March 2014 Addendum

Further Reading

More on Herrera's History of Dubious Lawyering

Open Records: City Attorney Dennis Herrera and his deputy city attorney's have a long history of fighting access to public records and providing advice on skirting the Sunshine Ordinance.

by Patrick Monette-Shaw

When considering the legal nonsense Shen and Herrera have advanced in Grossman's current lawsuit, it is worth remembering that Herrera and Company have a long track record of dubious lawyering that the *Westside Observer* has reported on in the past.

Prohibited Personnel Practices

As the *Observer* reported in our May 2013 article, "High Costs of City Attorney's Advice," in a 9-1-1 dispatcher's lawsuit, *Jane Doe and Anne Raskin v. City and County of San Francisco*, the City Attorney's Office claimed in a November 2011 brief that there were no disputes involving material fact. Phooey! There were plenty of facts in dispute.

Then, the City smeared the plaintiffs in its 29-page ***Motion for Summary Judgment***, claiming "Plaintiff Anne Raskin ***lived a charmed life*** at [the Department of Emergency Management] prior to the e-mail incident [at issue in the lawsuit]," a snide statement wholly out of place in a legal filing. At trial, the jury ruled in *Doe and Raskin's* favor, and they were awarded a $762,000 settlement, suggesting that City Attorney Dennis Herrera and his legal teams often bark up the wrong tree, tossing out flaky defense strategies hoping to see what will stick on the wall. In addition to Raskin's settlement, the City wasted $304,508 in City Attorney costs fighting *Doe and Raskin*.

And as the *Observer* reported last May, just as the City smeared Ms. Raskin, City Attorney's unnecessarily smeared Derek Kerr, MD, too. In an August 2012 ***Reply Brief***, the City wrongly claimed "It was Kerr's enduring sense of entitlement — his refusal to shoulder the heavier workload that every other doctor agreed to — that differentiated Kerr from his peers." The City further smeared Kerr, writing "Plaintiff Derek Kerr likes to swim upstream. He had a comfortable existence at Laguna Honda Hospital, where many of his peers took … divergent paths to address … [needs of patients]. Kerr refused to follow the [downstream] current." More fairy dust.

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Significantly, in *Derek Kerr v. City and County of San Francisco; Mitchell Katz, Mivic Hirose, and Colleen Riley*, City Attorney's brazenly shoveled a mountain of fairy dust when the City wrongly claimed that Dr. Kerr could not assert "*respondeat superior*" municipal liability against the City under *Monell v. Department of Social Services*, claiming it is "well settled law that 'municipalities are answerable only for their own decisions, [and] are not vicariously liable for the constitutional tort of their agents'." But the weight of evidence against the City caused its case to fall apart, and Judge Claudia Wilken ruled Kerr's lawyers had presented sufficient evidence of *Monell* municipal liability against the City. In the end, Kerr was awarded $75,000 for wrongful termination after fighting the City Attorney's bad interpretation of the law for over two years. In addition to Kerr's settlement, the City wasted an additional $450,493 in City Attorney costs fighting Kerr.

All too often, the City Attorney resorts to using *ad hominem* smears such as those against plaintiffs *Kerr* and *Doe and Raskin* — and now smears against Allen Grossman — and uses wrongful claims and disingenuous arguments. This author remains shocked that lawyers representing the City resort to using smears in their legal briefs, smears clearly irrelevant and disproved by factual evidence. Between just the *Kerr* and *Raskin* lawsuits, the City Attorney's legal fairy dust cost taxpayers $2.3 million to settle.

The Mirakrimi Affair

Tack on to that expense another $1.3 million of taxpayer funds racked up in legal costs wasted during the City Attorney's inept proceedings on behalf of Mayor Ed Lee to oust Sheriff Ross Mirkarimi for alleged official misconduct, spurious charges if there ever were any.

As the *Observer* reported in November 2012, " 'Consensus Mayor's' Sour Grapes," there's no sympathy to be found for Mayor Lee's reliance on the stupid legal strategy used to prosecute Mirkarimi developed by Deputy City Attorney's Sherri Kaiser and Peter Keith, most probably with the concurrence of their boss, Dennis Herrera.

Observers have noted that the same 1995 voter guide to change the City Charter contained a digest by then City Attorney Louise Renne that explicitly described the changes to our ethics laws and other Charter changes as "insignificant."

Clearly, voters weren't told in '95 that they would be giving new powers to the Mayor, or that they would be ceding to the Mayor authority to make discretionary decisions to remove elected officials for official misconduct without a recall election. That's not an "insignificant" change. It was a significant one.

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Had voters been told that the Mayor would gain such authority, the Charter amendments would likely not have passed and we'd still have the old "moral character" provisions.

Forget for a moment that the Ethics Commission threw out the official misconduct charges Lee initially filed, and that the Ethics Commission later rejected all six of the ***amended*** charges the Mayor then substituted. Forget that in order to move the charges to the Board of Supervisors, the Ethics Commission hastily incorporated portions of the Mayor's amended counts four and five into a new hybrid charge just minutes before voting on August 19, 2012, depriving Mirkarimi's lawyers of an opportunity to prepare a defense against an eleventh-hour new charge.

Instead, remember that when Mirkarimi's case was finally heard at the Board of Supervisors, Supervisor Jane Kim astutely asked Ms. Kaiser, "Does that open us up to the vagueness issue, which may make that clause then unconstitutional, because then a person may not reasonably be able to predict when their behavior is official misconduct or not?" Honing in on the "standard of decency" clause added to the Charter in 1995, Supervisor Kim noted that any standard of decency may change over time, depending on who is appointed to the Ethics Commission, who has been elected to the Board of Supervisors, and who is the elected Mayor, opening the question of whether the definition is too vague for anyone to determine what is or isn't official misconduct.

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And with that, the Board of Supervisors ended up voting against finding that Mirkarimi had engaged in official misconduct, the Mayor's entire case against Mirkarimi based on fairy dust from the City Attorney's Office.

More than likely, neither the Mayor, Herrera, Ms. Kaiser, nor Mr. Keith felt any remorse for having wasted the $1.3 million in taxpayer funds fighting a losing case based on fairy tales. To them, the $1.3 million may be chump change in fairy land.

City Claims More "Privilege"

On December 12, 2011, the City and County of San Francisco filed a lawsuit in San Francisco Superior Court against the architects who had designed the Laguna Honda Hospital replacement facility. The City reportedly claimed and sought over $70 million in legal damages, alleging design and construction errors and omissions.

Two years later, the lawsuit drags on, unresolved. And somewhat shockingly, general obligation bond funds intended solely for capital improvement expenditures appear to be being used to front the City's legal costs for the lawsuit.

In May 2013, the City's lawsuit against Anshen + Allen and Stantec was transferred from San Francisco Superior Court to the Alameda Superior Court, after the defendants asserted they could not receive a fair trial in San Francisco.

Stantec asserted in a filing on September 9, 2013, that the City and County of San Francisco had claimed "privilege" regarding withholding of 128 documents related to the negotiation of a $30 million "global settlement" with Turner Construction and various subcontractors for construction delays on the LHH Rebuild Project. Actually, this issue involves $30 million in a "global **delay** *change order*" related to the $195 million cost over-run of the $597 million replacement project — which was initially budgeted for just $400 million — but the City has alleged the 128 documents are privileged communications.

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It's abundantly clear that the City Attorney's Office consistently asserts "privilege" whenever it needs a shield to prevent criticism of its actions. Stantec has asked the Court to review whether the City's claim of "privilege" is valid to permit continued withholding.

The initial lawsuit claiming $70 million in design and construction errors has somehow now shrunk to a battle over $30 million to $40 million. The case is now tentatively set to go to trial in March 2015.

By the time a trial in this case may go to jury, nearly three years of mounting City Attorney legal expenses will have been spent, including an untold amount of bond financing, since the City refuses to disclose how much the on-going litigation has cost to date, claiming that releasing legal costs of pending litigation may harm the City's negotiating position by exposing its legal strategies. You can be sure that the eventual three-year legal bill from the City Attorney's Office concerning the LHH rebuild lawsuit will not come cheaply.

Ineffective Secrecy

What these cases show us is that the City Attorney's Office, the Ethics Commission, and other City departments believe that secrecy is an effective way to communicate between City agencies. It's up to us to teach them that secrecy is an ***ineffective*** way to run the City, is an unethical abuse of power and transparency, and is not a San Francisco value.

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