



DENNIS J. HERRERA  
City Attorney

November 2, 2012

## PROCEDURES AND GUIDELINES FOR ISSUING CITY ATTORNEY OPINIONS

In this memorandum, we set forth the policy of the City Attorney's Office for issuing legal advice, particularly written opinions.

A central mission of the City Attorney's Office is to provide the highest quality legal advice to the City and County of San Francisco. One of the enumerated duties of the City Attorney under Section 6.102 of the San Francisco Charter is "upon request, to provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County." The following procedures and guidelines reflect the City Attorney's commitment to fulfill this duty by making sure the advice this Office delivers is well considered, objective, consistent and clear.

This policy is organized in four main parts: (1) the generally applicable review procedure; (2) the procedures for public opinions; (3) the procedure for issuing opinions regarding legal issues presented by proposed Board of Supervisors legislation; and (4) drafting guidelines.

Thank you for your attention to these guidelines. If you have any questions please feel free to contact the Chief Assistant City Attorney.

### I. GENERALLY APPLICABLE OPINION REVIEW PROCEDURE

- Approval by the City Attorney. The City Attorney must approve any significant legal opinion before the opinion is issued. A significant legal opinion is any form of substantive advice - whether in writing or oral - that (i) presents a new question of law, including an interpretation of the City's Charter, Municipal Codes or other local, state or federal statutes, (ii) presents a matter of significant precedent, (iii) reverses or changes past advice from the City Attorney's Office, or (iv) involves a subject of public controversy. The Team Leader is responsible for determining whether or not a proposed legal opinion is significant and therefore requires the City Attorney's approval. If the opinion is significant, then the following steps apply.
- Search of Opinion Database. The author of the opinion should search the Office's Concordance database (for internal use only) for any previous advice regarding the subject of the proposed opinion. That database includes both public opinions and confidential and privileged opinions. The author should identify to the Team Leader, and ultimately to the Chief Assistant, whether the proposed opinion follows, and must identify any conflicts with previous advice.
- Team Leader Review. The Team Leader must review and approve the proposed opinion before the author presents the opinion for approval by the Chief Assistant or City Attorney. Before the presenting the final draft for approval, the Team Leader and the author of the opinion are responsible for identifying and consulting with all appropriate

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Deputies in the Office with substantive knowledge relevant to the subject matter of the opinion. The Team Leader also is responsible for identifying opinions that are appropriate for publishing in bound volumes or posting on the City Attorney web site, as further discussed below.

- Review and Approval by the Chief Assistant City Attorney. After the Team Leader and other appropriate Deputies review and approve the proposed opinion, the author must submit a final draft of the opinion to the Chief Assistant City Attorney (or such other Deputy on the Executive Team as the City Attorney may designate for a particular assignment) for review, together with a cover memorandum of no more than one page, specifying (i) who requested the opinion, (ii) the date this Office received the request, (iii) whether the request is confidential, (iv) the names of the Deputies who have reviewed the draft, (v) whether the opinion is consistent, or conflicts, with any past written advice of this Office, and, as appropriate, a brief description of any other significant due diligence or research done in support of the proposed opinion, (vi) the client billing number, (vii) when the opinion is due and (viii) whether the opinion is appropriate for publishing or posting on the web site and if so, why. If the request for the opinion is in writing, then the author should attach a copy of the request to the cover memorandum. The author should also attach copies of any significant statutes or cases, when appropriate. A template for the cover memorandum for approval of an opinion is available in our Templates on Office Online files. To find the template in Word, click on the icon "New" under "File" in the Toolbar Toggle, then find the folder named "Opinions2007" and look for the file with the name "OpinionMemo2k7CoverSheet".
- Review Time. The author should allow sufficient time for the completion of the opinion review and editing process, generally, at least one week. There may be circumstances when a quicker review is needed, but that should be the exception rather than the rule.
- Submittal to City Attorney. The Chief Assistant must approve the draft opinion and generally will submit the opinion to the City Attorney for approval.
- Issuance Only After Approval Received. A Deputy may issue the opinion once the Deputy has confirmed that the opinion has been finally approved by the City Attorney – or in instances where the City Attorney has delegated that responsibility, by the Chief Assistant or other designee – in accordance with the procedure outlined above. The Deputy must not preview the advice, either orally or particularly in draft form, with the requesting client, unless the Deputy has first obtained the approval to do so from the Chief Assistant or the City Attorney. Generally, the Office does not allow previews of its advice because doing so could suggest that the Office's advice can be negotiated, which it cannot. But depending on the circumstances, there may be exceptions to this general rule. Still, the Deputy preparing the proposed opinion may work with the requestor as appropriate to make sure the factual background is accurate, and to ensure that the Deputy understands the underlying goals and interests of the client.
- Copies. For all opinions that involve the Mayor's Office or the Executive Branch, the responsible Deputy should consult with the Deputy liaison to the Mayor and furnish a copy to that Deputy on the final opinion. Similarly, for all opinions that involve the Board of Supervisors, the responsible Deputy should consult with the Deputy liaison to the Board and provide a copy to that Deputy on the final opinion. The author should also

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timely provide copies to any other Deputies who may be liaison to departments or officers who may be affected by the advice.

- Electronic Format. Any legal memorandum that this Office delivers electronically to a client – whether confidential or public – must be provided by the responsible Deputy in PDF Adobe Acrobat format to preserve the integrity of the document.
- Filing with City Attorney Librarian; Concordance Database. After issuing the opinion, the authoring Deputy should send to the City Attorney Librarian an electronic copy (in PDF Adobe Acrobat format) by e-mail, for inclusion in our internal opinion "Concordance" database. This transmittal will help assure that our internal opinion database is complete and up-to-date. If the opinion is to be published or posted on the web site, the Deputy should so indicate and, as described in Part II, also transmit a copy to the Office's Public Information Officer.

**II. PROCEDURES FOR ISSUING PUBLIC OPINIONS**

- Publishing Opinions. It is the policy of the City Attorney to make written opinions publicly accessible whenever it is appropriate to do so. The City Attorney will decide on a case-by-case basis which opinions may be published. Factors that the City Attorney may consider in determining which opinions to publish include the willingness of the client commission, department, or official to make the opinion public; the significance of the issue for good government or public information; and its precedential significance. All opinions that the City Attorney approves for publishing will be placed on the City Attorney web site and in a bound opinion volume, as described further below.

In addition to City Attorney opinions that meet the above criteria for publishing, other opinions may be posted on the City Attorney web site that are important for the public to know. For instance, an opinion about the approval of a conditional use permit for a particular project might be important for the public to know even though it has no precedential significance and might not apply generally to future conditional use decisions.

- Signature by the City Attorney. The City Attorney must personally sign all opinions that are published.

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A sample signature block follows:

Very truly yours,

DENNIS J. HERRERA  
City Attorney

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Jesse Smith  
Chief Assistant City Attorney

APPROVED:

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DENNIS J. HERRERA  
City Attorney

- Assignment of Opinion Number. The City Attorney Librarian will be responsible for assigning numbers to opinions that will be published. Before the Chief Assistant or Chief Counsel presents an opinion to the City Attorney for approval for issuance and publication, the author will obtain a proposed opinion number from the City Attorney Librarian. The author will include the proposed opinion number at the top of the opinion, in the following format:

OPINION NO. 2002 [Year].00 [Number]

- Public Information Officer. For any opinion that will be published or posted on the City Attorney web site, after City Attorney approval, the authoring Deputy must promptly provide a copy to the Press Officer.
- Publication. Each year, the City Attorney Librarian will be responsible for publishing a bound volume of opinions. Generally, the City Attorney's Office will make copies available in its libraries, the Law Library for the courts and the Main Library.
- Posting on City Attorney Web Site. All published opinions will be posted on the City Attorney web site. The City Attorney Public Information Office will be responsible for maintaining opinions on the web site (in PDF or similar format that protects the integrity of the document), including developing a user-friendly index. In addition, as mentioned above, other opinions may be posted if they are relevant to the public and the attorney-client privilege does not prevent their disclosure.
- Advice on Sunshine or Conflict of Interest Matters. The policy of the City Attorney's Office is that all written advice delivered by this Office regarding Sunshine laws (public records and public meetings laws) or conflicts of interest laws will be publicly available upon request. Deputies must inform any City department, commission or officer requesting such written advice of this policy before issuing the opinion.

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**III. PROCEDURES FOR ISSUING OPINIONS REGARDING LEGAL ISSUES RAISED BY BOARD OF SUPERVISORS LEGISLATION**

In addition to following the procedures set forth above for opinions generally, Deputies must follow these procedures for issuing opinions regarding legal issues raised by City legislation proposed by the Board of Supervisors or Mayor.

- Confidential Written Advice; Electronic Format. If proposed legislation is legally defensible but would present significant legal issues if a person were to challenge it in court, then the Deputy responsible for the legislation shall discuss with the Team Leader and liaison to the Board of Supervisors whether confidential written advice is merited, and if it is shall obtain approval by the City Attorney before issuing the opinion in accordance as provided above. If the memorandum is intended to be confidential, the author must clearly designate it as such. See the public memorandum dated August 20, 2009 entitled "Disclosure of Attorney-Client Privileged Advice from the City Attorney's Office" for a discussion of our procedures for issuing confidential advice regarding proposed City legislation. (A copy of that memorandum is available on the City Attorney website under the Legal Opinions tab, at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=273>. But note that the memorandum's description of the Office's standard sequence for distributing and addressing confidential memoranda, in sections C and D of the Discussion, is outdated.) Any legal memorandum that this Office delivers electronically to a client must be provided by the responsible Deputy in PDF Adobe Acrobat format to preserve the integrity of the document.
- Sequence of Advice. The Deputy responsible for the proposed legislation should deliver the advice in the following sequence, and must *timely* provide the advice at each step along the way:
  - (1) Sponsor. If the responsible Deputy determines that a cautionary memorandum may be required, the Deputy will consult with the Team Leader and Chief Assistant or Chief Deputy about the need to issue the memorandum, and following that consultation but before issuing the memorandum, will advise the sponsor orally that a cautionary memorandum is likely. Before the legislation is introduced, the responsible Deputy must deliver the written memorandum to the sponsor (or sponsors) of the legislation, with a copy to the Deputy who is the liaison to the Board (Jon Givner), subject to obtaining approval under these guidelines. The responsible Deputy should generally send a follow up email to the sponsor or the sponsor's aide making sure the sponsor received the memorandum and offering to discuss any questions. Also, when the proposed legislation would affect a particular City department or official, or was prepared at the behest of - or in cooperation with - a particular City department or official, the responsible Deputy should discuss with the Team Leader and then with the Chief Assistant or Chief Deputy whether to copy that department or official on the memorandum, either at the time we send the memorandum to the sponsor, or later when we send the memorandum to the full Board and the Mayor; if the Office decides it should send a copy to the department or official, the responsible Deputy should let the sponsor know of our intention to do so, in advance.
  - (2) Full Board and Mayor. Once the legislation has been introduced and within a reasonable time before a committee of the Board considers the proposed legislation, the responsible Deputy must deliver the same substantive advice (after taking into account any applicable

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amendments to the proposed legislation) to each member of the Board, and the Mayor. In the "To" line, the opinion should be addressed jointly to the full Board and the Mayor; that means that neither the Board nor the Mayor may disclose the confidential memorandum without the approval of the other and in any event they should consult with this office before considering doing so. (Note that the need for the Board and the Mayor both to agree on disclosing such confidential cautionary memoranda distinguishes these guidelines from the previous opinion procedure described in our August 20, 2009 public memorandum entitled "Disclosure of Attorney-Client Privileged Advice from the City Attorney's Office.") The responsible deputy should also send a copy of the memorandum to the Clerk of the Board, as well as the following individuals in the City Attorney's Office: the Deputy liaison to the Board (Jon Givner), the Deputy liaison to the Mayor (Rob Maerz), the Legislative Analysis Unit (Paul Zarefsky), Allie Fisher and Laurel Turner. Where the memorandum is designated as privileged and confidential advice, the responsible Deputy should provide clear instructions to the Clerk that the Clerk place the memorandum in the confidential legislative file for that matter.

- (3) Amendments to the Underlying Legislation. If the underlying legislation is amended in response to advice of this Office or for any other reason in a way that changes the substance of our advice, the responsible Deputy should inform the sponsor and revise the cautionary memorandum accordingly. After obtaining approvals within the Office under the review process set forth in these guidelines, the responsible Deputy should issue the new memorandum under the procedure set forth in paragraph (2) above. The memorandum should clearly state that it supersedes the earlier memorandum due to changes in the legislation. Again, the responsible Deputy should generally send a follow up email to the sponsor or the sponsor's aide making sure the sponsor received the new memorandum and offering to discuss any questions.
- (4) City Law. The Deputy responsible for the legislation must make sure that each cautionary memorandum issued in connection with the legislative proposal during the legislative process is electronically filed in PDF Adobe Acrobat form in our internal database, City Law. If there is any material change in the substance of the cautionary memorandum that we make due to a change in the proposed legislation or otherwise, then the Deputy responsible for the legislation must ensure that there is an appropriate notation in City Law indicating that the earlier memorandum has been superseded. Before reissuing any cautionary memoranda during any step in the legislative process, the Deputy responsible for the legislation must reread the opinion to make sure it is the correct version and remains accurate, complete and current in light of any changed facts or circumstances.

**IV. DRAFTING GUIDELINES**

- Format. Generally, opinions should be in memorandum form and follow this format: (1) the question or issue presented, (2) a short answer, (3) background or facts, (4) analysis and (5) conclusion. While circumstances may dictate variations on this general format, the first page of the memorandum should always contain a clearly written short answer.

For opinions that will be published and numbered (see below for criteria), a template is on the City Attorney computer system. The name of the template is Op-p&#97. The template (1) includes a header with the Opinion No., a subject line, and lines for who requested and who prepared the opinion, (2) includes a signature block for approval by the City Attorney

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(3) removes the privileged and confidential reference from the header and (4) includes captions following the format set forth above.

For confidential opinions and other opinions that will not be published and numbered, Deputies should use their individual memoranda templates and make appropriate changes to follow the general format.

- Search Database for Earlier Opinions. Deputies should check with the City Attorney Librarian to determine if the Office has issued any earlier opinions regarding the subject matter of the proposed opinion. For internal use, the City Attorney Librarian, together with the head of the Information Services Team, will maintain a searchable computer database of all written opinions. The Office will conduct training sessions for Deputies on how to use the database.
- Writing Rules. Opinions should be clear and succinct. In writing opinions Deputies should follow these rules<sup>1</sup>:
  - Begin organizing by outlining.
  - Relax the tone - avoid legalisms (e.g. "pursuant thereto", "herein") and Latin words.
  - Write short, simple sentences, prefer small words to big ones and edit out unnecessary words.
  - Use clear topic thesis sentences at the beginning of paragraphs.
  - Use transitions – “bridges” – between sentences, paragraphs, and sections (inc. pronouns such as he, she, it), pointing words (e.g., this, that, these), echo links (e.g., this doctrine), explicit connectives (e.g., further, moreover).
  - Minimize the use of footnotes. Usually if the point is worth making it belongs in the text.
  - Use the active voice - minimize using the passive voice, except when: the actor is unknown, you want to hide the actor's identity, you want to avoid sexist language, or you want to avoid a buried verb.
  - Uncover buried verbs (e.g. “violated” instead of "was in violation of")
  - Eliminate unnecessary prepositional phrases (e.g., "in the event that", "on the part of," "facts of this case").
  - End sentences with a punch, not with a date - unless the date is critical.
  - Use "but" at beginning of sentences and "however" in the middle.
  - Use "that" restrictively and "which" nonrestrictively.

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<sup>1</sup> Many of these rules are based on the City Attorney's Office "Tips for Improved Briefing" (October 2001), which is turn is adapted from Bryan Garner's book entitled "The Winning Brief."

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- Use "under" or "according to" instead of "pursuant to."
- Avoid long quotations, but if you use them supply an informative lead in.
- Add flourish: use bullet points for lists, and dashes - rather than commas - to highlight interruptive phrases.
- Read it out loud to see if it flows naturally.
- Have one or more people edit your writing.
- Never use the word "clearly."
- Refer to parties by last name (unless they have earned a title or position).
- Describe actions (e.g., a report cannot do anything, only a person can).
- Avoid acronyms.
- Avoid dangling modifiers and keep nouns and verbs together.
- For argumentative opinions, prove our case before refuting the opposing side's arguments; organize the argument as dialectic.
- Use cases to best advantage - give facts if on point, otherwise just cite (consider bullets instead of string cites).
- Avoid using parentheticals to present your argument.
- Use an even tone; never distort the facts or the law; avoid hyperbole and personality attacks.
- Where appropriate, tell the recipient of your advice what you want the recipient to do or what your recommendations are.
- Minimize the use of nouns as adjectives.
- Before starting a list tell the reader what you are about to list (e.g., "this argument is defensible for four reasons").
- Do not overuse subheadings as a substitute for organization.
- Use "i.e." and "e.g." only inside parentheses. Outside parentheses write "that is" or "for example."
- Avoid contractions (such as "don't").
- Follow the word "this" with a modifying noun.
- Phrases such as "it should be noted" or "we contend that" are usually unnecessary.

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- Be sure your pronouns refer to the immediately preceding noun.
- Choose adjectives carefully, and minimize their use.
- Editing Guidelines. In editing opinions, Deputies should follow these rules<sup>2</sup>:

## Level One: Basic Edits

- Cut or reword pointless legalisms (e.g., hereafter, thereto, whereas, herein).
- Convert forms of the verbs to be (e.g., is, are, was, be, been) into stronger verbs.
- Convert the passive voice to the active voice unless there is a good reason not to.
- Change words that end in "-ion" to verbs when you can.
- Check every "of" to see whether it is propping up a wordy construction. If so, rephrase.
- Try to cut each sentence by at least 25%.
- Read it aloud, accenting the final word or phrase in each sentence. Does it read naturally?

## Level Two: Refining Edits. Ask yourself:

- Does the central point emerge clearly and quickly?
- Is there a strong counter-argument that you have not adequately addressed?
- Can you spot a bridge at the outset of each paragraph?
- For each block quotation, have you supplied an informative lead-in?
- Can you make your points better?
- Have you used real names for parties unless there is a compelling reason not to?
- Have you achieved the correct tone?
- Have you presented options and solutions rather than just problems and issues?
- Citations. Citation style should be consistent. Use either Blue Book or California Style Manual.

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<sup>2</sup> These rules are adapted from the Law Prose Editing Method in Bryan Garner's "Legal Writing in Plain English." Also, see Kiko Korn's MCLE presentation on Writing That Works, 12 Ways to Transform Your Prose.

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- Confidentiality. Opinions should be labeled “Privileged and Confidential, Attorney Client Privilege/Work Product” where appropriate for attorney-client communications. Under the California Rules of Professional Responsibility, in most instances Deputies have ethical obligations to maintain the confidentiality of legal advice to City officers, departments, boards and commissions. But where opinions would be useful to the public, Deputies should discuss with the appropriate client representative the possibility of issuing a publicly available opinion and refer to the procedures above for issuing public opinions.