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## MEMORANDUM

TO: MEMBERS  
San Francisco Elections Commission

JOHN ARNTZ  
Director of Elections

FROM: ANDREW SHEN *AS*  
Deputy City Attorney

DATE: September 12, 2019

RE: Outside Counsel for Matters Concerning the Election of the City Attorney

In November 2001, when the San Francisco voters amended the Charter to create the Elections Commission ("Commission"), the voters authorized the Commission to use outside counsel under certain circumstances when the City Attorney is standing for election. The outside counsel must meet certain qualifications and comply with the conflict of interest rules that also apply to the Commission, and if necessary, the Commission must pay for the outside counsel.

In this memorandum, we discuss this outside counsel provision for the upcoming November 5, 2019 election, when the City Attorney will stand for reelection. We have arranged for the Santa Clara County Counsel to serve as outside counsel, subject to your approval at the September 18, 2019 commission meeting. The Santa Clara County Counsel's Office regularly advises the Santa Clara County Registrar of Voters.

We also propose guidelines for handling legal advice on matters that could come within the terms of that provision. As discussed further below, the City Attorney's Office ("Office") will remain the Commission's legal counsel in all other matters. These proposed guidelines are consistent with the Commission's past practice in similar situations when we have retained an outside public law office to provide assistance for the Commission.

Please let us know if you have questions about or want to discuss this memorandum.

### DISCUSSION

#### I. **The City Attorney's Role as Legal Advisor to the Elections Commission and Department Of Elections**

The Charter provides that the City Attorney "shall serve as legal counsel to the Elections Commission and the Department of Elections." Charter § 13.104.5. Accordingly, the Office regularly advises the Commission and Department of Elections ("Department") on a range of matters, some of which are specific to elections and others that relate to general administrative matters that all City departments face. For example, the Office advises on federal, State and local elections laws; represents the City in elections-related litigation; and assists in preparing materials for publication in the Voter Information Pamphlet. Also, this Office advises on the general laws that govern all City agencies, such as: notice and agenda requirements for public meetings; responses to public records requests; the City's contracting process; contract administration; and personnel matters.

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The Charter provides an exception to this rule when the City Attorney is standing for election:

The [Elections] Commission may, by a majority vote of its members, hire outside legal counsel to advise the Commission and the Department on matters that directly involve the election or campaign of the City Attorney, if the City Attorney is standing for election.

Charter § 13.104.5. Because the City Attorney is running for reelection this November, the Charter's limited exception applies and the Commission may engage outside counsel.

**II. Qualifications and Payment of Outside Counsel**

The Charter specifies the qualifications for outside counsel:

In selecting outside legal counsel, the Commission *shall give preference* to engaging the services of a city attorney's office, a county counsel's office or other public entity law office with an expertise regarding the subject-matter jurisdiction of the Elections Commission. In the event that the Commission concludes that private counsel is necessary, it may, by a majority vote, engage the services of a private attorney who has at least five years' experience in the subject-matter jurisdiction of the Elections Commission.

Charter § 13.104.5 (emphasis added).

If the Commission uses outside counsel, the counsel is subject to the same conflict of interest rules that apply to the members of this Commission. For example, the counsel may not be an officer of a political party; a registered campaign consultant or registered lobbyist, or employed by or receive compensation from a registered campaign consultant or registered lobbyist. Charter § 13.103.5. Also, the counsel may not participate in any campaign supporting or opposing a candidate or ballot measure that will appear on the San Francisco ballot, other than candidates seeking election to federal or statewide office. *Id.* As indicated above, the Charter states a preference for attorneys in public law offices, and the conflict of interest provisions described above are less likely to be an issue for public attorneys.

In light of the preference for using a public law office with elections expertise, we have arranged for Santa Clara County Counsel to advise the Commission and Department on matters related to the City Attorney election. The Santa Clara County Counsel's office has agreed to provide this service free of charge. As counsel for Santa Clara County Registrar, the County Counsel has extensive experience in election law.

If the Commission decides to use private counsel rather than the Santa Clara County Counsel or another public law office, the costs "shall be paid for by the Commission." Charter § 13.104.5. Accordingly, the Commission and Department would be required to secure an appropriation of funds to hire alternative private counsel.

**III. Referral of Matters to Outside Counsel**

Under the Charter, the Commission may use outside counsel to advise on "matters that *directly* involve the election or campaign of the City Attorney." Charter § 13.104.5 (emphasis added). The Commission's authorization to use outside counsel is thus limited to matters that pertain specifically to the City Attorney's election or campaign. Of the legal issues likely to arise that relate to the November 5, 2019 election, we anticipate that few, if any, will pertain specifically to the City Attorney's election or campaign. The following example illustrates a

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matter that “directly” involves the City Attorney election and thus would warrant use of outside counsel:

*Example 1.* A legal question arises concerning the ballot designation, candidate qualification statement or nomination documents of a candidate for City Attorney. Because this question pertains specifically to the City Attorney’s election or campaign, use of outside counsel is authorized.

But when a legal question does not directly involve the City Attorney’s election or campaign, use of outside counsel is not authorized and the Commission and Department would consult as usual with this Office. The following examples illustrate when use of outside counsel is not authorized:

*Example 2.* A legal question arises concerning the ballot designation, candidate qualification statement or nomination documents of a candidate for another City office that is on the ballot. This question does not pertain specifically to the City Attorney’s election or campaign, so use of outside counsel is not authorized.

*Example 3.* A lawsuit is filed against the Director of Elections concerning whether a ballot measure properly qualified for the ballot. This question does not pertain specifically to City Attorney’s election or campaign, so use of outside counsel is not authorized.

*Example 4.* A lawsuit is filed against the Director of Elections or the Ballot Simplification Committee concerning whether materials relating to ballot arguments or other materials submitted for publication in the Voter Information Pamphlet are false or misleading. This question does not pertain specifically to the City Attorney’s election or campaign, so use of outside counsel is not authorized.

*Example 5.* A legal question arises concerning a contract with a vendor who provides goods or services in connection with the election. The question could affect all candidates on the ballot but does not specifically pertain to the City Attorney’s election or campaign, so use of outside counsel is not authorized.

When a legal question might directly involve the City Attorney’s election or campaign, but such involvement is not clear or certain, the Department or the Commission, as appropriate, may decide whether to refer the matter to outside counsel or this Office. The Department or Commission makes this decision on a case-by-case basis on the facts and circumstances of the situation, and may do so in consultation with outside counsel or this Office.