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THE PUBLIC EMPLOYEE'S "RIGHT" TO REIMBURSEMENT FOR PRIVATE LEGAL EXPENSES

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The Public Employee's "Right" to Reimbursement for Private Legal Expenses

Wait a minute, you say. Why would the government folks want their own lawyer? For what purpose? Who will pay their bills? Why can't they get by with the lawyers we already provide for them – from the Attorney General's Offices or City Solicitor's Offices or County Law Offices around the country? If they get to "go private," why doesn't everyone?

The answers to the question "why do they want or need their very own lawyer" are varied and telling. They include:

1. **I need the government to provide me with the most prestigious lawyer in the land, or the highest priced lawyer taxpayers' money can buy, or a lawyer who will tell me what I want to hear, so that I can be even more certain of the legal advice I get or of winning the suit I'm involved in, than I would be if underpaid government lawyers were handling it.**

2. **I need a lawyer - - - - to defend me from some civil or criminal investigative agency – States Attorney, or State prosecutor, or U.S. Attorney, or Ethics Board, or …. the list goes on. And because these investigators sometimes**

tell you what they are looking into and sometimes either don't or are very vague – it is often difficult to tell at the beginning whether they are looking into my official or work related behavior or something purely extracurricular. And similarly, it is often difficult at the beginning or at various points along the way – or maybe even when "charges" are or are not brought – to know or be able to intelligently guess whether the ending will be or has been good, bad or in between.

3. **I need a lawyer - - - - to sue some person or agency in the government for which I work for doing something I am unhappy with. Rare, but as Comptroller Joan Pratt and Circuit Judge Pam White can tell you – it does happen.**

4. **I need a lawyer - - - - to bring some claim or case on my behalf to vindicate my view of the Constitution or sense of justice that you my "regular lawyer" don't think is important enough or don't share my view of the appropriate outcome. While in the extreme case I could be at odds with my own government, I could also be fighting with some other government or person.**

5. **I need a lawyer - - - - to investigate the Governor, Mayor or County Executive you represent (and maybe also to investigate <u>you</u>, my government lawyer, because you**

gave them the legal advice that "enabled" their "bad" conduct) since I think they are "doing something wrong" or with which I disagree.

There probably are other circumstances where the creative public employee might ask for his or her very own lawyer, but the above categories cover most of the universe. And, while you may think some of these scenarios are fanciful, let me assure you that they are not.

This quest of some public employees and officials for their very own lawyer is "caused," if you will, by the fact that most of our governments put a single lawyer/official "in charge of" all the lawyering for the Government. While the Attorney General and the US Department of Justice have statutory but not constitutionally conferred "exclusive lawyer status",[1] our Constitution gives the Attorney General of Maryland the express responsibility for handling <u>all</u> suits and matters and legal advice.[2] Our Attorney General does have to share responsibility for criminal prosecutions with many others, but is protected by Article 5, Section 3(d) which says that "The Governor may not employ any additional counsel, in any case

[1] 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").
[2] MD CONST. art. V, § 3.

whatever, unless authorized by the General Assembly."[3] In Baltimore, Sections 22-26 of Article VII of the City Charter echo the Maryland Constitutional provisions by conferring authority to handle all of the City's legal business (except, importantly, criminal prosecutions) on the Department of Law and its head, the City Solicitor.[4] Section 24(c) contains an interesting and narrow exception which provides that:

> **"The City, Comptroller, and, with the approval of the Mayor, a department … may select outside counsel to represent it if:**
>
> **(1) the City Solicitor gives it written notice that representation of it by the Department of Law involves an irreconcilable conflict of interest; and**
>
> **(2) the Board of Estimates authorizes the employment of outside counsel."[5]**

Otherwise, no agency or officer of the City may employ or retain counsel other than the City Solicitor (or as retained from the private bar by the Solicitor).

[3] *Id.*
[4] BALTIMORE, MD., CITY CHARTER art. VII § 22–25.
[5] § 22–25(c).

This phenomenon is exclusive to the public sector. Judges do not have to face these dilemmas – except in the rare instance (with which our own Judge Pam White has passing familiarity) when they spill over and become caught up in some pending litigation. And equally obviously, the private practitioner is in an altogether different situation – since the private client is almost always in a position to walk away and hire someone else. But not so the public client covered by Constitutional and Charter based "one lawyer for the whole government" restrictions.

Why does the top lawyer for the government have a monopoly on legal services for the government client? The rest of the government is relatively free to get other services from the private sector (architects, engineers, other professionals, street sweepers etc.), albeit under some control from the Governor or Mayor who generally can restrain or prevent privatizing these services through the Board of Public Works or the Board of Estimates. But that power to restrain is shared with other public officials, whereas the restraining power over legal services is in the hands of only the government's top lawyer. There is something special and different about legal services and the attorney-client relationship that justifies making it harder to get another one. In the case of the Attorney General of Maryland, that lawyer is elected by the citizens and cannot simply be fired – rather only removed automatically

upon certain criminal convictions or not re-elected.[6] As City Solicitor, I of course can be fired, making the Mayor free to replace me with someone else – but that of course is permanent change rather than "matter by matter."[7] President Nixon's firing of his Attorney General Elliot Richardson and his special prosecutor Archibald Cox (and a few others who wouldn't do the job for him), also known as the "Friday Night Massacre", illustrates this point.[8] The President could and did fire him – but certainly with consequences given the reasons for the firing. For whatever reason, the law makes it hard to shop around on an ongoing basis – and that gives forced continuity to the attorney-client relationship in government – which I would argue (and not for personal reasons) is a good thing. But what about the government lawyer who demonstrates poor judgment – but is not so incompetent as to support permanent firing? Should poor judgment enable the client to insist on going to other counsel on a case by case basis? Our Charter says no – you have to fire your City Solicitor to get another lawyer. I leave it to others to decide whether that is good.

<u>Turning now to the simplest and perhaps most frequent reason for "going private</u>" – the client simply says I want the best,

[6] MD CONST. art. V, § 1.
[7] BALTIMORE, MD., CITY CHARTER art. V § 6(c).
[8] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A01 (*available at* http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm).

and/or most prestigious, or most sympathetic lawyer taxpayer money can buy for a particular job. My career as a public lawyer actually began in the midst of such a situation. In the Spring of 1973, Governor Marvin Mandel was presented with a strong and technically flawed Financial Disclosure bill that had been passed by the General Assembly and was on his desk for signature.[9] Neither he nor Attorney General Bill Burch wanted to take responsibility for possibly vetoing what was touted as a "good government" bill by Common Cause and other similar advocacy groups. So with the necessary consent of the Attorney General H. Vernon Eney was hired as special counsel (pro bono as I recall, so taxpayer money was not implicated) to review the legislation in the same way the Attorney General does with 1,000 bills a year. My first day at work as an Assistant Attorney General took me to Annapolis for the Special Session called to pass "improved and unflawed" financial disclosure legislation in the wake of Mr. Eney's opinion.

The Baltimore City Law Department is currently dealing with this same controversy. My Law Department and I advised six times in writing that the Baltimore City Council's "local resident preference" bill was unequivocally unconstitutional.[10]

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[9] *Mandel Asks Quick Action – Disclosure Bill Released*, MORN. HERALD, Aug. 2, 1973 at 40 (*available at* http://www.newspapers.com/newspage/24090838/).

[10] Letter from Ashlea H. Brown and Hillary B. Ruley, Assistant Solicitors, Baltimore City Department of Law, to The Honorable President and Members of the Baltimore City Council (Jan. 2, 2013) (*available at* http://legistar.baltimorecitycouncil.com/attachments/9951.pdf).

They passed it anyway and it became law without the Mayor's signature.[11] We told the Council that when suit is brought, someone other than us should be hired to defend the law. No suit yet, but stay tuned for next steps. And, because we didn't tell them what they wanted to hear, they have passed a charter amendment that will appear on the City ballot this fall that will give them their very own lawyer at additional expense who they will own (but not in litigation).[12]

Of course we hire private counsel all the time – under routine circumstances and generally for specialized litigation or transactions or to handle matters that are so labor intensive that we can't provide the number of professional bodies or other resources needed to handle within the severe constraints of our regular budgeted positions. And while those hired private lawyers do provide advice in the course of their work on particular matters, we do not hire private lawyers to give the Mayor or her senior people advice and legal guidance on the many important issues presented for disposition on a daily basis. And all of those hirings are made or not made with the approval of the City Solicitor, constrained only by the availability of funds to pay for them.

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[11] Luke Broadwater, *Council Approves Local Hiring Mandate*, BALT. SUN, Jun. 3, 2013 (*available at* http://articles.baltimoresun.com/2013-06-03/news/bs-md-ci-local-hiring-vote-20130603_1_large-city-contracts-council-president-bernard-c-jack-young).

[12] Luke Broadwater, *City Council Moves to Hire Its Own Lawyer*, BALT. SUN, Oct. 29, 2013 (*available at* http://articles.baltimoresun.com/2013-10-29/news/bs-md-ci-council-lawyer-hearing-20131029_1_large-city-contracts-councilman-warren-branch-council-president-bernard-c).

This brings me to the second category – one that regrettably comes up with some frequency – the government employee who is being investigated or prosecuted by a prosecutor or other governmental official or agency and thinks the government should pay for his or her representation.

The State of Maryland has had a statutory scheme in place for this sort of situation for 30 years. It is found in the State Government Article at Sections 12-313 through 12-318. In essence, it provides that a State employee or official who needs and hires private counsel to represent him/her in connection with a criminal investigation or prosecution may later, upon "exoneration," seek and obtain reimbursement of reasonable legal expenses with approval of the Board of Public Works.[13] These provisions begin with the prohibition against the Attorney General undertaking any such criminal defense representation on behalf of a State employee.[14] While that prohibition may seem obvious and appropriate, at the local level we have been confronted with situations where a City employee simply doing his/her job has a citizen swear out a warrant for criminal charges which seem meritless but need to be defended by some attorney, public or private. We sometimes do it – unless they elect to hire a lawyer at their own expense.

[13] MD. CODE ANN., STATE GOV'T § 12-314.
[14] § 12-313

It is important to note that the State representational reimbursement scheme does not apply to administrative proceedings directed against the public employee that can result in punitive outcomes – license revocation proceedings or ethics charges not criminal in nature come to mind.

If the case is criminal, the public employee is expected to notify the Attorney General promptly after retaining counsel and at the end of the day persuade the Attorney General to certify to the Board of Public Works after a review of the evidence and other information that "the applicant discharged the public responsibilities [that were the subject of the investigation or prosecution] in good faith, did not engage in unlawful conduct [of any kind], and was reasonable in retaining counsel and incurring the counsel fees for which reimbursement is sought."[15] To be able to even apply for reimbursement in connection with an investigation, the investigation must have been into the person's conduct as an officer or employee (as opposed to, for example, a criminal act of domestic violence) and must have ended without any criminal charges having been filed.[16] If the investigation remains open, any application for reimbursement is to be deferred until it is completed and closed with no charges brought. If reimbursement is sought for defending against actual criminal charges relating to the

[15] § 12-315
[16] § 12-314

person's conduct as an official or employee, all charges must have been disposed of without resulting in a plea of nolo contendere, a guilty plea, or a finding of guilt.[17] As a condition to obtaining reimbursement, the Attorney General may require the applicant to answer questions under oath and "to provide <u>any</u> information on the matter that was under criminal investigation or the subject of criminal charges."[18] The determinations of the Attorney General, and presumably the decisions of the Board of Public Works, are non-reviewable by the courts.

Because these provisions have been with us for 30 years, there is an informal precedent within the Attorney General's office that may (or may not) be shared with today's applicants. Of course, the Attorney General's office regards each case as unique and does not generally feel bound to follow prior precedents or to be precluded from shifting their standards. Venturing into this reimbursement process can be an unnerving undertaking and client expectations need to be carefully managed. And all should know (and remember) that certification by the Attorney General does not necessarily produce a favorable decision from the Board of Public Works. [<u>Some unpleasant experiences</u> - The best example of this in recent years occurred when officials in the Democratic

[17] § 12-315
[18] § 12-316 (emphasis added).

Glendenning Administration were eventually exonerated and certified eligible by Democratic A.G. Curran, but only to have their paperwork buried by the Republican Ehrlich Administration. The officials were eventually reimbursed when the democrats returned to power in the Governor's House.]

Baltimore City does not have any such statutory scheme in place – but rather has an erratic history (at least in the last 30 years) on the way to handle these things. Sometimes outside counsel is simply hired by the City up front for a group of City employees or Council members who receive grand jury subpoenas where it is not always clear whether they are mere witnesses, potential targets, or witnesses who might become targets or defendants. We in the Law Department have often had to not only manage the production of subpoenaed documents on these occasions, but also provide guidance to City employees who are believed to be mere witnesses but may at some point need private representation and later get reimbursed. Tip-toeing through those minefields can often be a challenge for the public lawyer. Fortunately, those City employees who concluded they should get private representation during the Dixon investigation and prosecution were few in number, did not ever end up as defendants, and did not ever submit expense reimbursement requests.

In the early stages of the Dixon affair, as City Solicitor I undertook to review not only the City's historical practices, but also the Maryland and federal law and process and best practices elsewhere. I was directed to halt that review when the press got wind that the issue was being evaluated; Mayor Dixon did not want anyone to think that either she or her City Solicitor were laying the groundwork for a subsequent legal expense reimbursement request. I quickly shut down the effort – and held my breath. And when Stephanie Rawlings-Blake became Mayor, it was decided to defer consideration of any new policy (to replace the erratic precedent from past decades) until we had a live matter before us requiring development of a policy. The federal law is similar to the Maryland statute in its basic principle but quite different and even more opaque in the details and processes followed.[19]

Taxpayer reimbursement for private representation fell into the national spotlight when the Chris Christie bridge scandal broke. Governor Chris Christie and his various New Jersey escapades has now become the subject of much attention and many investigations (but so far no criminal charges). The taxpayers of New Jersey will have to wait a bit to see what their final bill for his representation will be. But at $650 per hour

[19] Representation of Federal Employees by Private Counsel at Federal Expense, 28 C.F.R. § 50.16 (1990).

that bill has already hit several million dollars.[20] Bringing a new (at least in the public sector) wrinkle to the conundrum of private counsel engagement in investigative and criminal proceedings, the distinguished firm of Gibson, Dunn & Crutcher was hired by the Christie Administration to investigate the Christie Administration. Limited more than a little bit by the refusal of the key figures who had already sought legal counsel to be interviewed for the investigation, Gibson, Dunn & Crutcher, just a few weeks ago, exonerated the Christie Administration and presented the taxpayers with their several million dollar bill for services rendered.[21] I am sure commentators, taxpayers and lawyers have been in robust conversation over whether those services were rendered to Mr. Christie or the State of New Jersey – and I say that well knowing that retention of a distinguished outside firm to undertake a thorough and extensive investigation of a company in the sights of some prosecutor or serious administrative investigation is a common and often effective practice.

Prosecutions and investigations of public employees happen all the time and we have become accustomed to the need of those employees for outside legal representation. But now we have a new and thankfully relatively rare phenomenon – the public

[20] Elise Young, *Christie Campaign Can Use Funds to Pay Bridge Legal Bills*, Bloomberg News, Feb. 12, 2014 (*available at* http://www.bloomberg.com/news/2014-02-11/christie-campaign-gets-approval-to-use-funds-for-legal-bills.html).
[21] *Id.*

official or employee who wants to sue the government for which they work. This new trend of "outside counsel challenges" is best exemplified by the suit filed by Baltimore's Comptroller Joan Pratt challenging the alleged incursion into her telephone territory by so-called VOIP chicanery of The Mayor.[22] The Administration was said to have installed several VOIP units (including a few video units) surreptitiously, as the first intrusion of the Comptroller's exclusive dominion over the Municipal Telephone Exchange. The Comptroller did not first come to the City Solicitor as required by the Charter to seek certification that the Law Department could not represent her by reason of conflict, nor did she seek approval of the Board of Estimates of her retention of private counsel.[23] Instead, she turned to a friendly Peter G. Angelos, a powerful local attorney and owner of the Baltimore Orioles baseball team, who apparently empathized with her to the point of donating the free legal services of retired judge Chuck Bernstein. Armed with her new found private lawyer, the Comptroller initially peppered employees appearing before the BOE with dozens of questions about every single transaction involving MOIT, or mentioning the term VOIP, and finally filed suit on October 12, 2012.[24] Joining her in the ultimately unsuccessful suit were Joan Doe (taxpayer) and taxpayers Gertrude Hack and Joe

[22] *Pratt v. Mayor & City Council of Baltimore City*, Case No. 24-C-12-006018, Memorandum Opinion and Order, Feb. 13, 2013.
[23] *Id.*
[24] *Id.*

Collins.[25] By February, 2013 the case fell into the lap of our very own Judge Pamela J. White who rendered a decision in favor of the City on several alternative grounds.[26] The fact that the Comptroller failed to comply with the Charter in securing private counsel representation was cited by Judge White, but did not form the basis of her decision.[27] Judge White did cite to several cases dealing with significant limitations on the right of government employees to file suit challenging the alleged transgressions of the government for which they work.[28] While the Comptroller decided not to appeal and the case ended, the controversy was not quite over.[29] For one, the forty year old phone system of the City remains firmly in the grasp of the Comptroller despite repeated efforts by both Ms. Pratt and the Mayor to reach a compromise solution. And now, ironically and more relevant to the issue on which this paper focuses, the Comptroller is under "investigation" for a potential ethics code violation for having accepted the gift of free legal services from Messrs. Angelos and Bernstein. Naturally, she has asked for her own free lawyer. While the size of the WIP and AR in the Angelos-Bernstein representation is not known, and while some might say that the legal services provided were priceless, it is

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

clear that on a pure time logged basis they had "value" and thus would fit within the term "gift".[30]

While suits by vindicating public servants against their fellow governmental employees or agencies may be rare, they are by no means unheard of. Witness the several cases cited by Judge White where Maryland public employees had done exactly that. And for obvious reasons, with the Attorney General or the City attorney on the defendant's side, the plaintiff employee typically is armed with private counsel (presumably at his own expense).

While our City version of "sue the government you work for" involved a power struggle between high elected officials, violations of charter provisions limiting use of outside counsel, and ethics code claims – far more often these kinds of suits involve some public employee who wants to sue as a taxpayer challenging something that someone else in his government is doing or not doing. While these other suits may present interesting questions over whether an employee can sue his or her own government, I am not aware of any instance where public funds have been made available to pay for the plaintiffs legal representation – except for a test case or "collusive suit" sanctioned under Reyes v. Prince George's County and brought

[30] Black's Law Dictionary defines donation as "a gift." BLACK'S LAW DICTIONARY (9th ed. 2009).

pursuant the procedures which the Court of Appeals established in the 1970s.[31] I actually was involved in one of the few test suits brought under the Reyes rules – where public funds paid for me to represent the City Retirement Systems challenging The City and its South Africa Divestiture Ordinance – with the defense in the capable hands of Mel Sykes and also paid for by taxpayer funds.[32]

Finally, we come to perhaps the most recent attempt by public officials to go around their statutorily provided public lawyer– and once again our Law Department seems to be the potential "target". The City Council has armed one of its committees chaired by Councilman Jim Kraft with subpoena power and the mandate to investigate various aspects of the City's speed camera programs.[33] One of the central items the Council will be investigating is the negotiation of a settlement between the City and Xerox ACS, the City's earlier speed camera company. The Law Department was significantly involved in that negotiation. We were also significantly involved along the way in many other aspects of the speed camera program. As we produce the tens of thousands of documents called for by the Committee's request for documents, the Law Department was

[31] 380 A.2d 12 (M.D. 1977).
[32] Bd. of Trustees of Employees' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore City, 562 A.2d 720, 723 (Md. 1989).
[33] P. Kenneth Burns, *City Hall Notebook: Council Sends Subpoenas And Box Ban To Final Vote*, WYPR News, Mar. 11, 2014 (*available at* http://news.wypr.org/post/city-hall-notebook-council-sends-subpoenas-and-box-ban-final-vote).

responsible for assembling them and conducting a privilege review. Councilman Kraft, who has a staff of ½, has informally, but repeatedly, asked the Law Department to provide him out of our budget with a squadron of lawyers and support staff to facilitate his investigation of us and our clients. We have respectfully declined – on various grounds: the Council should use its own funds; any request for lawyers is premature since there is no dispute between the Council and the Administration or Law Department at this time; and the Council has already been offered the support of the Inspector General's Office. Fortunately, the Council's "ask" has now come down to non-lawyer staffers to review produced documents.

There are other rabbit holes in Alice's Wonderland. But the retention of private counsel to represent the government or its employees can, at least around the outer edges, be one of the more interesting and sometimes bizarre.

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