

October 2, 2012

BOARD OF FIRE COMMISSIONERS
FILE NO. BFC 12-132

Date: September 24, 2012
To: Honorable Board of Fire Commissioners
From: Stephen Miller, Independent Assessor *SM*
Subject: **REPORT CONCERNING STATE BAR COMPLAINT AND REQUEST TO
RELEASE REDACTED DOCUMENTS**

FINAL ACTION:	<input type="checkbox"/> Approved	<input type="checkbox"/> Approved w/Corrections	<input type="checkbox"/> Withdrawn
	<input type="checkbox"/> Denied	<input type="checkbox"/> Received & Filed	<input type="checkbox"/> Other

Recommendation:

That the Board of Fire Commissioners release documents to the public and State Bar of California as identified in this report, after they have been redacted to protect the privacy of Fire Department employees.

Background:

On February 21, 2012, the Independent Assessor filed a formal complaint against attorneys in the City Attorney's Office with the State Bar of California. The complaint was only filed after City attorneys engaged in repeated acts of misconduct over the preceding 18 months. The misconduct includes providing false, incomplete and misleading factual information; providing false, inaccurate and inconsistent legal advice; failing and refusing to communicate; and threatening to report the Independent Assessor to the State Bar.

The Fire Department requires quality and timely legal services. Some City attorneys are very angry that the Independent Assessor made negative comments about legal services provided to the Department. Unfortunately, some attorneys engaged in misconduct after some legal services were criticized.

The State Bar complaint said certain supporting documents were not provided because they may be protected by the lawyer-client privilege, but would be requested from the Fire Commission if necessary. As a result of an August 1, 2012 meeting with the State Bar, the Independent Assessor said he would request that the Fire Commission release certain documents to assist the State Bar in their investigation. A copy of a letter confirming that the request would be made is attached.

This request was to be presented to the Fire Commission for consideration at the August 21, 2012 meeting, but was not. On August 28, 2012, the State Bar closed the complaint, based in part on information provided by the City Attorney's Office, which claimed there was no "client-attorney relationship between the City Attorney's Office and the Independent Assessor." The State Bar also indicated that the Independent Assessor has a right to appeal the decision to close the complaint. The Independent Assessor intends to appeal and provide the State Bar with information not provided at the time the complaint was first filed or before the complaint was closed because the existence of a lawyer-client relationship is irrelevant to the issues.

The fact that the Independent Assessor is not a City Officer and the Fire Commission and Independent Assessor are not authorized to make client decisions in litigation matters is irrelevant to whether City attorneys violated their legal and ethical duties by: 1) providing false, incomplete and misleading factual information to the Fire Commission and public; 2) providing false, inaccurate and inconsistent legal advice to the Commission and Independent Assessor about their legal authority; 3) refusing to discuss and answer reasonable and responsible questions about their factual representations and legal advice; and 4) threatening to report the Independent Assessor to the State Bar.

City Attorney Opinion No. 96-5, dated May 17, 1996, says where there is no litigation or threat of litigation, attorney-client communications involving a single department or office may be under the control of the department head. All of the documents sought to be released involve the Fire Department and none of the documents involve pending or threatened litigation. On August 17, 2010, the City Attorney's Office told the Fire Commission that advice concerning the authority to access information in the Fire Department is confidential but that "it is your privilege to waive or not to waive." On September 21, 2010, the City Attorney's Office told the Commission that the extent to which confidentiality is maintained is decided by the Fire Commission.¹

The Independent Assessor sincerely regrets that the misconduct of a few detracts from the dedication and excellent work performed by so many in the City Attorney's Office. The following summary sets forth the general nature of the State Bar complaint. The State Bar complaint and all supporting information, including materials that may be privileged, were sent to the personal attention of City Attorney Carmen A. Trutanich on February 22, 2012.

Summary:

False Information in City Attorney's Response:

The City Attorney's Office provided an August 16, 2010 response to the *Assessment of the Department's Disciplinary Process and Professional Standards Division (Assessment)*.² It was signed by Senior Assistant City Attorney Zna Portlock Houston who supervises the unit whose legal service was criticized by the *Assessment*. The response contains false, incomplete and misleading information. A few of the more obvious examples include the following:

1. When the *Assessment* reported that the City Attorney's Office did not respond to a November 18, 2008 legal request from the Fire Department, the response signed by Ms. Houston said they first learned of this request on April 14, 2010. A July 21, 2009

¹ The City Council has the authority to "veto" the Commission's actions under Charter section 245.

² The March 27, 2010 *Assessment* is available to the public on the Fire Commission's website as BFC 10-027. The City Attorney's August 16, 2010 response is available to the public as BFC 10-087.

email **from** Ms. Houston says she received an April 1, 2009 Fire Department memo "listing the status of various requests for labor advice." The November 18, 2008 request for advice is listed on page two of the Fire Department memo Ms. Houston's own July 21, 2009 email acknowledges receiving. Therefore, the claim that the City Attorney's Office first learned of this request on April 14, 2010 is false.

2. The response signed by Ms. Houston said the *Assessment* was "completely false" in reporting that the City Attorney's Office did not respond to a January 30, 2009 request for an attorney to assist in presenting the Department's case at a Board of Rights hearing because no such hearing was scheduled for or conducted on January 30, 2009. The Board of Rights hearing was **NOT** scheduled for January 30, 2009. That was simply the date of the request. The second to last sentence of the legal request itself said the hearing would commence in mid-February. A later email said that the hearing would reconvene on February 17, 2009.
3. When the *Assessment* reported that the City Attorney's Office failed to respond to a February 10, 2009 request for advice, the response signed by Ms. Houston said: 1) the request was not received until April 2010; 2) once found, the City Attorney's Office confirmed that it had not been received previously; 3) the Fire Department made no effort to ask about the request between February 20, 2009, and April 2010; and 4) if the request had been received, it would have been logged in and assigned to an attorney. These statements to the Fire Commission and to the public are false for three reasons. First, Ms. Houston was one of two attorneys who were sent the request by email on February 10, 2009, at 2:57 p.m. Second, the February 10, 2009 request for advice was listed on page three of the April 1, 2009 Fire Department memo. Ms. Houston's own July 21, 2009 email acknowledges receipt of that Fire Department memo. Third, the February 10, 2009 request is the fourth item listed in Ms. Houston's own email, which asked if the "matter is still open."
4. The *Assessment* reported that the Fire Department had been waiting for over a year after a January 28, 2009 request asked for advice concerning investigative subpoenas. The response signed by Ms. Houston represented that the Fire Department said nothing about the request for investigative subpoena advice until October 2, 2009. This is a false statement for at least four reasons. First, Ms. Houston's own July 1, 2009 email confirmed receiving the Fire Department's April 1, 2009 memo. The request concerning investigative subpoenas was listed on page two of the memo that Ms. Houston's own email acknowledged receiving. Second, the legal request concerning subpoena powers was listed as number two in Ms. Houston's own July 21, 2009 email, which asked if the "matter is still open." Third, a second copy of the request for advice was sent directly to Ms. Houston by email on July 23, 2009 at 5:08 a.m. Fourth, a third copy of the legal request was sent directly to Ms. Houston on October 2, 2009, with an email which said "this is the request that was resent to you on July 23 in regards to the subpoena issue, as I mentioned to you today." The response signed by Ms. Houston also ignores the fact that the Mayor's Office contacted the City Attorney's Office about the investigative subpoenas request in July 2009. (The Fire Chief also renewed the request for advice with a memo to the City Attorney's Office on March 8, 2010.)
5. The response signed by Ms. Houston said that the *Assessment* "incorrectly" reported that the City Attorney's Office failed to provide advice in response to the January 28, 2009 request concerning investigative subpoenas in more than a year. The *Assessment* was dated March 27, 2010. That is more than a year. The advice was

finally provided in a written memo dated August 16, 2010, or another five months after the *Assessment* was published. Therefore, it took no less than providing the City Attorney's Office with three copies of the same request (on or about January 28, 2009, July 23, 2009, and October 2, 2009), the Fire Department's April 1, 2009 memo, the assistance of the Mayor's Office in July 2009, the Fire Chief's March 8, 2010 renewed request, the *Assessment* and more than 18 months to get advice concerning investigative subpoenas.³

Failures to Discuss and Answer Questions About the City Attorney's Response:

Despite being provided a draft for comment and fact checking, the City Attorney did not contend the *Assessment* was inaccurate before it was published or at the time it was formally presented to the Fire Commission on April 13, 2010. The City Attorney did not ask the Independent Assessor to fact check or verify the accuracy of the response signed by Ms. Houston before publication.

The Independent Assessor made eight written attempts to communicate with the City Attorney's Office about the response signed by Ms. Houston in the 18 months before the State Bar complaint was filed, including four requests that they "fact check" the Independent Assessor's detailed review of the City Attorney's response. The City Attorney would not provide information, discuss the response or answer questions about it. When Chief Deputy City Attorney William W. Carter was again provided the information described in this report on August 2, 2011, proving that the City Attorney's response signed by Ms. Houston was not accurate, he replied with a letter six days later that attempted to bully and threaten the Independent Assessor.

When the response signed by Ms. Houston was scheduled for a public discussion by the full Commission two years ago, the City Attorney requested a private discussion with a Commission subcommittee that never took place. After waiting four months for a private meeting, the subcommittee sent written questions directly to the personal attention of City Attorney Carmen A. Trutanich, more than a year before the State Bar complaint was filed. The subcommittee's questions were never answered. No corrective action has been initiated since detailed information was sent to the personal attention of Mr. Trutanich more than seven months ago on February 22, 2012.

False, Inaccurate and Inconsistent Legal Advice:

The City Attorney's August 23, 2010 advice limiting access to Fire Department information by the Fire Commission and the Independent Assessor was only issued after the *Assessment* criticized legal services requested by the Professional Standards Division (PSD).⁴ It was authored by Ms. Houston and Deputy City Attorney Vivienne A. Swanigan. Commissioners were later told that it was also from Chief Assistant City Attorney Pete Echeverria.

³ The statute of limitations for completing an investigation of alleged misconduct is normally only one year pursuant to City Charter section 1060 and the California Government Code!

⁴ The August 23, 2010 advice is attached to the *Subcommittee Report on Discussions with the City Attorney's Office Related to the Independent Assessor's Access to Department Information* and available to the public as BFC 11-140.

False, Incomplete and Misleading Statements about Fire Commission's Power and Authority:

Page 8 of the City Attorney's August 23, 2010 advice says "only" the Fire Chief has the "authority to appoint, discharge, suspend or transfer" Fire Department employees under Charter section 509 and "no such power resides in the" Commission. This advice is not accurate because it fails to include the very first sentence of Charter section 509, which says, "**Subject to the provisions of the Charter, the rules of the department and the instruction of his or her board...**," the Fire Chief shall appoint, discharge, suspend or transfer department employees. Deleting the first sentence of section 509 makes it appear as though the Fire Commission has no power over personnel matters. Including the first sentence of section 509, makes it clear that the Fire Chief's authority to appoint, discharge, suspend or transfer employees is **subject** to the Commission's instructions.

The August 23, 2010 advice fails to disclose the existence of formal City Attorney Opinion No. 2006:1, dated May 9, 2006, involving the Board of Animal Services Commissioners, which says, "In addition to the powers enumerated in Charter section 506, **the Board has the power pursuant to Charter section 509 to instruct the General Manager with respect to all matters that make up the duties and responsibilities of the General Manager.**" (Emphasis added.)

City Attorney Opinion No. 2006:1 also says: 1) the general manager's authority to appoint, discharge, suspend or transfer is subject to "*the instruction of the Board*, and so the Board, if it so desires, may instruct the General Manager regarding these tasks" (emphasis in original); and 2) "the General Manager may not disregard instructions of the Board that are consistent with applicable law." The opinion concludes by saying that "as head of the Department, the Board has far-reaching powers to supervise, control, regulate and manage the Department."

The August 23, 2010 advice fails to disclose the existence of *Patton v. Board of Harbor Commissioners of the City of Los Angeles* (1970) 13 Cal.App.3d 536, 542-43, which stated that a City of Los Angeles commission with the powers set forth in what is now Charter section 509 has **ultimate power over discipline**.

The representation that **only** the Fire Chief has authority over personnel matters, and no such power resides with the Commission, is directly opposite of the City Attorney's own May 16, 2011 advice, which relies on both City Attorney Opinion No. 2006:1 and *Patton* to say that the Fire Chief's functions of discharging and suspending employees are "subject to review and corrective instruction from the Fire Commission."

The City Attorney's advice failed to disclose that part of formal City Attorney Opinion No. 99-7, dated September 20, 1999, which says: 1) the Charter design for departments headed by boards calls for **joint management** where the board promulgates rules and instructs the chief administrative officer, and the chief administrative officer follows such rules and instructions; 2) commission instructions concerning personnel matters may be **specific**; and 3) the commission may issue **precise** directions that are operational in nature.⁵

⁵ Mr. Echeverria's signature on page 15 of City Attorney Opinion No. 99-7 appears to authorize its release.

False Statement Concerning Closed Session Meetings:

Pages 8 and 9 of the City Attorney's August 23, 2010 advice say that the Fire Commission may not meet in closed session to discuss personnel matters because the Commission has no role in personnel and discipline matters and has no role in the oversight of the disciplinary process. Prior to and even after this advice was given, the City Attorney advised the Fire Commission to meet in closed session to discuss personnel and discipline matters, as well as negotiations directly related to disciplinary oversight.

The City Attorney's August 23, 2010 advice failed to disclose the Court of Appeal decision in *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165, 1173 which explains that a commission, like the Fire Commission, may meet in closed session when power over personnel matters is **joint** or "**effectively shared**."

The City Attorney's Office: 1) previously advised Fire Commissioners in writing on how to comply with the Brown Act to avoid having their closed session discipline decisions being held null and void; 2) repeatedly advised Commissioners to meet in closed session to discuss public employee discipline, dismissal and removal for many years; 3) repeatedly advised the Fire Commission to meet in closed session to direct the Commission's negotiators on what Fire Department disciplinary guidelines should be adopted through negotiations with labor unions; and 4) cited and relied on *Gillespie* to tell the Fire Commission to meet in closed session to assist the Mayor in providing an "advisory" performance evaluation of the Fire Chief, even though no express Charter language provides the Commission with the authority to evaluate the Chief.⁶

Advice Fails to Disclose the Implied Power to Access Information:

Page 9 of the August 23, 2010 advice says the Fire Commission is without authority, except as expressly provided, to access personnel records of Department employees because the Commission has no role in personnel actions or discipline. However, the City Attorney's Office failed to disclose that as **head of the Fire Department**, the Fire Commission has the implied power to access all information available to and everything within the control of the Department. This is a particularly critical failure because Charter section 523 says the Independent Assessor shall have the same access to information as the Fire Commission.

A 1946 City Attorney opinion says the law presumes that Commissioners have the *implied* power to access Department information in order to carry out their *expressly* stated powers because knowledge is essential to the Commission's intelligent supervision over the Department.⁷ This highly relevant 1946 opinion was not disclosed by the advice concerning the authority to access Fire Department information.

City Attorney Report No. R99.0021, dated January 25, 1999, involving access to information, says the Police Commission, as head of the Police Department, may access all information available to the Department. Being the **head of the department** is the only reason set forth in this City Attorney report for the Commission having the authority to access Department information. The portion of this City Attorney report concerning access to information was not

⁶ Verbally confirmed by Deputy City Attorney Janet Jackson at the Fire Commission meeting on August 7, 2012.

⁷ 33 Ops.L.A. City Atty. 46.

disclosed even though the City Attorney was reminded of it by email more than three months before the August 23, 2010 advice was issued.⁸

City Attorney Report No. R99-0302, dated September 30, 1999, also involves access to information and says, "When New Charter section 573 becomes operative on July 1, the Inspector General will 'have the same access to information' as the Commission. The Commission, as **head of the Police Department**, has access to everything within the control of the Department. On July 1 the Inspector General will have the same authority." (Emphasis added.) The City Attorney also failed to disclose this report concerning access to information in its August 2010 advice.

The Fire Commission is the **head of the Fire Department** with the express power to supervise, control, regulate and manage the Fire Department pursuant to Charter section 506, and has the express power to instruct the Fire Chief in the appointment, discharge, suspension or transfer of Department employees pursuant to Charter section 509. With these express powers, the Fire Commission has the implied power to access all information available to and everything within the control of the Department in order to intelligently carry out their express powers, as explained by the legal authorities that the August 23, 2010 advice failed to disclose.

The legal authorities not included in the August 23, 2010 advice clearly establish that the power of the Inspector General to audit, investigate and oversee, or the Independent Assessor's power to audit, assess and review, are all **irrelevant** in determining the extent to which their respective Commissions, as the heads of their respective departments have the implied power to access all department information.

"Exclusive Jurisdiction" Falsely Represented:

Page 14 of the City Attorney's August 23, 2010 advice says the Fire Chief "has exclusive jurisdiction over the appointment, discipline and transfer of employees in the Department" pursuant to Charter sections 509 and 574. This is a misrepresentation.

Nowhere in Charter sections 509 and 574 does it say or even suggest that the Fire Chief has "exclusive jurisdiction" over personnel and disciplinary matters in the Fire Department.

Only the Police Chief has "exclusive jurisdiction" over personnel and discipline matters pursuant to Charter sections 509, 571 and 574. There are no corresponding Charter sections stating the Fire Chief has "exclusive jurisdiction" over personnel and discipline matters.

The representation that the Fire Chief has "exclusive jurisdiction" over the appointment, discipline and transfer of employees is exactly opposite of the City Attorney's May 16, 2011 advice that says the Fire Chief's functions of discharging and suspending employees are "subject to review and corrective instruction from the Fire Commission."

Failure to Disclose Performance Evaluation Requires Access:

Page 15 of the August 23, 2010 advice says an evaluation of the Police Chief by the Police Commission would necessarily involve the ability to directly determine the Police Chief's handling of disciplinary matters so it would also require a review of relevant personnel files, if deemed necessary.

⁸ The Independent Assessor's May 11, 2010 email to Ms. Houston and Mr. Echeverria, among others.

The advice fails to acknowledge the Fire Commission's authority to review the Fire Chief's disciplinary actions and issue corrective instructions, nor does it discuss the Mayor's request that the Commission provide an "advisory" evaluation of the Fire Chief's performance. These tasks would similarly involve the need to directly determine the Fire Chief's handling of disciplinary matters, and, therefore also require review of relevant personnel files.⁹

Personnel Department's Report is Falsely Represented:

Footnote 20 on page 11 of the City Attorney's August 23, 2010 advice falsely states that there is no indication in the Personnel Department's report that a review of confidential personnel records by the Independent Assessor was required.

The representation is false because page 7 of the Personnel Department's January 14, 2008 report to the City Council said: "Regardless of what form oversight may take, access and flexibility are the two crucial elements this function needs to be successful. Unfettered access to complaint and disciplinary tracking systems, databases, files, members, investigations, management etc. is paramount because anything less would be an impediment." Complaint and disciplinary tracking systems, databases, files and investigations are obviously confidential personnel records.

Not only is the need to have access to confidential personnel records plainly obvious, whether the Personnel Department's report expressly said review of confidential records was required is irrelevant. The Independent Assessor has the same authority to access information that the Fire Commission has, the Fire Commission has access to all Department information in order to intelligently carry out their express powers as the head of the Fire Department and authority to access information is implied or presumed because knowledge is essential to intelligently carry out the expressly stated power and duty to audit, assess and review how the Department handles misconduct complaints.

Misrepresenting the Legislative History and Impact of Investigative Power:

The City Attorney's August 23, 2010 advice purports to review the legislative history and page 13 falsely concludes that without the power to investigate, "it is impermissible for the IA to have investigators as direct reports, or to otherwise receive investigative material or information regarding confidential personnel or disciplinary matters, such as by attending Department meetings where those matters are discussed."

Only the Independent Assessor's ability to **conduct** investigations was removed during legislative hearings by the City Council. The duty to **review** complaint investigations was never removed from the Charter provision or from the original class specification that the City Attorney's Office assisted with writing and the Fire Commission approved before legislative hearings began.

The legal presumption that provides access to information when conducting an investigation is the same legal presumption that provides access to information when auditing, assessing or reviewing how the Fire Department handles misconduct complaint investigations, including how Department investigations are conducted, complaints are adjudicated and whether investigations and adjudications comply with Department policies.

⁹ Recommendation No. 9 on page 27 of the *Assessment* says the Fire Chief should be held accountable through his or her annual performance evaluation for proposed and final disciplinary decisions.

During the legislative hearings on the proposed Independent Assessor position, the chair of the Public Safety Committee informed the full City Council that the Independent Assessor would perform an audit and assessment function, would not perform an investigative function and was "supposed to be the eyes and ears of the Commission to make sure PSD is doing its job well."

The City Attorney's Office advised the City Council that the Charter amendment would allow an Independent Assessor to conduct audits for the Commission and provide oversight of complaints, and the Independent Assessor would work for the Commission to provide independence and autonomy, as well as checks and balances.

The Chief Legislative Analyst's Office informed the City Council that the intent was to create an Independent Assessor position that would provide an additional level of independence and oversight to ensure that reforms were taking place.

The Civil Service Commission approved the Independent Assessor's class specification describing the same duty to **review** investigations that the City Attorney's Office helped write and that was approved by the Fire Commission on October 7, 2008. That duty was never removed during legislative hearings and says the Independent Assessor:

"Reviews investigations of complaints filed against Department employees to determine whether investigations are conducted fairly and comprehensively and progress within standard time frames, and to determine whether adjudication complies with Department policies and procedures."

The City Attorney fails to provide any legal citation to support a claim that access to Fire Department information for the purpose of conducting an audit, assessment or review requires that the Independent Assessor also have the authority to conduct his or her own investigations. No such legal authority exists.

Failure to Disclose Decisive Voter Intent:

The City Attorney's August 23, 2010 advice fails to disclose or discuss the decisive nature of the voters' intent in approving the Charter amendment creating the Independent Assessor position.

In 2008, the City Attorney filed a lawsuit against the City Controller, asking the court to determine that the City Controller did not have the Charter authority to conduct an audit of the City Attorney's Office. That lawsuit correctly explained that voter intent is decisive and that ballot materials carry the greatest weight in determining voter intent.¹⁰

The March 3, 2009 ballot asked voters if the Fire Commission should be empowered to appoint an Independent Assessor "who shall be responsible for auditing, assessing and reviewing the Fire Department's handling of complaints against sworn and civilian employees." No voter could fail to assume, intend and presume that to audit, assess and review how the Department handles misconduct complaints, it would be **essential** that the Independent Assessor have access to all information generated as a result of handling misconduct complaints, including investigative information.

¹⁰ Mr. Echeverria's name is on the first and last page of the lawsuit explaining the decisive nature of voter intent.

Since the Fire Department handles misconduct complaints by tracking, investigating and adjudicating complaints, and prosecuting sustained complaints, it is essential that all information relating to complaints, investigations, adjudications and prosecutions be available for audit, assessment and review.

The City Attorney failed to disclose the importance of “voter intent” when interpreting Charter provisions even though they were reminded of the rule by email more than three months before the August 23, 2010 advice was issued.¹¹ The rule was previously set forth in a highly relevant City Attorney opinion letter as follows:

“It is a common maxim of jurisprudence that ‘[o]ne who grants a thing is presumed to grant also whatever is essential to its use.’ Civil Code § 3522. The people of Los Angeles have granted the IG responsibility to oversee the investigation and adjudication of misconduct within the Department, subject to any limitations imposed by the Board. To fulfill this mandate it is presumed that the IG has the all [*sic*] powers **essential** to the fulfillment of that responsibility. Thus, the IG may review and copy any internal misconduct investigation whether it be criminal or administrative in nature and regardless of the personnel involved. [Footnote omitted.] In auditing any internal investigation, the IG may require the cooperation of any Department employee(s), conduct interviews and obtain documents and things deemed necessary to a thorough investigation.” (Emphasis added.)

City Attorney opinions that the August 23, 2010 advice failed to disclose clearly establish that to properly perform the expressly stated power and duty to audit, assess and review how the Fire Department handles misconduct complaints, the Independent Assessor has the implied or presumed power to review and copy all Fire Department information necessary to determine if the Department is handling such complaints properly, including any internal misconduct investigation materials in order to determine if a thorough investigation has been conducted.

Failures to Discuss and Answer Questions About False, Inaccurate and Inconsistent Legal Advice:

Before the State Bar complaint was filed, the Independent Assessor initiated six unsuccessful written attempts to ask questions, provide information, and discuss or resolve issues related to his authority under the Charter with the City Attorney’s Office. One of those attempts included providing an opinion letter from Dean and Distinguished Professor of Law Erwin Chemerinsky. The City Attorney’s Office response to Dean Chemerinsky was aggressive and unprofessional. Furthermore, Fire Commissioners were unsuccessful when they attempted to ask questions and discuss the issues either in writing or in public four times before the complaint was filed.

Despite saying they would discuss the issues with or answer questions from the Independent Assessor and/or Fire Commissioners on three occasions, the City Attorney’s Office failed to do so before the State Bar complaint was filed. The City Attorney’s Office was twice successful in avoiding a public discussion of the advice before the complaint was filed. A subcommittee of the Commission sent written questions directly to Mr. Trutanich a year before the State Bar complaint was filed, which were never answered before the complaint was filed.

On August 8, 2011, Mr. Carter responded to questions from the Fire Commission, Commission President and Independent Assessor about the Charter authority to access Fire Department

¹¹ The Independent Assessor’s May 11, 2010 email to Ms. Houston and Mr. Echeverria, among others.

information with a letter addressed to the Fire Commission. Mr. Carter's letter attempted to bully and threaten the Independent Assessor.

The issues raised in this report were presented in the subcommittee's September 12, 2011 report, and in the Independent Assessor's report of the same date, five months before the State Bar complaint was filed.¹² Mr. Trutanich failed to take corrective action after all information related to the issues was sent to his personal attention more than seven months ago on February 22, 2012.

Misconduct Related to Litigation Report:

After a jury returned an almost \$1 million verdict against the City of Los Angeles based on allegations that the Fire Department retaliated against an employee, the Independent Assessor asked the City Attorney's Office to provide information concerning how the case had been litigated and what actions the Fire Department needed to take to prevent similar lawsuits. The class specification that the City Attorney helped write says the Independent Assessor oversees civil litigation and is to work with the City Attorney to determine if a nexus exists between Fire Department policies and litigation, and whether policy revisions might mitigate lawsuits.

On May 23, 2011, the City Attorney's Office wrote to say they would not discuss the litigation with the Independent Assessor because he worked for the Fire Commission and the Commission was not the client. On October 13, 2011, the City Attorney's Office wrote to say they would not provide a copy of the deposition testimony of a chief officer who testified in the retaliation case. The Mayor's Executive Directive No. 9, titled *Litigation Risk Management*, says the Fire Department **shall** review depositions and continuously evaluate litigation.

On August 29, 2011, the City Attorney's Office was asked to comment on and correct the Independent Assessor's draft report, which indicated: 1) the Independent Assessor could not determine if the almost \$1 million verdict was the result of Fire Department misconduct or the way the City Attorney's Office litigated the case; 2) an inability to fully consider potential corrective action in response to the lawsuit was because the City Attorney's Office refused to communicate the necessary information; and 3) the City Attorney's Office provided false, incomplete or misleading information about the verdict to the City Council's Budget and Finance Committee.

In a September 2, 2011 letter, Mr. Carter threatened to report the Independent Assessor to the State Bar of California if he did not "cease and desist" from criticizing or questioning legal services. The Independent Assessor's final report, with the May 23, 2011 emails and the September 2, 2011 letter attached, was removed from the Fire Commission's website following a closed session meeting with the City Attorney's Office on September 20, 2011.¹³

Request to Disclose Documents:

It is respectfully requested that the following documents be released to the public and State Bar of California in a redacted form to prevent the identification of Fire Department employees and

¹² These reports are available to the public as BFC 11-140 and BFC 11-141, respectively.

¹³ In July 2012, the City Attorney's Office received an excellent trial result in the second part of the lawsuit. The City Attorney's Office says it has strong grounds for an appeal of the almost \$1 million verdict.

to protect their privacy.¹⁴ The redacted documents can be provided by the Independent Assessor after they have been reviewed by the Fire Department and the City Attorney's Office. The documents are of vital public interest, relevant to the issues raised by the complaint and may assist the State Bar in the investigation of this matter, and may resolve issues that remain in dispute. Some of the documents listed are relevant to claims and issues not set forth in this brief report.¹⁵

ITEM	DOCUMENT
1	July 21, 2009 email from Ms. Houston to PSD.
2	April 1, 2009 Fire Department memo listing status of various requests for legal services.
3	November 18, 2008 Request for Advice and attached draft letter.
4	January 30, 2009 Request for Advice.
5	February 4, 2009 email from PSD to City Attorney.
6	February 10, 2009 Request for Advice and February 10, 2009 email to Ms. Houston.
7	July 23, 2009 email from Fire Department to Ms. Houston.
8	October 2, 2009 email from the PSD to Ms. Houston.
9	August 16, 2010 Legal memorandum Re: Investigative Subpoena Powers.
10	August 18, 2009 Request for Advice.
11	August 19, 2009 emails between PSD and the City Attorney's Office.
12	October 28, 2009 Request for Advice.
13	September 2, 2009 email from the City Attorney's Office to PSD.
14	Undated email from the PSD to the City Attorney's Office.
15	September 4, 2009 email from the City Attorney's Office to PSD.
16	August 8, 2011 letter from Mr. Carter Fire Commission and Fire Chief.
17	December 15, 2008 emails between the City Attorney's Office and Fire Commission staff.
18	May 16, 2011 advice memorandum from the City Attorney's Office to the Fire Commission and the Independent Assessor.
19	April 21, 2010 email from the City Attorney's Office.
20	May 11, 2010 email from Ms. Houston to the Independent Assessor.
21	February 7, 2012 emails to and from the City Attorney's Office.
22	February 7, 2012 email from Fire Commission President Hudley-Hayes and February 8, 2012 email from the City Attorney's Office.
23	October 13, 2011 email from the City Attorney's Office to Independent Assessor.
24	The City Attorney's July 31, 2012 written closed session meeting legal analysis.

Attorney Professional and Ethical Violations:

The City Attorney's claim there is no duty to comply with legal and ethical standards when advising the Fire Commission and Independent Assessor is frivolous and meritless. The fact that the City Council makes client decisions in litigation matters or that the Independent

¹⁴ It may become necessary to provide the name of the Fire Department employee who received or sent the documents.

¹⁵ Commissioners are provided a complete set of the documents with this report without redaction.

Assessor is a City employee, does not permit City attorneys to violate the State Bar Act or the Rules of Professional Conduct when providing legal advice not involving litigation.

Ms. Houston's own emails prove that the City Attorney's August 16, 2010 response to the *Assessment* presented the Fire Commission and the public with knowingly false information about the status of legal services provided to the Fire Department by the City Attorney. Business and Professions Code section 6068 requires an attorney to refrain from misleading and deceptive acts without qualification and there are no exceptions. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) Making false statements about the status of legal matters amounts to misconduct by an attorney in reference to his duties and obligations as an attorney and a violation of what is now Business and Professions Code section 6106. (*Marsh v. State Bar* (1930) 210 Cal. 303.) Deliberately false representations to a client about the condition or performance of the attorney's duties are acts involving moral turpitude. (*Footte v. State Bar* (1951) 37 Cal.2d 127, 129.) Engaging in fraud and deceit involves moral turpitude and is reprehensible whether or not the victim is a client or whether or not any harm was done. (*Lewis v. State Bar* (1973) 9 Cal.3d 704, 713.)

The City Attorney's August 23, 2010 legal advice is titled *Los Angeles Fire Department Independent Assessor's Authority to Access Fire Department Personnel and Disciplinary Records and Information*. It was provided as a confidential attorney-client communication and is addressed to both the Fire Commission and Independent Assessor personally. The legal advice is now available to the public as an attachment to BFC 11-140.

When a party seeking legal advice consults an attorney and **secures that advice**, the relation of attorney and client is established *prima facie*. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 812.) The essence of a confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party so an attorney's violation of the duty arising in a confidential relationship warrants discipline even in the absence of an attorney-client relationship. (*Id.* at 813.)

By providing both the Fire Commission and the Independent Assessor with confidential legal advice, the City Attorney undertook the duty to provide accurate legal advice to them in compliance with ethical standards. (*Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 526.) No disclaimer will be effective if the lawyer is in fact performing legal services or offering legal advice. (*Benninghoff v. Superior Court* (State Bar) (2006) 136 Cal.App.4th 61, 73, fn 10.) The Los Angeles City Attorney has an ethical and legal duty when providing advice interpreting the City's Charter to give advice that is legally accurate pursuant to section 6068 and Rule 3-110. (*The City of Los Angeles v. Los Angeles City Controller, Laura N. Chick*, paragraph 29 of the City Attorney's complaint filed on November 19, 2008, in Los Angeles County Superior Court Case No. BC 402345.)

When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct. (*Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 429.) A member of the State Bar should not under any circumstances attempt to deceive any other person including clients and those who are not clients. (*McKinney v. State Bar* (1964) 62 Cal.2d 194, 196.) The attempt to deceive both the Fire Commission and the Independent Assessor with false, inaccurate and inconsistent legal advice about their legal authority is obvious.

The City Attorney's August 23, 2010 advice failed to disclose the first sentence of Charter section 509, City Attorney Opinion No. 2006:1, the Court of Appeal decision in *Patton* and City Attorney Opinion No. 99-7. These legal authorities describe the Fire Commission's ultimate authority over personnel and discipline matters in the Fire Department and the Commission's power to instruct the Fire Chief in all such matters as confirmed and explained by the City Attorney's May 16, 2011 advice. An attorney who fails to disclose legal authority he knows to be directly adverse to the position the attorney is advocating is derelict in his or her duty. (*Southern Pacific Transportation Co. v. Public Utilities Commission of the State of California*, 716 F.2d 1285 (9th Cir. 1993).)

An act by an attorney for the purpose of concealment or other deception is dishonest and involves moral turpitude under Business and Professions Code section 6106. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 679.) Concealment of a material fact misleads as effectively as a false statement and no distinction can be drawn among concealment, half-truth and false statement of fact. (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

The City Attorney's August 23, 2010 advice falsely represents that the Fire Chief has "exclusive jurisdiction" over the appointment, discipline and transfer of Department employees pursuant to Charter sections 509 and 574. Affirmative representations made with the intent to deceive are grounds for discipline, even though no harm results; the suppression of the truth, by one having knowledge or belief of the fact, to deceive another, or to induce him to rely, constitutes actual fraud; it is the duty of an attorney to employ, for the purpose of maintaining the causes confided to him, only such means as are consistent with the truth. (*Scofield v. State Bar* (1965) 62 Cal.2d 624, 628.)

The City Attorney's August 23, 2010 advice misrepresents that the Fire Commission needs the express authority to access confidential personnel records. The advice fails to disclose prior City Attorney opinions which clearly state that commissioners who head a department have the implied power to access all department information because such access is essential to intelligently carry out their express duties. This failure is particularly critical because the Independent Assessor has the same authority to access Fire Department information as the Fire Commission. The failure to disclose the implied power to access all Fire Department information is intentional because the City Attorney's Office was reminded of their prior formal opinions three months before the August 23, 2010 advice was issued.

Affirmative misrepresentations or intentionally deceiving a client involve moral turpitude and violate Business and Professions Code section 6106. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 505.) An attorney who intentionally deceives his client is culpable of an act of moral turpitude. (*Gold v. State Bar* (1989) 49 Cal.3d 908, 914.) Moral turpitude includes fraud and implies an intentional breach of a duty owed to the client. (*Call v. State Bar* (1955) 45 Cal.2d 104.)

Individual Fire Commissioners, the Commission's Personnel Committee, a subcommittee of the Commission, the full Fire Commission and the Independent Assessor have repeatedly attempted to ask questions about or discuss the City Attorney's August 16, 2010 response and August 23, 2010 legal advice since they were provided more than two years ago. The Independent Assessor attempted to discuss and obtain information concerning litigation involving the Fire Department that resulted in an almost \$1 million verdict, as authorized by his job description. City attorneys consistently failed and refused to communicate or cooperate.

Adequate communications with clients is an integral part of competent, professional performance as an attorney. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.) Habitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients, constitute acts of moral turpitude justifying disbarment. (*Twohy v. State Bar* (1989) 48 Cal.3d 502, 512.) An attorney must keep a client reasonably informed about the developments relating to the employment or representation, and must promptly comply with reasonable requests for information and copies of significant documents to keep the client so informed. (*In re Daniel S.* (2004) 115 Cal.App.4th 903.)

Mr. Carter sent a letter threatening to report the Independent Assessor to the State Bar if he did not "cease and desist" commenting on or questioning the City Attorney's legal services to the Fire Department. Lawyers may not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute. (Rule 5-100 and *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 169-79.) An attorney was disbarred for (among other things) sending letters threatening to bring charges before the district attorney and several public agencies. (*Matter of Rodriguez* (Rev. Dept. 1993) 2 Cal. State Bar Ct.Rptr. 480, 488, 499.)

Mr. Trutanich was placed on notice of the issues when a subcommittee of the Commission sent a letter with questions to his attention in January 2011, and again when a copy of the State Bar complaint with all exhibits was sent to Mr. Trutanich's personal attention a year later on February 22, 2012. An attorney has an obligation to adequately supervise his employees. (*Layton v. State Bar* (1990) 50 Cal.3d 889, 900.) An attorney is responsible for the work product of his employees which is performed pursuant to his authority. (*Crane v. State Bar* (1981) 30 Cal.3d 117, 123.) An attorney must accept the responsibility of supervising the work of his staff. (*Fitzpatrick v. State Bar* (1977) 20 Cal.3d 73, 83.) The duty to supervise is separate and distinct from the underlying duties to act competently. (*Gadda v. State Bar* (1990) 50 Cal.3d 344, 353.)

No attorney who engaged in the misconduct described in the complaint is relieved of his or her responsibility even though they are subordinate to the City Attorney. Every lawyer is required to comply with the rules of professional conduct, including the duty to act with competence and ethics, notwithstanding the fact the lawyer may be acting at the direction of a superior. (*In re Maloney & Virsik* (Rev. Dept. 2005) 4 Cal. State Bar Ct.Rptr. 774, 786-87.)

Reporting Violations and Prohibited Retaliation:

California Labor Code section 1102.5(a) says an employer may not prevent an employee from disclosing violations of state statutes or violations or noncompliance with state rules or regulations. Section 1102.5(b) says that an employer may not retaliate against an employee for disclosing information the employee has reasonable cause to believe discloses violations of state statutes or violations or noncompliance with state rules or regulations. The Independent Assessor claims the protections of section 1102.5 because he has reasonable cause to believe he is reporting violations of the State Bar Act and violations or noncompliance with the Rules of Professional Conduct.

Conclusion:

The State Bar Act and the Rules of Professional Conduct do not permit the City attorneys to: 1) provide the Fire Commission and public with false information in response to the *Assessment* even though it criticizes some of the legal services provided to the Fire Department; 2) provide false legal advice about the authority of both the Commission and the Independent Assessor; 3)

fail and refuse to engage in reasonable and responsible communications; and 4) threaten the Independent Assessor in an attempt to bully him.

While the attorney misconduct has been directed at the Fire Commission and Independent Assessor, the true victim is the public who voted to create the Independent Assessor position. An attorney has an ethical responsibility to the public as well as to his or her clients. (*Coppock, supra*, 44 Cal.3d at 687.) The purpose of attorney discipline is not to punish, but to protect the public, the legal profession and the courts. (*Rodgers, supra*, 48 Cal.3d at 318.)

Margolis & Margolis LLP

ATTORNEYS AT LAW

ARTHUR L. MARGOLIS

SUSAN L. MARGOLIS

2000 RIVERSIDE DRIVE
LOS ANGELES, CALIFORNIA 90039-3758
TELEPHONE (323) 953-8996
FAX (323) 953-4740

August 13, 2012

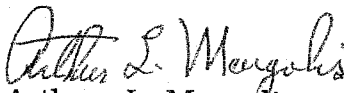
Blithe Leece
Senior Attorney
THE STATE BAR OF CALIFORNIA
1149 South Hill Street
Los Angeles, CA 90015-2299

RE: Investigations 12-0-12052; 12-0-12053; 12-0-12054; 12-0-12055;
12-0-12056; 12-0-12057; and 12-0-12058

Dear Ms. Leece:

This is to confirm that, pursuant to a meeting we had with State Bar Investigator Tom Tran on August 1, 2012, Stephen Miller is requesting that the Fire Commission authorize the release of certain records to assist the Bar's above-referenced investigations. Consideration of the matter is scheduled for the Commission's meeting to be held on August 21, 2012.

Very truly yours,


Arthur L. Margolis

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