

PRACTICE TIPS

The Good, The Bad, and The Ugly: Selecting, Retaining, and Supervising Outside Counsel

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City Attorneys are expected to know a lot. This myth fits nicely into the model that many of us pursued as we entered law school: many of us were the kid who knew the answers, who aced the tests, who raised our hands (some of us haven't grown out of that model). The problem is that our cities have so many issues and so many challenges that we cannot possibly know all of the answers. There are bond and finance issues. Land use and sign ordinances. How much of a city's reserves have to be in insured accounts? There is litigation (not everyone is a trial lawyer) and appellate arguments (we can't all be a former Solicitor General or Supreme Court clerk). We often need help.

Our role is often (though rarely discussed) similar to the General Counsel of a medium to large corporation. In most cities (depending on locale), the lawyer may serve as a member of the executive team, the *de facto* chief ethics officer, might be appointed either by the chief executive or by the legislative branch of the City, or any of myriad other options. An excellent discussion of the various roles of general counsel in the corporate world is found in Professor Deborah DeMott's article, *The Discrete Roles of General Counsel*, published in the Fordham Law Review.[1] In her article, Professor DeMott discusses in detail some of the challenges raised here. While Professor DeMott apparently disagrees, as applied to city and county attorneys, the role of the chief legal officer is largely the same regardless of whether the lawyer serves in-house or is part of a firm providing such services for a few or many clients.

Hiring outside counsel is not an easy choice for a City Attorney. There are a number of considerations or challenges to be overcome. It is impossible to identify or discuss all of those challenges. Once upon a time, when a baby lawyer complained that the team of trial attorneys and litigators he was a part of was as qualified and effective as those at BigLaw, a senior lawyer explained that corporations often hired a firm for representation based on the mantra of "covering one's backside" (or words to that effect). If the litigation or representation went badly, General Counsel or Chief Executives could look at the Board and say, "We hired BigLaw. What else were we supposed to do?" That may not always be an option. But it is an answer.

Selection is only the first step. City Attorneys must also supervise and manage the lawyers they hire. Sometimes, the outside lawyer makes reports directly to the governing authority, but most of the time City Attorneys take what they hear from the outside counsel and report to the governing authority (that's what I do and what I recommend).

In any event, the lawyer the City Attorney recommends or the lawyer she retains for her specialized problem remains a reflection of the lawyer who made the hire. If they are prepared, you are prepared. If they are unable to establish an answer to a direct question from the Court or an elected official, you didn't answer the question.

This article will discuss these competing and inextricably intertwined conditions and challenges of hiring and supervising outside counsel. Those challenges apply whether your city comprises one thousand persons or more than one million.

Hiring and Retaining Outside Counsel: A number of considerations arise under this rather simple sounding rubric. Should you? Must you? May you? Will you? Not to mention the ever important: Who?

1. When is Outside Counsel Advised? Or required?

Your City Manager calls you at 8:30 one morning. Just like when your mother told you that nothing good happens after midnight, nothing good happens when a phone call from City Administration comes before 9:00 am.

The challenge presented by this early morning call for assistance is an area of law you are not familiar with. The Model Rules of Professional Responsibility say lawyers should not take a matter in which they do not believe they are competent to handle the representation. ABA Model Rule 1.1. The comments to the Rule provide some further guidance. Comment [1B] suggests that if you can learn the area of the law, then you are competent. Comment [2] says that you are competent if you went to law school and passed the bar exam. (Is that even true?) Nonetheless, there are some things we all know, or should know to avoid unless we have specialized, e.g., bond work, employee benefits law, the intersection of tax law and municipal finance.

But that does not end the question, does it? Do you have the time to devote to the problem? What are the political considerations of the problem presented? Was your Council or Board split or united in their vote? Is there a vocal community opposition group and a contested election coming up? (Yes, I know you aren't supposed to take those questions into account, but we are not human if we do not acknowledge that they play some small role in the decision).

Each of these questions imparts some bit of data into the "should I" analysis. There is no bright line test for the resulting answer; no magic algorithm to be utilized and pop out the alchemical solution. Sometimes one consideration will win out over others. Sometimes an answer to that same issue will have no impact whatsoever on the analysis of whether to hire outside counsel. Each situation is unique (something I'm sure your clients hate hearing as much as mine do). In the end, it is a judgment call that you make with the blessing (and within the budget) of the city administration.

These questions are undoubtedly important, but they have little impact on the conflict or "must I" question. Legal conflicts of interest (*requiring* separate counsel for parties) arise in numerous circumstances. A few of those might include: (1) Is the target of the lawsuit, claim, or complaint the appointing authority (does your charter answer whether you are appointed by the Mayor or by the Council); (2) Are there facts in dispute between various participants in the transaction; (3) Are the facts alleged by the opposing party sufficient to create a difference of opinion or facts between the parties; (4) Are the parts of your client at war with themselves (this happens frequently in Georgia)? If you answer any of these questions in the affirmative, you then have to determine if the potential conflict is waivable by the client (and even if it is, whether you wish to seek a waiver).

In the four examples above, I would step aside and hire some other lawyer to represent the pieces and parts of the dispute, regardless of the possibility of securing a waiver. Remember a City Attorney represents the city, not individual officers, officials, or employees. This is an easy part of our jobs to forget (and one your elected officials and administrators likely always forget). As the advocate for the entity, your primary responsibility is to it, not any one person. You don't get to pick sides or parties or claims to defend. The best choice in those situations described above: Step away. Just step away.

Different, albeit similar, questions arise when the question becomes necessary to retain counsel to advise the Board or Council because they are sitting in a quasi-judicial role and the City Attorney is acting as an advocate. Different rules apply (arguably) when the lawyers are from an in-house law department, part of a law firm, or an individual lawyer.

The first step in deciding whether to obtain separate counsel is the client's ordinance. What procedure is called for? What role is defined for the legal advisor by the Ordinance? What arguments do you create for opposing counsel with the introduction of another lawyer into the mix? The fact remains that your quasi-judicial board needs your advice and counsel. Or at the least, the advice and counsel of someone with a law degree. The application of facts to law often requires at least some discussion of the interpretation of the applicable ordinance, statute, or case precedent. I try not to leave such matters to persons with access only to Google.

2. So, you decided you should hire outside counsel. How do you determine who should be retained?

Now that you made the initial decision that you should get outside help, how do you pick who to retain? That, after all, is the point, right?

Expertise and the ability to work with the lawyer you pick should be part of the criteria. Those pieces are so much part of the choice, they are cliché. But think about what cliché means. How many times has the foolish husband, who is working hard but not quite making it and is angry at the world, been part of a TV situation comedy in the last sixty years? When Ralph Cramden and the *Honeymooners* arrived on television, it was new and untried. The trope has reappeared over and over because it continues to be true and works, in comedic terms. Clichés exist because they are, at least in part, true and workable understandings of reality. Your outside lawyer must be someone you trust and whose expertise suits the challenge faced by the client.

What other qualities are important or necessary or nice-to-have?

A sense of urgency should be near the top of the list. If, in establishing boundaries and reporting (discussed further below), you ask to review documents before they are filed, you don't want to receive those documents at lunchtime when they are due to be filed that day by 5:00 pm. Your deadlines and requirements should become your lawyer's.

Similarly, a willingness to collaborate may be important. While the client is the same for both of you, as the general counsel for the client, your wishes are entitled to deference, if not preference. In this role, the city or county attorney serves two roles, first as lawyer and second as agent for the entity in the control of the legal matter being litigated. Given that those two roles are inextricably intertwined in dealing with outside lawyers, the city or county attorney should expect that its opinion of the matter is entitled to weight and (to some extent anyway) deference.

Deference can be a dangerous thing, however. Undoubtedly, if the same firm is not engaged over and over for similar matters, the repository of information on the global position of the city or county's other matters lies with the city or county attorney. This tactical choice enhances and strengthens the position of the city or county attorney, but like the lawyer who represents himself, there is questionable utility for the lawyer who only ever listens to himself.

Finally, *gravitas* can be an important consideration. Remember when the baby-lawyer asked why her team couldn't compete for the "bet the company" type of litigation? Well, the same rules occasionally apply to public entities. There may not be a bankruptcy pending if the litigation is lost, but the harm to the client may still be substantial, either in terms of absolute costs (decreased financial rating or large pay-out in damages), or in terms of damage to reputation and standing in the larger community. In such situations, selecting a lawyer who, either personally or by association with a particular firm, carries significant legal stature may be advantageous.

But it can also be dangerous. Several years ago, a metro Atlanta school district hired the Atlanta-based national law firm King & Spalding to represent it in a construction dispute. The firm entered into a split fee agreement with the school district, charging both an hourly and a contingency fee for the representation. After accruing $17 Million in fees over 5 years in the litigation, there was a potential pay out of another $19 Million if the suit proved successful. The trial court agreed

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that the contract appeared unfair, but said the issue of fairness was between the law firm and the client, not for the court to pass judgment on.[2]

As that story reveals, the choice of a firm with the power and heft to litigate a substantial matter may come at a price. That price might not be measured solely in dollars (though substantial), as the law firm providing general counsel duties (ostensibly for other reasons), the Superintendent, and most of the School Board are now different than they were at the time the litigation was initiated. There are many experts available, and not every expert is the right fit for the situation. Cost, expertise, staffing choices, and a host of other not strictly legal considerations go into the analysis of who is the right choice for the particular case in the particular circumstance.

Supervision and Establishing Expectations

Setting boundaries is always important. We have to train our clients when it is too late to call or text and expect an immediate response.

Boundaries are just as important to your outside counsel. You will no doubt receive a retention agreement or engagement letter from the lawyer you hire. That will establish your lawyer's expectations. What about yours?

As Chief Legal Officer, you are the legal face of the City. As Professor DeMott describes it, the Chief Legal Officer is the purchasing agent for the client entity.[3] Regardless of your perspective or role, you have the right to expect that lawyers working for the City keep you abreast of events in the matters they are working on. If they are retained by an insurer, you have the right to know what they are telling the insurer.[4] Regardless of who selects or hires the outside lawyer, you are entitled to be able to speak cogently when an elected official asks you about the status of a transaction or a piece of litigation.

I typically send a responsive letter to the engagement document. I outline what I expect and how often I expect it. If the matter is of interest to the media, I make sure the lawyer knows that. If there are issues with public perception about the matter, I communicate that as well. I try to make sure there are no surprises on either side of the representation. What is expected and communicated should, in the end, be mutual.

Here is how I establish the *quid pro quo* between me and outside counsel:

(Notice that the copies requested are all electronic. I do not have the time, space or staff to file paper copies of every matter referred to outside counsel.) The reasons for these requirements were learned over the years and from some embarrassing experiences. Here is just one of those cases from about 15 years ago:

I was defending a pair of cases arising out of the same incident on behalf of a South Georgia community. One case was filed in state court; the other in Federal court. We tried the state court case first and hung the jury 10-2 in our favor. The state trial judge was ready to tee things up almost immediately, but we were also specially set for the Federal trial within a couple of weeks. Before jury selection was complete, the seven-figure-plus demand came down to the low six figures. We had spent a week in trial with three days of deliberations in the state court case only to have to do it all again. The federal trial was not expected to be any shorter or less difficult.

I called the insurer and passed along the new demand. I did not, much to my later embarrassment, call the County attorney and let him know what was going on. Over the course of the next four hours, we were able to resolve both cases, largely (from the insurer's perspective) for what it would cost to try the two cases again. I packed my bags and headed for home, thinking I had done a good job for my clients but sorry not to get to try the case.

The next morning I got a call from the County Attorney. The settlement had hit the paper and the electeds were appalled, including the Sheriff (who I was told was particularly angry) (in Georgia, the county Sheriff's office is created by the State Constitution, a position that the Georgia Sheriff's Association guards like Beefeaters guard Her Majesty's Crown Jewels). I explained what happened, the insurer's analysis, and my repeated recommendations that the cases were winnable (it was an excessive force case and each Plaintiff had testified that during the alleged beatings, none of the officer said anything to any of them. Our expert, a retired FBI agent, was prepared to testify that no excessive force case ever occurs without some evidence of taunting or statements by the officers in an effort to trigger a response from the arrestee to allow more beating). What I failed to do, despite knowing better and having regularly kept the County Attorney informed on all of my other reports and discussions about the case, was call him and let him know what was going on. I broke the fundamental rule of representing public entities: do not let electeds get surprised by something you did that appears in the newspaper.

Set your expectations early. Adhere to your expectations. Yes, you will have to pay for some of those expectations, but that is a small (relatively speaking) price to pay to make sure your client is apprised of all relevant information and documentation.

OUTSIDE COUNSEL EVENT	MY EXPECTATION
Monthly Billing	Status Report and Plan for the next month
Any document sent to opposing counsel	An electronic copy
Communication with opposing counsel	An electronic copy
Initial evaluation report (for insurers)	An electronic copy
Communication regarding settlement	Addressed to me/ Phone call to me
Review of documents to be filed	Depends on matter
Any document that is filed	An electronic copy

Pitfalls, Pratfalls, and Other Lessons from the Trenches

1. When "We're going to win" becomes a frantic "We've got to settle"–or No Matter What, It's Still All About You

A colleague hired a trial lawyer with stellar credentials and many years of experience and trials to verdict to represent a public entity where my friend was the County Attorney. The trial lawyer was with a well-known national firm. The matter was a personal injury case

involving a collapsed roadway.

For months, the reports arrived regularly identifying and extolling the absolute defensibility of the case. No surprises. No issues. Discovery proceeding according to plan. No surprises in discovery.

Then a trial calendar arrives. All of a sudden there are immediate, repeated, and often frantic calls for settlement authority. The County Attorney then calls his Board Chairman and asks that an executive session be scheduled for the next work session. Upon arrival the County Attorney presents the most recent report and asks for settlement authority as suggested by trial counsel. The Board Chairman responds, "*You've* been telling us for months this case is winnable and now you want settlement authority?"

Note who is addressed. It is not the Trial Lawyer. It is the County Attorney. There is no distinction between National Firm lawyer and the County Attorney. They are the same person. The only person on the hook for this change in position is the local lawyer.

The lesson from this experience is two-fold: (1) Make sure that who you hire to try your cases really wants to try your case; and (2) The messenger always dies (maybe not literally, but at least figuratively).

Trying cases is not for everyone. It is strenuous and challenging work. Personally, I love trying cases. There is no more perfect forum for learning the craft of advocacy than a courtroom. But not all lawyers feel that way and even some dedicated trial lawyers no longer want to try a case.

Regardless of who you hire, the City (or County) Council knows its lawyer is you. When your message changes without sufficient notice and explication, you get blamed. It does not matter that you are relying on outside experts and lawyers. The message is yours. I tend not to wait on a face-to-face opportunity to deliver bad news. I get it to the client as early as possible, preferably in writing. I then follow up with individual phone calls with each elected official to make sure they have their questions answered. What changed? How did it change? Why did it change? When did it change? Answer those questions early and often to mitigate the effect of a changing situation on the messenger.

2. Who You Hire May as Well Be You OR It's Still All About You

You are the lawyer your electeds know. You are the one who has worked for months, years (decades?) to establish a rapport and a level of trust with your Board or Council. In a world where lawyers are seen as slightly more desirable than pond scum, you are (hopefully) the exception that proves the rule.

And let's face it: Being a defendant in a lawsuit makes it personal. Therefore, as far as the people who make up your client are concerned, no matter who the actual lawyer is, the lawyer they rely on is you. And who you hire as outside counsel is equated to being you.

Early in my career, I had City Managers decide who they wanted to hire. This rarely worked out well because many of those lawyers would be after my client to retain them for the general counsel work for my client, or perhaps had even interviewed or responded to an RFP for the work I was doing. This led to suspicion and challenges in understanding what the outside lawyer was doing and whether he/she was looking for something to create a wedge between me and the client. This didn't happen often, but it became a risk that I was constantly on the look-out for.

Nonetheless, the client still equated these lawyers with my office and the advice I provide. When they failed, or appeared unprepared, it may as well have been me who failed or was unprepared. This is what I call the "No good deed goes unpunished" rule of representing local government.

If the need for outside counsel is based on a legal conflict, the need is obvious and the result is somewhat different. There is a natural disconnect between the lawyer and the City/County based on the existence of the legal conflict. Nonetheless, depending on the reason for the conflict or who the conflicted officer or official is, the City Attorney will likely still need to receive reports from someone involved in the litigation in order to keep the entity (whoever or whatever that may be) apprised of the progress of the case. Remember, we exist, at least in part, to make sure elected officials do not get surprised by events in the paper.

3. Who gets to make the decision about WHO to hire?

Most of this article assumes that the decision whether to hire outside counsel is a conversation between the City/County Administration and City or County Attorney. Perhaps the Mayor or the Chair of the County Governing authority may be involved. If there is a need (for whatever reason) for outside counsel, the governing document for the City/County may offer guidance on the role or responsibility of the City Attorney.

The Charter of your city or county may also provide a basis of control. Most of the Charters I have worked with designate the attorney as Chief Legal Officer and require her to appear and represent the client in all litigated matters. The language provides at least an argument (if your city manager won't agree) that the lawyer gets to pick the lawyer. But that may not be enough. Besides, arguments with clients over the niceties of Charter language are some of the fastest ways out the door from that client.

The Model Retainer Agreement recommended by IMLA, many of whose terms I have adopted in my own agreements with clients, provides that ultimately the choice of outside counsel lies with the City orCounty Attorney. In truth that may be the single most important provision of my agreement, beyond the amount of the retainer or the hourly rate for matters outside the retainer. When the contract language is coupled with the language from your Charter, the arguments tend to fall by the wayside, resolving the question of

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De-"coding" the Landscape Cont'd from page 11

2. *See id.*
3. *See* Wulfsohn v. Burden, 150 N.E. 120 (N.Y. 1925); see also Newman F. Baker, Aesthetic Zoning Regulations, 25 Mich. L. Rev. 124 (1927).
4. *See e.g.* Central Hudson Gas & Electric Co. v. Public Service Commission, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion).
5. Christina Chloe Orlando, Art or Signage?: The Regulation of Outdoor Murals and the First Amendment, 35 Cardozo L. Rev. 867, n. 21 (2013) citing Alan Weinstein, Legal Issues in the Regulation of On-Premise Signs, in Context-Sensitive Signage Design 119, 119-120 (Marya Morris et al. 2001).
6. *See e.g.* Pennsylvania Land Trust listing of the types of communication and types of media aid covered in sign ordinances (http://conservationtools.org/guides/50-sign-ordinance).
7. *Id.*
8. *Id.*
9. *See e.g.* https://www.dos.ny.gov/lg/publications/Municipal%20Control%20of%20Signs.pdf
10. Christina Chloe Orlando, *supra note 5.*
11. 900 F.2d 551, 555-56 (2d Cir. 1990)
12. 506 F.3d 886 (9th Cir. 2007)
13. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(plurality decision).
14. 453 U.S. 490, 507-08 (1981).
15. United States v. Carolene Products Co., 304 U.S. 144 (1938).
16. See FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).
17. *See* Central Hudson Gas & Electric Co. v. Public Service Commission, 447 U.S. 557 (1980) (commercial speech; Court adopted a four-part balancing test, less than strict scrutiny, but more restrictive than rational review and appears to be an intermediate plus standard;); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (speech in public forums); United States v. O'Brien, 391 U.S. 367 (1968) (content-neutral speech laws); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ("erogenous zoning" restrictions affecting speech).
18. Edenfield v. Fane, 507 U.S. 761, 770 (1993).
19. *See* Bowers v. Hardwick, 478 U.S. 186 (1986), contrast to Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Witt v. Department of the Air Force 527 F.3d 806 (9th Cir. 2008).
20. Granite State Outdoor Advertising, Inc. v. Clearwater, 213 F.Supp.2d 1312, 1327 (M.D. Fla. 2002), affirmed in part and reversed in part, 351 F.3d 1112 (11th Cir. 2003).
21. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(plurality decision)
22. *Id.* at 493
23. *Id.* at 570
24. 607 F. Supp.2d 1326 (M.D. Fla. 2009).
25. *Id.* at 1331.
26. *Id.* at 1331-33.
27. 680 F.3d 359 (4th Cir. 2012).
28. 447 U.S. 557, 561 (1980).
29. 533 U.S. 405, 409 (2001) (emphasis added).
30. 186 Ohio App. 3d 558, 564-65 (Ohio Ct. App. 2010).
31. Id. at 573.
32. *Id.*
33. 644 F.3d 728 (8th Cir. 2011).
34. *Id.* at 736.
35. Id. at 732.
36. Id. at 736
37. Id. at 738.
38. 607 F. Supp.2d 1326, 1334 & fn. 9 (M.D. Fla. 2009). *See also* Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782 (Or. Ct. App. 2011) (holding that distinctions between "painted wall decorations" and "painted wall signs" constituted impermissible content-based restrictions).
39. 226 F.3d 1214 (Colo. Ct. App. 2009).
40. Id. at 1219.
41. Id. at 1220.
42. 893 F. Supp. 589 (D. S. C. 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998).
43. 2017 WL1226913 (S.D. Cal. 2017).
44. *Id.* at *2, 6.
45. Id. at *5.



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control and responsibility in favor of the City or County Attorney.

Early in the representation of a local government, my City Manager decided she was going to choose who represented the City in a litigated matter. There was no consultation nor any discussion about who would perform the services. The whole episode was about control and establishing a pecking order, and to make sure I knew where on that pecking order I belonged. As mentioned briefly above sometimes knowing when not to fight is often more important than knowing when to fight (see *The Art of War*, Sun Tzu, quoted in Sun Tzu's 31 Best Pieces of Leadership Advice, 15.1)[5], and I elected not to take that battle on at that time.

Conclusion

Recognizing the need for, then selecting and supervising outside counsel can present a challenge to the City or County Attorney unlike most of the challenges faced on a daily basis. Even when supervision of other lawyer employees is part of the daily routine, supervising peers or lawyers who may have more experience than you or have expertise that far exceeds yours in a particular area can be challenging in the best of times. If the lawyer you hire knows more than you do about employee benefits, how do you know you are getting good advice? However, if you can truly evaluate the advice you receive, why did you need the expert in the first instance? It becomes a bit of a Sisyphean task to ask for, much less receive, quality advice when you need it, if that becomes the standard against which you measure the choices.

1. goo.gl/SHm65Z (last accessed August 31, 2017).
2. (goo.gl/A5b5s5 (last accessed on August 31, 2017).
3. See link *supra* and text accompanying note 82.
4. *See, e.g.,* Bank of America, N.A. v. Superior Court of Orange County, 212 Cal. App. 4th 1076 (2013).
5. Forbes.com (May 24, 2014) bit.ly/2grzmSt (last accessed August 31, 2017).