City Attorneys Department Spring Conference: Updating the “Counsel and Council” Publication

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Counsel and Council Guide

The Guide addresses:

- The role and function of a city attorney and the ethical responsibilities 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.
Counsel and Council Guide

The Role of the City Attorney: Legal Foundation

- Rules of Professional Conduct
- CA Gov’t Code sections 41801-41805:
- City Charter (if you have one)
- Municipal Code

Key ethical obligations:
- Perform legal services competently and with diligence (Rule 1.1 and 1.3)
- Maintain confidential information (Rule 1.6)
- Client is the city; NOT individual council members (Rule 1.13)
- Duty to uphold the integrity of the legal system
  - Cannot mislead the courts (Rule 3.3) or
  - Cannot advise or condone conduct that clearly violates the law (Rule 1.2.1)
- Duty of defense to individual employees under the California Government Tort Claims Act
- Specific ethical obligations of city prosecutor (Rule 3.8)
- Duties to public – cannot provide direct legal advice to member of public but
  - Assure city complies with the law (Rule 1.16)
  - Protect the public interest (e.g. compliance with the Brown Act)
Counsel and Council Guide

The practical reality:
- City’s chief legal advisor
  -- akin to general counsel for a corporation
- Key member of the City’s senior management team
  -- help shape policy and solve problems
- Risk Manager
  -- identify and mitigate risk
- Resource Manager
  -- office and outside counsel oversight

The challenge:
- Extraordinary Range of Practice Areas
- Lack of appreciation of complexity and risks
- Advice often asked for and must be given in public
- Incredible Volume of Work
- Real and False Urgencies

Practice tip: Refer to and share the Council and Counsel Guide with your Councilmembers!
Polling Question

How to join

Web

1. Go to Pollev.com/calcities
2. Respond to activity

Do you mostly give legal opinions by:
   a. Formal written opinion
   b. Email
   c. Phone/Zoom
   d. At meetings
   e. In the hallway of city hall

Counsel and Council Guide

Types of Prosecutorial responsibilities for city attorneys:

- Criminal violations of local laws (i.e., violations of the municipal code)
- Criminal violations of state laws that are infractions, misdemeanors, and wobblers (e.g. Grand Theft, Sexual Battery, Assault with a Deadly Weapon)
- Certain state law violations where civil prosecutions are authorized (e.g., Business and Professions Code Section 17200)
- Certain civil enforcement actions (e.g. abatement of nuisances or violations of the Unruh Civil Rights Act)
Counsel and Council Guide

Appointment of City Attorneys:

- City councils directly appoint city attorney in 469 of California’s 481 incorporated cities.
  - Approximately 2/3 are contract city attorneys from law firms
  - Approximately 1/3 are hired as in-house city attorneys

- Voters directly elect city attorney in 10 charter cities (Compton, Chula Vista, Huntington Beach, Long Beach, Los Angeles, Oakland, Redondo Beach, San Diego, San Francisco, and San Rafael)

- City managers appoint city attorney in two charter cities (Folsom and Shafter)

Steps in recruitment of City Attorney (whether in-house or contract):

- Prepare job description
- Determine qualifications
- Publicize vacancy and solicit applications
- Vet applications and narrow candidates recommended for interviews
- Interviews: can include professional panel, executive management panel or just city council but confidentiality is critical
- Select city attorney
- Negotiate agreement
- Approve agreement in open session
Counsel and Council Guide

City Attorney Selection—What Can a Council do in Closed Session?

**YES**
- Develop interview questions
- Decide which candidates to interview
- Conduct interviews of candidates
- Discuss candidates
- Decide which candidate to appoint

**NO**
- Discuss recruitment process
- Consider proposals from recruiters or approve a contract with a recruiter
- Designate an ad hoc committee
- Discuss or negotiate compensation directly with candidates
- Appoint/hire a City Attorney

Gov’t Code §§ 54957(b)(1); 54957.1

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Counsel and Council Guide

You’re Hired! Beginning the Counsel/Council Relationship:
- Familiarize yourself with city’s charter (if applicable), municipal code, Council goals, policies and procedures, budget, and city attorney job description

- Discuss with Councilmembers
  - Priorities, expectations and outstanding issues
  - Mode and frequency of communication
  - Unique conflict of interest issues
  - Basics like Brown Act, Public Records Act, land use, etc.

- New Councilmembers: Orientation materials and meetings
Counsel and Council Guide

Maintaining a strong Counsel and Council relationship:

• Effective communication
  ▪ Timely information
  ▪ Confidentiality of communications
  ▪ Communication of difficult news

• Preventative legal advice
• Problem solving and providing options
• Distinguishing legal and policy advice
• Assist with risk assessment
• Be respectful of individuals and their roles
• The client is the city

Performance Evaluations:

• Informal Evaluation
  ▪ Feedback from council members typically based on specific situation
  ▪ Informal discussions about performance in closed session

• Formal Evaluation
  ▪ Can be professionally facilitated
  ▪ City attorney may prepare a self-evaluation or list of accomplishments
  ▪ Council members complete written evaluations
  ▪ May involve a 360-degree evaluation of subordinates and/or executive staff
Counsel and Council Guide

How to evaluate a city attorney:

• Qualitative factors
  ▪ Quality of legal advice
  ▪ Responsiveness and communication
  ▪ Effectiveness

• Quantitative factors
  ▪ Cost
  ▪ Performance-based management" tools or “Key Performance Indicators” (KPIs)

Polling Question

How to join

Web

1. Go to Pollev.com/calcities
2. Respond to activity

Does your performance evaluation as a city attorney, assistant city attorney or deputy city attorney include quantitative “performance-based management” tools or “Key Performance Indicators” (KPIs)?

a. Yes
b. No
Counsel and Council Guide

**Challenges to the Counsel and Council relationship:**

- Questionable legal behavior of city or city official
- Role of counselor to the city versus advocate in dealing with third-parties
- Political neutrality or appearance of favoritism among council members
- Wanting a “second opinion”
- Legal challenges to the city attorney’s advice or job performance

**Termination of relationship with city attorney:**

- City attorney retires or leaves for other career opportunities (Rule 1.16)
- City council wants, for whatever reason, “to go in another direction”
  - Sometimes the council just wants another approach or individual
  - Sometimes because of the city attorney’s performance
  - Sometimes because the city attorney has engaged in misconduct (hopefully rarely)
Questions?