

**To:** Commissioners, 2024 Charter Review Commission ("**2024 CRC**")

**From:** City Attorney Working Group (the "**Working Group**") (Alex Garcia, Brian McGiverin and Jessica Palvino)

**Subject:** Preliminary Report

**Summary and Recommendation:**

Building on the work of and recommendation from the 2018 Charter Review Commission (see Attachment A), the City Attorney Working Group conducted additional research and interviewed a subject matter expert regarding whether the 2024 CRC should recommend amendments to Article V, Section 6 of the City of Austin's Charter, which provides that the city manager shall appoint the city attorney.

Upon concluding its work, the Working Group unanimously supports amending Article V, Section 6 and recommends a two-pronged approach:

- (1) The city attorney shall be nominated by the city manager and confirmed by the council, and shall serve until removed by the joint action of both council and manager; and
- (2) One attorney within the office of the city attorney shall be appointed as "legislative counsel" to the city council, during which time appropriate ethical walls will be in place to protect the attorney-client privilege.

**Resources:**

In reaching this recommendation, the Working Group relied heavily on the report from the 2018 Charter Review Commission (see Attachment A). The Working Group confirmed that Texas Home Rule Charters, Second Edition (2010), published by the Texas Municipal League, has not been updated since its last publishing.

Additionally, the Working Group studied the National Civic League Model City Charter provisions relating to the appointment of the city attorney (see Attachment B), along with the associated commentary, and spoke with the author about the drafting of Section 4.03.

The Working Group met three times to discuss its proposed recommendation and considered various written resources, including those included as Attachment C.

## Attachment 1

## Recommendation No. 6: City Attorney

The CRC was directed to consider and made recommendations regarding “Appointment of the City Attorney by the City Council” Resolution No. 20170622-040 at 10.d. The CRC unanimously recommends that the City Attorney be appointed by City Council.

### **Background and Policy Reasons for the Recommendation**

Proposed revisions to Article V, Section 6, which would have required the city attorney to report to council rather than the city manager, were presented to City of Austin voters in 2012 and failed to pass. In its February 22, 2012 Report to City Council, the 2012 Charter Revision Committee (“2012 CRC”) recommended by a vote of 14-1 that “Council appoints the City Attorney.” These recommendations were adopted by the Council and included on the November 2012 ballot as Proposition 6. Proposition 6 failed to pass, with 49.37% voting “Yes” and 50.63% voting “No.”

The City Attorney Working Group provided its report to the CRC on January 22, 2018. The Working Group’s final recommendation was presented on February 8, 2018 and passed by a vote of 11-0.

The City of Austin is an outlier in terms of how its city attorney is appointed. According to the most recent Texas Municipal League survey in 2010, most Texas home-rule cities (73%) authorize their council to appoint the city attorney directly. The CRC is also recommending this charter revision to ensure accountability of the city attorney’s office to the city council.

### **Substance of the Proposed Amendments, Revisions or Repeals to the Charter:**

The CRC recommends that Article V, Section 6 “City Attorney”, be revised as follows:

“There shall be a department of law, the head of which shall be the city attorney, who shall be appointed by the city ~~manager~~ council. The city attorney shall be a competent attorney who shall have practiced law in the State of Texas for at least five (5) years immediately preceding his or her appointment. The city attorney shall be the legal advisor of, and attorney for, all of the officers and departments of the city, and ~~he or she~~ the city attorney shall represent the city in all litigation and legal proceedings, and the representation shall comply with the Texas Disciplinary Rules of Professional Conduct. ~~He or she~~ The city attorney shall draft, approve, or file ~~his or her~~ written legal objections to, every ordinance

**Preliminary Report of the City Attorney/Boards & Commissions Committee  
of the 2018 City of Austin Charter Revision Commission**

**Summary and Proposed Options:**

The City of Austin is an outlier in terms of how its city attorney is appointed. According to the most recent Texas Municipal League survey in 2010, most Texas home-rule cities (73%) authorize their council to appoint the city attorney directly.

In regard to the appointment of Austin's city attorney, the options for the 2018 Charter Revision Commission ("2018 CRC") to consider are:

<b>Option One:</b>	Status quo, with no charter revisions recommended. City attorney continues to be appointed by the city manager with no input from council.
<b>Option Two:</b>	The city council appoints the city attorney
<b>Option Three:</b>	The city manager selects the city attorney, with council approval
<b>Option Four:</b>	The city council appoints the city attorney, on recommendation of the city manager
<b>Option Five:</b>	Mayor appoints the city attorney, with council approval

**Introduction:** The City Attorney/Boards & Commissions Committee (the "Working Group"), consisting of Matt Hersch, Diego Martinez-Moncada, and Jessica Palvino, was asked to review Item 10.d – "Appointment of the City Attorney by the City Council" – contained in Resolution 20170622-040 and provide recommended options to the 2018 CRC. Our research and findings are presented below.

**Charter Provision At-Issue:**

The Working Group reviewed potential revisions to Article V, Section 6 of the City of Austin's Charter. Currently, this section reads:

**CITY ATTORNEY.**

There shall be a department of law, the head of which shall be the city attorney, **who shall be appointed by the city manager.** The city attorney shall be a competent attorney who shall have practiced law in the State of Texas for at least five (5) years immediately preceding his or her appointment. The city attorney shall

percent (3%) of home-rule cities, the city council appoints the city attorney on the recommendation of the city manager. In seven percent (7%) of home-rule cities, the mayor appoints the city attorney with council approval.

In Houston and El Paso, the mayor appoints the city attorney with the approval of city council. (See Att. 3 at 66) In Dallas, the appointment is by council. (Att. 3 at 66). In Fort Worth, the city attorney is appointed by the city council on recommendation of the city manager. (Att. 3 at 66). In San Antonio, the city manager appoints the attorney and no council confirmation is required. (Att. 3 at 66).

#### **Summary of Argument Supporting Council Appointment of City Attorney:**

Proponents of having the city attorney appointed by council argue that this is a key step for accountability. They argue that it is important for council members – who are accountable to the voters – have an attorney representing the city who is accountable to them.

If legal advice goes through the city manager, then there is a risk that the advice is filtered before it reaches council. Many legal questions are so crucial that the city council needs to be sure the attorney's opinion is not "laundered" in any way before it gets to the council.

In connection with Proposition 6, Marcus Norris, former head of the Texas City Attorneys Association, explained the pros and cons of having the city attorney report directly to council. (See Att. 2). He explained that having the attorney report to the council can make more sense in large cities, where being a council member is a full-time job, Norris said. "If a council is actively involved in day-to-day activities at City Hall, they might not want to wait in line and say, 'city manager, can you please have the city attorney take a look at this.'" (See Att. 2).

Proponents also point out that the overwhelming majority of home-rule cities require the city attorney to be appointed directly by council.

#### **Summary of Argument Supporting City Manager Appointment of City Attorney:**

On the opposite side, some argue that having both the manager and the attorney report to the city council can be divisive. The city manager and city attorney must often work closely together on difficult issues, so having the manager appoint the attorney can make for better teamwork between the two.

In connection with Proposition 6, former Austin City Attorney Barney Knight opposed the change. (Att. 2) He stated that he opposed the change because city councils in big cities often hire an attorney who is politically well-connected, but "does not understand how intense a specialty municipal law is. Whereas if a city manager picks a city attorney, they tend to concentrate on the breadth and depth of their municipal law experience" (Att. 2).

Marcus Norris explained the cons of having the city attorney report directly to council. (Att. 2). He explained that the city manager and city attorney often must work closely on difficult issues, so having the manager appoint the attorney "can make for better teamwork between the two.

## **CRC Recommendation Regarding Article V, Section 6 (City Attorney)**

**Recommendation:** City Council appoints the City Attorney.

**Proposed Charter Revision:**

### **§ 6. - CITY ATTORNEY.**

There shall be a department of law, the head of which shall be the city attorney, who shall be appointed by the city ~~manager~~council. The city attorney shall be a competent attorney who shall have practiced law in the State of Texas for at least five (5) years immediately preceding his or her appointment. The city attorney shall be the legal advisor of, and attorney for, all of the officers and departments of the city, and ~~he or she~~the city attorney shall represent the city in all litigation and legal proceedings, and ~~the~~representation shall comply with the Texas Disciplinary Rules of Professional Conduct. ~~He or she~~The city attorney shall draft, approve, or file ~~his or her~~his or her written legal objections to, every ordinance before it is acted upon by the council, and ~~he or she~~the city attorney shall pass upon all documents, contracts and legal instruments in which the city may have an interest.

There shall be such assistant city attorneys as may be authorized by the council, who shall be authorized to act for and on behalf of the city attorney.

**Policy Reasons:** The City of Austin is an outlier in terms of how its city attorney is appointed. According to the most recent Texas Municipal League survey in 2010, most Texas home-rule cities (73%) authorize their council to appoint the city attorney directly. The CRC is recommending this charter revision to ensure accountability of the city attorney's office to the city council.

**Estimated Fiscal Impact:** None

**Impact on existing city laws, rules, practices, and procedures:** Other than the amendment of Article V, Section 6 of the City Charter, the appointment of the City Attorney by City Council will likely have an impact on existing City laws, rules, practices and procedures. Due to time and resource constraints, the full extent of this impact cannot be accurately assessed by the CRC.

**Proposed Ballot Language:**

Shall the City Charter be amended to provide that the City Council appoint the City Attorney?

## Attachment 2

some of these adequately, and their inclusion in the local ordinance could be unnecessary. Cities should consider conducting an equity analysis in its personnel system, for example in terms of recruitment, retention, hiring, and promotion policies and practices. This type of audit can highlight the gaps in human resources that limit or undermine diversity and inclusion.

#### **Section 4.03. City Attorney.**

##### **Alternative I – Full time City Attorney – sole counsel to city.**

The city manager shall appoint a city attorney, subject to confirmation by the council. The city attorney shall be the chief legal officer of the city, conduct all the law business of the city, be the legal advisor to the council, the city manager, all departments, and other instrumentalities of the city government. The city attorney shall represent the city in all actions in which the city is a party and shall have the authority to settle claims and compromise debts in amounts not to exceed {\*\*\*} and to settle claims and compromise debts in greater amounts with the consent of the city manager. The city attorney and the staff of the office shall engage in no other law practice. The city attorney may, with the approval of the council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the city attorney. The city attorney shall serve until removed from office by the joint action of the city manager and the Council.

##### **Alternative II – Full time City Attorney – sole counsel to city – removal by Council only.**

The city manager shall appoint a city attorney, subject to confirmation by the council. The city attorney shall be the chief legal officer of the city, conduct all the law business of the city, be the legal advisor to the council, the city manager, all departments, and other instrumentalities of the city government. The city attorney shall represent the city in all actions in which the city is a party and shall have the authority to settle claims and compromise debts in amounts not to exceed {\*\*\*} and to settle claims and compromise debts in greater amounts with the consent of the city manager. The city attorney and the staff of the office shall engage in no other law practice. The city attorney may, with the approval of the council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the city attorney. The city attorney shall serve until removed from office by the council.

##### **Alternative III – Part time City Attorney**

The City Manager shall appoint an attorney or law firm as independent contractors to act as city attorney, subject to confirmation by the council. When a law firm is hired as city attorney, the firm must designate an attorney to act as the city attorney for purposes of any requirement in law or otherwise that the city have a person filling that office; the person so designated must be approved by both the city manager and council. The city attorney shall be the chief legal officer of the city, conduct all the law business of the city, be the legal advisor to the council, the city manager, all departments, and other instrumentalities of the city government. The city attorney shall represent the city in all actions in which the city is a party and shall have the authority to settle claims and compromise debts in amounts not to exceed {\*\*\*} and to settle claims and compromise debts in greater amounts with the consent of the city manager. The city attorney may, with the approval of



- c. Where the position is full-time, the attorney should not be allowed to have a private practice but may be able to engage in other activities such as teaching or charitable work subject to the city's ethics laws.
- d. In option 1, the city attorney holds sole responsibility for the legal work of the city. This option offers the city a single resource for legal analysis and advice. Should agencies, including the council or manager, feel they need a second opinion from another source, they must get both the approval of the city attorney and the council. By creating this process, shopping for legal opinions will be constricted but will also be available when appropriate and necessary.
- e. Options 3 & 4 address part time city attorneys who represent the city as part of a private practice.
- f. Each option includes an authority to settle or compromise claims and debts. Those matters should be handled by the attorney with some specific authority and by both the attorney and manager beyond that authority. There may be a need to address the issue in the Finance section as well. Moving settlements of cases outside the council process can help to resolve more claims and eliminate the political posturing in cases of sensitivity.

#### **Section 4.04. Land Use, Development, and Environmental Planning.**

Consistent with all applicable federal and state laws with respect to land use, development, and environmental planning, the city council shall:

- (1) Designate an agency or agencies to carry out the equitable planning function and such decision-making responsibilities as may be specified by ordinance;
- (2) Adopt an inclusive and comprehensive plan and determine to what extent zoning and other land use control ordinances must be consistent with the plan;
- (3) Determine to what extent an inclusive and comprehensive plan and zoning and other land use ordinances must be consistent with regional plan(s); and
- (4) Adopt development regulations, to be specified by ordinance, to implement the plan.

The designated agency, the city manager, and the mayor and council shall seek to act in cooperation with other jurisdictions and organizations in their region to promote integrated approaches to regional issues.

#### **Commentary.**

Regulation of land use and development is a council function and an important aspect of home rule, allowing local governments to manage growth and enhance quality of life in the community. However, land use and development decisions have not always been made through a social equity lens, which has resulted in differential benefits and burdens for community members. Furthermore, in many instances land use regulations have been employed to, explicitly, exclude marginalized groups. Therefore, we recommend that the designated agency, the city manager, and the mayor and council incorporate social equity concerns into land use, development, and environmental planning activities. For example, comprehensive plans, land use ordinances,

## Attachment 3

# City Managers and City Attorneys: Associates or Adversaries?

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The city manager-city attorney relationship has received only cursory attention in recent years. Yet this important and complex relationship can have an extraordinary impact on the operational effectiveness of municipal government. This study identifies the perceptions held by city managers and city attorneys about each other's functional responsibilities and interactive patterns. These perceptions are then summarized and synthesized into specific recommendations for improving the city manager-city attorney relationship. The data sources for the study are 20 in-depth interviews of city managers and city attorneys and two recent (1985-1986) nationwide questionnaire surveys of council-manager cities. Out of courtesy to the officials involved and a desire to avoid creating or aggravating potential interpersonal conflicts, attorney questionnaires and manager questionnaires were not mailed to the same cities, except in a small test group. The response rates represented an acceptable, statistical population cross section of council-manager cities in the United States. Fifty-two percent (104 out of 200) of attorneys responded to the first survey; 42% (84 of 200) responded to the second survey. City manager response rates were 61% (122 of 200) for the first survey, and 70% (141 of 200) for the second.

Before examining the survey results, it is useful to note the historical development of the city manager and city attorney in council-manager cities.

## Historical Background

The structural framework of municipal government in the latter part of the nineteenth century was insufficient to withstand the pressures of modern machine politics, corruption, and excessive state government interference. Municipal reform began in earnest between 1850 and 1870 as city councils almost uniformly stripped administrative powers from mayors and created overlapping council committees and multiple independent boards.<sup>1</sup> Though the purpose was to eliminate executive corruption and provide more checks and balances, the reform had unexpected consequences:

There was such an ingenious combination of checks and balances and mingling of power, that nobody could be to blame for anything. It took everybody to do anything, and everybody did it, and everybody said it was you and not I, and everybody was right.<sup>2</sup>

Municipal legal offices functioned in this labyrinthian committee setting. Subsequently, three significant and

■ *Since the inception of the council-manager form of municipal government nearly 80 years ago, personal and professional relations between the city manager and the city attorney have often been marked by suspicions and competition. This article provides a brief account of the evolution of the relations of these two professional groups and more specifically reviews data from nearly 500 managers and attorneys on functional responsibilities and interaction patterns. The lack of consensus on whether the attorney is a member of the management team or fills a unique "watchdog" responsibility for the council and/or the public has led to numerous sensitive issues, including administrative control, greater responsibility of the attorney, city attorney client, and attorney involvement in policy development. Resolution of these concerns is expected to have significant consequences for municipal government effectiveness.*

somewhat inconsistent trends appeared near the turn of the century, all advocating public accountability: the decline of council committees, the ascendance of the absolute executive appointment power, and the long ballot. In this process, several municipal officers began to be viewed as city overseers: comptroller, treasurer, auditor, and city attorney. City attorneys generally were "to attend to all suits and matters and things in which the city is interested," and to fill the additional role of "independent watchdog" over the city.<sup>3</sup>

Shortly, a divergent reform movement began to deal with the same issue of executive corruption, while at the same time streamlining municipal administration. This was the adoption of the council-manager form of government. Cities involved at the developmental stages of this governmental form included Staunton, Virginia (1908); Lockport, New York (1910); Sumter, South Carolina (1912); and Dayton, Ohio (1914). The National Municipal League published a Model City Charter in 1915, which contained the outlines of the council-manager form.<sup>4</sup> Undergirding this Model Charter were two unambiguous principles: (1) a unification of ultimate legislative and executive power in one elected council, and (2) a delegation of the day-to-day management operation to a professionally trained administrator, protected from daily politics and inappropriate council interference, but ultimately answerable to the council. One important aspect of the management

operation so delegated was the power of appointment. Richard S. Childs, known as the "father of the council-manager system," strenuously advocated that membership in the newly established City Managers Association be contingent on the city manager exercising complete appointment powers:

To insist that the managers must have appointive power over all the administrative departments does not exclude managers in cities where the charter [now] excepts a few of the minor officers from the managers' control such as corporation counsel, a city clerk, assessors or police judge, for these officers are not necessarily integral parts of the administrative establishment. The provision does, however, prevent some future city from hiring a manager of ten years experience from another city and finding that he knows nothing of police problems. Such situations would tend to bring the professional managers into disrepute.<sup>5</sup>

The eventual conflict between these two reform concepts, checks and balances on the one hand and centralized professional management on the other, produced a range of managerial authority in council-manager cities. This is particularly evident in the arrangements for appointing city attorneys. For example, the 1923 Berkeley, California, charter mandated council appointment of the attorney. The 1928 Austin, Texas, charter allowed for city manager appointment of the city attorney, but that provision was adopted only after numerous exceptionally divisive debates.<sup>6</sup> Fort Worth, Texas, in 1940, provided for council appointment and control of the two "independent watchdog officials"—the treasurer and the director of law.<sup>7</sup> One advocate of city manager appointment of the city attorney, Arthur W. Bromage, attributed some early abandonments of the council-manager form of government to defective charters that required extensive council appointments, including appointment of the city attorney.<sup>8</sup> In 1941, one observer lamented that

a judicially disposed legal advisor, over whom a city executive has no control is not consistent with vigorous and effective management. A legal advisor who simply looks down his nose and says, "no, it can't be done," or smiles wanly and says, "I guess it's all right to go ahead," is not much help to one responsible for the conduct of administration. What is needed is a helpful and cooperative attorney, one who says, "Let's see what you want to do. It looks to me as if you'd have trouble if you take that course. Why not try this or that? And if that won't fill the bill, why, let's draw an act for the next session of the legislature."<sup>9</sup>

By 1957, survey data showed the following distribution of selection processes for the city attorney in council-manager cities:<sup>10</sup> elected, 6%; council appointed, 52%; council appointed/manager recommendation, 2%; manager appointed, 28%; manager appointed/council approval, 7%; and other, 5%.

Many of these selection processes were mandated by state laws. An in-depth analysis of state statutes dealing with municipal attorneys reveals enormous differences between jurisdictions, not only in appointing processes but in attorney responsibilities. Some of these inherited, statutorily-mandated appointment processes have un-

doubtedly had a great deal to do with city manager-city attorney relationships in individual cities. The significant differences in the city attorney appointment processes throughout the country show that the institutional "heritage" of the city manager-city attorney relationship is a lack of consensus on whether the attorney is a member of the "management team" or whether the attorney fills a unique "watchdog" responsibility for the city council.

From 1957 to 1978, observers from both the city management and city attorney professions analyzed the problems in the relationship of these two professionals and pointed up the critical need to remedy the underlying stresses.<sup>11</sup>

### Present-Day City Manager and City Attorney Profiles

A brief present-day sketch of these two professionals furnishes the background against which their relationship can be evaluated. While all the city attorneys surveyed possess advanced educational degrees, only 64% of the managers surveyed have advanced degrees; 26% of the managers surveyed have bachelor's degrees, and 10% are without a college degree. On the whole, city attorneys view their city managers as receiving significantly less rigorous college training. Attorneys conclude that the core skills of legal training—issue formulation and case analysis—are the most important skills lacking in management training. The managers, conversely, identify the lack of emphasis on the management skills of administrative integration/coordination and on budgeting as the noticeable weaknesses of legal training.

Slightly more than 80% of the city managers selected the city management profession following enrollment in public administration or related classes. Approximately 43% of the city attorneys had either some public administration training or some prior experience in local government. Except for a few "range riders," all the managers serve as full-time city employees and are prohibited from additional employment. In critical contrast, about 46% of the attorneys are on part-time retainer, and only 48% are full-time, in-house. Among this latter group of city attorneys, 45% are permitted to engage in outside private practice. Full-time city attorney salaries are reported as averaging \$48,000, while city manager salaries average \$49,000.

All managers in this study are council appointed and are subject to council dismissal. The 1985-86 survey of city attorneys (which updates, to an extent, the 1957 survey cited earlier) shows that 26% of the city attorneys are appointed by the city manager; 48% by the city council; 24% by the manager and council; and 2% by the mayor alone. More precisely, however, over 85% of the council appointments extensively involve the manager in the selection process, in such aspects as screening interviews, assessment exercises, and oral recommendations. Cincinnati, Ohio, and



ministrative innovator."<sup>13</sup> While city management is a collaborative effort, the manager has primary responsibility to orchestrate the effort, under scrutiny of the council and the public. The following selected responses from our survey of managers and attorneys illustrate the new textbook descriptions of city managers:

#### *City Managers*

- It is becoming all too clear that cities need effective leadership. My role is to act as the catalyst in developing the environment where leadership becomes the key with elected and appointed personnel. I need to make things happen.

- I do all the things that I have done for years, but now I am expected to take a much more aggressive role in policy making, innovation, and strategic planning.

#### *City Attorneys*

- I have seen the manager's role go from that of an errand boy for the council to a policy leader. It's a dramatic change.

- More than anytime I have seen, the manager is now the focal point. The council, the public, and the press all expect the manager to make things happen. He is supposed to be the energy, the dynamic element to get things going.

#### *City Attorneys*

NIMLO and ICMA authors are in essential agreement on the primary city attorney responsibilities:

- (1) to assure that city operations are constitutional;
- (2) to provide advice to city officials;
- (3) to prepare formal legal opinions and other documents;
- (4) to prosecute state and local misdemeanor violations; and
- (5) to provide legal representation for the city in civil litigation.<sup>14</sup>

A recognition of broader application of attorney skills has led to some amplification of this list:

The legal profession is characterized by precision of thought and expression and by analytical skills, qualities that can be put to good use by the skillful administrator who is able to involve the attorney in the city's administration. . . . The legal mind . . . is trained to analyze problems, and to separate critical issues from irrelevant ones. Finally, experienced trial attorneys have devoted their careers to rapidly acquiring extensive knowledge about widely varied subjects. These skills give the administrator who has a good rapport with this attorney an "instant expert" who may master not only the legal aspects of a subject, but often its technical aspects as well.<sup>15</sup>

The historical nonconsensus on whether the city attorney is part of the manager's team or independent council "watchdog" has led to a wide range in state code and city ordinance job descriptions for city attorneys. While some codes elaborate on attorney responsibilities relating to bonds, contracts, etc., more often

than not, the descriptions are unhelpfully brief and general. For example,

The city attorney shall be the chief legal advisor of the council, the city manager and all departments, boards, commissions and agencies of the city in all matters affecting the interests of the city. He shall have such powers and duties as may be assigned by the council.<sup>16</sup>

To some extent, the image of an "independent" city attorney may draw its impetus from attorney membership in organized bar associations which, in most states, exercise licensing and disciplinary authority over attorneys under the direction of the state supreme court. These organizations propose model rules of conduct which are adopted and enforced by the local courts. Although by law city attorneys scarcely have more of an affirmative obligation to investigate and report wrongdoing within the city organization than do other department heads, attorneys do have unique rules and considerations to follow in reacting to such wrongdoing. If attorneys ignore these rules, disciplinary proceedings may follow. For example, all attorneys owe strict duties of confidentiality to clients, both individual and organizational.<sup>17</sup> Furthermore, attorneys representing organizations must weigh the wrongfulness of acts by employees, officers, and directors against the likelihood of harm to the organization. Actions taken by the attorneys must minimize disruption to the organization.<sup>18</sup> In each case, higher authority is to be consulted, and in the case of cities, "the city council shall have the right to employ or retain special attorneys, if it deems it to be in the best interest of the city."<sup>19</sup>

Generally, city attorneys exercise some prosecutorial authority under state statutes, usually to enforce state and local misdemeanor laws. This may be another basis for the image of the "independent" city attorney. However, most city prosecutors do not perform independent investigations of criminal conduct but work closely with the police, the manager, and the other department heads who exercise code enforcement authority. Except in the rare cases of express statutory authority to conduct independent investigations, city attorneys would necessarily work closely with organizational authorities in any investigation of wrongdoing. To do otherwise, even as a prosecutor, could run afoul of the duties to the "organization as client." In only 2 of the 100 city codes providing for appointed city attorneys studied in this research are references found to "inherent attorney investigative responsibilities." An example of such a reference reads,

If any citizen has knowledge of the misapplication of funds of the city, or the abuse of its corporate powers, or of the nonperformance of any contract, . . . he may present evidence of the same to the City Attorney who shall thereof investigate such evidence and shall take such legal course as the necessities of the case require.<sup>20</sup>

Whether city attorneys can or should enter the policy-making process is a constant question. Furthermore, practitioners wonder if and when city attorneys may publicly dissociate themselves from policy with which

Banovetz speaks of "multiple supervision" of the attorney's office: "When appointment review or approval by the Council is combined with the attorney's lawyer-client view of his relationship to the elected council, it will be seen that most legal departments have a dual responsibility to the chief administrator and to the legislative body."<sup>26</sup> Selected comments on this subject from survey respondents identify some of the implications of multiple supervision of the attorney's office:

#### *City Managers*

- The Manager has budgetary and administrative authority, including performance evaluation over the attorney, but discipline is at the consent of the council.
- I have administrative control over the attorney by charter. He is a department head, though I do treat him very differently.
- Both of us are employees of the council, and thus we consult with each other and report together, but work independently.
- We work together both as council appointees, and any disagreement would be settled by the council.

#### *City Attorneys*

- While the council appoints me, I report to the manager. He recommends my budget, approves changes, and may stall hiring.
- Although I am independent of my manager, my assistants aren't.
- I operate independently, from my own office building, not in the city facilities. His administrative control is purely cosmetic.
- We work as a team; no one controls the other, except my budget.

Most city codes do not expressly deal with the scope of the manager's supervision of the legal department. This omission can routinely lead to friction, frustration, and inefficiency. One city that deals expressly with the issue by code removes the city attorney from the manager's supervision altogether: "In addition to the elective officers and their respective staffs, the position of City Attorney shall be excluded from the scope of the Manager's surveillance; however, the services and facilities of said City Attorney shall be made available to the City Manager."<sup>27</sup>

In connection with this issue of administrative control, our survey asked if city attorneys have a "greater public responsibility" than other department heads—a possible basis for a sense of independence from the manager. In cities with council-appointed attorneys, 93% of the attorneys and 36% of the managers regard attorneys as ultimately having a "greater public obligation" than other department heads. In contrast, in cities with manager-appointed attorneys, 67% of the attorneys and just 18% of the managers held that attorneys have a greater obligation to the public. Note some of the representative comments received:

#### *City Managers*

- No, to take that position requires a belief that other department heads do not have the same degree of integrity as does an attorney.
- No, this sounds like professional lawyer balderdash.
- No, an attorney's oath is not really much different from a city engineer's licensing.
- Yes, the attorney's professional ethics outweigh mere current administrative loyalties.
- Yes, his assurance to the public that all actions are legal is far more extensive in scope than a single department director.
- Yes, though his duty may not be any higher, the penalties for misuses are more professionally severe and damaging.

#### *City Attorneys*

- No, I owe a different type of duty, not a higher duty, to the public than my colleagues do. Lawyers do not have a finer moral sense than other public officials.
- No, the city attorney owes a possibly higher duty because of his licensing requirements, yet his responsibility to the public is not any greater.
- Yes, from a standpoint of being a legal counselor, advisor, and leader, the attorney does appear to have a higher duty.
- Yes, I am hired because of my expertise in knowing what's legally right and wrong—that is the essence of my job; other jobs focus on technical expertise.
- Yes, it goes without saying that the attorney must be such an arbiter, to ensure that department heads do not abuse their authority to the detriment of the public.

Some managers report an "us versus them" attitude among city attorneys who hold to this sense of "greater public responsibility." One attorney who disapproves of such an attitude has said:

The theory seems to be that the lawyer . . . had acquired some duty . . . to be the final arbitrator of right and wrong. I cannot agree with this philosophy. . . . I do not believe that the ritual of becoming a member of the bar invests a government lawyer with the power of life and death over the agency he serves. The agency head takes his own oath of office, and he is also subject to the inscrutable forces of public opinion. In carrying out his responsibility to decide policy, the agency head looks to his lawyer's counseling as one of his strongest supports; but the lawyer's counsel can never usurp the decision which must be made by the responsible head of the agency.<sup>28</sup>

David Caylor has said that attorneys have an overarching obligation to assure justice, achieve fairness, and avoid using the economic power of government to harass individuals or groups. Nevertheless, when an attorney is ordered by the council to take illegal or questionable actions, Caylor declares that a single reasonable attempt by the attorney to articulate an opposing position is all that is required. He or she should not attempt to serve as an advocate on behalf of an abstract

**TABLE 3**  
**Comparison of Manager and Attorney Perceptions on Desired Work Level**

Status		Level I	Level II	Level III	Level IV
Manager	Attorney works at	20%	13%	10%	57%
	Attorney wants to work at	18%	11%	9%	62%
	Manager wants Attorney to work at	12%	10%	14%	64%
Attorney	Attorney works at	20%	8%	17%	55%
	Attorney wants to work at	20%	12%	14%	54%
	Manager wants Attorney to work at	10%	9%	18%	63%

#### *Level IV*

- Formulates policy alternatives, upon request
- Collaborates with manager in formulation of policy alternatives, upon request
- Brainstorms with manager on policy problems, upon request

Respondents were then asked to identify the cumulative level at which (a) the city attorney currently works, (b) the city attorney would like to work, and (c) the city manager would like the city attorney to work. Their answers can be grouped as shown in Table 3.

Clearly, the managers and attorneys surveyed share similar perceptions about the level at which the city attorney is functioning and should function. Though a majority of attorneys are now functioning at a high level of activity, 83% of the city managers and 60% of the city attorneys further state that the city attorney should be a permanent member of the manager's "policy team," so that the city attorney would be regularly used in the policy-making process. Those who advocate this expanded role for the city attorney cite the attorney's extensive knowledge of public case law, problem-solving and analytical skills, and long-term familiarity with city programs.

Paradoxically, some ambiguity about the extent of administrative control over the legal department is acceptable to 96% of the managers and 93% of the attorneys surveyed. Yet the comments underscore the institutional tension that this ambiguity fosters:

#### *City Attorneys*

- I believe that the two offices can be compatible, but must work together if the city is to benefit. Independence is vital; cooperation is crucial. Both can be on shaky ground.
- The problem with our city is that the two of us are strong willed officials who tend to solve the "relations" by careful avoidance.
- Things would be great if the council didn't expect me to keep an eye on the manager.
- The manager's "don't call me, I'll call you" arrangement is counterproductive for the city; it does make for more independence for me.
- We have an excellent relationship because we communicate regularly.

#### *City Managers*

- We seem to get along; there is no written SOP, neither is there an annual evaluation of his performance.
- I have the highest respect for the attorney and staff.
- While we get along fine, the nondefined relationship gives each of us some room to operate.
- We have it clearly worked out who he works for.

#### **Professional Relations**

Managers and attorneys recognize each other as the ranking, professionally-trained municipal officials. However, their evaluations of each other's professionalism show some striking differences. Seventy-one percent of the managers rate attorneys as very high in professional development; 24% accord a high ranking; and 4% give a moderately high ranking. However, only 48% of the attorneys rank the managers as very highly professional; 25% express a high professional rating; and 24% give a moderately high ranking.

Managers appear more disposed to have high confidence in the attorney's professional abilities, despite the fact that 47% of the managers also express frustration over attorneys' "it can't be done attitude." Attorneys, on the other hand, appearing somewhat more preoccupied with administrative deficiencies in their manager, simultaneously bristle at any "naysayer" label.

#### *City Managers*

- While I don't expect him to have management skills, he needs to be more aware of administrative concerns.
- The attorney is able to see critical issues quickly.
- The attorney has excellent training, and we know how to operate together.
- When our attorney was hired, he became aware we wanted to reach goals, not get legal instruction.
- He needs to remember that our objective is to make progress. His attitude toward assisting us has created problems.

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preciation of the expectations of each profession for the other can facilitate that goal.

*City attorney expectations of city managers:*

1. Understand the nature of legal services, including lead times, other time constraints, ambiguity of precedent, preferability of preventive law over reactive law, and the dual role of the attorney as counselor and advocate; the former role being conservative and the latter role being liberal.
2. Keep the attorney informed on status of projects, contracts, and negotiations to facilitate preventive law.
3. Invite the attorney to all determinative meetings to facilitate discussion and decision making.
4. Involve the attorney earlier in the policy process for his or her assistance and detached perspective.
5. Establish priorities to help the attorney properly allocate legal resources.
6. Support the attorney in providing legal training to departments to help them grasp legal implications of department programs and policies.
7. Develop early agreements on code enforcement philosophy and practices.
8. Channel legal opinion requests from departments through the manager's office, but allow some flexibility for direct council requests.
9. Consult with the city attorney on retainer of special counsel, and keep him or her informed of special counsel activities.
10. Do not discount the priority of an adequate legal department budget during the program budgeting process.

*City manager expectations of city attorneys:*

1. Appreciate that nonlegal aspects of administrative issues, including financial, organizational, and political aspects, are of equal importance to legal aspects.
2. Function in the "watchdog" capacity only in accordance with the considerations of Rules 1.6 and 1.13 of the ABA Model Rules of Professional Conduct, by

working closely with management, where appropriate.

3. Assist in ameliorating the dual-supervision issue by recognizing the need for some management supervision of the legal department.
4. Translate legal competency into team spirit by finding avenues to further council-manager objectives, where possible.
5. Avoid public discussion of the merits of legal and policy issues prior to council consideration.
6. Regularly inform the manager on the status of legal issues.
7. Display interest in policy issues, particularly in requests to aid in the policy process.
8. Limit outside practice to permit quality time and attention to municipal issues.
9. Pursue continuing legal education in municipal law to meet the challenges on the horizon for urban services.
10. Accept some flexibility and ambiguity as part of the policy-making process, rather than insisting on rigid adherence to past precedent or required procedures, at least in the initial stages.

A former city attorney, now turned city manager, touched on the essence of this issue when he said, "To remove the adversarial relationship and develop the associate perspective will require communication, clarification, and cooperation."

\* \* \*

**Doyle W. Buckwalter** is Associate Director of the Institute of Public Management and coordinator of the City Management program at Brigham Young University. His research interests and publications are in the fields of local government management and inter-governmental administration.

**J. Ivan Legler** is the City Attorney for the City of Pocatello, Idaho. His research has appeared in *The Urban Lawyer*, a publication of the section of Urban, State and Local Government Law of the American Bar Association.

*Notes*

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2. Samuel Bowles, "Relation of State to Municipal Government and the Reform of the Latter," *Journal of Social Science*, vol. 9 (January 1878), p. 142.
3. Charles B. Elliott, *The Principles of the Law of Public Corporations* (Chicago: Callaghan and Company, 1898), p. 238. See also Ernest S. Griffith, *A History of American City Government: The Conspicuous Failure, 1870-1900* (New York: Praeger Publishers, 1938).
4. Richard S. Childs, "The Theory of the New Controlled Executive Plan," *National Municipal Review*, vol. 2 (January 1913), p. 80.
5. Richard S. Childs, "Professional Standards and Professional Ethics in the New Profession of City Manager," *National Municipal Review*, vol. 5 (April 1916), p. 198.
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7. Austin F. MacDonald, *American City Government and Administration* (New York: Thomas Y. Crowell, 1946), p. 215.
8. Arthur W. Bromage, *Manager Plan Abandonments* (New York: National Municipal League, 1940), pp. 12-18.
9. Thomas Harrison Reed, *Municipal Management* (New York: McGraw-Hill Book Company, 1941), p. 291.
10. Robert H. McManus, "How Should the City Attorney Be Selected?" *Public Management*, vol. 39 (January 1957), p. 4.
11. See Charles S. Rhyne, *Municipal Law* (Washington: National Institute of Municipal Law Officers, 1957), sec. 8-62; Allen Grimes, "The Jobs of City Manager and City Attorney," *Public Management*, vol. 41 (February 1959); James M. Banovetz, ed.,

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## Charter Revisions

Bobby Levinski <bobby@sosalliance.org>

Mon 10/2/2023 3:18 PM

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Cc: Bill SOS Alliance <bill@sosalliance.org>

You don't often get email from bobby@sosalliance.org. [Learn why this is important](#)

### External Email - Exercise Caution

Commissioners,

While I will be bringing forward recommendations for charter amendments from the Save Our Springs Alliance at a later date during your public process, I wanted to take a moment to send a quick note of support for reviving the Charter amendment concerning an independent City Attorney. I see that you are adding potential topics to discuss, and I hope you consider adding this to the list.

As I am sure you will discuss in your consideration of various charter amendments, in 2012, the charter amendment that would have established an independent city attorney was narrowly defeated.

PROPOSITION NO. 06 - Ordinance #20120426-069			
Yes	% Yes	No	% No
117811	49.37%	120826	50.63%
Shall the city charter be amended to provide that the city council appoint the city attorney? There is no anticipated fiscal impact to the City if this amendment is approved.			

As an attorney and a former staff member for three City Council members, I believe wholeheartedly that the City Council should receive independent legal advice, unfiltered by City Management. This is a basic structural issue that ensures the decision makers are receiving unbiased legal advice.

This is not a statement against the current City Attorney (who is great) or any City Manager that Austin has had; it's based on my overall experience throughout my time in and outside of City Hall. There have been times when the advice from the legal department has changed based on conversations with City Management, and there have been times when City attorneys have gotten into trouble for giving the City Council legal options in lieu of a single, firm recommendation. The City attorneys need to be free to voice their legal opinions and give the City Council their best advice possible.

Please add "independent city attorney" to the potential charter amendment list.

Many thanks,

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