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City Attorney

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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. Written opinions include advice to our clients that we give by formal memorandum or letter, and less formal means of communication such as email.

The San Francisco Charter vests in the elected City Attorney the authority and duty to act as the City’s independent legal advisor. 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 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. Another goal is to make sure our advice is responsive and helpful to our clients, including giving options to address legal issues and reduce or avoid legal risk where possible.

This policy for issuing opinions consists of four parts: (I) the generally applicable review procedure; (II) the procedure for issuing confidential opinions regarding legal issues presented by proposed Board of Supervisors legislation, known as “cautionary memoranda”; (III) the procedures for public opinions; and (IV) drafting guidelines for all opinions.

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 we issue the opinion. A significant legal opinion is any form of substantive advice—whether in writing or oral, formal or informal—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 a proposed legal opinion is significant and therefore requires the City Attorney’s approval. If the opinion is significant, then all of the following steps apply.

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- Search of Electronic Opinion Database. The Deputy City Attorney authoring the opinion must search the Office's internal opinion database for any previous advice regarding the subject of the proposed opinion. The current database is *IPro*. Opinions that were on the old *Concordance* opinion database remain on the current database, which became operational on September 11, 2018. The opinion database contains both public opinions and confidential and privileged opinions, including memoranda, letters and email communication. It also includes confidential internal summaries of legal analysis. After searching the opinion database, the author of a new proposed opinion must identify to the Team Leader, and ultimately to the Chief Assistant, whether the proposed opinion follows, or conflicts with, previous advice, or whether the opinion addresses a new area of law that no opinions on the database have dealt with.
- 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. Also, before presenting the final draft for approval, the Team Leader and the author of the opinion are responsible for identifying and consulting with all appropriate Deputies in the Office with substantive knowledge relevant to the subject matter of the opinion. Finally, the Team Leader is responsible for identifying and recommending for approval opinions that are appropriate for making public 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. In submitting the opinion for approval, the author must submit 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 making public 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, or quote the request in the 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 the Office I-drive under the Opinions tab. The requesting Deputy should submit all these materials by email, including the draft opinion in word format.
- Review Time; Additional Review for High Litigation Risk. The author must 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

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should be the exception rather than the rule. If the opinion involves a high risk of litigation, the Chief Assistant may ask that the Chief Deputy, Chief of Appeals or other designated litigator also review the opinion, and that may require additional time.

- 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 with the requesting client, either by reading the draft memorandum to the client or by showing the client a draft, 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 a preview 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 must 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 must consult with the Deputy liaison to the Board and provide a copy to that Deputy on the final opinion. The author must also 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 (that is, to prevent the transmittal of metadata in word or similar documents and to ensure that recipients do not inadvertently change the document).
- Submitting the Opinion for Filing in the Electronic Opinion Database. After issuing the opinion, the authoring Deputy should send an electronic copy (in PDF Adobe Acrobat format) by e-mail to the Office’s Litigation Support Division, together with the completed Opinion Database Request Form, for inclusion in our internal opinion database. The email address to use for this purpose is: CTYATT-LITIGATIONSUPPORTGROUP@sfcityattorney.org. The Opinion Database Request Form is available in the Office I-drive under the Opinions tab. This transmittal will help assure that our internal opinion database is complete and up-to-date and that our opinions are

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more readily searchable. In particular, the completed transmittal form informs the Litigation Support Division about how to categorize the opinions once added to the database. 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 CONFIDENTIAL MEMORANDUM OPINIONS REGARDING LEGAL ISSUES RAISED BY BOARD OF SUPERVISORS LEGISLATION, KNOWN AS CAUTIONARY MEMORANDA

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 that the Board of Supervisors or Mayor proposed, which confidential opinions we often call "cautionary memoranda."

- Confidential Written Advice. 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 must 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 <https://www.sfcityattorney.org/legalopinions>. But 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.)
- Electronic Format. Deputies may provide legal memoranda that this Office delivers to the Mayor and members of the Board by email. 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 and to ensure that recipients do not inadvertently change the document.
- Consistent Terminology for Legal Risk Assessments. We describe legal risk in cautionary memoranda in terms of the substantive risk of a plaintiff prevailing in a facial or as-applied challenge to an ordinance, and often we also address the practical risk of a plaintiff filing a lawsuit. In both instances, we describe the risk on a five point scale: (1) very high; (2) high; (3) medium; (4) low; and (5) very low. To provide consistent advice to our clients, Deputies must use this scale in describing legal risk in all cautionary memoranda. Note that as to the third level of risk on November 14, 2023 we changed the term from "significant" to "medium."

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Either in a cover email delivering an opinion or in the opinion itself (which may be in a footnote), depending on the recipient and how familiar they are with our risk assessment framework, consider including a note to this effect:

The City Attorney's Office evaluates legal risk based a five-point scale—very high risk, high risk, medium risk, low risk, and very low risk—and we use that scale in this opinion. We reach this evaluation through analysis of the law and facts applicable to a particular set of circumstances. We expect the recipient policymaker(s) to consider the level of risk and any options to reduce that risk presented here as part of their informed decision-making.

Also, when identifying a medium risk in an opinion, consider including a note that this assessment is in the mid-level in our five point scale and it means that the City could just as easily lose as win in court.

- Estimate of Litigation Costs. In instances where we are issuing an opinion identifying a high or very high risk of litigation or of losing on the merits if there is a lawsuit, advice Deputies should involve a litigator in reviewing that assessment. Team Leaders may reach out to the Chief Deputy to identify an appropriate litigator to review the advice. Often, in the opinion we also try to include an estimate of the cost of defending the ordinance, including through appeal, and any liability the City could have for attorneys' fees, depending on input from the litigators about whether we can provide a reasonable estimate and it would be useful to do so.
- 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, and send a PDF copy to the Deputy liaison to the Board (Anne Pearson), the Deputy liaison to the Mayor (Manu Pradhan), the Legislative Analysis Unit (Paul Zarefsky and Anna Pasquale), and the Office's Litigation Support Division (Brendan Patrick), 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

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- 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 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. The responsible deputy should also send by email a PDF copy of the memorandum to the Clerk of the Board, and send a PDF copy to the following individuals in the City Attorney’s Office: the Deputy liaison to the Board (Anne Pearson), the Deputy liaison to the Mayor (Manu Pradhan), the Legislative Analysis Unit (Paul Zarefsky), and the Office’s Litigation Support Division (Brendan Patrick). Where the memorandum is designated as confidential and privileged 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) Waiver of the Attorney-Client Privilege. For confidential cautionary memoranda, the privilege may be waived only if all the recipients in the “To” line of the memorandum agree to waive the privilege. That means once we have issued a confidential cautionary memorandum addressed to the Mayor and the Board, the Board, acting as a body, and the Mayor must both agree to waive the privilege. Until we issue the confidential cautionary memorandum to the Board and Mayor, the sponsor(s) could waive the privilege. But we ask that any recipients of confidential advice who wish to provide a copy of the memorandum or otherwise disclose the advice to a third party, and therefore waive the privilege, consult with us before doing so. And we discourage them from disclosing the advice if doing so could harm the City’s interests, especially when not all of the City’s highest policy members have participated in making that decision. City officials who are listed in the “CC” line of a cautionary memorandum do not have authority to waive the privilege. For more information on waiver of the privilege for cautionary memoranda, see our August 20, 2009 public memorandum entitled “Disclosure of Attorney-Client Privileged Advice from the City Attorney’s Office” available on the Office’s website at <https://www.sfcityattorney.org/legalopinions> (although the opinion procedure described in that memorandum is now outdated.)

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- (4) 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 materially changes the substance of our advice, the responsible Deputy must 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.
- (5) City Law. In addition to filing the opinion in our opinion database, the Deputy responsible for the legislation must make sure that each cautionary memorandum we issue in connection with the legislative proposal during the legislative process is electronically filed in PDF Adobe Acrobat form in our internal document 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.

III. PROCEDURES FOR ISSUING PUBLIC OPINIONS

- Making Opinions Public. In the interests of transparency and accountability, the City Attorney's policy is 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 the office will make public. Factors that the City Attorney may consider in determining which opinions to make public 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. In addition to City Attorney opinions that meet the above criteria for making them public, we may post other opinions on the City Attorney website 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.

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- Posting on Website and Public Information Officer. For any opinion that the City Attorney or Chief Assistant has approved making public and posting on the City Attorney's Office web site, the authoring Deputy must provide a copy of the final opinion to the Office's Public Information Officer after the client receives the opinion. The authoring Deputy should consult with the Chief Assistant and the Office's Public Information Officer about the timing of posting the opinion following delivery of the advice. Also, the authoring Deputy should, upon request by the Chief Assistant, consult in advance (that is, before the opinion is issued) with the Office's Public Information Officer if a public opinion is likely to become news-worthy.
- Publishing Opinions.

From time to time over its history, the City Attorney's Office has had the practice of publishing opinions. The City Attorney reinstated that practice in 2002, but more recently the Office has suspended that practice. If the City Attorney determines to publish any opinions in the future, the process for doing so is as follows:

- Signature by the City Attorney. The City Attorney must personally sign all opinions that we publish.

A sample signature block follows:

Very truly yours,

DAVID CHIU
City Attorney

Jesse Smith
Chief Assistant City Attorney

APPROVED:

DAVID CHIU
City Attorney

- Assignment of Opinion Number. The City Attorney Librarian will be responsible for assigning numbers to opinions that we will publish. Before the Chief Assistant or Chief Counsel presents an opinion to the City Attorney for approval

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for issuance and publication, the author must 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]

- 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.

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 contain a clearly written short answer.

For confidential opinions and most other opinions, Deputies should use their individual memoranda templates and make appropriate changes to follow the general format.

To improve the consistent look and readability of formal opinion memoranda, please prepare them using single spacing between lines, six points before and after paragraphs, and indenting the first line of paragraphs 0.5.

For any opinions that will be published and numbered, a template is on the City Attorney computer system. You can find the template in the New/Custom/Workgroup/Opinions 2019 folder, in Word. 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 (3) removes the privileged and confidential reference from the header and (4) includes captions following the format set forth above.

- Length. Generally, opinions should be no longer than *five pages* and all the important points we wish to make should be summarized up-front, preferably in the first page.

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Sometimes our opinions need to be longer because of the complexity of the subject matter or for other reasons. A Deputy who wishes to provide an opinion longer than five pages should get advance approval from the Team Leader or Chief Assistant.

- Search Database for Earlier Opinions. Deputies must search the Office’s internal electronic opinion database to see if the Office has issued any earlier opinions regarding the subject matter of the proposed opinion, and as described above, in the review process must identify whether the opinion is consistent with any previous advice, conflicts with previous advice, or covers new ground. As mentioned above, the current database is *IPro*. The Office conducts training sessions for Deputies on how to use the database, including any significant updates to the database.
- Writing Rules. Opinions must be clear and succinct. In writing opinions Deputies should follow these rules, many of which are based on the City Attorney’s Office “Tips for Improved Briefing” (October 2001), and are turn adapted from Bryan Garner’s book entitled “The Winning Brief”:
 - Where possible, 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 (including 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. Almost always, if the point is worth making it belongs in the text and readers often do not read footnotes. In advice opinions, use footnotes, if at all, only for citations.
 - 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.

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- Use “but” at beginning of sentences and “however” in the middle.
- Use “that” restrictively and “which” nonrestrictively.
- 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” or the phrase “of course.”
- 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 to the extent possible.
- Avoid dangling modifiers and keep nouns and verbs together.
- 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.”
- For clarity, 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, 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):

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.
- Read it aloud, accenting the final word or phrase in each sentence. Does it read naturally?

Level Two: Refining Edits. Ask yourself:

- Is there a clear and concise summary of the advice at the outset?
- 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 achieved the correct tone?
- Have you presented options and solutions rather than just problems and issues?

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- Citations. Citation style should be consistent. Use either Blue Book or California Style Manual.
- Confidentiality. Opinions should be labeled “Privileged and Confidential, Attorney Client Privilege/Work Product” for all 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 their Team Leaders and with the appropriate client representative the possibility of issuing a publicly available opinion and refer to the procedures above for issuing public opinions.