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MEMORANDUM

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

FROM: DENNIS J. HERRERA *DJH*
City Attorney

DATE: August 27, 2010

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

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

Summary

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

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

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

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

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

Discussion**I. The Role of the City Attorney**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Matters That Do Not Involve Elections or Campaign Finance

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

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

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

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

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

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

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

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

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

IV. Hiring Outside Counsel

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

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

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

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