

## Finding II

### City Auditor Response To City Council Questions

At its September 14, 2004 meeting, the City Council requested the City Auditor's Office to answer the following three questions:

1. Who is the City Attorney's client?
2. What is the standard for the City Attorney going up the chain of command?
3. What is the standard for City employees going up the chain of command?

The City Auditor's responses to these questions are:

- It is clear that the City Council is the City Attorney's primary client.
- The California Rules of Professional Conduct and the American Bar Association Model Rules of Professional Conduct have varying standards regarding an attorney's responsibility to report up the chain of command; and
- The City's current Code of Ethics encourages, but does not require, employees to report improper activities.

---

#### Who Is The City Attorney's Client?

Based upon our review of available authoritative sources and discussions with the CAO, it is clear that the City Council is the City Attorney's primary client.

To answer "Who is the City Attorney's client and what is the standard for the City Attorney going up the chain of command?" we referred to four recent publications: 1) a League of California Cities (League) publication entitled Counsel and Council: A Guide for Building a Productive Employment Relationship (Counsel and Council); 2) another League publication entitled Practicing Ethics: A Handbook for Municipal Lawyers (Handbook); 3) the California Rules of Professional Conduct (CRPC); and 4) the American Bar Association Model Rules of Professional Conduct. Due to the evolving role of city attorneys, the Counsel and Council publication asks the same question, "Who does the City Attorney represent? Is it a corporate "city" client? Are individual "public officials" clients? Is the "public" the client?"

Is it some combination of all of these?” The publication notes that the California courts have not provided much guidance on this subject. However, it also notes that the courts have made it clear that ethical standards of the profession govern government lawyers. In California, these standards are contained in the CRPC.

The CRPC defines an attorney’s role and responsibilities. Specifically, the CRPC states

*“In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.”*

Similarly, Counsel and Council states in response to the question, “Who is the client” that “the client is the city—the municipal corporation as a whole.” Further, Counsel and Council, the Handbook, and the CRPC provide clarification as to “who is the city?” Specifically, Counsel and Council states “In general terms, the city attorney takes direction from the majority of the city council.” Under the CRPC “an individual council member or other city official is not the client.” The City Attorney agrees that “the Mayor and City Council are the [city attorney’s] primary client.”

---

**What Is The Standard For The City Attorney Going Up The Chain Of Command?**

According to the League’s Handbook, “When a city attorney learns that the conduct of a city official or employee is or may be a violation of law that may be ‘reasonably imputed to the organization’ or is ‘likely to result in substantial injury to the organization,’ State Bar rules expressly authorize, (but do not require), the city attorney to take the matter to the ‘highest internal authority within the organization’.” Specifically, the CRPC reads “If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in the Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest . . .” to include among others:

*“ (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or*

*(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.”*

In contrast to the CRPC, the ABA Model Rules of Professional Conduct Section 1.13 (b) requires the reporting of such behavior whenever the attorney believes it is in the best interest of the client to do so. According to the Handbook, the State Bar is contemplating a change to also require reporting of such behavior when it is in the best interest of the client to do so.

According to the City Attorney, he and his office consider it to be their duty to report such matters up the chain of command to the City Manager, and if still unresolved, to the City Council by way of a memorandum. There has not been an occurrence in which it was the opinion of the City Attorney that the conduct of a City official or employee was clearly in violation of law and was required to be elevated to the City Council to prevent such violation. However, the City Attorney has informed the City Auditor that it is not at all unusual for the City Attorney to elevate legal concerns to the City Council when the City Attorney believes a particular course of conduct being pursued by City staff creates significant exposure to the City. Such memorandums are generally Attorney/Client communications, which are not discussed in this report, but of which the Council is aware.

According to the City Attorney, there has never been any doubt in his mind that his primary client is and his ultimate responsibility is to the City Council.

The City Attorney did not report any problems with the Converged Network RFP because, according to the City Attorney, his office “was not aware of the level of Cisco involvement in the creation of the Converged Network RFP and believed the standardization issue was resolved in April 2004, based on representations from the IT Director that we had standardized on Cisco routers and switches in 1999, and that the only telephony equipment that would work was the Cisco equipment. We did not know that the standardization issue was not resolved nor that Cisco was heavily involved in the creation

of the RFP until the July audit/investigation. Had these issues been known at the time the RFP was going to Council, it would not have gone forward (we would not have signed off on the Council memo) or Council would have been separately advised of the issue by my Office.”

**What Is The Standard For City Employees Going Up The Chain Of Command?**

The City’s CODE OF ETHICS FOR OFFICIALS AND EMPLOYEES OF THE CITY OF SAN JOSE (Code of Ethics), which was last revised in 1991, addresses employee responsibilities for the reporting of improper activities. Specifically, the Code of Ethics reads as follows: “Persons in the City service are strongly encouraged to fulfill their own moral obligations to the City by disclosing to the extent not expressly prohibited by law, improper governmental activities within their knowledge. No officer or employee of the City shall directly or indirectly use or attempt to use the authority or influence of such officer or employee for the purpose of intimidating, threatening, coercing, commanding, or influencing any person with the intent of interfering with that person’s duty to disclose such improper activity.”

In regards to employees’ responsibility for reporting improper activities, the City’s Code of Ethics allows for, and even encourages employees to report improper activities. However, the policy does not require them to come forward. Our review of other jurisdictions found similar statements of policy on this issue; however, several other jurisdictions’ policies establish a higher employee reporting standard than the City’s Code of Ethics. For example, the City of Seattle’s Municipal Code allows, but does not require employees to report. Specifically, their Municipal Code states “Every City employee shall have the right to report, in good faith and in accordance with this subchapter, to a City official, another government official or a member of the public, information concerning an improper governmental action.”

Similarly, the University of California’s Policy on Reporting and Investigating Allegations of Suspected Improper Governmental Activities (Whistleblower Policy) does not require persons to report. Specifically, the University’s policy states “Any person may report allegations of suspected improper governmental activities.”

On the other hand, other jurisdictions from different branches of government have implemented policies that require

employees to report improper activities. For instance, in 1990, President George Bush signed Executive Order 12731, which required, as a condition of federal employment, that every federal employee disclose waste, fraud, and abuse of authority within their agencies. Specifically, the Executive Order stated the following: “Public service is a trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.” “Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.”

Other local jurisdictions’ fraud policies require employees to report improper activities. For instance, the City of Toronto Corporate Fraud Policy states “Any employee who has knowledge of an occurrence of irregular conduct, or has reason to suspect that a fraud has occurred, shall immediately notify his/her supervisor. If the employee has reason to believe that the employee’s supervisor may be involved, the employee shall immediately notify their Commissioner and the City Auditor.”

Requiring an employee to disclose improper activities is consistent with the Governmental Accountability Project (GAP) recommendations for effective whistleblowing laws. The GAP, which is a non-profit, nonpartisan public interest law firm that specializes in whistleblower protection, has developed a checklist for effective whistleblower protection laws. With regards to disclosing an illegality, the GAP checklist states that the whistleblower law should contain a provision for a “Duty to disclose an illegality. This provision helps switch the whistleblowing context from a personal initiative for conflict, to a public service duty to bear witness.”

An August 22, 2003 memorandum from Mayor Gonzales recommended “that a Blue Ribbon Task Force be established to review outstanding issues relating to the ethics ordinances...” During December 2004, the Blue Ribbon Task Force (Task Force) is scheduled to review the Code of Ethics. Therefore, due to the varying standards regarding an employee’s duty to report improper activities, we recommend that the San Jose City Council refer to the City’s Task Force for discussion and consideration, amending the Code of Ethics regarding an employee’s duty to report improper activities.

We recommend that the San Jose City Council:

**Recommendation #3**

**Refer to the City's Blue Ribbon Task Force for discussion and consideration, amending the Code of Ethics regarding an employee's duty to report improper activities. (Priority 3)**

In response to direction from the City Council, the City has taken steps to inform employees about the options available to them for reporting any inappropriate activities. Specifically, the City has informed employees about "safe spaces" where employees can feel comfortable raising issues and voicing concerns. To assist them in locating these resources, the Office of Employee Relations has updated its intranet website to provide employees with information about the options that are available for reporting concerns, filing complaints, and raising questions. The revised website may be used to obtain information about who to contact regarding various types of issues, including but not limited to harassment and discrimination, workplace violence, ethical issues, violations of City rules or policies, substance abuse, and theft. Additionally, employees can visit the website to obtain a copy of a Memorandum of Agreement to locate a policy in the City Policy Manual, or to review the City's Code of Ethics.

To further foster an environment where employees can feel comfortable raising issues and voicing concerns, the City Auditor's Office is working with the Office of Employee Relations to establish a hotline. We have conducted a survey of the ten largest cities in California and other jurisdictions throughout the United States and Canada. We will be conducting additional research to determine the best program for the City of San Jose. The City Auditor's Office and the Office of Employee Relations will report back to the Rules Committee in January 2005.

---

**CONCLUSION**

We have responded to three questions raised by the City Council at their September 14, 2004 meeting and determined that the City Attorney's client is the City Council acting on behalf of the City. In addition, we found that the CRPC and the ABA have varying standards regarding an attorney's responsibility to report up the chain of command. Furthermore, the City's current Code of Ethics encourages but does not require employees to report improper activities.

---

**RECOMMENDATIONS**

We recommend that the San Jose City Council:

**Recommendation #3 Refer to the City's Blue Ribbon Task Force for discussion and consideration, amending the Code of Ethics regarding an employee's duty to report improper activities. (Priority 3)**

