Exhibit B

Special Counsel’s Report dated May 5, 2008

ATTORNEY CLIENT PRIVILEGE

Special Counsel's Report

INTRODUCTION

Recent hearings of this Council have addressed the most fundamental precept of our democracy – that the voice of the people must be heard and heeded. That voice cries out for honest information, as opposed to propaganda; for accountability, rather than the evasion of responsibility, the casting of blame elsewhere and the attribution of improper motives to others.

These hearings were historic. For three full days, this body, the Detroit City Council patiently heard the testimony of seven witnesses, all with different perspectives on the issue surrounding the settlement of a very high profile case and the implications of that settlement for the integrity of city government. Almost without exception, the hearings were courteous, productive and enlightening. Members asked thoughtful questions and, while the questions were often hard and painful to answer, the hearing was conducted in an atmosphere of civility. In other words, at a time when it was so badly needed, these hearings have demonstrated that the government of this city can operate effectively and with integrity.

Our job has been and continues to be twofold: *first*, to determine what happened when Council was asked to approve the *Brown/Nelthrope/Harris* settlement – what it was told and *not* told. The central question in this part of the hearings was – why was the confidentiality agreement not disclosed to the Detroit City Council?

Second, it is now for this body, having heard the evidence, to weigh its options and to implement measures that will prevent anything like this from happening in the future. What structural changes must be made so Corporation Counsel can fully and completely advise City Council without fear of antagonizing the Mayor or anyone else? In other words, how to ensure that a lawyer's obligation to his or her client can be fulfilled – providing good, accurate and complete advice free of conflict of interest, secret agendas and the private concerns of the powerful.

These hearings have been policy driven, as will be this Report. However, in order for this Council to generate policy, it is necessary that it understand what has happened to it and to this community; and it is necessary that its understanding be the result of sober and clear-eyed scrutiny.

The Detroit City Council has been harshly criticized for even having held these hearings, at all. It has been asked how - with this City beset by so many very serious problems, with so much work to do - can the Detroit City Council spend its precious time reliving the past, especially reliving past mistakes and errors? This question ignores reality. The circumstances surrounding the *Brown/Nelthrope/Harris* settlement have thrown this city into an unprecedented "constitutional crisis". Failure to address that crisis can only make things far worse. As the philosopher George Santayana has said, "Those who cannot learn from history, are doomed to repeat it."

This Report, then, is designed to learn from our recent history, so that we may go forward in a constructive spirit, rebuild our city's government in a way that will make it even more progressive and more productive, and so that we are not doomed to repeat our unhappy recent past.

PART ONE
EXECUTIVE SUMMARY

CAST OF CHARACTERS

Gary Brown	)	Former members, Detroit Police Department,
Harold Nelthrope	)	Plaintiffs in whistleblower lawsuit against
Walter Harris	)	Mayor and City of Detroit.
Kwame Kilpatrick	)	Mayor of Detroit
Christine Beatty	)	Mayor's Chief of Staff
John Johnson	)	City of Detroit Corporation Counsel
Valerie Colbert-Osamuede	)	Senior Assistant Corporation Counsel
Wilson Copeland	)	Outside Counsel for City of Detroit
Samuel McCargo	)	Outside Counsel for the Mayor
Michael Stefani	)	Attorney for Plaintiffs
Valdemar Washington	)	Court Ordered facilitator

EXECUTIVE FACTUAL SUMMARY

A. During the years leading up to the Brown/Nelthrope trial, the records clearly reflect that the Plaintiffs would have settled the case for between $2-3 million, and then shortly before trial, for $4.3 million. The evidence further suggests that the idea of settlement was given little attention by the Law Department, the other defense lawyers or the judge. Consequently, in August, 2007, the case went to trial and on September 11, 2007, the jury returned a verdict in favor of the Plaintiffs, in the amount of $6.5 million, not including interest or attorneys fees.

B. Immediately after the verdict, the Mayor and the Corporation Counsel, along with the private outside counsel, hired to represent the Mayor and the City, took the position that there would be an appeal and, probably, no settlement of the case due to a number of factors. The primary factor was that it would be bad policy to settle a case where the settlement would set an example for others to follow that

settlements were available when "anyone can allege anything" and get a "verdict"[1] against the City.

C. On October 17, 2007 a court ordered post-trial 'attorney fee facilitation' was held and, after several hours, the Plaintiffs' counsel Michael Stefani, attempted to broaden it to a negotiation for a "global settlement." This proved futile.

D. At this point, Mr. Stefani, produced a new 'brief,' *Plaintiffs' Supplemental Brief in Support of Their Motion for Attorney Fees and Costs,* yet unfiled and incomplete. He then instructed the facilitator that it be shown to the Mayor's lawyer, Mr. McCargo, only. This new brief contained excerpts and complete messages from text messages exchanged between Mayor Kilpatrick and his Chief of Staff, Ms. Christine Beatty. These messages, Mr. Stefani testified, contained statements that proved that the prior sworn testimony of both the Mayor and Ms. Beatty was false. [2]

E. After Mr. McCargo read the brief, he immediately consulted his co-counsel, Ms. Valerie Colbert-Osamuede and Mr. Copeland, and then called the Mayor. Ms. Colbert-Osamuede in turn immediately summoned the Corporation Counsel, Mr. John Johnson. Negotiations for a 'global settlement' were *then* opened and within two hours, at the very most, the *Brown/Nelthrope* case was settled for $8 million. In addition, a related case, that of Walter Harris, was settled for $400,000 at the same time.

F. Without question an essential part of this settlement included strict and swift measures to protect the confidentiality of these text messages. The most important of these were, as follows:

- The messages, the *Supplemental Brief* and other less important information, were to be placed in a safe deposit box to which only the Mayor's representative, yet un-named, and Mr. Stefani would have the key;

- Once the settlement money was paid to Mr. Stefani and his clients, the contents of the safe deposit box were to be turned over to the Mayor's representative;

- None of the Plaintiffs, Mr. Stefani, nor his staff were allowed to disclose the contents or the existence of the text messages to any "person or *entity,"* including the Detroit City Council*;* and

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[1] *Testimony of John Johnson, Corporation Counsel, City Council Closed Session, September 19, 2007, Transcript,* [hereinafter referred to as *"Tr."*], *p. 24*

[2] Indeed, the "Brief" disclosed used the very threatening word "perjury" three times, and in one such reference mentions "irrefutable direct evidence" of perjury.

- Any such disclosure by any party or attorney would result in the forfeiture to the City of Detroit of essentially the full amount of that party's or attorney's share of the settlement funds.

- Mr. Stefani was to destroy all his copies of and delete the entire contents of his *Supplemental Brief* from his office's computer system.[3]

G. There is no doubt that the reason these cases were settled so abruptly, and for these amounts, was the disclosure, by Stefani, of the text messages. Before that disclosure, settlement had been stalled – indeed, Mr. Johnson had declared to Council, on the record in closed session, that it would require an "awfully, awfully, awfully, awfully" attractive offer[4] to settle the case -- and the Law Department was waiting for the trial transcript to evaluate an appeal. As soon as the messages were disclosed, the Mayor was reached, Corporation Counsel was contacted and the case was settled virtually immediately.

H. Similarly, and for the same reasons, had there been no disclosure of the text messages, there would have been no settlement at that time and certainly not in that amount.

I. The confidentiality provisions, the likes of which were unique -- indeed unheard of -- was an essential part of the settlement. The original Settlement Agreement, dated October 17, 2007, and signed by both Ms. Colbert-Osamuede and Mr. Copeland on behalf of the City, (and by Mr. McCargo and Ms. Colbert-Osamuede on behalf of the Mayor), included both the confidentiality terms *and* the monetary terms of the agreement. Thus without these terms, there would never have been a settlement at that time and for this amount. Part of the $8.4 million was payment for confidentiality, not only from the public but from the City Council as well.

J. From the beginning, it was understood that there was to be no disclosure of the very existence of the terms of confidentiality to the Detroit City Council, that, in fact, it would be concealed and hidden from this body. This is evidenced by the way in which the first Settlement Agreement, (signed by all the attorneys on behalf of all the parties, including the City), was consciously split into two separate Agreements, with only the portion with the monetary terms presented to City Council and the portion with the confidentiality terms withheld. The obvious reason for the decision not to disclose this information to the Council was an attempt to prevent the possibility of public disclosure of the highly embarrassing and, even possibly incriminating, text messages, or their contents; and to keep this

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[3] This was indeed done, but subsequently, after the Public Hearing and in response to a subpoena from the office of the City Council Special Counsel, a computer technical specialist has been able to retrieve the Brief from the inner bowels of Mr. Stefani's computer system, and Tuesday April 29, 2008, Wayne County Circuit Court Judge Robert Colombo ordered the public disclosure and distribution of that Brief.

[4] *City Council Closed Session, September 19, 2007, Tr. p.23*.

information confined to as few people as possible. Among those to be excluded from knowing about the "Confidentiality Agreement," were the members of the Detroit City Council;

K. The matter was rushed before the Internal Operation Committee by the Law Department on October 18, 2007, with absolutely no mention of the Confidentiality Agreement or any of its terms,[5] the day after the settlement was reached and then forwarded to the entire Council.

L. One day later, on October 19th, the Detroit Free Press filed a FOIA request asking for the "entire settlement agreement' in the *Brown/Nelthrope/Harris* cases.

M. As a result of this FOIA request, an elaborate scheme was undertaken on behalf of the Mayor to prevent public disclosure of the settlement, and particularly to protect the Mayor from disclosure of the existence of either the text messages or the Confidentiality Agreement. This scheme involved the following:

- The formal approval on October 18th by Council of the monetary terms, i.e. $8.4 million to settle the cases;

- The formal rejection, on October 27th, by the Mayor, of the terms of the October 17th version of the settlement, that contained both monetary and confidentiality terms;

- The denial, on October 29th, by the Law Department of the FOIA request, based upon the claim that the terms of the settlement had not yet been worked out;

- The subsequent creation, on November 1st, of two "new" agreements, one, monetary and the other, "confidential," to replace the earlier unitary agreement of October 17th. The "Confidentiality Agreement" purported to be "private" and "individual and personal," signed by "Kwame Kilpatrick," "Christine Beatty" and "Michael Stefani,[6]" and was to be overseen by the Mayor's private attorney, Mr. Mitchell;

- The "Approval" of the settlement by the Mayor, also dated November 1st, four days after the October 27th "Rejection";

- On October 29th, a new response to the FOIA request that disclosed *only* the monetary agreement, now "cleansed" of confidentiality provisions.

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[5] See *Lawsuit Settlement Memorandum, dated October 18, 2007,* submitted by Valerie Colbert-Osamuede and approved by John Johnson, Corporation Counsel.

[6] *Confidentiality Agreement, dated November 1, 2007*.

N. The Mayor deliberately authorized, and subsequently ratified, a scheme designed to prevent the Detroit City Council from obtaining knowledge of critical terms and conditions of the *Brown/Nelthrope/Harris* settlement. He did so for personal reasons: to prevent disclosure of his false testimony; to prevent disclosure of his personal relationship; and to prevent disclosure that *public* funds were expended to accomplish the concealment of *private* matters;

O. Mr. Stefani, Mr. Johnson, Ms. Colbert-Osamuede, Mr. Copeland, Mr. McCargo and Mr. Mitchell all actively assisted the Mayor and participated in this scheme;

P. At the time they did so, Mr. Johnson, Ms. Colbert-Osamuede and Mr. Copeland were acting in their capacities as the attorneys for the City of Detroit, more specifically as attorneys for the Detroit City Council, which was their client, ethically and legally;

Q. In carrying out this scheme, the Mayor deliberately violated at least two provisions of the Charter of the City of Detroit:

1. Section 2-106 that prohibits the "use of public office for private gain." In this case the "use of public office" included the services of the Law Department and independent counsel, paid for by public funds, as well as access to the City's funds to pay for this settlement at that time and in that amount. The "private gain" was that he circumvented personal embarrassment and possible criminal liability; and

2. Section 6-403 that prohibits the settlement of any "civil litigation of the city" without the "consent of the city council." Since the critical terms and conditions were not disclosed to Council, there was never informed consent to the settlement. As a result the case was settled by the Mayor, without the consent of Council, in violation of this provision.

RECOMMENDATIONS

A. That the Charter be Amended and/or Revised as follows:

1. To give the Corporation Counsel the autonomy to carry out his or her professional and ethical obligations on behalf of the City as a whole, and to allow for termination only for good cause by the Mayor, and only with concurrence of the City Council;

2. To amend/revise Section 6-403 of the Charter that currently provides as follows:

The corporation counsel shall prosecute all actions or proceedings to which the city is a party or in which the city is a party or in

which the city has a legal interest, when directed to do so by the mayor."

To:

"The corporation counsel shall prosecute all actions or proceedings to which the city is a party or in which the city is a party or in which the city has a legal interest, *in consultation with* the mayor *and the city council*."

B. That the Detroit City Council participate as *amicus curiae* in all proceedings in the criminal case. <u>*People v. Kwame Kilpatrick and Christine Beatty*</u>. Council would not to take a position as to any substantive issues pending before any court in the criminal case. Rather the *amicus* participation of the Council would be simply to ask that the courts, trial and appellate, to urgently **expedite** all matters on an emergency basis, in order to ease the burden of this festering crisis and to see to it that our city can function as effectively as possible

C. That City Council officially adopt the findings and conclusions of fact herein set forth, including a determination that the Mayor has violated two highly important and sensitive sections of the City Charter, 2-106 and 6-403. Council should also find that the violations of these sections are "punishable by forfeiture."

D. That Council's adoption of these findings and conclusions will constitute an official recognition of Charter violations and breach of the integrity of government and public office.

E. That Council, once it has made a finding that the Charter has been violated, decide from among a series of options as to how to best proceed. Among these options are the following:

1. Consider a forfeiture of elective office proceeding against the Mayor, pursuant to City Charter Section 2-107. Here are some of the problems with such an approach:

    a. It is to be noted that the previous Charter gave to Council the power of impeachment. That power was removed from the current Charter. The reason for this, according to the Commentary was to narrow the Council's power to exclude "any person who was duly elected and who met the … requirements." Nonetheless, the power to undertake forfeiture remains, and must be given its due meaning;

    b. Even after a full blown forfeiture proceeding, at which the Mayor would be entitled to full due process (representation by counsel, the right to confront witnesses and evidence against him, etc.), he would still then have a right to a hearing *de novo* in court. In essence this means a new trial, starting from scratch; and

c. If Council were to proceed promptly, such a proceeding would have to be done against the backdrop of pending criminal charges.

2. Request the Governor to act to remove the Mayor from office, pursuant to Michigan statute, MCL 168.327. The grounds for such a request would be "official misconduct." This statute requires the "party making the charge" before the Governor to: 1) "exhibit" the charges to the Governor in writing; 2) to verify those charges by a sworn affidavit, signed by the party making the charge (presumably member of the Detroit City Council); and/or

3. Immediately censure the Mayor, based upon the findings and conclusions of fact, adopted herein, and wait for the criminal prosecution to take its course. The censure resolution should cite the following circumstances:

- That immediately after the *Brown/Nelthrope* verdict, the Mayor stridently proclaimed that there would definitely be an appeal and no settlement;
- That, less than one month later, as soon as Mr. Stefani disclosed that he had possession of the text messages, the Mayor immediately settled the case (and the related *Harris* case) for well over the amount of the full verdict, and for between 80% and 85% of the *full* value of the case, an unprecedented payment after (and so soon after) verdict;
- That there never would have been such a settlement without Stefani's threat to disclose the text messages;
- That a major part of the settlement was that both the existence and the contents of the text messages were to be turned over to the Mayor and to be kept *secret*. This was known as the "confidentiality agreement";
- That the purpose of this confidentiality agreement, was to protect the Mayor and Ms. Beatty, and had nothing to do with protecting the interests of the City of Detroit;
- That the agreement included a requirement that the confidentiality agreement was to be kept secret from the Detroit City Council, while at the same time seeking its formal consent to the settlement;
- That the Mayor, acting through his lawyers (and the City's lawyers) manipulated the City Council to consent to the settlement by deliberately withholding from it critical information, i.e. the confidentiality agreement;
- That, the Mayor thus settled this major case without the informed consent – and therefore without the authentic

consent – of the Detroit City Council and thereby violated Section 6-403 of the Charter;

- That he used his public office for private gain, in violation of Section 2-106 of the Charter; and
- That these acts constitute official misconduct.

F. Given that there are ongoing investigations of these matters by the investigative and prosecutorial arm of the Michigan Supreme Court, Michigan Attorney Grievance Commission, as they relate to Mr. Stefani, Mr. McCargo, Mr. Copeland, Mr. Johnson and Ms. Colbert-Osamuede, this body stands ready to cooperate with the Grievance Commission, if asked to do so. In addition, Council may, acting by resolution, forward this Report to the Commission;

G. That the Stefani "Supplemental Brief" be forwarded to the Department of Justice, the Honorable Julian Cook and the Court appointed monitor in the case of *USA v. City of Detroit*, in which a consent judgment was issued. The purpose would be to inform those persons and entities, given their ongoing concerns regarding the supervision, discipline and training of police officers and the handling of citizen complaints within the DPD, if the quoted e-mails are authentic, it appears that the Mayor and his office attempted to interfere with the operations of the DPD's Internal Affairs Unit which has a critical role in the oversight of the supervision, training a discipline of problem police officers, as well as in the oversight of the citizen complaint process.

H. That as a pre-condition for City Council's consent or approval of any settlement proposed by the Law Department, the Corporation Counsel undertake the following:

1. The designation of an attorney, within the Law Department, as an "Ethics and Conflicts Officer," among whose responsibilities it will be to screen all cases where the City is asked to provide legal representation for more than one party;

2. That all Law Department attorneys representing more than one party in a single case, routinely and periodically check with the Ethics and Conflicts Officer to assure that a conflict has not developed;

3. That when there is any uncertainty with regard to any issue of conflict of interest that cannot be clearly resolved by the ethics and conflicts officer, standing outside, independent counsel with experience in issues relating to professional responsibility, be retained to advise the Corporation Counsel.

I. That as a pre-condition for City Council's approval of any contract with independent counsel requested by the Law Department the Corporation Counsel undertake those same measures set forth in Paragraph F, 1 – 3, immediately above.

J. That by ordinance, Corporation Counsel be required, when seeking Council's consent to a settlement pursuant to Charter Section 6-403, to include in their Settlement Memorandum the following matters:

1. Whether the case is currently pending in Federal or state court;

2. Whether the settlement sought is pre- or post-verdict;

    a. If post-verdict, what if any meaningful effort was made by either party to settle the case before trial, (either informally or formally through an alternative dispute resolution process);

3. A description of the risk management[7] strategy that was undertaken, if at all, as to the case at issue, and if not, why not;

4. A summary of the routine screening for conflicts of interest, for both Law Department attorneys and independent counsel, was conducted with respect to the case at issue;

5. A complete disclosure and description of *all* material terms and conditions of the settlement, including all confidentiality agreements (in closed session, if necessary);

6. A complete disclosure and summary of all implications for internal operations of City agencies or departments, or training, supervision and discipline of City employees, that are raised by the case at issue, if any, and a summary of the review of said implications conducted by both by the Law Department and the agency/department in question.

    a. For example, if the case involves claims of excessive force (or other misconduct) by a Detroit police officer, whether this officer has been sued previously for similar alleged behavior, or has been the subject of previous citizen complaints or disciplinary reviews, and whether the departmental response was appropriate.

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[7] For purposes of this Report, the phrase "risk management" is defined as follows**:** the routine identification of those claims and/or cases that present a potential significant chance of substantial awards against the City of Detroit, and the undertaking of appropriate measures to protect the City, to wit: 1) a settlement strategy that includes aggressive motion practice, combined with mediation and other alternative dispute resolution ("ADR") mechanisms; and 2) the identification of high risk factors and personnel that cost the City large amounts of money or *could* cost the City large amounts of money. For example, since police officers who are the subjects of repeat complaints of misconduct are known high risk employees, these must be identified and aggressively re-trained, supervised and disciplined.

7. As to every settlement requested in an amount over $1 million, the following questions are to be answered:

    a. Whether the particular case came within the Corporation Counsel's routine risk management program?

    b. Whether the settlement request by Corporation Counsel is a part of its routine risk management program?

    c. Whether the case at issue was ever viewed as a risky (i.e. potentially expensive case)?

    d. What earlier attempts and strategies were put into place to settle the case?

K. That every *verdict, independent case evaluation* and/or *other alternative dispute resolution recommendation* over a certain amount (e.g. $1 million) be promptlyreported to City Council.

1. That the report include the full current value of the judgment, if any, including the amount of the verdict, interest, costs and attorney fees. It should also include a summary of the prior history of settlement discussions and what if any routine risk management steps were taken in the particular case *before* the $1 million plus verdict/evaluation;

2. That the Corporation Counsel's report also answer the following questions:

    a. Is settlement of the case recommended and, if so, why?

    b. Does any proposed settlement need to be expedited and, if so, why?

    c. If post-verdict, is there a likelihood of success on appeal? (i.e. strong, moderate, poor?)

[Continued on next page.]

PART TWO
FINDINGS AND CONCLUSIONS
OF FACT AND LAW

FACTUAL HISTORY

The Case and the Trial:

1. Three honorable police officers - Gary Brown, Harold Nelthrope and Walter Harris – sued the Mayor and the City of Detroit for creating a hostile work environment and then discharging them, when their Internal Affairs investigation of certain police officers probed whether the Mayor was used his DPD Executive Protection Unit to serve his own personal pleasure and needs.

2. All three officers were represented by attorney Michael Stefani, in two separate lawsuits. The Brown and Nelthrope case went to trial in August 2007 and resulted in a jury verdict of $6.5 million (not including interest and attorney fees).

3. Throughout, the *Brown/Nelthrope/Harris* cases were high profile cases in the community and in the Detroit metropolitan area. The reasons for this notoriety are clear, manifest and multiple:

    - The Mayor was himself a Defendant and had testified, both in deposition and at trial, to enormous publicity;
    - His Chief of Staff, Ms. Christine Beatty, also testified to enormous publicity;
    - Both had consistently testified, under oath, that they did not have a personal, romantic and sexual relationship, an important issue in the trial;

- Plaintiffs' claims, if believed, demonstrated that public resources were used to interfere with investigations of highly controversial allegations regarding the Mayor's private and personal pastimes, such as the so-called "Manoogian Mansion party," as well as his affair with Ms. Beatty;

- Also, if believed, the Plaintiffs' claims in these cases highlighted and contrasted the hard working, dedicated and ethical behavior of lifetime police officers with the frivolous behavior of the Mayor and his immediate circle;

- Further, Plaintiffs' claims, if believed, demonstrated that any police officer who dared engage in an investigation of misconduct by an elected official, i.e. who had the courage to do his job, could and would be faced with loss of his career, and subjected to extreme humiliation and worse; and

- Finally, if believed, these claims revealed that the Mayor had subverted the idea of honest law enforcement, and attempted to turn the Executive Protection Unit of the Detroit Police Department into party caterers, bartenders and, worse, procurers.

September 11, 2007 to October 17, 2007 – The Verdict and Early Assessments and Response

4. For the reasons summarized above, the $6.5 million verdict against the Mayor and the City of Detroit in this case constituted a public disgrace for the Mayor and for the City. The Mayor immediately announced that the verdict was outrageous, deeply flawed and that he and the City would absolutely appeal. At the same time, the Corporation Counsel, his Senior Assistant, the City's outside counsel and the Mayor's outside counsel all came before the Detroit City Council, in closed

session, on September 19, 2007 and advised that an appeal was promising and that settlement was unlikely.[8]

5. In reality, it is now apparent that the Mayor, his lawyers and the Law Department were less motivated by the merits of any appellate issues[9] than they were by the idea that an appeal would create the desirable effect of diminishing the public relations damage caused by the disgraceful verdict, as the delays necessarily associated with an the appeal would cause publicity connected to the case to grow stale.

6. From the date of the verdict on September 11, 2007, until October 17, 2007, when it was disclosed to Mr. McCargo, the Mayor and the attorneys for the City of Detroit that the infamous text messages existed and were about to be made part of the public record, every single public and private statement by the Mayor, by his spokespeople and by the attorneys on behalf of both the Mayor and the City, was unequivocal that there would be *no settlement*—unless there was an "awfully, awfully, awfully, awfully" attractive offer[10] -- because it was neither appropriate nor in the best interest of the City of Detroit.

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[8] *City Council Closed Session, Sept. 19, 2007, Tr. pp. 9, 21.*

[9] As Mr. Copeland testified at the Public Hearing on April 8, 2008, they met with their appellate attorney, Morley Witus, within days of the September 11 verdict, to discuss the merits of an appeal, and that although Mr. Witus had not yet reviewed the trial transcript, from what he had heard from the trial attorneys, he made it clear to them that there was nothing that suggested the likelihood of success on appeal. *City Council Public Hearing, April 8, 2008, Tr.pp.191-193.*

[10] *City Council Closed Session, September 19, 2007, John Johnson, Tr, p.23.*

7. During that time period, the City Council was advised that a settlement would have been bad policy because it would have become "precedent." It was feared that this would open the floodgate to claims and litigation. As Mr. Johnson said:

> "[I]t's a bigger issue than just what's presented … it affects everyone at this table, everyone in this administration, everyone who is a public official, we need to take a *serious* look at this before just say let's pay." (emphasis added)[11]

8. One major reason cited by Mr. Johnson at the April public hearing for his unwillingness to settle and their interest in pursuing an appeal in September, was alleged juror misconduct.[12] According to Mr. Johnson's April testimony, after Mr. McCargo's post-trial investigation of juror misconduct failed to yield any hopeful results, he then became far more willing to settle.[13]

9. However, this claim is somewhat disingenuous because the issue of juror misconduct was never raised by Mr. Johnson during the September 19, 2007 closed session as a reason for not settling. Rather, despite that we now know that they were given no reason by their appellate counsel to so believe, Mr. Johnson told the City Council that "…we have some solid issues that, we feel would result in an entirely different outcome on appeal."[14] This position did not flag until, on October 17, 2008, Mr. Stefani disclosed the text messages; and then it turned 180 degrees - on a dime.

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[11] *Id., at p. 25*

[12] *City Council Public Hearing, April 11, 2008, John Johnson, Tr. pp. 167 - 168.*

[13] *Id..*

[14] *City Council Closed Session, September 19, 2007, Tr. p.9*

10. For this reason, had Mr. Stefani not obtained the Kilpatrick/Beatty Skytel text messages and thus not disclosed them to Mr. McCargo, a mere one month later, the *Brown/Nelthrope/Harris* cases would most likely not have been settled for many, many months thereafter, if not years.

<u>The October 17th Settlement</u>

11. The October 17, 2007 meeting was originally designed to facilitate a settlement of the amount of attorney fees recoverable in the Brown/Nelthrope case. It employed the use of a court-ordered official facilitator, former Judge Val Washington, who attempted to bring the parties together in a relaxed atmosphere to agree upon the amount of statutory attorneys fees owed to Mr. Stefani.

12. When these negotiations faltered, Mr. Stefani, presented the possibility of a "global settlement" of this case, as well as the Harris case – a settlement of the entire case – not just the attorneys fees --, that would dispose of *all* litigation and appeals. This suggestion was rejected by the City's and the Mayor's attorneys.[15]

13. At this point, Mr. Stefani gave a copy of an unfiled brief (to be filed the next day) that included excerpted portions of text messages between the Mayor and Ms. Christine Beatty that had been, theretofore, unavailable.[16] These texts appeared to establish that the Mayor and Ms. Beatty had testified falsely at their depositions and in trial testimony at the *Brown/Nelthrope* trial, with respect to both whether or

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[15] See *Stefani Testimony, City Council Public Hearing, April 8, 2008, Tr. pp.43-44.*

[16] *Id., at pp.44-45.*

not Gary Brown had been fired and whether or not they were involved in a romantic sexual relationship.[17]

14. In addition the text messages disclosed that the firing of Gary Brown from his sensitive position as the leader of the Internal Affairs unit of the DPD could raise public concern, as well as concern in the U.S. Department of Justice and with federal Judge Julian Cook, as to whether the police department was committed to the reforms called for in a consent decree in federal court between the City and the Justice Department.

15. This arguable false testimony of these two high level public officials, if publicly exposed, presented an obvious threat to both of them, by subjecting them to the very real risk of criminal prosecution, among other things.

16. When it was disclosed that Mr. Stefani had the text messages, Mr. McCargo immediately called the Mayor; and Ms. Colbert-Osamuede called Mr. Johnson. The Mayor immediately authorized negotiation for a global settlement and Mr. Johnson joined the other attorneys at the facilitation location. Thus, despite the fact that negotiations had broken down, once Stefani disclosed that he had the text messages, within approximately one hour, there was an agreement, at least as to the monetary terms of the settlement - $8.4 million, and the beginning framework for a very detailed confidentiality agreement regarding the text messages.

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[17] *Plaintiffs' Supplemental Brief in Support of Their Motion for Attorney Fees and Costs, pp. 5-18.*

17. At some point during these discussions, once the amount was agreed upon, the attorneys took a break and arranged to meet later that evening at Mr. Stefani's office to finalize the terms. Mr. Johnson left and delegated to Ms. Colbert-Osamuede and Mr. Copeland the authority to complete the negotiations on behalf of the City.

18. Thus, by the end of the day on October 17, 2007, all of the lawyers had worked out a comprehensive agreement, called a "Settlement Agreement,"[18] that included both monetary terms - $8.4 million to settle *Brown/Nelthrope/Harris*, in exchange for a signed release; *and*, specific terms of confidentiality and secrecy that imposed a strict "gag order" on the Plaintiffs and their lawyer, Mr. Stefani, created a detailed mechanism by which the text messages themselves, along with all hard copies of his *Supplemental Brief*, would be turned over to the Mayor, through his representative, and required Mr. Stefani to delete all electronic versions of the *Brief* from his office computer network.[19]

19. This October 17th "Settlement Agreement" contained conditions precedent that required the parties to accept the terms of the settlement within specified periods of time. In particular, the "City" was called upon "to obtain the approval of the Mayor in writing" *within 10 days*.[20]

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[18] See *First Settlement Agreement of October 17, 2007,* ***Exh. 03,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

[19] *Stefani Testimony, City Council Public Hearing, April 8, 2008, Tr. pp.53, 56.*

[20] ***Exh. 03,*** *October 17, 2007 Settlement Agreement, p.3.*

20. The "Settlement Agreement" was signed on that date by *all* the attorneys, Mr. Wilson Copeland and Ms. Valerie Colbert-Osamuede on behalf of the City of Detroit, attorneys Mr. Samuel McCargo and Ms. Valerie Colbert-Osamuede on behalf of "Mayor Kwame Kilpatrick, and attorneys Mr. Michael Stefani and Mr. Frank Rivers, on behalf of the Plaintiffs Brown, Nelthrope and Harris.[21]

21. As a matter of law, this "Settlement Agreement" was a complete and binding agreement on October 17th.

22. While the Mayor and his lawyers knew that the *monetary* aspects of the settlement had to be disclosed to the Detroit City Council, in order to get its consent, the "confidentiality" portion of the settlement was to be kept secret and concealed from Council as well as from the media and the public. This was understood from the very beginning and is reflected in Mr. Stefani's hand written notes that make it perfectly clear that only the "monetary provisions" of the Agreement were to be brought before Council.[22] The same point is made in the typed version of the Agreement, also prepared on October 17th. [23]

23. Far from being the mere "nuts and bolts" of an average agreement, as characterized by Ms. Colbert-Osamuede and Mr. Johnson, the confidentiality provisions of the October 17th "Settlement Agreement" constituted the very heart of this extremely high profile and unique settlement.

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[21] *Id., pp. 3-4.*

[22] *See the Stefani Handwritten Notes*

[23] ***Exh. 03, The First Settlement Agreement of October 17, 2007,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing, ¶ 8, p.3.*

The Settlement is Brought to the City Council for Consent and Approval

24. The next day, October 18, 2007, when the settlement was presented to the Internal Operations Committee of the Detroit City Council, *only the monetary terms* were disclosed.[24] As a result, only two things were immediately made known to the media, to the public and to the City Council: a) that the Brown/ Nelthrope/Harris cases were settled; and b) that they were settled for $8.4 million. Both the fact and terms of the confidentiality and secrecy provisions of the settlement agreement were withheld by the Corporation Counsel from its client, the Detroit City Council.

The FOIA Request and Attempts to Circumvent It

25. One day later, on *October 19*, 2007, the Detroit Free Press filed a Freedom of Information Act (FOIA) request with the City of Detroit Law Department seeking "the entire settlement agreements" in the *Brown/Nelthrope/Harris* cases.[25]

26. Upon the arrival of the FOIA request, on October 19th, an elaborate scheme, consisting of a series of contorted and contrived maneuvers, occurred that was designed to extract an approval of the settlement by the Detroit City Council, while at the same time concealing the "confidentiality" portions of the agreement and the existence of Mr. Stefani's copy of the text messages:

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[24] ***Exh. 04,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

[25] ***Exh. 13,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

- On October 23, 2007 the settlement was brought before the entire body of the Detroit City Council, again, presenting only the monetary terms of the agreement, with *no disclosure* as to the "confidentiality" provisions;

- The October 17 Agreement -- not even its very existence -- was ever disclosed to Council. However, Council had every reasonable expectation to believe that the terms of the agreement that was presented to it was undertaken with the full approval of the Mayor, since it was urgently recommended by the Corporation Counsel. Base upon the recommendation of the Corporation Counsel and the sparse and incomplete Lawsuit Settlement Memorandum[26] presented to it, Council approved the settlements;

- Nonetheless, on October 27, 2007, on exactly the 10th day permitted in the original Settlement Agreement, and on the very last day that the City was required under that agreement to obtain the approval of the Mayor in writing, "Mayor Kwame Kilpatrick" signed a "NOTICE OF REJECTION OF PROPOSED SETTLEMENT TERMS ARISING OUT OF OCTOBER 17, 2007 FACILITATION"[27];

- Council was never notified of this Notice of Rejection and in fact only learned of it for the first time after the Stefani deposition, January 30, 2008;

- On October 29, 2007, the City's 10-day deadline for responding to the *Detroit Free Press* FOIA request, and two days after the Mayor's "Notice of Rejection," the City of Detroit Law Department was thus able to deny the October 19th FOIA request for the "entire settlement agreements,"[28] by stating that "there is no settlement, as the parties are working out the details of the agreement."[29]

- In fact the Mayor and his lawyers, as well as the lawyers for the City, knew perfectly well that there was a final "Settlement Agreement" as of October 17th, but rather than disclose this to the *Free Press*, as they were by law required to do, they chose instead to create the fiction that the Mayor had "rejected" the October 17th Agreement, (without telling City

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[26] ***Exh. 04,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

[27] ***Exh. 05,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

[28] ***Exh. 13,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing*

[29] ***Exh. 14,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

Council), and then subsequently fracture the earlier unitary agreement into two parts which, when read together consisted of exactly the same terms as were set forth in the single original Agreement. By doing this, the Law Department could report back to the *Free Press* on October 29, 2007 that the parties were still working out the details.

- Thus, on November 1, 2007, the parties split the original October 17th "Settlement Agreement" in half and executed *two* "new" agreements which merely recapitulated the same October 17th "Settlement Agreement," in two parts: a) a "Settlement Agreement and Release" that contained only the monetary terms of the settlement and a release[30]; and b) the "Confidentiality Agreement"[31] that contained only the confidentiality provisions from the first agreement, that was signed by the Plaintiffs' lawyer, Mr. Michael Stefani, "Kwame Kilpatrick" (sic), "individually and personally" and "Christine Beatty," "individually and personally."

- The November 1, 2007 "Confidentiality Agreement" *purports* to be a free-standing, "private," individual and personal document. As such, it compels the plaintiffs not to disclose the existence or contents of the text messages to "any person or *entity*"[32] (i.e. the Detroit City Council). Yet it is clearly integral to, and therefore a part of, the monetary settlement. For example, it requires that any inquiries about the text messages or the confidentiality agreement are to be responded to by saying that the "Plaintiffs agreed to accept an *amount* … in order to avoid the uncertainty of a trial or an appeal…."[33] In addition, it identifies the City of Detroit as the party to which any liquidated damages, resulting from a breach of the confidentiality agreement, default.

- In structure and by their terms, the November 1, 2007 "Settlement Agreement and Release" and "Confidentiality Agreement," read together, are essentially identical to the terms of the unitary "Settlement Agreement" executed on October 17th.

- The only logical reason to have split the original agreement in half is so that there would, as of November 1, 2007, be *one* agreement that could

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[30] ***Exh.7 (Brown & Nelthrope Settlement Agreement and General Release)*** *and* ***Exh. 8 (Harris Settlement Agreement and General Release),*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing*

[31] ***Exh. 9, "Confidentiality Agreement,"****p.1, "Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

[32] ***Id.,*** *p. 3.*

[33] ***Id.,*** *pp. 4-5*

be disclosed to the media, the public and the City Council; and *another* that could, arguably, be hidden and concealed.

- This is precisely the reason that, *also* on *November 1, 2007*, the Mayor *finally* filed a "NOTICE OF MAYOR KWAME KILPATRICK'S APPROVAL OF TERMS AND CONDITIONS OF SETTLEMENT AS APPROVED BY CITY COUNCIL ON SEPTEMBER 23, 2007,"[34] a mere four days after having rejected virtually the identical settlement. He could appear to approve the "Settlement Agreement and Release" while hiding the ball - the "Confidentiality Agreement," the disclosure of which would and did create private risks and dangers for him and for Ms. Beatty.

- Finally, as well, now the City Law Department could respond to the *Free Press* FOIA request with a Settlement Agreement that did not include the 'secret' and undisclosed "Confidentiality Agreement." It did so, on December 7, 2007.[35]

27. In summary, it is clear, from the evidence and the credible testimony, that the principal impulse to settle the case came from the Mayor, on October 17, 2007, immediately after learning that the *Brown/Nelthrope/Harris* plaintiffs' attorney had the text messages. His central motivation, rather than to serve the best interest of the City, was instead to prevent public disclosure of those text messages to protect himself. It is thus perfectly clear, both from the testimony before this Body as well as the circumstances surrounding the settlement process, that the Mayor ordered all of the lawyers to settle the case and to cover up the existence of the text messages.

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[34] ***Exh. 06,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

[35] ***Exh. 16,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing.*

28. The Mayor authorized his lawyers and the lawyers for the City, Mr. McCargo, Mr. Johnson, Mr. Copeland and Ms. Colbert-Osamuede, to settle the cases for $8.4 million, only if there would be a guarantee from Mr. Stefani and his clients that there could be no disclosure of the *existence* of the text messages, let alone of their content.

29. The settlement amount of $8.4 million thus not only paid for a release by all three Plaintiffs of their claims against the City of Detroit and the Mayor, it also paid for the silence of the Plaintiffs and their attorneys as to both the existence and the content of the text messages. Thus, this settlement was paid quickly and for an unprecedented 90% of its full value, (including interest and attorney fees), largely to protect the private interests of the Mayor and Ms. Beatty – i.e. to protect them from criminal prosecution and personal embarrassment.

30. All other cases that have been reported by the Corporation Counsel to this reporter, settled *after verdict*, have been settled for amounts less that the actual verdict itself, excluding interest and attorney fees. The amounts have varied from 17% less than the actual verdict, to over 50% less than the actual verdict. This case, *Brown/Nelthrope/Harris*, on the other hand, was settled for about 21% *more* than the actual verdict. Clearly, this case was treated very differently.

31. The obvious reason is the existence and content of the text messages and the agreed upon "confidentiality Agreement" to conceal them. It is therefore clear that had there been no "Confidentiality Agreement," there would have been no settlement of these cases at that time, or for this amount.

32. Each excuse, justification, rationalization or reason offered by the witnesses during the City Council Public Hearing for not disclosing the confidentiality provisions of the settlement to the City Council fails when seriously examined, as dramatically exemplified below:

- ***The only terms of the settlement that mattered were the monetary terms.*** According to Ms. Colbert-Osamuede and Mr. Johnson, the confidentiality agreement was mere "nuts and bolts." They also both testified that in employment cases it is routine to have confidentiality agreements and not to disclose them to Council when it consents to the settlement.[36] In fact, this was hardly a *routine* settlement. It was the highest profile case involving the City of Detroit and every aspect of it was of deep concern and great interest to the City Council, as was well known to the Corporation Counsel. Further, as noted above, the confidentiality provisions of the agreement were its heart and took up at least 50% of the October 17th "Settlement Agreement."

- ***Confidentiality agreements are common in employment cases; therefore there was nothing unusual in the settlement***. Even in those settlements with the City where there has, in the past, been a confidentiality agreement, the confidentiality provisions are but a relatively small part of the overall settlement agreement and they are simple and straight forward terms of settlement. For example, in the several anonymous examples of such agreements provided to the Special Counsel by the Corporation Counsel during the course of this investigation, there is only one brief clause relating to confidentiality, stating, for example: "Plaintiff agrees not to disclose any of the terms of this settlement agreement." This is vastly different than the elaborate confidentiality provisions set forth in *Brown/Nelthrope/Harris*, with their millions of dollars in liquidated damages, elaborate procedures for exchanging keys to safe deposit boxes, escrow agreements, etc. This settlement was unique because it was tailored to the private and personal interests of the Mayor. There has *never* been a settlement agreement like this involving the City of Detroit, with a *separate* confidentiality agreement.

- ***The subject matter of the confidentiality agreement was protected by attorney-client privilege.*** While this may be the case with some settlements that include confidentiality agreements, for example where a police officer confides certain matters to his (and the City's) lawyer, here such an argument makes no sense, since the information that was concealed and "confidential" did not come from a client, or even a City employee. It came from the opposing counsel. There simply is no privilege in play.

[36] *City Council Public Hearing, April 11, 2008, Tr. pp. 171-174 and 179-180.*

- ***The 'confidential' information, if disclosed, may have proven damaging to the City of Detroit, as distinguished from the Mayor and Ms. Beatty, personally***. A number of the lawyers testified that they believed that the text messages were protected by the 'deliberative process privilege,' and further that their disclosure might embarrass the City because they contained insulting references to other local politicians, business people and prominent persons. There are several problems with these assertions: *first*, neither Mr. McCargo nor Mr. Johnson, who made these assertions, had ever seen the messages (so they testified) and therefore did not have a basis for making such a claim of privilege; *second*, it is far from clear that the deliberative process privilege applies to such communications; but *most importantly*, IT DOES NOT MATTER. The need to prevent Council from learning the *content* of the text messages is very different than advising Council that there is certain sensitive material protected by a confidentiality agreement that is a part of the settlement. *There is no excuse for the failure to disclose to the Detroit City Council the existence of the confidentiality agreement*.

- ***The only way to protect the sensitive information was to settle the case and enter into a 'confidentiality agreement'.*** This concern is clearly pretextual. Had there been a genuine concern about the public disclosure of such matters, the lawyers could have readily filed an application in the Wayne County Circuit Court for an emergency protective order that would have sealed the text messages in question and required an *in camera* (in chambers, judge's eyes only) inspection. If this could not be obtained from the Circuit Court, there is little doubt that it would have been obtainable through an emergency application to the Michigan Court of Appeals. Had this path been taken, the parties and their attorneys would have been bound by order of the court and constrained by the threat of contempt, both much stronger that the mere confidentiality agreement into which they eventually entered. The only problem with such an approach is that then the Judge, who had heard the testimony, would have seen the text messages. If, as it appears, the texts contradict the sworn testimony of both the Mayor and Ms. Beatty, they would have been in serious trouble, for these messages then would have been disclosed to the very judge before whom the original (and conflicting) testimony had been presented.

33. Most significantly, the *Brown/Nelthrope/Harris* "Confidentiality Agreement" is the *only* such agreement that was ever separate from the "Settlement

Agreement."[37] Even if it was not a unique circumstance, it was extremely unusual and should have been flagged for consideration by Council.

34. In fact, the reason for other confidentiality clauses in settlement agreements may be to avoid other City employees learning how much a co-worker receives by way of settlement, so as not to encourage more such cases. Those other confidentiality agreements are *nothing* like the *Brown/Nelthrope/Harris* "Confidentiality Agreement." Unlike the agreement in this case, the others are, on the whole, simply agreements that the plaintiffs will not disclose the amounts of the settlements. Even in those cases that contain such confidentiality provisions, however, the amounts are still disclosed to the City Council before it approves those settlements. . So the subject of the confidentiality agreement is known to the Council. Additionally, from what we have learned, these other agreements say nothing about liquidated damages in the event of a violation of the agreement, nothing about safe deposit boxes and nothing about the agreement being "private" and "personal". They are therefore a wholly different species of agreement than the unique "Confidentiality Agreement" executed in this case and, most significantly, *not disclosed to this body.*

35. The position of the Corporation Counsel, that Confidentiality agreements are mere "nuts and bolts" is belied by the fact that this case is unique in the many ways pointed out in this report. Regardless, this deficiency can be avoided in the

[37] Mr. Johnson has been very helpful in providing Special Counsel with data for this report. In that regard, he reports that Ms. Colbert-Osamuede remembers that there may have been a few other cases with separate confidentiality agreements, but she cannot recall the names of the plaintiffs. Thus the *only* such agreement that can be identified is the *Brown/Nelthrope/Harris* settlement.

future by a requirement that all confidentiality agreements be fully disclosed any time Council's approval of a settlement is sought. If necessary, the contents of the confidentiality agreement can be disclosed in closed session.

36. There is no reasonable explanation for the Corporation Counsel or any of the other lawyers *not* to have disclosed the "Confidentiality Agreement" to Council, *other* than that the material covered by the agreement disclosed wrongful behavior by the Mayor, unrelated to his public office, for which he may have been criminally liable, or subject to yet further investigation by federal agencies and the Detroit City Council.

37. At a minimum, therefore, as the above-described events dramatically illustrate, there were *two* major ways in which the "public office" was used for "private gain," in violation of Section 2-106 of the City Charter:

    A. Public funds helped to pay, as a *quid quo pro,* for the confidentiality agreement with the plaintiffs; and

    B. Significant public resources (i.e. time, money and the services of City officials) were used to conceal the existence and content of the Mayor's and Ms. Beatty's text messages from the Detroit City Council and the public.

38. Furthermore, and of urgent concern to this Council, the Mayor, through his surrogates, Mr. Johnson, Ms. Colbert-Osamuede, Mr. McCargo and Mr. Copeland, deliberately and purposefully withheld information -- indeed the crucial terms and conditions -- of the *Brown/Nelthrope/Harris* settlement from the City Council. Thus, the consent of the Council to these settlements was never validly obtained because *it was not informed consent;* in fact it was intentionally

uninformed consent. As a consequence, Section 6-403 of the City Charter, that clearly and *absolutely* requires that "(n)o civil litigation of the city may be settled without the consent of the city council" was deliberately subverted and violated.

[Continued on next page.]

PART THREE
PERTINENT LEGAL ISSUES

Unprecedented Settlement Terms

A. As noted above, no case can be settled without the *informed* approval of the Council. In this case, since Council was not advised as to material terms and conditions of the settlement, its consent was *not* informed consent and therefore, there was *no* consent. Thus, arguably, the settlement was not authorized by the City Charter and was therefore invalid. There is as well the additional consideration that the Mayor subsequently "rejected" the settlement, on October 27, and thereby further invalidated it. As a practical matter, however, at this juncture there is little that can be done to "put Humpty Dumpty back together again," sp to speak, for the following reasons:

- The funds have been paid out and would be difficult to retrieve;
- From the evidence that has been disclosed, not least of which from the infamous text messages, it is now undeniable that Brown, Nelthrope and Harris were in fact wronged, and it would be unjust to attempt to set aside their recovery;
- Moreover, these plaintiffs have a $6.5 million jury verdict against the City, not including interest and attorney fees, which would be reinstated if the settlement were set aside. Plus, by now, the time for the City's right to appeal has expired and, unless the Court of Appeals were to grant leave to file a delayed claim of appeal, the

plaintiffs and their attorney would be in a position to now recover *more* than the amount of the settlement; and

- It would be a legal nightmare and require a huge expenditure of additional time, resources and money.

<u>Corporation Counsel's Attorney-Client Responsibility</u>

B. Under both the Detroit City Charter and the Michigan Rules of Professional Responsibility, as well as generally accepted principles of legal ethics, the actual "client" of the Corporation Counsel is the City of Detroit.[38] This fact results in a series of implications:

- The "City" is the Corporation Counsel's primary client;
- Neither the Mayor nor any specific officials are the "City of Detroit;" they are, rather, "constituents" of the City of Detroit and *not* the primary clients; and
- Therefore, when the possibility of a conflict of interest arises for Corporation Counsel in its representation of both the City and one or more of its officials (including the Mayor), the Corporation Counsel must seek separate, independent representation for the official and continue to represent the City.

C. The question then is: who or what is the Corporation Counsel's *primary* client, i.e. what entity can best embody the identity of the City of Detroit? The answer

[38] See *Report of Professor Brigitte McCormick*, to be provided as a separate document to members of Council.

is, the Detroit City Council. This is so because Council, which consists of officials elected by the voters, is the only entity that has a collective, "representative" identity, over and above that of its individual members. The Detroit City Council is therefore, the single entity that can best be identified as "the City of Detroit," as distinguished from a "constituent" of the City of Detroit. As the an ethics panel of the Michigan State Bar has written,

> "The city attorney, whether an employee of the municipality or outside counsel retained by the municipality, must first remember that as city attorney the lawyer represents the *city council entity*, not city departments, individual city officials, individual council members or employees."[39]

D. Under the current Charter, the Mayor is the Corporation Counsel's supervisor[40], to wit:

- The Mayor selects the Corporation Counsel (with the approval and consent of Council);
- The Corporation Counsel prosecutes all actions in which the city is a party or has an interest, "when directed to do so by the Mayor"; and, most significant,
- The Mayor may remove the Corporation Counsel, *without cause* and *without approval or consent* of Council.

E. However, ultimately, principles of legal ethics and the Rules of Responsibility govern the relationship between an attorney and his/her client. Thus, given the ethical principles outlined above – i.e., that the Corporation Counsel's primary

[39] Michigan State Bar, ethics opinion RI-259 (April 9, 1996)

[40] Charter, Section 6-401, 6-403

client is the City of Detroit acting through the Detroit City Council – the job of the Corporation Counsel is to further the legal interests of the City, as expressed through Council.

F. Obviously, however, given the fact that under the current scheme as set forth in the Charter, the Mayor has the power to hire, fire (without cause) and control the Corporation Counsel's decisions regarding when to defend the City in Court, when to initiate litigation, and when to settle or not settle a case, the responsibilities of the Corporation Counsel are confusing and need clarification. The obvious answer is to amend the Charter to make the Detroit City Council a co-equal partner in these decisions, as suggested in the Recommendation section of the Report.[41]

G. The abstract analysis of who is the Corporation Counsel's client does not, however, change the facts of the *Brown/Nelthrope/Harris* settlement. At the time Corporation Counsel sought the consent of the Detroit City Council, he and Ms. Colbert-Osamuede unquestionably recognized that the City Council was their client, as evidenced by the Lawsuit Settlement Memorandum, clearly labeled as an "*attorney-client*" communication.[42]

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[41] Recommendation A, above, p. 7.

[42] ***Exh.04, Lawsuit Settlement Memorandum,*** *"Documents Re: The Brown, Nelthrope and Harris Settlements" binder from City Council Public Hearing, pg 1.*

Forfeiture of Office

H. Under Section 2-107(B) of the City Charter, forfeiture of office is available when an elective officer violates a provision of the Charter "punishable by forfeiture." Unfortunately, however, there is no clear definition of precisely what is punishable by forfeiture, and neither the Report of the 1973 Charter Commission nor the Commission's Commentary cast any light on that issue. However, Section 2-107 of the Charter does state that the "city council shall be the judge of the grounds of forfeiture of an elective officer."

I. It is therefore reasonable and correct to conclude that it is up to this Body to determine the following:

- First, which Charter provisions, when violated, are "punishable by forfeiture;"
- Second, when the behavior of an elective official constitutes a violation of one or more such provisions of the Charter; and
- Third, that such conduct constitutes "official misconduct," as well, within the meaning of Michigan statute, MCL 168.327.

[Continued on next page.]

CONCLUSION

The Detroit City Council has, for the most part, shown unity, courage and determination in its resolve to honestly investigate the circumstances that have contributed to the current crisis. In so doing, it has it has identified and confronted deep-seated institutional problems that, unless resolved, seriously threaten this community. On the whole, it has taken the high road of attempting to shape policy, rather than to pursue superficial political ambition or to distract the community with scandal. You are to be commended. It has been an honor to serve this effort. I remain committed to continue in your service in whatever follow-up capacity you see fit, in order to facilitate the ultimate goals, both to move our city past this crisis and to prevent similar crises in the future.

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