

DEPARTMENT OF FIRE AND POLICE PENSIONS

360 East Second Street, Suite 400
Los Angeles, CA 90012
(213) 978-4545

REPORT TO THE BOARD OF FIRE AND POLICE PENSION COMMISSIONERS

October 20, 2011

ITEM: B.2

FROM: *for M. Liggio* Michael A. Perez, General Manager

SUBJECT: LEGAL SERVICES MODELS (CF# 11-1127) AND POSSIBLE BOARD ACTION

RECOMMENDATION

That the Board:

1. Consider the attached Council Motions and determine if the Board would like to provide a response to the City Council for its consideration; and,
2. Instruct staff to prepare a report for the November 3, 2011 Board Meeting if it should choose to provide a response to the City Council.

DISCUSSION

On June 28, 2011, the City Council adopted a Motion (Attachment 1) that instructs the Chief Legislative Analyst (CLA) to, "prepare a report that reviews the models for providing legal services to cities in California and, to the extent relevant, other cities across the nation, including a detailed review of the requirements related to providing both civil and criminal services." This Motion was later amended by the City Council on July 19, 2011 (Attachment 2) to, "exclude from its review cities and counties that contract out legal services, and to also review the capacity of the City attorney as the legal advisor to Council and City departments." In response to the Motions, the City Attorney's Office issued a letter to the Council (Attachment 3) putting the current structure in historical context as well as discussing past efforts to revise the Charter for a similar purpose.

At the September 15, 2011 Board Meeting, Commissioner Diannitto asked that this issue be placed on a future Agenda for the consideration by the Board. This report is in response to this request.

In response to the Council actions, both the Water and Power Employees' Retirement Plan (Attachment 4) and the Los Angeles City Employees' Retirement System (Attachment 5) have provided reports to the CLA and the City Council for their consideration. In their letters, each System stipulates that in their opinion, there is an inherent conflict in having the City Attorney's Office represent both the City and the pension systems.

If the Board directs staff to prepare a response for its consideration, we envision the background information being similar, but we would provide relevant examples of our past experiences. These experiences include, but are not limited to:

1. Staff within the City Attorney's Office, Retirement Benefits Division (RBD), being over-ruled by higher level staff within the City Attorney's Office (unbeknownst to staff within LAFPP or RBD), putting LAFPP staff at a disadvantage when discussing Charter provisions with staff from an elected office;
2. The City Attorney telling the Board and staff on several occasions that confidential advice provided to elected officials cannot be divulged since the privileged is held by those officials and not by the City Attorney's Office; and,
3. Board members being told that they cannot access outside fiduciary counsel without the approval of the City Attorney's Office.


While these are issues the Board will want to consider when deciding to respond to the City Council, the Board is reminded that it is perhaps the only body in the City that is currently conducting an annual evaluation of the service provided by the City Attorney's Office. Through this process, the Board has the opportunity to communicate areas of strength and future expectations for staff within the Retirement Benefits Division. As such, some of these issues could have been communicated to the City Attorney's Office in July 2011, but the Board chose a more moderate tone in its letter summarizing the findings of the evaluation.

BUDGET

No impact at this time.

POLICY

No policy change as recommended.



William S. Raggio, Assistant General Manager
Administrative Operations Division

MAP:WSR

Attachments (5)

11-1127

ATTACHMENT 1

JUN 28 2011

BUDGET & FINANCE

MOTION

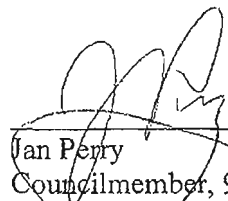
Most cities in the State of California contract or hire city attorneys to provide legal services. In these cities, the city council seeks a qualified candidate or firm based on the needs of the city. The city has an opportunity to ensure a high level of service and hold their appointed attorneys accountable for the quality of their services and the timeliness of their actions.

In a few large cities, the city attorney is an elected position. One of the key reasons a city chooses to implement a legal services structure based upon an elected city attorney is to accept additional responsibility for the prosecution of limited criminal matters on behalf of the people of the State. Counties in California employ a legal services model with a county counsel to advise departments and officials and an elected district attorney who is responsible for civil and criminal prosecutions.

The City's approach to structuring legal services is unique in California, but it may result in complications that create challenges not present in other governmental models for legal services. Review of the way other cities and counties structure their legal services would be helpful to provide an understanding of the options available for service delivery

I THEREFORE MOVE that the City Council instruct the Chief Legislative Analyst to prepare a report that reviews the models for providing legal services to cities in California and, to the extent relevant, other cities across the nation, including a detailed review of the requirements related to providing both civil and criminal services.

PRESENTED BY:



Jan Perry
Councilmember, 9th District

SECONDED BY:



Bernard C. Fisher

ORIGINAL

GLA

jw/hd

AMENDING MOTION

I HEREBY MOVE that Council AMEND the recommendation of the Budget and Finance Committee report (Item #6, Council file 11-1127) relative to reviewing models for providing legal services to cities and counties in California and across the nation, to include the following:

INSTRUCT the Chief Legislative Analyst to exclude from its review cities and counties that contract out legal services; and to also review the capacity of the City attorney as the legal advisor to Council and City departments.

PRESENTED BY _____
RICHARD ALARCON
Councilmember, 7th District

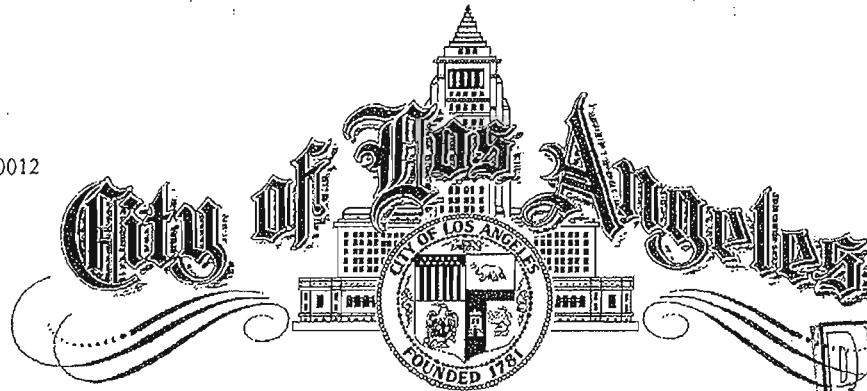
SECONDED BY _____
JAN PERRY
Councilmember, 9th District

July 19, 2011

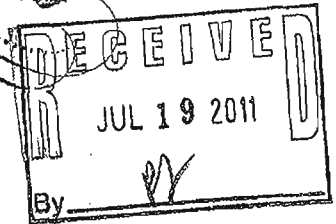
CF 11-1127

City Hall East
200 N. Main Street
Room 800
Los Angeles, CA 90012

(213) 978-8100 Tel
(213) 978-8312 Fax
CTrutanich@lacity.org
www.lacity.org/atty



CARMEN A. TRUTANICH
City Attorney



July 19, 2011

The Honorable Eric Garcetti
President, Los Angeles City Council
200 North Spring Street
Room 470, City Hall
Los Angeles, CA 90012

Re: Motion regarding Legal Services

Dear President Garcetti:

City Charter Section 270 et seq. establishes the Office of the Los Angeles City Attorney as the "One City Attorney" for the municipal corporation, and mandates that this Office provide all civil and criminal legal services to the City, except for certain Charter-defined exceptions. For more than 160 years, with the exception of a short period between 1911 and 1933, the City has been served by an independent, elected "One City Attorney," who acts as both the City Attorney and City Prosecutor. Similarly, the largest cities in the state, including San Francisco, Oakland, Long Beach, San Diego and San Bernardino, have recognized the merit of an independent, elected City Attorney.

In June 2011, Councilmembers Parks and Perry presented a motion requesting that the Chief Legislative Analyst prepare a report that reviews various models for providing civil and criminal services in California and, to the extent where relevant, "across the nation." The ultimate purpose for such a proposed motion appears to be another attempt to question the wisdom of and change the long-standing provisions of the Charter mandating an independent, elected City Attorney, which can only be accomplished through the approval of the voters.

The apparent underlying purpose for the proposed motion is not new. Over the past century, there have been several failed attempts rejected by both the voters and other elected officials to remove the independence of the City Attorney from the City Charter. The history of the City also amply demonstrates that an independent, elected "One City Attorney" provides the most effective legal services for representing both the municipal

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corporation and the People of the City of Los Angeles, as well as maintaining transparent, open and good government.

This Office therefore believes that the motion is imprudent and would unnecessarily consume City time and resources. Moreover, as provided in the Charter, an independent, elected City Attorney assures professional and objective legal advice free from political influence or coercion, and ultimately, is accountable to the voters of the City. In short, an independent, elected City Attorney will more effectively stand up to political influence and coercion in providing his/her best legal representation, as opposed to an appointed City Attorney, who may be less objective, more compliant and perhaps, downright submissive to special interests and thereby, not accountable to the voters of the City.

The following is a brief historical summary of previous attempts to dismantle the Charter-mandated independence of the City Attorney's Office.

A. Historical Foundation for the City Attorney

The Office of the Los Angeles City Attorney has existed since "at least" 1822. (L. David, *Law and Lawyers: One Hundred Twenty Eight Years in the History of Los Angeles As Seen From the City Attorney's Office* (1950; David), at 1.)¹ Under both Spanish and later Mexican rule, the *sindico-procurador* was the attorney for the City of Los Angeles. (David, at 4.) California secured independence from Mexico in 1846 and joined the Union in 1850. (110 Ops.L.A.CityAtty. 1, 5 (1986).)² At section 37 of the 1850 California Constitution, the Legislature authorized the formation of municipal corporations. (*Ibid.*) On March 11, 1850, the Legislature in its first session passed the "Act for the Incorporation of Cities" which provided for an elected "City Attorney." (*Id.*, at 6.) At section 27 of the Act, the City Attorney's duties were set forth as:

"[i]t shall be the duty of the City Attorney to attend to all suits, matters, and things in which the City may be legally interested; to give his advice and opinion, in writing, whenever required by the Mayor or Common Council, and to do and perform all such things touching his office, as the Common Council may be required of him." (*Ibid.*, citation omitted.)

On April 4, 1850, pursuant to the Act for the Incorporation of Cities, (stats. 1850, ch. 30, at 88), the City of Los Angeles was incorporated by statute. (Stats.1850, ch. 60, at 155.)

¹ Leon Thomas David was a former attorney at the Los Angeles City Attorney's Office, and served as both a Municipal and Superior Court Judge.

² This opinion is sometimes informally cited as Ops.L.A.CityAtty. No. 85-46.

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The structure of the Office of the Los Angeles City Attorney remains largely unchanged since at least 1850. Integral to that structure has been the Charter requirement that there to be "One City Attorney," *i.e.*, one attorney who represents all of the interests of the municipal corporation, including the simultaneous representation all of the interests of the municipal corporation's sub-units.

By an ordinance of November 29, 1872, the City Attorney was required to be present at regular meetings of the Council and to draft ordinances for consideration of the Mayor and Council when requested by them. (W. McPherson, *Charter and Revised Ordinances of the City of Los Angeles (1873)*, at 187.)" (110 Ops.L.A.CityAtty., *supra*, at 6.) In the following years, the Charter has been amended numerous times; each time retaining an independent, elected One City Attorney. (See Cal. Const. art. III, § I, stats. 1873-74, at 636; Cal. Const. art. V, §7, stats. 1873-74, at 642; Cal. Const. art. V, §4, 1875-76 stats., at 702; Cal. Const. art. V, §3, stats. 1878, ch. 440, at 652; 1889 Charter §49, 1889 stats., at 472; stats.1925, at 1047-48); stats.1953, ch. 202, at 4252; stats. 1975, app., at 63-65.)

On June 8, 1999, the voters adopted the City's current Charter. (Eff. Jul. 1, 2000 [Charter, § 110(a)].). Consistent with the City's unbroken history since at least 1850, the City retained an independent, elected City Attorney, who serves as the municipal corporation's exclusive legal representative.

B. The City Attorney As The Municipal Prosecutor: Origins and Development

When the City's statutory Charter was amended on April 1, 1876, the City Attorney for the first time was authorized to prosecute violations of municipal ordinances and resolutions. (Cal. Const., art. V, § 4, 1875-76 stats., at 702.) In 1911, the City's 1889 Charter was amended, the Office of the City Prosecutor was created to prosecute municipal crimes. (1889 Charter, § 50, 1911 stats., at 2099-2100.)

In 1929, the Legislature amended the Municipal Courts Act of 1925 by adding Section 24½, which authorized cities of certain populations holding freeholders charters to prosecute "misdemeanor offenses arising upon violations of the laws of the state." (1929 stats., ch. 751, at 1429.) Accordingly, for the first time, California city attorneys were accordingly authorized by state law to prosecute state law crimes, *i.e.*, crimes arising under the Penal Code.³

Effective January 10, 1933, an amendment to the City of Los Angeles' 1925 Charter abolished the Office of City Prosecutor. At that time, the Office's duties to prosecute

³ The current descendant of the Municipal Courts Act of 1925 is Government Code section 72193 which authorizes city prosecutors of charter cities to prosecute state law misdemeanors committed within the city limits.

municipal crimes were transferred to the City Attorney, which was authorized to prosecute state law misdemeanors. (1933 stats., ch. 4, at 2742-44, 1925 Charter, §§ 42(8),43.) Under the current Charter adopted on June 8, 1999, the City Attorney continues to serve as the municipal prosecutor pursuant Government Code section 72193. (Charter, § 271(c).)⁴

C. Historic Failed Efforts To Eliminate The Charter's One City Attorney

Over the past one hundred years, there have been several unsuccessful attempts to eliminate the Charter's "One City Attorney" mandate. In 1912, the year after the City Prosecutor was created, the voters rejected a revised Charter that would have created an appointed City Attorney. (Menziez, at 8.) In the early 1920s, a twelve member "Board of Freeholders" (Charter Reform Commission) was elected by the voters of the City to update the 1889 Charter (Menziez, at 12.), which resulted in the 1925 Charter. (*Ibid.*)

During the 1925 Charter debates, Mayor George E. Cryer and City Attorney Jess E. Stephens strenuously argued the issues regarding the organization of the City Attorney's Office. (*Ibid.*) On one side, Mayor "Cryer insisted that the [City Attorney] should be an appointee of the Mayor in order that harmony among the various departments and officers of the city might be achieved. [On the other side, City Attorney] Stephens. . . upheld the argument that the City Attorney ought to be under the control of no officer or department of the city lest his opinions be influenced by fear of removal. It will be recalled that a previous attempt to make the City Attorney an appointee of the Mayor had received opposition of civic groups in 1915, and; in 1925, it did not appear that the electorate of the City was dissatisfied with the existing selection, the office remained elective." (*Id.*, at 14.)

The pervasive and well-documented corruption and scandals of the 1920s and 1930s within the City lead the voters and other elected officials to the wisdom of maintaining an independent, elected and unified City Attorney, who both represents the City and municipal corporation in all civil matters and prosecutes all misdemeanor criminal violations within the City's jurisdiction. The voters and the City Charter have mandated such independence and unified responsibilities since 1933.

In 1990, the Ethics Commission was created when the Charter was amended by the passage of Proposition H. (Former Charter, § 600 et seq.)⁵ During the debate on the

⁴ The Los Angeles City Attorney is also authorized to prosecute violations of the Charter and City ordinances. (Charter, § 271 (c).)

⁵ Former Charter Section 600(Q) provided: "The City Attorney shall provide legal services to the Commission. Notwithstanding Section 42 of the Charter, the Commission may employ or contract for staff counsel to give advice

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Charter amendment's language, former Councilmember Gloria Molina introduced Motion No. 3, which would have authorized the Commission to hire its own lawyers, not subject to the supervision by the City Attorney. (Transcript of Council Debate (Jan.17, 1990), at 1.) Former Councilmember Michael Woo, in opposition to the motion, argued that the proposed motion "sets a very dangerous precedent of other departments coming and asking for their own lawyers." (*Id.*, at 1.) Late Council President John Ferraro added, "including the City Council." (*Id.*, at 2.) Former Councilmember Hal Bernson also correctly noted that a Charter amendment would be required to authorize the Ethics Commission to hire its own lawyers "because under the current Charter the City Attorney is the official representative of the City." (*Id.*, at 2-3.) Former Councilmembers Richard Alatorre and Marvin Braude expressed their concerns about the cost to the City for the Ethics Commission to retain independent counsel. (*Id.*, at 2.) Councilmember Braude also expressed a concern that independent counsel for the Ethics Commission would set a "precedent" for other departments. (*Id.*, at 3.)⁶ The Council thereafter voted 12-3 against the motion. (*Ibid.*)⁷

In 1991, former City Attorney Burt Pines also addressed the need and wisdom for One City Attorney, stating: "[P]roposals presented by the Mayor, among others, have suggested that there will be improved efficiency and cost savings if the City Attorney reports directly to the Mayor and the City Council is given the opportunity to seek its own counsel. Instead of efficiency, this would create chaos. In instances where the lawyers for the Mayor and City Council disagree, the only possible arbiter would be a court of law." (B. Pines, *No Conflict Because There is One Client*, Los Angeles Times, April 30, 1991 at B7.)

In 1992, two years after the passage of Proposition H, in a letter to former City Attorney Hahn (Jan. 23, 1992), then-City Ethics Commission President Dennis Curtis opined that the Ethics Commission should be able to select its own employee attorney subject to the City Attorney's veto, and that such an attorney should be "housed" at the Ethics Commission, supervised by the Ethics Commission executive director and work exclusively on Ethics Commission matters. (*Ibid.*) In his January 27, 1992 response, City Attorney Hahn stated that "except for those investigatory and enforcement matters

to the Commission and take such action as the Commission may direct on matters which directly involve the conduct of the City Attorney, his or her office, or his or her election campaign." (Compare 1999 Charter, § 708 [language substantially unchanged].)

⁶ Councilmember Molina rejected the argument that a precedent would be established for other City departments, arguing that the Ethics Commission was unique, as an independent body. (*Id.*, at 3.)

⁷ A few years after the approval of the 1999 Charter, the City Ethics Commission once again raised the issue as to whether it was entitled to independent counsel. In a letter (May 20, 2003) from City Attorney Senior Counsel Frederick N. Merkin to the City Ethics Commission, Mr. Merkin again reiterated that the commission was not entitled to independent counsel.

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involving the staff of the City Attorney's Office itself, all legal services to the Commission are to be provided by my office. The City Council specifically considered and rejected a proposal that the Ethics Commission have other or outside counsel. The City's electorate ratified that decision." (*Id.*, at 1.) City Attorney Hahn further stated that the Charter "*mandates*" (emphasis original) that he select the Ethics Commission attorney and that he supervise that attorney. (*Id.*, at 12.)⁸

In 1998, both the appointed and elected Charter Reform Commissions considered the structure of the City Attorney's Office. At that time, then-Mayor Richard Riordan argued that the Mayor, Council and various departments should be allowed to hire their own attorneys. (Letter (Jul. 20, 1998) from Mayor Richard Riordan to Elected Charter Reform Commission, at 3.) City Attorney James Hahn, however, argued that the City Attorney should continue be an independent, elected One City Attorney. (See, e.g., Letter (Jun. 24, 1998) from City Attorney James Hahn to Members of the Los Angeles Elected Charter Commission, at 1-3.)

At that time, City Attorney Hahn also responded to a proposal by a Charter Reform Commissioner, who urged that the One City Attorney be replaced by (1) an elected City Attorney (City Prosecutor), (2) a General Counsel appointed by the Mayor and City Council and (3) a Legislative Counsel appointed by the City Council. (*Id.*, at 4.) In rejecting the creation of such a proposed troika, City Attorney Hahn argued that such a proposal would result in increased and redundant costs, such as libraries and office space, and that each office would "work at cross purposes." (*Id.*, at 5.) For example, according to City Attorney Hahn, the positions of the General Counsel and the Legislative Counsel could differ. In such an event, assuming the differences could be resolved, and the elected City Prosecutor would enforce the law, there is "no mechanism" for ensuring that the three proposed city attorneys would agree on the application or interpretation of the law, thereby causing a "disconnect" between the three lawyers. (*Ibid.*)

In a later speech entitled, "The Importance of an Elected, Independent City Attorney"), City Attorney Hahn again argued that an independent City Attorney provides "checks and balances" between the Mayor and City Council. (*Id.*, at 12-13.) City Attorney Hahn further concluded that only an independent, elected City Attorney "**directly answerable to the electorate can have the necessary independence to withstand the pressure that inevitably occurs when the public interest and the parochial interest of other public officials conflict. . . Under the present system, those officials are not guaranteed legal opinions to their liking; they are guaranteed an independent analysis taking into account the interest of the ultimate client, the residents of the city.**" (*Id.*, at 24-25, emphasis added.)

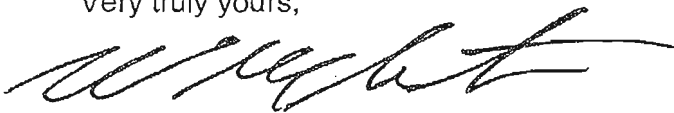
⁸ Throughout the Ethics Commission's entire existence, legal services have been provided by the City Attorney's Office under the direction of the City Attorney.

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From its very beginning, this City has been served by an independent, elected City Attorney. The City's "One City Attorney" structure provides economical, professional, objective and voter-accountable legal and prosecution services to the municipal corporation and its residents. Without voter approval, such Charter-mandated independence cannot be eliminated. Hopefully, these important historical perspectives and good government issues will be considered in reviewing the proposed motion.

Thank you for your consideration of this letter. If necessary, additional information, materials and authority will be provided to the Council.

Very truly yours,

A handwritten signature in black ink, appearing to read "W. Carter", with a long, sweeping horizontal stroke extending to the right.

WILLIAM W. CARTER
Chief Deputy

cc: Los Angeles City Council



Water and Power Employees' Retirement Plan

SANGEETA BHATIA
RETIREMENT PLAN MANAGER

MONETTE CARRANCEJA
ASSISTANT RETIREMENT PLAN MANAGER

MARY HIGGINS
ASSISTANT RETIREMENT PLAN MANAGER

JEREMY WOLFSON
CHIEF INVESTMENT OFFICER

BOARD OF ADMINISTRATION
JAVIER ROMERO, PRESIDENT
CYNTHIA M. COFFIN, VICE PRESIDENT
MARIO IGNACIO
RONALD O. NICHOLS
BARRY POOLE
ROBERT K. ROZANSKI
VACANT

August 30, 2011

The Honorable City Council
c/o Office of the City Clerk
Room 395, City Hall
Mail Stop 160

Attention: Councilmember Bernard Parks
Chair, Budget and Finance Committee

Honorable Members:

Subject: Review of Models for Provision of Legal Services (C.F. 11-1127)

The Chief Legislative Analyst has been instructed to prepare a report reviewing models for providing legal services to cities and counties. I would like to request this Committee also include in this review models for providing legal services to the City's three retirement systems.

An audit conducted on behalf of the Mayor, City Council, and Controller which was released in 2008 found significant issues with how legal services are currently provided to the Water and Power Employees' Retirement Plan (Plan). These are noted in the attached recommendation: *"Evaluate the Procedures in Place Relating to Legal Advice Provided to the Board and Staff."* Most notably, there is an inherent conflict of interest when the City Attorney is required to represent both the Plan and the Plan Sponsor (the Department of Water and Power, or DWP). The Retirement Board has a fiduciary duty to the members of the Plan, while DWP serves a broader purpose.

This conflict of interest became very apparent in 2009 and 2010 when the Retirement Board requested advice from the City Attorney regarding a governance issue related to approval of the Plan's budget for administration of retirement benefits. When the City Attorney did not provide the advice, the Retirement Board was permitted to request advice from outside fiduciary counsel who is under contract with the City Attorney's Office and serves as counsel to a number of California retirement boards including the CalPERS Board. After the advice was received and presented to the Retirement Board, the City Attorney was asked by DWP to address the same issue. The City Attorney released his opinion a year later and after another entire budget cycle had passed. The opinion contradicted the advice provided previously by outside fiduciary counsel. This situation resulted in confusion and uncertainty, as well as additional expenditures.

Further, in an oral presentation to the Retirement Board, the City Attorney's representative commented that it is the role of the City Attorney to reconcile this type of internal issue. This statement is in obvious conflict with the City Attorney's professed role to provide advice in a clear and impartial manner. It is the responsibility of the Retirement Board and the DWP Board of

Commissioners to reconcile issues of this nature, each acting on its own behalf with advice from its own attorneys.

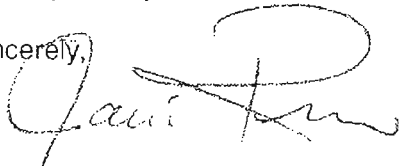
Retirement systems also require expert, timely legal advice in some unique areas (e.g. fiduciary responsibility, investments, divorces, taxes related to retirement benefits and income, probate, successive preference, and guardianships). Even though the Retirement Board has the fiduciary responsibility to ensure the prompt delivery of services, the City Attorney determines which attorneys will be assigned to the Plan, how many will be assigned, and the experience level of those assigned.

For years, the section of the City Attorney's Office that handles matters for the City's three retirement systems has been understaffed. This has led to significant delays in providing advice to the Retirement Board and to Staff on many critical matters, as well as on some routine items. This has resulted in late benefits payments and has jeopardized the Plan's relationships with its consultants and members. For example, the City Attorney allowed several contracts, including the one for tax counsel, to lapse without processing extensions. In another case, it took the City Attorney more than one year to process a contract for third-party specialized investment legal counsel and then took an additional eleven months to approve the invoices for their payments.

Legal services are critical to conduct Retirement Board business. Under the current model of attorney services, the City Attorney cannot provide completely independent advice since they represent all City departments and pension boards. Under the current model, the City Attorney cannot guarantee prompt responses to the myriad questions posed from the Plan staff. Therefore, the current method of providing legal services must be reviewed and changed so the Retirement Board can meet its fiduciary responsibility. The optimal time to conduct this review is in conjunction with the City Council's review of legal services.

Thank you for your attention to this request.

Sincerely,



Javier Romero, President
Board of Administration
Water and Power Employees' Retirement Plan

JR:jae
Attachment

- c: Councilmember Mitchell Englander, Vice Chair, Budget and Finance Committee
- Councilmember Jose Huizar, Committee Member
- Councilmember Paul Koretz, Committee Member
- Councilmember Bill Rosendahl, Committee Member
- Gerry Miller, Chief Legislative Analyst
- Erika Pulst, Legislative Assistant
- Sangeeta Bhatia, Retirement Plan Manager
- Cindy Coffin, Vice President, Retirement Board of Administration
- Mario Ignacio, Retirement Board Member
- Ron Nichols, DWP General Manager, Retirement Board Member
- Barry Poole, Retirement Board Member
- Robert Rozanski, Retirement Board Member

2g. Use of Legal Counsel

1. Evaluate the Procedures in Place Relating to Legal Advice Provided to the Board and Staff

Principles

Boards and staff members of public pension systems should have access to expert legal advice, as needed. Laws are continuously changing which requires management and boards to assess how they affect their organization and operating environments. In many organizations, the role of a legal function is not only to keep an organization's board and management informed about such changes, but to help ensure that the organization is in compliance with applicable laws, rules and regulations. In addition, it is not uncommon for the legal function to serve as an advocate and represent organizational interests. In this context, the specific organization, rather than an external entity, determines how best to accomplish all of their legal needs, including, evaluating whether they have enough legal-related issues to warrant in-house legal expertise; to rely upon outside legal resources; and/or to use a combination of both options.

A public pension fund is different from other governmental agencies in that its governing body, the Board, has a specific fiduciary duty to the members of the System. Accordingly, a public fund is best served by an attorney whose duty runs exclusively to the fund's fiduciaries, unimpaired by a simultaneous duty to other public officials who do not have a fiduciary responsibility to the fund's participants and beneficiaries.

Granting the board the exclusive authority to contract for legal services is reflective of best practices for public pension funds.¹ A report stemming from an investigation of the San Diego City Employees' Retirement System and the City of San Diego Sewer Rate Structure, the drafters echo this best practice, stating that to "*to enhance the likelihood that [the retirement system] will act for the sole benefit of the system's beneficiaries, independent of the City, [the retirement system] must be free to retain its own independent legal counsel.*"² We agree with the Kroll Report. To be consistent with best practices, the board must be empowered to independently select its legal advisor(s), which may be in-house legal counsel and/or external legal counsel (including using the state, county or city attorney's office or a private law firm). Indeed, a board given authority and discretion to select its legal counsel could and often does also choose to use the sponsoring government's attorney for certain issues when a combination of expertise, convenience and cost renders such a choice prudent.

¹ Uniform Management of Public Employee Retirement Systems Act, Sec. 5(a) (2).

² Report of the Audit Committee of the City of San Diego. August 8, 2006 (The Kroll Report)

- Assist in determining appropriate investment staffing structure for managing real estate assets;
- Provide Board with quarterly real estate performance and analysis reports of portfolio;
- Provide annual report to Board reviewing real estate investment policy;
- Research general real estate investment subjects and upon request, provided data to Board and staff;
- Review proposals and transactions to assure compliance with established investment objectives; and
- Attend Board meetings as requested.

Task Area 2f Recommendation 8

The Board should continue to employ a real estate specialist to assist the Board and staff with developing and implementing the real estate portfolio.

While granting pension funds the authority to independently retain its legal advisors is consistent with best practices, it is not necessarily the common practice. In a number of states and municipalities, the state, county or city attorney is the constitutional or statutorily designated legal advisor to the pension fund. Notwithstanding such designation, a number of the respective Boards have nevertheless been authorized to retain their own in-house legal counsel.

A myriad of arrangements exists where the applicable legal framework does not empower the pension fund to independently retain legal counsel. Where statutory provisions dictate that the attorney for the sponsoring government also serve as the fund's attorney, precise and enforceable procedures should be established for identifying situations in which conflicts of interest or lack of specific expertise require the engagement of separate counsel.

Risks

If a public fund attorney's loyalty and independence are compromised, the fund is at risk of being guided by legal advice colored by conflicting obligations and the attorney's need to accommodate interests other than the interests of the fund's participants and beneficiaries. The fund also risks violating applicable rules and regulations and entering into binding agreement(s) that do not represent the organization's best interest.

An attorney who represents the pension fund but is employed by the sponsoring governmental entity may be viewed as representing two clients with potentially conflicting interests without the consent of both clients, since the pension fund does not have the discretion to select the attorney.

a. Adequacy of Legal Resources

Managing pension fund assets requires expert legal advice. The trustees of a public pension fund need attorneys knowledgeable in the interpretation and application of the complicated laws governing their funds, experienced in reviewing and negotiating agreements with investment managers, consultants and service providers and familiar with the legal issues surrounding emerging investment issues such as private equity, venture capital, class action litigation and corporate governance. Given that a public pension board typically consists of trustees who, although appointed by various stakeholders, owe a duty to the fund's participants and beneficiaries, the attorney for the board should have undivided loyalty to the fund.

While fund attorneys are generally not considered "fiduciaries" in the same way that trustees are, they have a similar duty of loyalty derived from the professional canons of ethics which govern the legal profession. As the Official Comment to Rule 1.7 of the American Bar Association's Rules of Professional Conduct states, "*Loyalty and independent judgment are*

essential elements in the lawyer's relationship to a client." The California Rules of Professional Conduct require attorneys to avoid representing clients with potentially conflicting interests unless both clients consent.³

A number of California public retirement systems employ independent in-house counsel including CALPERS, CALSTRS, LACERA, San Diego, Orange County, San Bernardino, Alameda County, and Santa Barbara County.

General Observations

In general, the Board members and staff appear to have a healthy respect for the legal work provided by the City Attorney's office to the pension fund, finding the assigned lawyers to be knowledgeable about fiduciary, investment, benefit, and municipal, issues in general.

A number of interviewees felt the Board should have the autonomy to select their own internal legal counsel. Other Board members commented that the current arrangement whereby legal support is provided by the City Attorney works fine.

Observed Conditions

Legal services are provided to the pension fund by the Los Angeles City Attorney's Office (the "City Attorney"). The City Attorney is a separately elected official whose powers and duties include, among other things, serving as "legal advisor to the City, and to all City boards, departments, officers and entities." (See Article II, Section 271 of the Los Angeles City Charter, emphasis added.) In addition, the City Attorney may engage outside counsel (at the fund's expense) when a particular matter before the Board (such as tax, private equity or securities litigation) requires specialized expertise that is not available within the City Attorney's Office.

The City Attorney's Office provides or obtains through the use of private external law firms a variety of legal services, including:

- Investments (private equity, hedge funds, real estate) – typically handled through the use of external legal counsel;
- Divorces/dissolutions;
- Charter changes (administrative forms, procedures);
- Litigation;
- Monitoring of procedural compliance related to Board meeting/minutes (governance, ethics matters, public services/disclosure);
- Tax counsel;
- Power of attorneys; and

³ California Rules of Professional Conduct, Rule 3-310(C)(1)

- Member inquiries/questions (coordinated with member attorneys to provide independent advice to the System).

The City Attorney determines which attorneys, the number of attorneys and the level of experience of those attorneys who are assigned to the pension fund. Currently, the City Attorney's Office has assigned one attorney to represent the Board of Administration on investments and general pension fund matters and a second attorney to represent the Board of Administration on benefits matters. Both attorneys report to the City Attorney. A different unit in the City Attorney's Office handles all legal issues, with the exception of retirement system matters, for the Department of Water and Power. We support the City Attorney's position that separate legal counsel should be assigned to the retirement system. This view comports with the assertion that the pension fund is separate and distinct from the Department of Water and Power.

As discussed earlier, the City Attorney's representative assigned to the Board of Administration attends every Board and committee meeting and believes the Board, the retirement staff and the City Attorney's Office have developed a very good working relationship. This belief is shared as well by various board members.

Board members also indicated that they received some fiduciary training from outside attorneys, although there is no separate formalized education program regarding applicable laws and regulations. See Section 2a.7 Travel and Education for a more complete discussion on Education and Training.

The fact that the City Attorneys assigned to the Board of Administration are employees of and under the control of the City Attorney creates an inherent structural conflict of interest. The City Attorney's control over the attorneys from the City Attorney's Office is inconsistent with the Board's status as an independent decision-making body with a fiduciary responsibility to the Water and Power participants and beneficiaries. In reality, the interests of the City Attorney are not necessarily always aligned with the interests of the Board of Administration. This is not unique to the Board of Administration. In fact, with respect to litigation, particularly litigation relating to benefits, it is quite likely that the City's interests may be at odds with those of the pension fund.

The lawyers in the City Attorney's Office believe they can adequately represent both the interests of the Board of Administration and those of the City. The designated lawyer believes the City Attorney's Office provides the attorneys with sufficient latitude to carry out their legal responsibilities to the Board of Administration without facing any conflicts of interest. They believe their role is to serve as general counsel to the Board.

The City Attorney lawyers are assigned to the Board of Administration on the basis of both availability and nature of the legal issue/matter. The City Attorney's Office has not

designated areas of specialization for each lawyer. The Board of Administration does not have the ability to insure that their work is given priority or that the lawyer with the best expertise is assigned to a given matter.

In addition to serving the Board of Administration, designated lawyers in the City Attorney's Office are responsible for delivering legal services to the City's other pension systems (LAFPPS and LACERS) and to the Department of Water and Power. The City Attorney charges the Department quarterly for services provided to WPERP. The Board of Administration has a fiduciary obligation to monitor those services and the costs associated with the provision of services.

Task Area 2g Recommendations 1-6

The Board of Administration should seek authority to hire its own internal legal counsel, who should report to the Pension Fund Manager. The autonomy we contemplate would include the authority to decide to use the City Attorney for certain issues that do not raise potential conflicts, and as to which familiarity with California law would render reliance on the City Attorney prudent.

Prior to hiring its own attorney, the Board should evaluate the responsibilities and legal skill sets required and then evaluate the economics of hiring an in-house lawyer versus the shared expense cost of maintaining the current arrangement.

If the Board hires its own attorney, the Board should establish in its Governance Documents the scope and limits of that attorney's authority, as well as the relationship between any in-house attorneys the Board of Administration may hire and the City Attorney's Office.

The Board should work with the City Attorney to develop and institutionalize, in advance, a process that will be invoked in the event a potential conflict of interest arises.

The Board and staff should request a meeting with the City Attorney's Office to discuss how to enhance the overall effectiveness of the services delivered by the City Attorney's Office.

The Board should seek the cooperation of the City Attorney's Office to establish procedures to ensure that the Board plays an integral role in determining the number of attorneys and the level of expertise of attorneys assigned to provide legal support to the pension fund.

The City Attorney's lawyers conduct a competitive bid process to select outside legal counsel. The City Attorney has hired outside fiduciary, tax, securities litigation, real estate and alternative investment, and securities litigation counsel to assist it in the provision of legal

services to the Board. According to the City Attorney, the need for and process for selecting outside counsel rests solely with the City Attorney.

The City Attorney's Office compensates external legal counsel on the basis of time spent.

Task Area 2g Recommendations 7-8

Under the current structure, the Board of Administration should have more autonomy in determining when there is a need for outside legal assistance and, if a need arises, the Board should be allowed to participate in the process for selecting a law firm(s) to provide those services.

The Board of Administration and the City Attorney should execute a formal memorandum of understanding which specifically identifies the process for selecting and terminating outside counsel. This process should also be incorporated into the Board's Governance Documents.

The role of the City Attorney, and more specifically the attorneys assigned to Board of Administration, are not defined in the Governance Documents; consequently, Board members have divergent views on the appropriate role of the City Attorney and the attorneys assigned to the Board of Administration.

Task Area 2g Recommendation 9

If the current structure is maintained, the Board's Governance Policies should be revised to clearly define the role and responsibilities of the City Attorney assigned to the Board of Administration.

With very few exceptions, the City Attorney must approve all draft contracts executed by the retirement system "as to form." (See Administrative Code, Section 370.) The Code does not define the scope of this "approval;" therefore, it is not clear whether or not this is a substantive review.

The pension fund does not have its own in-house legal counsel to draft contracts and other legal documentation. (We understand that outside counsel is used to draft documentation relating to private equity and real estate investments.) We were informed that the City Attorney has utilized standardized contracts for several years. However, it is our understanding that the standardized contract is not particularized to address matters specific to the investment industry.

Task Area 2g Recommendations 10-11


The Board should direct the City Attorney to develop a model investment contract to improve efficiency and streamline the contract review process. A number of public pension funds make use of model contracts for this very reason.

The Board should conduct a legal compliance review with the City Attorney's Office. Alternatively, the Board of Administration should consider establishing an internal compliance function and hire a staff to perform such responsibilities.



960 P. Second Street, 2nd Floor
 Los Angeles, CA 90012
 Mail Stop 175
 (800) 779-8328
 (DL) (888) 349-3936
 www.lacers.org

INTER-DEPARTMENTAL CORRESPONDENCE

Date: September 6, 2011
 To: Gerry F. Miller, Chief Legislative Analyst
 Attention: Christopher Concepcion
 From: Thomas Moutes, General Manager 
 Los Angeles City Employees' Retirement System

SUBJECT: LEGAL SERVICE MODELS (CF# 11-1127) – PUBLIC EMPLOYEE PENSION SYSTEM EXPERIENCE

The purpose of this memorandum is to provide information for your consideration as your Office prepares a response to the July 20, 2011 Council request for a report on legal service models. The boards of public employee retirement systems, like the Los Angeles City Employees Retirement System (LACERS), are bound by trust law to serve as trustees in a fiduciary capacity independent from their trustors, the City. To fulfill this role, legal service models employed by public employee retirement systems often differ from the legal service models provided for other departments within the same city, county, or state.

Legally-mandated Duties and Responsibilities of Public Pension Fund Boards

Pension boards, such as LACERS Board of Administration, have legally-mandated fiduciary duties and responsibilities that are not required of other City boards. This fiduciary duty is the highest standard of care defined by law and requires that the members of the Board and key staff who oversee the pension trust, have an exclusive, primary duty to act in the best interest of the members of the trust, above self-interest, above City interests, and above interest to any other constituencies.

The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.
 -- California Constitution, Article XVI, Section 17

Section 1106, of the Los Angeles City Charter also contains these fiduciary requirements for LACERS Board Members. The LACERS Board has complete management and control over the pension fund [Charter Section (1102(c)]; one of the fundamental rights of any governing body is the right to hire counsel of its choice.

The Current Legal Structure in the City of Los Angeles Conflicts with the Fundamental Duty of Loyalty

The "Duty of Loyalty" to beneficiaries of a trust for which the entity was established is a fundamental obligation of the key decision-makers working on behalf of the trust. The boards and high-level staffs of the City's pension funds, such as LACERS, are the only entity and individuals in the City that have the explicit, legally-mandated fiduciary duties and responsibilities cited above. For this reason, no other City "department" has been found by the courts to be an independent legal entity, separate from the City. The LACERS Board and staff operate under a more stringent standard than that established by the City Governmental Ethics Ordinance by disallowing even the potential appearance of conflict that interferes with those duties. However, there is nothing in the City Attorney's Powers and Duties as delineated in Section 271 of the City Charter that specifically mentions a responsibility to LACERS members (or the members of the other City pension funds) – only that the City Attorney is the legal advisor to all City boards.

Unlike LACERS Board and high-level staff, no one else in the City – including the City Attorney – has the mandate that their duty to LACERS participants and their beneficiaries shall take precedence over any other duty they may have. Because the City Attorney does not have such a legal mandate and may have other perceived duties and/or interests involved with its reviews of LACERS situations, conflicts of interest (potential and those that are perceived to be actual) are bound to occur. Such situations are not only undesirable because these conflicts can adversely impact our members, but they also can unnecessarily put our Board and staff in untenable positions – including the risk of being accused of not fulfilling their fiduciary responsibilities for instance if they took a position which differed from the advice of the City Attorney, even if the Board felt its position was in the best interest of the members.

The broad legal powers provided by the Charter also presumably make the City Attorney the sole legal arbiter of whether a conflict of interest exists. Simply stated, a conflict of interest involving the City Attorney's Office does or does not exist simply because the City Attorney says it does or does not exist! Additionally, the City Attorney currently controls LACERS access to outside legal counsel who may not have the same perceived conflict. Even if LACERS is allowed by the City Attorney to receive outside, independent legal advice, the City Attorney can simply overrule that advice if he does not agree with it for any reason. This again puts LACERS Board and staff in an untenable legal position as it relates to their fiduciary responsibilities and exposes LACERS (and, therefore, the City) to potential litigation.

Several examples of these potential conflicts of interest exist. We would be glad to provide you with further information as desirable.

Best Practice for the Provision of Legal Services

The necessity for pension funds like LACERS to have truly independent legal advice is recognized by many entities. Following are a few reference points that indicate the best practices in the provision of legal services to retirement systems:

*...In addition to other powers conferred by the governing law, a trustee has exclusive authority, consistent with the trustee's duties under this [Act], to: ... (2) obtain by [employment or] contract the services necessary to exercise the trustee's powers and perform the trustee's duties, including actuarial, auditing, custodial, investment, and **legal services** (emphasis added).*

-- Uniform Management of Public Employee Retirement Systems Act (1997)
(Attachment 1, Page 14)

*A governing body should be **permitted to rely on the expertise and advice of appropriately selected and unconflicted consultants and staff** (emphasis added).*

-- The Stanford Institutional Investors' Forum, Committee on Fund Governance, Best Practice Principles (2007)
(Attachment 2, Page 17)

The LACERS Board should seek authority to hire its own legal counsel, who should report to the General Manager. The authority we contemplate would include authority to decide to use the City Attorney for certain issues that do not raise potential conflicts, and as to which familiarity with California law would render reliance on the City Attorney prudent.

-- Management Audit of LACERS conducted on behalf of the Mayor, City Council, and Controller (2007)
(Attachment 3, Page 93)

Survey of Other Jurisdictions

Based on the Council motion, we requested Hewitt EnnisKnupp, Inc. (Hewitt) to conduct a survey (Attachment 4) regarding the legal representation of public employee retirement systems. Hewitt sent the survey to all of the public employee retirement system representatives of the National Association of Public Pension Fund Attorneys (NAPPA). A total of thirty-one responses were received.

We are providing each set of results in three breakdowns:

- All Responses;
- Responses from Jurisdictions with One Million or More Residents; and
- Responses from Jurisdictions with Three Million or More Residents.

Please note that not all respondents answered all of the questions. Following are the key results of the survey:

Question: *Who provides the primary legal services) for the retirement system?*

Response Category	All Responses		Jurisdictions with 1 Million+ Residents		Jurisdictions with 3 Million+ Residents	
Staff of Retirement System	22	71.00%	19	76.00%	13	81.25%
City/County/State Attorney	8	25.80%	5	20.00%	2	12.50%
Shared – System & City/County/State Attorney	1	3.20%	1	4.00%	1	6.25%

The vast majority of systems surveyed have their primary legal services provided by staff of the retirement systems. This is especially true for jurisdictions with populations in excess of three million residents (similar to the City of Los Angeles), in which more than 80% of the systems have their primary legal services provided by staff of the retirement systems. Only 12.5% of the jurisdictions with populations in excess of three million residents have a model similar to the City of Los Angeles in which the primary legal services are provided by the City, County, or State Attorney.

Question: *To whom do the attorneys report?*

Response Category	All Responses		Jurisdictions with 1 Million+ Residents		Jurisdictions with 3 Million+ Residents	
Retirement System	21	77.77%	21	87.50%	14	87.50%
City/County/State Attorney	5	17.24%	2	8.33%	1	6.25%
Shared – System & City/County/State Attorney	1	3.45%	1	4.16%	1	6.25%

The attorneys for vast majority of systems surveyed report to the system staff, board, or a combination of the system staff and board. This is especially true for jurisdictions in excess of three million residents in which 87.50% of the systems reported having one of these reporting structures for their attorneys. For the larger populations, only 6.25% follow the model currently employed by the City of Los Angeles.

Question: *Who has the authority to hire and fire attorneys providing legal services to the retirement system?*

Response Category	All Responses		Jurisdictions with 1 Million+ Residents		Jurisdictions with 3 Million+ Residents	
	Count	Percentage	Count	Percentage	Count	Percentage
Retirement System	19	65.50%	17	70.00%	11	73.33%
City/County/State Attorney	5	17.24%	3	12.50%	2	13.33%
Shared – System & City/County/State Attorney	4	13.79%	4	16.67%	2	13.33%
Other	1	3.45%	0	0.00%	0	0.00%

In the vast majority of systems surveyed, the authority to hire and fire the attorneys providing legal services to the system is controlled by system staff, board, or a combination of the system staff and board. This is especially true for jurisdictions in excess of three million residents in which 73.33% of the systems reported having one of these structures. In these jurisdictions, the authority to hire and fire the attorneys rests solely outside the systems only 13.33% of the time (“City/County/State Attorney” responses), with the same 13.33% of jurisdictions following the model currently employed by the City of Los Angeles.

Question: *Who controls access to outside counsel if the retirement system needs specialized legal services or if the retirement system perceives a conflict of interest with its attorney?*

Response Category	All Responses		Jurisdictions with 1 Million+ Residents		Jurisdictions with 3 Million+ Residents	
	Count	Percentage	Count	Percentage	Count	Percentage
Retirement System	18	64.29%	16	69.57%	10	71.43%
City/County/State Attorney	4	14.29%	4	17.39%	1	7.14%
Shared – System & City/County/State Attorney	4	14.29%	2	8.69%	2	14.29%
Other	2	7.14%	1	4.34%	1	7.14%

In the vast majority of systems surveyed, access to outside counsel is controlled by system staff, board, or a combination of the system staff and board. This is especially true for jurisdictions in excess of three million residents in which 71.43% of the systems reported having one of these structures for accessing outside counsel. In these jurisdictions, only 14.28% of systems require approval exclusively outside of the retirement system for the use of outside counsel ("City/County/State Attorney" responses plus "Other" responses), with just 7.14% following the model currently employed by the City of Los Angeles.

The Optimal Attorney Service Structure for LACERS

In order to help LACERS Board and high-level staff fulfill their responsibilities and minimize the legal exposure LACERS (and, therefore, the City's exposure) may face due to the way legal services are currently provided in the City, LACERS would advocate for the following:

- City Attorneys provide the primary legal services to LACERS, but:
 - LACERS in-house legal counsel should be selected by and report to the General Manager of LACERS;
 - LACERS Board, with General Manager recommendation, would have the authority to fire attorneys providing legal services to LACERS;
 - The General Manager or Board of LACERS in consultation with staff attorneys would decide whether the retirement system requires outside counsel on specific issues.

LACERS does not anticipate that the new model would necessitate contracting out for more legal services than it currently does as any potential additional contract services based on the above approach would be offset by a reduction in contract legal services that are needed because the current structure for providing attorney services exists.

Conclusions

LACERS Board and staff are currently constrained in their ability to fulfill their legally-mandated fiduciary responsibilities. This lack of ability to fulfill their fiduciary responsibilities is directly related to the current structure for the provision of attorney services to LACERS.

Best practice in the retirement industry as documented in the Uniform Management of Public Employee Retirement Systems Act; the Stanford Institutional Investors' Forum, Committee on Fund Governance, Best Practice Principles; and the 2007 Management Audit of LACERS conducted on behalf of the Mayor, City Council, and Controller indicates the need for retirement systems like LACERS to have greater authority over the legal services they receive.

The survey Hewitt conducted regarding the legal representation of public employee retirement systems indicates the vast majority of retirement systems, especially those in highly-populated jurisdictions similar to Los Angeles, allow much greater authority over legal services than the model currently employed in the City of Los Angeles. The additional authority includes: having the attorneys report to the general manager and/or board of the retirement system; autonomy in hiring and firing decisions over their legal counsel; and having the general manager and/or board of the retirement system determine when access to outside counsel is necessary based on their fiduciary duties.

There is a reason that both best practice and the survey results validate the need for retirement systems to have greater authority: retirement boards and high-level staff simply cannot fulfill their legally-mandated fiduciary duties under models of attorney services that provide for less authority. This is because, unlike LACERS Board and high-level staff, no one else in the City – including the City Attorney – has the mandate that their duty to LACERS participants and their beneficiaries shall take precedence over any other duty they may have.

TM:bc
2011-0906-070

c: Bernard C. Parks, Councilmember Eighth District
Jan Perry, Councilmember Ninth District
LACERS Board of Administration