

## **On the matter of Attorney Client Privilege Held by the Pension Board**

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SDCERS Board of Administration**

When Committees and Boards take action on the basis of votes, the prevailing view predominates the discussion that follows as though it were a unanimous decision. Often, the dissenting views and minority opinion, which led up to the vote, are lost in the exchange. Such is the case with the discussion surrounding the San Diego City Employee Retirement System (SDCERS) deliberation and votes on the question of waiver of attorney-client privilege. Based on the first vote in April when the Retirement Board voted 8 - 4 not to waive the privilege, the Board has been painted into a corner as obstructionists unaware of or unconcerned with the ongoing investigations, with the City's financial plight, or the well being of the Pension System itself. But considering the rhetoric with which the new Board was greeted, the 4 to 8 decision was not a bad showing.

Obviously, not all members of the Retirement Board are opposed to waive the attorney-client privilege - in fact; in subsequent votes the number moved up a notch to 5 - 8 in favor of waiver. Then, faced with a City Attorney lawsuit, which named Trustees individually, four volunteers resigned including one of the original supporters of the waiver. These resignations, along with a previous vacancy, condensed the Board to nine members, making the seven votes required for waiver an unlikely prospect.

Waiver of attorney-client privilege is a complicated and critically important action. By now the Trustees have been given reams of reading material and listened intently to countless hours of closed session briefings by a number of excellent attorneys. But, in this matter, as in other areas of research and education, people having the benefit of the same information can and do arrive at diametrically opposed positions. And while I respect the opinion of Board members with whom I differ - I respectfully disagree.

Having read the materials provided, listened to the attorney briefings and the ensuing Board discussion I voted to waive the attorney-client privilege. It was my view that waiver was in the best interests of the Retirement System, and it was my responsibility as a fiduciary of that system to support that action. Similarly, it is also in the best interest of the plan sponsor, the City of San Diego.

More recently and more importantly, Federal District Judge Irma Gonzalez, having access to much more information than I, ruled that the criminal investigation of the U.S. Attorney provided sufficient cause to suspend the attorney-client privilege held by SDCERS. Her ruling made previously subpoenaed SDCERS documents available only to the U.S. Attorney, and the U.S. Attorney. Since then the Board made available, separate and apart from and not required by Judge Gonzalez' ruling, subpoenaed documents to other investigative agencies, including; the Securities and Exchange Commission (SEC), the San Diego District Attorney, and the San Diego Independent Auditor, Kroll Inc., which is working with KPMG on City audits.

This breakthrough is the result of continuous dialogue between the Retirement Board, staff counsel and outside attorneys, and serious discussion by Board President Peter Preovolos with a wide array of interested parties. The issue had not devolved to a yes or no question on waiver. It was and continues to be a question of how the legitimate needs of investigative agencies can be addressed while at the same time preserving the integrity of SDCERS past, present and future attorney client relationships and safeguarding SDCERS from risks, which may

arise from waiver of the attorney client privilege. And as is the case with any deliberative board, continued dialogue and compromise is necessary in the search for a solution, which can gain the support of at least a seven-vote majority.

Last Tuesday, one of the Board vacancies was filled with a new volunteer, a CPA with 25 years experience. His time, talent, and experience will be a welcome addition. In the meantime the Board is working to conduct the extensive day-to-day business of overseeing SDCERS, and providing service to members both active and retired. I am confident that all members are following the path dictated by their experience, their understanding of the issues and responsibilities, and their conscience with the greater good of SDCERS as the ultimate goal.