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## ARTICLE

# THE OFFICE OF THE CITY ATTORNEY OF SAN FRANCISCO

*LOUISE RENNE\**

### I. THE UNIQUE ROLE OF THE SAN FRANCISCO CITY ATTORNEY

The San Francisco City Attorney's Office serves the Mayor, Board of Supervisors, and other elected officials as well as the approximately 100 departments, boards, commissions, and offices that comprise the City and County of San Francisco's government.<sup>1</sup> In many ways, the office is unique among city attorney offices, both because of the extraordinary scope of activities performed by the City and County of San Francisco's government, and the scope of the City Attorney's Office activities within that structure.

At the outset, it is important to note that the San Francisco City Attorney is elected — comparatively unusual among cities. All county counsels in California are appointed by the County Board of Supervisors, and most city attorneys are appointed by the City Council. Only a few other city attorneys in California are elected.<sup>2</sup> The first elected San Francisco City Attorney was Franklin Knight in 1898.

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<sup>1</sup> See The Office, CITY ATT'Y OF S.F., <http://www.sfcityattorney.org/aboutus/theoffice/> (last visited Feb. 25, 2017) (providing a description of the office's mission and responsibilities).

<sup>2</sup> Michael Reiter, *Elected City Attorneys in California Versus Appointed City Attorneys in California*, MICHAEL REITER, ATTORNEY AT LAW BLOG (May 3, 2011), <https://michaelreiterlaw>

The large size of the office reflects the diversity of the tasks it undertakes. San Francisco is the only consolidated City and County in California. This makes the role of the San Francisco City Attorney unique because he or she acts both as county counsel and as city attorney. In all other counties in California, there is a County Counsel who represents the county in its legal affairs (e.g. county health and social services), while each city within the county has its own city attorney providing services typically associated with a city (e.g. police and fire services). As a result of this unique structure, the San Francisco City Attorney has far broader responsibilities than any individual county counsel or city attorney in California.

The San Francisco City Attorney also has broader responsibilities for historical reasons. At one time, neighboring San Mateo County was a part of San Francisco County, but San Mateo County separated in 1856.<sup>3</sup> At that time, San Francisco then became a City and County. However, portions of the land in San Mateo County remained under San Francisco ownership: San Francisco International Airport; Crystal Springs Reservoir, which is a part of the Hetch Hetchy water and power system that provides San Francisco with its drinking water; and Sharp Park Golf Course, which is owned and maintained by the San Francisco Recreation and Park Department.<sup>4</sup> The San Francisco City Attorney is the attorney for all these enterprises. Unlike most cities, San Francisco has its own port, airport, employee retirement system, water, power, and clean water systems; and is one of the very few cities that operate its own transportation system. This further expands the responsibilities of the office.

Another unique feature of the San Francisco City Attorney's office is that the San Francisco City Attorney (as well as a few other City Attorneys in California cities having a population in excess of 750,000) is authorized under state law (Bus. & Prof. code § 17200 et seq) to pursue allegations of unfair and unlawful competition in civil proceedings. As will be discussed further in this article, this state law assists the City Attorney in pursuing affirmative litigation on behalf of citizens and taxpayers. In such cases, the City Attorney represents the people of the State of California — a role more traditionally associated with that of the State Attorney General.

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.wordpress.com/2011/05/03/elected-city-attorneys-in-california-versus-appointed-city-attorneys-in-california/.

<sup>3</sup> *San Francisco History – Timeline*, SFGENEALOGY, <http://www.sfgenealogy.com/sf/history/hgtim1.htm> (last updated Feb. 6, 2016).

<sup>4</sup> *Real Property Owned by the City and County of San Francisco: Parcels Outside of the City and County Boundaries*, CITY AND CTY. OF S.F. – REAL ESTATE DIV., <http://sfgov.org/realestate/real-property-owned-city-and-county-san-francisco-parcels-outside-city-and-county-boundaries> (last updated May 29, 2002).

Over the years, there has been discussion over whether having an elected City Attorney is a good idea. One side argues that having an elected City Attorney means the City Attorney may have his or her own political or policy agenda. From my point of view as a former City Attorney, electing this position has great merit because it helps to ensure that the City Attorney can be fully independent and neutral regarding legal advice offered. Neither the Mayor nor the Board of Supervisors can complain that the City Attorney inherently favors one side over the other because neither one appoints the City Attorney. Furthermore, since the City Attorney is an elected official, the City Attorney is accountable to the public. This reinforces the concept that in exercising the powers of the City's chief legal officer, the City Attorney must both provide the best possible legal advice and protect the public interest.

I began my journey as City Attorney due to the unfortunate death of George Agnost, who had served San Francisco from 1977 to 1986. I was appointed to fill out the remainder of his term by Mayor Dianne Feinstein, the first female San Francisco mayor. I became the first female City Attorney, and was reelected three times. Ultimately, I served as City Attorney for 16 years, from 1986 to 2002. During that time, we had the opportunity to more than double the size of the office. With more attorneys, we provided more specialized services in the areas of family and children services,<sup>5</sup> telecommunications, water, and environmental law. We also aggressively pursued affirmative litigation on behalf of the public. Currently, the office has about 185 attorneys.

## II. THE DUTIES OF THE SAN FRANCISCO CITY ATTORNEY

The San Francisco Charter controls the way in which San Francisco is governed. Charter § 6.102 sets forth the specific duties of the San Francisco City Attorney.<sup>6</sup> Some other local and state laws (such as Bus. & Prof. Code § 17200 et seq) augment these duties and powers. Because the charter mandates that the City Attorney is the chief legal advisor and

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<sup>5</sup> Now United States Senator Kamala Harris served as head of the Family and Children Services when she was in the City Attorney's Office.

<sup>6</sup> See S.F., Cal., CHARTER § 6.102, [http://library.amlegal.com/nxt/gateway.dll/California/charter\\_sf/articleviolethelectiveofficers?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$anc=JD\\_6.102](http://library.amlegal.com/nxt/gateway.dll/California/charter_sf/articleviolethelectiveofficers?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_6.102) (explaining the duties of the San Francisco City Attorney: representing the City and County in all legal proceedings; providing advice or written opinions to any officer, department head, board, commission or other unit of local government; making recommendations to the Board of Supervisors for or against the settlement or dismissal of legal proceedings; approving as to form all surety bonds, contracts and ordinances; examining and approving title to all real property to be acquired by the City and County; preparing reviews annually and making available to the public a codification of ordinances of the City and County; investigating, evaluating and recommending disposition of all claims made against the City and County).

representative of all elected officials and City units of government, the City speaks with one legal voice. Can you imagine the chaos that would ensue if the Mayor or Board of Supervisors or separate departments or agencies decided to hire their own attorney, particularly if they did not like the advice provided by the City Attorney? There will obviously be occasions where the City attorney may have a conflict, but the Charter provides a remedy in such cases by allowing the City Attorney to hire outside counsel.<sup>7</sup>

In general terms, the duties of the office can be divided into two sometimes-overlapping categories: (1) advice and (2) litigation. The advice side of the office provides oral or written advice and approves the form of all new contracts, ordinances, and other city documents. The litigation side of the office represents the City in all legal proceedings, including administrative hearings, proceedings in state or federal trial and appellate courts, and the United States Supreme Court. Since both halves serve all 100 city departments, the City Attorney's Office is called upon to be proficient in such diverse areas of law as arts and cultural matters, health and welfare issues (including issues involving children and families), public finance and tax, labor and employment issues, land use, ethics and public interest laws, environmental law, general municipal law (including the application of diverse state and federal laws), real estate, construction and contracts, code enforcement and more. How these various responsibilities are currently organized can be viewed on the City Attorney website.

#### A. ADVICE

On the advice side, the City Attorney's role is to provide legal advice applicable throughout the city and not to make policy, a role reserved to the City's policy makers including the elected officials and department heads. Drawing a distinction between giving legal advice and making policy is not always clear or easy; best understood, the City Attorney may frame legal options for its client agencies or elected officials, but it is the agencies or elected officials that must decide how to proceed. The City Attorney may privately harbor the opinion that a chosen policy is a bad one or that a poor business deal has been struck, but the City Attorney has an obligation to defend the City's final policy decision unless it is contrary to the Canon of Ethics or plainly unconstitutional.

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<sup>7</sup> See S.F., Cal., CHARTER § 6.102, [http://library.amlegal.com/nxt/gateway.dll/California/charter\\_sf/articleviolethelectiveofficers?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$anc=JD\\_6.102](http://library.amlegal.com/nxt/gateway.dll/California/charter_sf/articleviolethelectiveofficers?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_6.102).

The issues presented to the City Attorney are often novel and “on the cutting edge.” They can be raised in the context of a proposed piece of legislation on which the Mayor and the Board of Supervisors may or may not agree. A proposed ballot measure, whether emanating from within City Hall or from the citizens, may raise substantial legal issues to be “opined upon” by the City Attorney. An ethics or conflict of issue may arise which requires an opinion to be issued by the City Attorney. There are often contentious land use issues that will require the City Attorney to provide a legal answer. And of course, there will often be civil rights issues to be considered and addressed by the City Attorney’s Office. For example, I remember when the issue of domestic partner benefits was controversial. The affirmative stand of the City on this question ultimately led to the validation of same sex marriages, a history in which the San Francisco City Attorney’s office was involved from beginning to end.

During my time as City Attorney, one of the most dramatic events was the earthquake in 1989. The City Attorney’s Office was called upon to join the Mayor and other critical emergency personnel at the command headquarters to draft the important and required emergency declaration that would provide needed relief and allow emergency actions to take place.<sup>8</sup> In fact, if one reviews the myriad responsibilities undertaken by the City Attorney’s office, it is clear that there is little that occurs within city government that does not come through the door of the City Attorney’s office in one way or another and requires the considered advice of the City Attorney’s office.

One final point about the unusual role of the City Attorney in San Francisco: in a government as large and diverse as San Francisco’s, battles among officials, boards, and departments are inevitable. The City Attorney can serve a critical role in keeping the peace, actively working with different parts of the government to forge consensus.

## B. LITIGATION

The City Attorney represents the City and County in all legal proceedings, no matter the forum. This also includes all claims against the City even if they do not arise to formal litigation. Most of the claims and litigation handled by the office are on the defense side, ranging from individual “slip-and-fall” cases to large class actions. And they range

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<sup>8</sup> During that difficult time, members of the City Attorney’s office also volunteered to help with the shelters that were needed and were “on the spot” in the Marina area for several days working closely with the police and fire departments in providing needed service.

across all aspects of city government, literally from A to Z — the airport to the zoo.

Many matters (certainly the large and complex) involve not only significant amounts of money, but important questions of public policy. This requires the City Attorney not only to be a forceful advocate on behalf of the City, but also to work closely with the City's policy makers to ensure that the litigation can be successfully resolved. The City Attorney must take all settlements to the Board of Supervisors and the Mayor for approval.

The history of the City Attorney's office is replete with cases of high visibility raising important public policy issues. One such civil rights case arose shortly after I became the City Attorney with litigation filed against the Fire Department challenging the hiring and promotional policies of the department for discriminating against women and minorities. Challenges to the department's policies had a long history even before I became City Attorney, and there were strongly held views about the department policies (to put it mildly) on all sides. At the time, Ed Lee, now mayor of San Francisco, was an attorney for the plaintiffs. The deputy responsible for handling the case was a forceful advocate, but at the same time was able to work with all sides in the case to resolve it in a positive way, forever changing the department. The San Francisco Fire Department not only changed its policies, it set a precedent for other fire departments across the country. Not long after the case was resolved, the first African-American fire chief in San Francisco, Robert Demmons, was appointed; he was a lead plaintiff in the litigation. Today, the Fire Department is led by a woman, Joanne Hayes-White.

In addition to acting as the City's defense attorney, the San Francisco City Attorney's office has been at the forefront of pursuing affirmative litigation, acting as a plaintiff's attorney in matters where the City has a valid claim to enforce or where members of the public have been "wronged". Affirmative litigation cases can range from a code enforcement matter to unfair competition actions against corporate defendants and others, using California's Unfair Competition Law as a legal tool.<sup>9</sup> At the time we first pursued affirmative litigation, it was very much outside the norm of the generally defense-minded public law bar. But, given the array of affirmative litigation cases that the San Francisco City Attorney has pursued against banks, the lead paint companies, title companies, the tobacco industry and others, and the nearly \$1 billion in recoveries from those cases, I think that it is fair to say that the San

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<sup>9</sup> See CAL. BUS. & PROF. CODE § 17200 et seq. (West 2016).

San Francisco City Attorney's office is now widely recognized as a national leader in public sector affirmative litigation.

One of the first affirmative litigation cases in which I was involved was the City's lawsuit against the Olympic Club challenging its policies barring women and all minorities from joining the club. Some argued that the club should be immune from the suit because it was private. But, as we pointed out, three of the holes in the Olympic Club golf course were on city-owned public land. So, we argued, the club had a choice; play golf on a 15-hole course and continue to discriminate, or play on 18 holes and accept women and minorities. Fortunately, the Club had a strong preference for 18 holes and changed its policies. Women and minorities became members and a woman has become President of the Club. The Olympic Club case foreshadowed similar fights elsewhere. Women are now able to join other prestigious golf clubs such as Augusta National. And, just recently, the British Open transferred its tournament from a well-known club in Scotland that continued to discriminate against women, to a club in Scotland that did not.<sup>10</sup>

Another case that stands out for its long-term historical consequences is the lawsuit to stop the Joe Camel ads targeting young people to get them to start smoking, which we won, and the related litigation in which other cities and counties throughout California joined against the tobacco companies because of the adverse health injuries caused by smoking. Ultimately, when there was a nation-wide global settlement involving all the State Attorneys General, California was unique in that local governments in California received half the proceeds allocated to California because of the effort that San Francisco and its local allies had made on behalf of California and its local governments.

I am proud to say that instead of just spending the money "willy nilly" as some jurisdictions did, the voters of San Francisco voted to use the proceeds to rebuild Laguna Honda Hospital — a hospital which has worked with the poor and those in need of skilled nursing services since the Gold Rush. San Franciscans really do have a heart!

In conclusion, it is obvious that the office of the San Francisco City Attorney is unique and plays a huge role in making San Francisco Government work. Whether on advice matters or litigation, the San Francisco City Attorney's office has often had a profound impact on the lives of San Franciscans and the government that serves them. The office now attracts the "best and the brightest" lawyers nationally, and works with top law schools to encourage lawyers who might otherwise have wound up in top private law firms. Throughout the years, the people of San

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<sup>10</sup> *Muirfield Out of Open as Women Members' Golf Ban Stands*, RTE (May 19, 2016), <http://www.rte.ie/news/2016/0519/789499-golf-scotland/>.

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Francisco have been fortunate to have a City Attorney's office staffed by attorneys and staff dedicated to the City and to the public interest. May it always be thus!