbursable expenses including, but are not limited to fees required or assessed by law, court or other agencies, process server fees, notary fees, court reporter, outside investigator fees or expert fees pertaining to City litigation, messenger and delivery fees, postage, copying and travel expense for travel outside the borders of Monterey County. Mileage shall be charged at the then-current IRS reimbursement rate.

Unless required by circumstances to preserve the CITY's interests, no external cost in excess of \$ _____ shall be incurred without consent of the City Council. In order to aid in the preparation or presentation of any case as City Attorney, it may become necessary to hire special experts. No person shall be employed in this capacity, however, without consent of the City Council. City

Attorney is not obligated to pay or advance any costs or expenses, and may, at its sole option: (1) request CITY to advance payment for the cost item(s); (2) arrange to have the cost billed directly to CITY; or (3) advance the cost on behalf of CITY and see reimbursement.

If CITY authorizes attendance, the CITY shall reimburse City Attorney for registration and travel expenses (excluding hourly charges) relating to conferences or functions held by the League of California Cities, in the same manner as expenses are paid for Council Members, the City Administrator, or the City staff.

(City of Carmel-By-The-Sea, 2018)

5. Costs and Other Expenses

_____ may incur various costs and expenses in rendering the legal services required by this Agreement which, if customary and necessary for the performance of legal services hereunder, shall be reimbursable by City. These costs and expenses are described in more detail in Exhibit "B". City agrees to reimburse _____ for these costs and expenses in addition to the fees for legal services. Reimbursable costs shall not include any overhead or administrative charge by _____ or _____'s cost of equipment or supplies except as provided herein.

_____ may determine it necessary or appropriate to use one or more outside investigators, consultants, or experts in rendering the legal services required (particularly if a matter goes into litigation). City will be responsible for paying such fees and charges. _____ will not, however, retain the services of any outside investigators, consultants, or experts without the prior approval of City. _____ will select any investigators, consultants, or experts to be hired only after consultation with City.

The cost and expense referenced to herein include certain travel expenses; transportation, meals, and lodging; when incurred on behalf of the client. Generally, except in connection with litigation (travel costs to court and for discovery are chargeable), these will only be charged when outside of the area, and only with the prior agreement of City.

Finally, periodically, when on-site, _____ personnel may be required to make local and long-distance telephone calls, or make photocopies, or incur other expenses on behalf of the City as well as other clients. _____ will not be charged for such expenses and, in exchange, will not charge the City for calls made from our office or other locations to the City.

(City of Glendora, 2018)

6.5 Costs, Expenses and Advances

City shall pay for costs, expenses, and advances incurred by Firm on behalf of City and services provided by or obtained through Firm on behalf of City ("Costs & Advances"). Such Costs & Advances shall be the actual cost of the service obtained and there shall be no mark-up of the Costs & Advances by the Firm. Costs & Advances include, but are not limited to: outside courier services, court runner services, court reporter services, and transportation services. The Parties agree that City shall pay the Costs & Advances of copying and printing at the rate of _____ per page, as adjusted annually by the CPI. Automobile mileage will be calculated at the rate per mile that is provided by the Internal Revenue Service at the time the expense is incurred. All Costs & Advances shall be itemized on Firm's monthly invoice to City and shall be due pursuant to Section 6.8 of this Agreement.

(City of Sonora, 2019)

Article 9

RESOLUTION OF DISPUTES

COMMENT: Many legal services agreements with contract city attorneys provide administrative procedures to resolve disputes between the city attorney and the city. The subject matter covered by the procedure may be limited to fee disputes (city of Monterey Park) or it may apply more broadly (city of Carmel-By-The-Sea). Although such provisions appear also in full-time city attorney employment agreements, they are more common in contract city attorney agreements.

4. 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 Monterey Park, 2020)

Dispute Resolution

Recognizing the absolute ability of either party to this agreement to terminate the relationship with 90 days written notice, under conditions as set out above, the parties also acknowledge that they may wish to resolve an issue without exercising the termination provisions of this agreement. Therefore, in the event the CITY becomes dissatisfied with any aspect of its relationship with City Attorney, including, for example, the quality or adequacy of representation or fees and/or charges, the CITY shall bring such concerns to the attention of City Attorney immediately. It is acknowledged that most problems can be resolved by good faith discussion. Nevertheless, it is possible a dispute may arise which cannot be resolved by discussion. In such an event, each party agrees to submit that matter to the following resolution process.

In case any disagreement, difference, or controversy shall arise between the _____ and the CITY with respect to any matter in relation to or arising out of or under this Agreement, whether as to the construction or operation thereof, or the respective rights and liabilities of the parties or otherwise, and the parties to the controversy cannot mutually agree as to the resolution thereof, then such disagreement, difference, or controversy shall be determined by proceeding with the following procedure:

Either party may give notice to the other of the dispute and the City Administrator and the City Attorney or their designees will meet within three (3) business days to attempt to resolve the dispute. In the event that the parties are unable to reach an agreement as to how the dispute may be resolved within thirty (30) days, after the notice of dispute has been issued, both parties hereby agree to submit the dispute to mediation. The mediator shall be jointly selected by the parties, or failing agreement on the selection of a mediator, within thirty (30) days, from the date of first notice of dispute, the mediator shall be selected by a retired Judge or Justice selected by the supervising Judge of the Civil Division of the Monterey County California Superior Court.

In any mediation conducted pursuant to this section, the provisions of California Evidence Code section 1152 shall be applicable to limit the admissibility of evidence disclosed by the parties in the course of the mediation. The submission to Mediation in accordance with the requirements of this section of any and all agreements, differences, or controversies that may arise hereunder is made a condition precedent to the institution of any action or appeal at law or in equity with respect to the controversy involved.

In the event the parties are unsuccessful in resolving through the mediation process a dispute concerning only the amount of attorneys' fees and costs incurred, then the parties agree that the attorneys' fees and costs dispute shall be submitted to Binding Arbitration to a single Arbitrator in accordance with the existing Rules of Practice and Procedure of the Judicial Arbitration and Mediation Services, Inc. (JAMS) within thirty (30) days of the close of mediation as declared by the mediator. The award by the arbitrator shall have the same force and effect and may be filed and entered, as a judgment of the Superior Court of the State of California and shall be subject to appellate review upon the same terms and conditions as the law permits for judgments of Superior Courts. A "Prevailing Party" shall be determined in the Arbitration, and the prevailing party shall be entitled to reasonable attorney's fees and costs incurred, and accrued interest on any unpaid balance that may be due. Costs shall include the cost of any expert employed in the preparation or presentation of any evidence. All costs incurred and reasonable attorney fees shall be considered costs recoverable in that proceeding, and be included in any award.

(City of Carmel-By-The-Sea, 2018)

Article 10

INSURANCE/INDEMNIFICATION

COMMENT: Many cities require contract city attorneys to maintain insurance covering acts and omissions. Some such provisions are very detailed (city of Modesto). Some provisions require the city attorney to indemnify the city for any liability arising from acts of the city attorney, regardless of insurance coverage (city of Sausalito). Somewhat less common are indemnification provisions whereby the city indemnifies the city attorney for certain actions, as seen in the city of Galt example.

14.0 Indemnity

_____ agrees to defend, indemnify and hold harmless the City, its elected and appointed officials, officers, agents, employees and volunteers from and against any and all claims, demands, actions, losses, damages, injuries, and liability, direct or indirect (including any and all costs and expenses in connection therein), arising out of the performance of this Agreement or its failure to comply with any of its obligations contained in this Agreement, except for any such claim arising out of the sole negligence or willful misconduct of the City, its officers, agents, employees or volunteers.

_____’s responsibility for such defense and indemnity obligations shall survive the termination or completion of this Agreement for the full period of time allowed by law. The defense and indemnification obligations of the Agreement are undertaken in addition to, and shall not be in any way be limited by, the insurance obligations contained in this Agreement.

Further, _____ will indemnify City, and hold it harmless, from an assertion that as a result of providing services to City, _____ or any of its employees or persons performing work pursuant to this Agreement is entitled to benefits from, or is covered by, the Social Security retirement system or the California Public Employees Retirement Systems. Notwithstanding the foregoing, however, _____’s obligations for any payments to such claimant shall be limited to those payments which City may be required to pay.

(City of Sausalito, 2021)

5. Insurance and Indemnification. During the entire term of this Agreement, Attorney shall maintain the following insurance:

- a. Minimum Scope of Insurance: Coverage should be at least as broad as:
 - i. Insurance Services Office Form No. CG 0001 (Commercial General Liability);
 - ii. Insurance Services Office Form No. CA 001 (Ed. 1/87) (Automobile Liability, Code “any auto”);
 - iii. Workers’ Compensation as required by the Labor Code of the State of California, and Employers’ Liability Insurance;
 - iv. Professional Liability (Errors and Omissions) insurance against loss due to error, omission or malpractice.
- b. Minimum Limits of Insurance: Attorney shall maintain limits no less than:
 - i. Commercial General Liability: \$1,000,000 combined single limit per occurrence, including endorsements for contractual liabilities, broad form property damage and personal injury.
 - ii. Automobile Liability: \$1,000,000 combined single limit per accident for personal injury and property damage arising from owned, hired and non-owned vehicles.
 - iii. Workers’ Compensation and Employers’ Liability: Workers’ compensation limits as required by the Labor Code of the State of California and Employers’ Liability limits of \$1,000,000 per accident.

- iv. Professional Liability (Errors and Omissions): \$2,000,000 combined single limit per occurrence.
- c. Deductibles and Self-Insured Retentions: Any deductibles or self-insured retentions must be declared to and approved by the City.
- d. Other Insurance Provisions: The policies are to contain, or be endorsed to contain, the following provisions:
 - i. General Liability and Automobile Liability Coverages:
 - (1) The General Liability and Automobile Liability policies shall be written on an occurrence form and shall name City, its officers, officials, agents, employees and volunteers as additional insureds. Such policy(ies) of insurance shall be endorsed so that Attorney's insurance shall be primary and any insurance or self-insurance maintained by City, its officials, employees or volunteers shall be in excess of Attorney's insurance and shall not contribute with it.
 - (2) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees or volunteers.
 - (3) Coverage shall state that Attorney's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
 - ii. All Coverages:
 - (1) Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be canceled except after thirty (30) days prior written notice has been given to City. In addition, Attorney agrees that is shall not reduce its coverage or limits on any such policy except after thirty (30) days prior written notice has been given to City and City approves the reduction in coverage or limits. Attorney further agrees that is shall not increase any deductibles or self-insured retentions on any such policy except after thirty (30) days prior written notice has been given to City and City approves such increase.
 - (2) In the event claims made forms are used for any Professional Liability coverage, either (i) the policy(ies) shall be endorsed to provide not less than a five (5) year discovery period, or (ii) the coverage shall be maintained for a minimum of five (5) years following the termination of this Agreement and the requirements of this section relating to such coverage shall survive termination or expiration of this Agreement. Attorney shall furnish City with the certificate(s) and applicable endorsements for ALL required insurance prior to City's execution of this Agreement.
- e. Acceptability of Insurers: Insurance shall be placed with insurers with a Bests' rating of no less than A:VII. This requirement may, however, be waived in individual cases for Errors and Omissions Coverages only; provided, however, that in no event shall a carrier with a rating below B:IX be acceptable.
- f. Verification of Coverage: Attorney shall furnish City with certificates of insurance showing compliance with the above requirements and with original endorsements affecting all coverages required by this Agreement both prior to the execution of this Agreement, and during the pendency of this Agreement at any time upon request by City. The certificates and/or endorsements shall set forth a valid policy number for City, and shall indicate the Issue Date, Effective Date and Expiration Date. The certificates and endorsements for each insurance policy shall be signed by a person authorized by the insurer to bind coverage on its behalf. The certificates and endorsements shall be forwarded to the City Representative.
- g. Payment Withholding: City shall withhold payments to Attorney if the certificates of insurance and endorsements required in this section are canceled or Attorney otherwise ceases to be insured as required herein.
- h. Indemnity: City acknowledges that _____ is being appointed as City Attorney, Chief Assistant City Attorney and Special Counsel pursuant to the authority of Government Code section 36505, and has authority of that office. Accordingly, the City is responsible under Government Code section 825 for providing a defense for Attorney,

including the City Attorney, Assistant City Attorney and Special Counsel for actions within the scope of its engagement hereunder.

(City of Modesto, 2014)

7. Indemnification

The City shall defend, hold harmless and indemnify Employee against any tort, civil rights, personnel, discrimination, professional liability claim or demand or other legal action, whether groundless or otherwise, arising out of an alleged act or omission occurring in the course and scope of Employee's performance of his duties. Such indemnity shall cover Employee against any and all losses, damages, judgments, interest, settlements, fines, court costs and other reasonable costs and expenses of legal proceedings including attorneys fees, and any other liabilities incurred by, imposed upon, or suffered by Employee.

The City may compromise and settle any such claim or suit and pay the amount of any settlement or judgment therefrom. Further, any settlement by Employee must be made with the prior approval of Employer in order for indemnification, as provided in this Section, to be available.

The City's obligation to defend and indemnify Employee is contingent on Employee's cooperation with the City, and with defense counsel. In addition, the City's obligation is contingent on Employee's conduct having occurred within the course and scope of his employment.

In the event of a claim or litigation against both the City and Employee, the City may retain a single attorney to defend both parties, unless there appears to be a conflict in the positions of the City and Employee. In the event that there is a conflict between the City and Employee, then separate counsel shall be retained for each party, and Employer shall pay for both attorneys.

(City of Galt, 2010)

Article 11

FILES AND RECORDS

COMMENT: It is important for legal services agreements to describe what happens to files created in connection with the city attorney's work. Typically, they are owned by the city but maintained at the city attorney's office. When the agreement ends, usually there is a provision for transferring the files to the city.

8.1 Records Created as Part of Law Firm's Performance

All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Law Firm prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the Client. Law Firm hereby agrees to deliver those documents to the Client upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the Client and are not necessarily suitable for any future or other use. Client and Law Firm agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of both parties.

(City of Willows, 2020)

10. Ownership of Records; Retention of Records

Upon termination of this AGREEMENT, all reports, plans, documents, records, and data or certified copies of same prepared by _____ pursuant to this AGREEMENT shall become property of CITY. _____ shall deliver such reports, plans, documents, records and data to CITY upon CITY's written request.

_____ shall keep and maintain full and complete documentation and accounting records, employees' time sheets, and correspondence pertaining to the services performed hereunder, and _____ shall make such documents available for review and/or audit by CITY and CITY's representatives at all reasonable times during the AGREEMENT period and for at least four (4) years from the date of the completion and or termination of this AGREEMENT.

(City of Saratoga, 2005)

Section 12. Ownership of Records

- A. The Firm shall maintain complete and accurate records with respect to costs, expenses, receipts, and other such information required by City that relate to the performance of services under this Agreement. The Firm shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Firm shall provide free access to the representatives of City or its designees at reasonable times to such books and record, shall give City the right to examine and audit said books and records, shall permit City to make transcripts therefrom as necessary, and shall allow inspection of all work, data, documents, proceedings and activities related to this Agreement. Such records, together with supporting documents, shall be maintained for a period of three (3) years after receipt of final payment.
- B. Upon completion of, or in the event of termination or suspension of this Agreement, all original documents, designs, drawings, maps, models, computer files, surveys, notes, and other documents prepared in the course of providing the services to be performed pursuant to this Agreement shall become the sole property of the City and may be used, reused or otherwise disposed of by the City without the permission of the Firm. With respect to computer files, the Firm shall make available to the City, upon reasonable written request by the City, the necessary computer software and hardware for purposes of accessing, compiling, transferring and printing computer files.

(City of Mission Viejo, 2020)

Article 12

SUBCONTRACTING/ASSIGNMENT

COMMENT: Many legal services agreements require city approval prior to the city attorney assigning or contracting out any of the services contemplated by the agreement.

9. Prohibition Against Subcontracting or Assignment

The experience, knowledge, capability and reputation of _____, its partners, associates, and employees, was a substantial inducement for City to enter into this Agreement. Therefore, _____ shall not contract with any other person or entity to perform, in whole or in part, the legal services required under this Agreement without the written approval of City. In addition, neither this Agreement, nor any interest herein, may be transferred, assigned, conveyed, hypothecated, or encumbered voluntarily, or by operation of law, whether for the benefit of creditors, or otherwise, without the prior written approval of City. Adding attorneys to _____, changes in the partnership, name changes and similar changes shall not be deemed a transfer or assignment requiring approval of City or amendment hereof.

(City of Menifee, 2014)

11. Subcontractors

- 11.1 The FIRM's firing or retaining of third parties (i.e. subcontractors) to perform services pursuant to this AGREEMENT is subject to prior approval by the CITY.
- 11.2 All contracts entered into between the FIRM and its subcontractor shall also provide that each subcontractor shall obtain insurance policies which shall be kept in full force and effect during any and all work and for the duration of this AGREEMENT. The FIRM shall require the subcontractor to obtain all policies described in section 9 of this AGREEMENT in the amounts required by the CITY, which shall not be greater than the amounts required of the FIRM.
- 11.3 The CITY shall not be made a party to any judicial or administrative proceeding to resolve a dispute between the FIRM and any consultants, contractors or others hired by the FIRM to perform or assist in performing services under this AGREEMENT. The FIRM agrees to defend and indemnify the CITY as described in Section 11 of this AGREEMENT should the CITY be made a party to any judicial or administrative proceeding to resolve any such dispute or should the CITY incur any costs in responding to third-party discovery requests.

(City of Encinitas, 2019)

8.2 Assignment and Subcontracting

City and Firm recognize and agree that this Agreement contemplates personal performance by Firm and is based upon a determination of Firm's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Firm. Firm may not assign this Agreement or any interest therein without the prior written approval of the Mayor. Firm shall not subcontract any portion of the performance contemplated and provided for herein, other than to outside counsel as described in Section 6.4 of this Agreement, without prior written approval of City.

(City of Sonora, 2019)

Article 13

TERMINATION

COMMENT: The termination of legal services agreements with contract city attorneys or firms are often similar to termination of a full-time, at-will city attorney. Possible differences for contract city attorneys include the following: the obligation for the departing attorney to cooperate with the city during the transition to a new attorney, provision for transfer of files, and assurance that the attorney/firm will be paid for work done prior to termination.

Termination

The City may terminate this Agreement, with or without cause, upon written notice to _____.

_____ may terminate, with or without cause, on sixty days written notice to the City. In either event, the City agrees to secure new counsel as quickly as possible and to cooperate fully in the substitution of the new counsel as counsel of record. _____ agrees to cooperate fully in any such transition, including the transfer of files. Notwithstanding the termination of _____'s services, City will remain obligated to pay to _____ all fees and costs properly incurred prior to termination.

(City of Artesia, 2019)

5.0 Termination of Agreement and Legal Services. This Agreement may be termination by the City immediately with or without cause. _____ may terminate the agreement upon sixty (60) days' written notice of termination.

In such even, all finished or unfinished documents, project data and reports, both originals and all duplicate copies, in all forms and media requested by the City, shall immediately be turned over to the possession of City, which owns all such materials. IN the event of such termination, _____ shall be paid for all satisfactory work, unless such termination is made of cause, in which event compensation, if any, shall be adjusted in the City's sole discretion in light of the particular facts and circumstances involved in such termination.

(City of Sausalito, 2021)

6. Termination of Agreement

City has the right to terminate the Firm's representation at any time, without cause, subject to an obligation in writing to the Firm at least thirty (30) days prior to termination. Termination is effective thirty (30) days from the date of the written notice unless otherwise specified therein. The Firm has the same right, subject to the Firm's ethical obligations to allow the City sufficient notice prior to termination so that City will be able to arrange alternative representation. In either circumstance, City agrees to secure new counsel as quickly as possible and to cooperate fully in the substitution of counsel as counsel of record in any action in which the Firm may represent the City. The Firm agrees to cooperate fully in any such transaction, including allowing for the retrieval of all files held by the Firm. Notwithstanding the termination of the Firm's representation, City shall remain obligated to pay to the Firm all fees and costs incurred prior thereto.

(City of Chico, 2020)

Article 14

GENERAL/MISCELLANEOUS

COMMENT: Most legal services agreements conclude with fairly standard legal provisions that address the agreement itself. Many also appear in the full-time employment agreement, like Entire Agreement, Severability, and Governing Law. (See Appendix A.) The extracts below are more likely to be found in contract city attorney agreements. Although not yet common in legal services agreements, many contracts entered into by cities increasingly contain authorization for electronic or digital signatures in accordance with California Government Code Section 16.5.

Section 20 Advice of Legal Counsel Each party acknowledges that it has reviewed this Agreement with its own legal counsel and based on the advice of counsel, freely entered into this Agreement.

(City of Turlock, 2019)

Corporate Authority

The persons executing this Agreement on behalf of the parties hereof warrant that they are duly authorized to execute this Agreement on behalf of said parties and that in so executing this Agreement the parties hereto are formally bound to the provisions of this Agreement.

(City of Beaumont, 2020)

Section 21 No Implied Waiver or Breach

The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach or that term or any other term of this Agreement.

(City of Sonora, 2019)

Section 6.04 General Provisions

.....

- d. In any action to enforce the terms of this contract, the prevailing party shall be entitled to recover reasonable attorney's fees and court costs and other non-reimbursable litigation such as expert witness fees and investigation expenses.

(City of Cupertino, 2017)

3.19 Counterparts This Agreement may be signed in counterparts, each of which shall constitute an original.

3.20 Delivery of Notices All notices permitted or required under this Agreement shall be given to the respective parties at the following addresses or at such other address as the parties ay provided in writing for this purpose:

Client: City of Anderson
1887 Howard Street
Anderson CA 96007
Attn: City Manager
[Attorney} -----

Such notices shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

IN WITNESS WHEREOF, _____ THE Client and _____ have executed this Agreement for City Attorney Legal Services as of the date first written hereof.

(City of Anderson, 2011)

Appendix D

City Attorney Transition Checklist

Lynn Tracy Nerland, San Pablo City Attorney, August 2015

What to tell your successor — and what to ask your predecessor or otherwise figure out

FORMATION

Is the city a charter or general law city? If it is a charter city, get the charter.

ADMINISTRATIVE MATTERS

1. Does the city attorney have clerical or admin support? If so, what does that person do?
2. Are there assistant or deputy city attorneys, or other staff, in the office?
3. Are there any outside counsel arrangements and if so, what do they do? (Obtain their agreement/retention letter and billings from the past year.)
4. Is there a key to the city attorney's office?
5. Where are the files kept and are there keys to the files?
6. Is there an alarm if I want to access my office after hours?
7. What is the budget for the office and how are expenses paid? What is the status of the budget? Do departments get billed directly for city attorney time?
8. Can I get new business cards, a nameplate for council meetings, nametag, etc.?

CITY COUNCIL/GENERAL MEETINGS

1. Do any of the council members have unique conflict of interest issues (Is there a map showing where they all live and lease/own property?)
2. What are the council's priorities?
3. What are the priorities of the individual council members? (Just FYI.)

4. What is the best mode of communication with council members? Do they look at email regularly? Are some better at hearing something as opposed to reading it and vice versa?
5. Any relationship issues among the council? With the city manager?
6. What boards, commissions, and council subcommittees exist and does the city attorney typically attend these?
7. What is the typical time and process for closed sessions? Are closed session minutes kept?
8. Does the city council have rules of procedure? Does it follow Roberts Rules of Order? Does the city council look to the city attorney as the parliamentarian?
9. Does the council receive a stipend/salary and benefits?
10. How often has the city council been receiving written updates or status reports from the city attorney, if at all?

CITY MANAGER

1. Does the city manager have set executive staff meetings and does the city attorney attend? (If not, should you?)
2. Does the city manager look to the city attorney for general advice or just specifically legal advice? If so, how will you distinguish between the two?
3. What are the priority issues from the city manager's standpoint?
4. Any particular trainings needed for staff or council? Is the city in compliance with AB 1234 ethics training and procedures?
5. What has been the custom and how do the city manager and the department managers wish legal services be delivered to staff, e.g., formal written opinions, emails, etc.? Are all requests routed through a manager or documented in a service request?

CITY CLERK

1. When did the city last file updated information with the Secretary of State for the roster of public agencies, known as the California Roster or Cal Roster? Are there any other related entities like a financing authority?
2. What is the process for handling Public Records Act requests? Who handles them? What is the city attorney's role and do any template responses exist?
3. Are agendas for council meetings posted 72 hours before a meeting? What about for meetings of boards, commissions, and standing council committees?
4. When was the conflict of interest code last updated? Do officials, employees, and designated consultants file Form 700s on time?
5. Is the city attorney involved in reviewing agendas and staff reports and if so, is there an electronic agenda management system?
6. Does the city attorney review the council minutes before they are finalized?
7. Are the city's records kept in paper files or electronically? If electronically, is there a search program? Is there a records retention policy and is it followed?
8. Is the municipal code kept in paper format or electronically? How often is it updated?
9. Where are the city's current administrative policies and how are updates distributed?

CLAIMS AND LITIGATION

1. Is the city self-insured or part of a joint risk pool?
2. Who has settlement authority? (Obtain a copy of the resolution or ordinance in case the custom does not comport with the actual written authority.)
3. How are claims processed?
4. How has the city handled claims for punitive damages against employees? (Typically, this pertains to police officers.)
5. Is there a public information officer who will handle inquiries from the press about a case or is that the city attorney's role?
6. What are the pending cases?
7. Look at the last letter to the city's auditors prepared by the city attorney regarding existing and potential claims and lawsuits.
8. Does the risk pool place certain insurance requirements or other requirements on its members that may affect claims, contracts, real property documents, etc.?

CODE ENFORCEMENT

1. Where in the organizational chart does code enforcement exist? (Police Department? Building?)
2. How are municipal code violations addressed? Does the city have an administrative citation process?
3. What is the city attorney's role in the code enforcement process? (Be aware of *Haas and Nightlife Partners* due process issues.)

ECONOMIC DEVELOPMENT

1. Did the city have a former redevelopment agency? If so, where in the dissolution process is it?
2. Does the city have any other "related" entities involved in economic development?
3. Is there a map of city-owned properties?
4. Does the city have any leases and who manages those leases (buildings, telecommunications facilities, billboards, etc.)?

FINANCE

1. Is there a purchasing ordinance and more detailed purchasing procedures?
2. Are there templates for various kinds of bid documents and contracts, such as construction, professional services, maintenance, legal services, and design services? Are those templates included with bid and request for proposal (RFP) documents that are sent to bidders/proposers? Is there a contract routing process that involves someone reviewing insurance certificates and additional insured endorsements?
3. What taxes are in place other than property tax and regular sales tax (e.g., business license tax, utility users tax, special taxes, Mello-Roos, and assessment districts)? Have they been approved by the voters? Any Prop. 62 or 218 issues?
4. Is there an expense and reimbursement policy for employees and elected officials?
5. Are there any outstanding bonds requiring continuing disclosures? Are there continuing disclosure policies in place and are they implemented?

HUMAN RESOURCES

1. Is the city attorney involved in preparing notices of discipline, investigations, etc.? If so, how are *Haas/Nightlife Partners* due process issues handled with a Skelly hearing?
2. Is there a civil service commission or similar entity?
3. Who provides AB 1825 anti-harassment training?
4. Are the employees represented? Is the city attorney involved in labor negotiations? Get copies of all memoranda of understanding (MOU).
5. Are there personnel rules?
6. Is the city part of an employment risk pool?
7. Any pending grievances?
8. Any pending appeals of discipline? Other employee issues?

IT

1. Can staff members access email and other programs remotely? If so, how?
2. How long are emails held and is there an email policy?
3. Is there a page on the city's website for the city attorney's office? If so, who has access for updating it?
4. Is there a protocol/contact person for issuing and implementing "litigation holds?"

PLANNING AND BUILDING

1. If there is a planning commission, does legal counsel attend?
2. If legal counsel attends, what are the protocols for observing an "ethics wall" for quasi-adjudicative appeals?
3. What is the status of the following uses: adult business, medical marijuana, cabaret, card rooms/casinos, and massage?
4. Are there any mobile home parks and if so, is there rent control?
5. Does the city collect impact fees, and if so for what? Have collected fees been programmed?
6. Does the city have its own CEQA implementation guidelines or policies?

POLICE

1. Does the police department have updated policies, especially as to the use of force and pursuit?
2. What is the protocol for an officer-involved shooting?
3. How are Pitchess motions handled? Any officers with Brady issues?
4. How are weapons forfeiture petitions handled?

PUBLIC WORKS

1. What is the procedure for encroachments in the public right of way? Is there an ordinance, policy, or permit?
2. Who provides various utility services (water, sewer, storm drainage, garbage, recycling phone, gas, electric, and cable) and are there any issues with these services?
3. Does the city have a transition plan under the Americans with Disabilities Act (ADA)? Is anyone identified as the ADA coordinator or recipient for complaints or questions? Does the website have the contact information and related information?



LEAGUE OF
**CALIFORNIA
CITIES**

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