

MEMORANDUM

TO: Councilmember Bruce Harrell

FROM: Jean Boler, Civil Division Chief; Darby DuComb, Chief of Staff

SUBJECT: The City Attorney's Office Best Practices for Controlling Legal Risk

DATE: August 16, 2010

CC: Pete Holmes, City Attorney

This memorandum focuses on the City Attorney's recommended best practices for controlling the financial risk associated with potential and actual litigation against the City. It is important to note that the City Attorney has other responsibilities in addition to litigation defense. The City Attorney's Office also recovers money for the City, for example, in contract, collections, and environmental remediation actions, as well as through tax appeals and land use code enforcement. We also advise on legal and regulatory matters such as ordinance and rule drafting that impact the quality of life in Seattle, but do not have direct financial implications to the City's budget. Below are the basic steps for controlling legal risk.

Consultation

Departments should consult the City Attorney's Office before embarking on projects that could create legal liabilities. One of the key ways the City Attorney's Office helps the City manage legal risk is by providing knowledgeable legal experts who are available to advise on potential legal issues before liability develops. For example, contract lawyers can help draft contracts that reduce the risk to the City if projects are delayed or mismanaged; employment lawyers can assure that employment decisions meet legal requirements; environmental lawyers can help structure transactions that manage our remediation obligations; and tort lawyers can clarify legal obligations to make sure that City practices are reasonably safe. Sometimes client departments may think that they are saving time by not consulting our office because lawyers may recommend measures that require additional steps. Time and effort spent making sure that all legal contingencies are considered will prevent delay and cost later. Consideration of legal risks and issues should be an important part of all projects and decisions. Lawyers from the City Attorney's Office are always available to consult on these issues and risks.

Pre-litigation

Investigation: As soon as we anticipate litigation, i.e., it is reasonably apparent that a lawsuit may be filed against the City, an investigation should be conducted into the facts, and the

evidence preserved. The initial alert to a possible lawsuit may come from a regulating agency, a plaintiff's lawyer, an administrative or contract claim, or an internal complaint. Assistant City Attorneys who specialize in the particular legal area help the department explore the underlying facts and advise them on legal consequences.

Litigation hold: If litigation is anticipated, the City has an obligation to preserve all information, including electronic information that may be relevant to a claim. The City Attorney's Office has a litigation hold process that notifies individuals likely to have documents and electronic information relevant to a claim or lawsuit and instructs them to gather and preserve relevant information in whatever format it exists. Some individuals may also have litigation holds placed on their email accounts so that relevant emails are not deleted by the City's automatic deletion system.

Early resolution assessment: Often there are opportunities to resolve a potential liability before a lawsuit is filed. The Office of Risk Management in the Finance and Administrative Services Department generally handles the investigation and settlement of administrative claims with assistance and advice from the City Attorney's Office. Some civil actions do not require claim filing and those potential lawsuits may be settled by departments with advice from our office. Pre-litigation settlement requires careful assessment of the facts and the legal basis for liability to assure that appropriate claims are settled at a reasonable amount.

Litigation

Case Assignment: Under the City Charter, the City Attorney supervises litigation. Art. XIII, §3. Lawsuits must be served on the Mayor's Office and are then referred to the Civil Division of the City Attorney's Office. The Office is divided into seven sections with defined expertise: Contracts, Employment, Environmental Protection, Government Affairs, Land Use, Torts and Utilities. Cases are assigned to the section with the appropriate expertise. Large projects are sometimes handled by lawyers from more than one section. Within sections there are often specialists who handle specific cases. For example in the Torts Section, certain attorneys work regularly on flooding cases while others specialize in crosswalk cases.

Investigation and early evaluation: The commencement of a lawsuit requires a full scale investigation into the claim. The complaint in the case gives an outline of the facts alleged and legal theories. As soon as possible the lawyers assigned to the case meet with potential witnesses and review documents. Lawyers also research the applicable law and assess the facts in light of the law. If the claim is exceptionally weak, the legal team may decide to bring an early motion to dismiss. A settlement assessment is made that is reevaluated throughout the case. An early offer of judgment may be made, particularly in cases where the plaintiff's fees may be shifted to the City if the plaintiff prevails. If the plaintiff rejects an offer of judgment and later recovers less than that amount at trial, the City is not obligated to pay fees or costs incurred after the offer was made.

Conduct of the litigation: The lawyers assigned to each case use their professional expertise to determine case strategy. While it is often advisable to take the plaintiff's deposition and secure

discovery from the plaintiff early in the case, there may be cases in which the plaintiff's lack of attention to the case dictates a less aggressive strategy. Costs incurred in litigation should be proportional to the City's potential exposure. Experts may not be necessary if the case is likely to be dismissed on summary judgment or the value of the case does not justify the expense. In cases in which the potential liability of the City is high, experts should be retained early. Summary judgment motions should be made in most cases to either end the case pre-trial or narrow the issues that will be tried. When high value cases are not dismissed on summary judgment, lawyers may decide to bring in litigation consultants to help inform trial strategy through focus groups or mock juries. The City normally appeals any adverse judgment if there are appealable issues.

Settlement: Because the City Attorney's office handles all types of litigation from administrative appeals and enforcement actions to class actions and severe injury torts, settlement requirements differ depending on the litigation. Enforcement actions and administrative appeals as well as smaller cases are settled in consultation with the affected department and the section director. Larger settlements must be approved by the City Attorney. The City Council is notified of any settlements that involve payments from the Judgment Claims Fund over \$500,000 prior to the settlement being finalized. The Risk Manager, in consultation with the City Attorney's Office, briefs the Council on claim settlements over \$100,000.

Education

Every case provides an opportunity to evaluate actions taken. Assistant City Attorneys should always give feedback to departments concerning lessons learned from litigation. This feedback may take the form of informal discussions or a formal memo and meeting. Systemic problems that could lead to increased liability will be brought to the attention of the department, Risk Management and other appropriate persons within the City. In addition, lawyers in the City Attorney's Office conduct City-wide trainings on legal requirements.

Accountability

Making lawyers and legal advice a key part of business and policy decisions is critical to controlling legal risk. Effective public policy and business practices are not possible without good legal advice during the formation of such business practices and policy. Departments and managers are encouraged to contact the City Attorney's Office early and often and make us an essential part of the organization's leadership team. Making changes recommended by lawyers often requires our assistance in the implementation of that advice and any new practices or policies. Departments are encouraged to keep our lawyers involved until their projects are completed.

