INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
2015 Annual Conference
Las Vegas, Nevada

Work Session IX

The Role of Outside Counsel - The need for specialization in ever increasing complex legal situations. How can this relationship be managed to meet expectations, what are the benefits and pitfalls in such relationships.

Gary R. Alexander
Attorney
(Admitted: MD, DC, VA, and FL)
Law Offices of Alexander & Cleaver
54 State Circle
Annapolis, MD 21401
410-279-1008
galexander@alexander-cleaver.com
www.alexander-cleaver.com

©2015 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2015 Annual Conference, held October 3-7, 2015 in Las Vegas, NV. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

I gave a lot of thought to this topic and this paper. I researched guidelines, articles, and studies on the question of retaining outside counsel -- how to avoid pitfalls -- practical suggestions. I kept coming back to my own experience as a young attorney -- recently appointed as People's Counsel to the Maryland Public Service Commission -- an independent consumer advocate state government position that represents residential ratepayers before that agency in all utility cases. Back then, the People's Counsel Office was small and part-time, but still had a budget to hire attorneys and expert witnesses in lengthy and hard fought electric, gas, water, and telephone rate cases. To make a long story short -- I retained an expert to prepare testimony on telephone rate design in my first case (of many more to follow). I got a written recommendation from the Chair of another state Public Service Commission and some others. Proudly, I had the "expert" take the stand, and after five minutes of cross by the phone company attorneys exploring his overly puffed up resume the Chair called me into his office: "Young Man, either withdraw this guy and his testimony, or we will have to do it ourselves!" I ended up withdrawing his pre-filed testimony and recouping from him what the State had paid him.

Afterwards, I presented an annual award named after this "expert" at the Commission Christmas party to the Commissioner or Staff member to have the biggest screw up during the year. 1

It only took one incident -- and even after 40 years, this traumatic experience has stayed with me, and has guided my approach to every type of selection I have made since: attorney, employee, witness, spouse, you name it! The process of selecting and managing the employment of outside counsel is much more complex than my "less than expert" witness example. The need grows for more "specialists" in the ever growing complex legal demands of litigation, transactions, ethics, and other subjects that government attorneys must deal with on a daily basis; and I know that for most of you, the politics of your position doesn't get any easier either. How do you find, manage, and control an outside attorney that you want to think like you do? How can you find the legal help you need on budgets that never prioritize legal work or lawyers? How can you ethically resolve the political, legal, and fiscal problems of a multiple defendant law suit? I know there are many more questions like this. Unfortunately, I don't have any specific answers. This paper may provide some help on process or selection criteria, but in the end, your common sense and experience will win or lose the day with the outside counsel you choose.

There is also pressure from any number of sources to factor in for the selection of outside counsel. For example, at last year's IMLA Conference in Baltimore, long-time Baltimore City Solicitor, George Nilson, presented a paper on reimbursement for private legal expenses to public employees. George is a long time well respected colleague, known for "saying it like it is" put it bluntly:

'TURNING NOW TO THE SIMPLEST AND PERHAPS MOST FREQUENT QUESTION FOR GOING PRIVATE -- THE CLIENT SIMPLY SAYS I WANT THE BEST, THE MOST PRESTIGIOUS, OR MOST SYMPATHETIC LAWYER TAXPAYER MONEY CAN BUY FOR A PARTICULAR JOB."

My bottom line was that it always was a special honor to represent government, and I wanted to feel that I more than paid for my advice and counsel if whoever hired me felt they received good value for my services.

Outside Counsel – You're a Partner!

Over the years after representing State Attorneys General, state and county government, and municipalities, I can tell you that from the outside counsel side, it's sometimes not easy either! Many call the relationship a "partnership" and essentially that's what you are getting yourself into. That partnership must be carefully managed and afford opportunities for a full and free exchange of ideas. 2

What is the "partnership" goal you want to achieve? A close working relationship: cooperation, collaboration, coalition, connection, alliance. 3

Much of my personal experience as outside counsel to government has centered around legal work in public utility and energy matters. Today, both challenges and opportunities for government are vastly different from the "old" days of regulated rates and fossil-fired generation. In many places government can now manage its supply and cost for energy by buying electricity and natural gas in the competitive market place. Government today can meet other policy and societal goals by building, operating, and maintaining its own sources to generate power – solar, wind, geothermal, waste to energy. Every year the new technology list gets longer. Negotiating a long-term purchase power agreement, or intervening in various cases before state or federal regulatory agencies, evaluating the energy market place for contracts and opportunities – there are many opportunities for the advice and counsel of outside representation.

Corporate Counsel Comparison

The corporate world also has to deal with the "who", "when", "why" and "how much" to address the need for outside counsel, and some of that private sector advice is helpful. A 2013 article from the ABA Section of Litigation sets forth selection guidelines for choosing outside counsel:

- "contacting referral sources, such as friends, outside corporate counsel, classmates, or other in-house counsel that can recommend capable litigation counsel;
- consulting lists of attorneys available in print or online media, such as Martindale-Hubbell, FindLaw, or Who's Who;
- whether to hire a small, medium, or large firm;

- what qualities and attributes appropriate litigation counsel would possess;
- whether to interview prospective outside counsel or hold a beauty contest." 4

The Association of Corporate Counsel has assisted its members by recommending "Best Practices" when the need arises to hire Outside Counsel.

Two considerations of importance are:

1) Defining the objectives of representation in the choice of counsel up front -- what exactly are we going to want from outside counsel?

- "Fight because we did nothing wrong;
- establish precedence;
- preserve goodwill with employees/customers/vendor;
- quick resolution;
- minimize attorneys' fees/ avoid drain on in-house resources."

2) And what qualities are important to look for from outside counsel?

- "Analysis of issues;
- knowledge of the law;
- knowledge of recent settlements;
- listening; persuasion (convincing fact finder or negotiating ability;
- style (Big Bully vs. Gentle Giant, client sensitivities)." 5

Other Outside Counsel Guidelines

One study points to the lack of uniformity and the complexity of specific state, municipal boards, and commissions involved in just one state's look at contracting for outside legal services. 6

In 2001, the Louisiana Bureau of Governmental Research (BRG) studied and issued a report on legal services contracting across the state. With 302 municipalities then allowed to employ special counsel "should the occasion require" or "in the case of extreme necessity," no specific procedures were specified. Home rule municipalities, parishes, boards and commissions, School Boards and State entities were also utilizing outside counsel. The BGR report recommended the use of written contracts, a cost benefit look at whether more in-house counsel would be a better choice, an evaluation system, and the use of comprehensive written policies and procedures for selecting and managing legal services contracts. 7

Contrast those very general lack of specifics with the lengthy guidelines for selection and management of outside counsel presented by my panel colleague G. Foster Mills of the Law Department of the City of New York.

The League of California Cities established a handbook to assist municipal attorneys that includes a chapter on 'The City Attorney and Outside Counsel". 8

The handbook covers topics such as: "Avoiding improper Grounds for Hiring or Firing Outside Lawyers; Develop and Use Standard Contracting Procedures; Billing and Other Practices of the Outside Firm; Confidentiality of Records of Outside Counsel". There are a number of interesting "Practice Tips" such as: "If pressure is being exerted by a council member or city manager to fire or stop using a lawyer or law firm that is performing in a satisfactory manner, and the city attorney senses that it is because they are not viewed as a member of the "right" group, the city attorney should indicate that the matter is being handled appropriately. Further, the city attorney should advise them ..... they cannot make those types of decisions based on illicit reasons, such as those related to race, national origin, sex, sexual orientation, religion, age, or disability." 9

There is no escape from the duty of the city attorney to manage the outside counsel including reviewing bills, pleadings, correspondence, regular updates, and the engagement agreement should make it clear: "that the city attorney is in charge of all legal services and tactical decision-making. The City Council and city manager should also understand that the city attorney must have the discretion to control the manner in which litigation or other legal matters are handled, and that appropriate oversight is being exercised regarding the firm." 10

Other Selection Guidance

We can learn from the Federal Government that also attempted to study and address the complexities of hiring outside counsel. One 1985 report on the hiring of private attorneys noted then that while more than 20,000 lawyers were federal employees, the government still spent millions on "private attorneys to provide diverse legal services". 11

While cost, procurement, and other aspects of retention of outside counsel were addressed, preeminent importance was attached to the unique constitutional vesting of governmental authority in "officers" of the United States requiring "close control" in litigation". The report stressed that while the price of the services should not be the sole test of cost effectiveness, the benefit to be gained and quality of the services are also important criteria. Among the ten listed recommendations, the Report stated: "Each agency that anticipates a need to hire private attorneys should prepare written public guidelines detailing:

(a) The criteria for deciding whether or not to seek outside legal assistance,
(b) the factors relevant to the choice of attorney or firm,
(c) the procedures for procurement,
(d) appropriate limitations on counsel's authority,

(e) conflict of interest and other ethical considerations,
(f) billing practices, and
(g) procedures for review of fees." 12

In-House Challenges

The role of outside counsel can also be helpful when legal issues arise between elected officials within the municipality. I will label these internal issues as "in-house." For instance, a host of major issues can arise during elections. Challenges to an election can cause personal and ethical nightmares for staff counsel if there is no clear direction in your charter on how to resolve the issue. In most instances, staff counsel has established relationships with members of the local government which further complicates the matter. Developing personal relationships with clients is always a risky proposition for attorneys, but many times it is inevitable -- particularly when local government representation spans many years. The legal advice provided could impact the political future of someone regarded as a friend. In order to avoid the perception of bias, and salvage your working relationships going forward, it may be wise to engage outside counsel to wield the legal hatchet if necessary. This is the prudent thing to do on many different levels. In many situations, especially election disputes, perception is reality with voters. The government attorney is often placed under the microscope in these situations. Accordingly, retaining an experienced attorney as outside counsel solves a multitude of problems associated with in-house disputes or contested elections.

Likewise, another in-house issue that often arises in local governments are ego-driven tussles between the executive and legislative branch, such as significant disputes between a mayor and council. These are often nasty affairs that can disrupt good government for weeks if not resolved expeditiously. A dispute over one issue inevitably bleeds into other routine issues, due to anger, politics, or hurt feelings. One example was the dispute between the mayor and City Council of Bluffdale, Utah some years ago. As reported in the *Desert News*, disagreements over the mayor's management style, treatment of staff and councilmembers, and alleged disregard for city policies and procedures led the Council to strip the mayor of her administrative powers. 13 While there is no evidence of egos being involved, this dispute was so severe state senators were brought in to mediate the dispute. Most local governments would not have the opportunity to bring in such high-powered mediators to assist. Most likely, dispute resolution will fall to staff counsel. As most of you know, we could discuss many, many such in-house disputes that have occurred with all sorts of fact patterns, disputes, and litigation. Again, issues like these put staff counsel in a no-win situation if asked to intervene because there is typically no answer that will placate everyone. Perfect legal advice on the issue will not be enough to extinguish a blazing, ego-driven political inferno. Inevitably, you are left to deal with one or more members that are dissatisfied with your advice. This presents

another opportunity to engage outside counsel to help resolve the issue with no political strings attached.

As these examples demonstrate, engaging outside counsel to handle in-house disputes and issues can be a practical resolution. Outside counsel will be free to provide advice and guidance hopefully without his/her judgment being clouded by interpersonal relationships, threats of reprisals, and/or charges of favoritism.

Who is the Client?

Another challenge for both the government counsel and the outside counsel in many cases is to determine who the client is. Can one lawyer simultaneously represent both the city and some of its employees? What is the role of the lawyer who is paid for legal services from one source, but represents a different person? ABA Model Rules, State Bar Rules, statutes, court decisions, and ethics opinions may contribute to a minefield for both the government attorney and the outside counsel accepting employment.

One interesting "Private Practitioner's Perspective" on these questions and discussing the proposition generally in Oklahoma "to retain or not to retain"--concludes: "It is often said that two heads are better than one. In the representation of multiple defendants, it may be that two lawyers are better than one, and, even if not necessarily better, two lawyers may be required." 14

Special legal and other questions arise in the rapidly growing number of contingent fee private law firms representing government. Government entities in California and others have been particularly active in such cases against the lead paint industry, opioid drug manufacturers, and many more. We could spend several seminar days just reviewing and discussing all the litigation and questions that have been raised on outside counsel representation in such matters and the payment to them of contingency fees. Environmental special counselors are bringing remedial lawsuits on behalf of government for environmental cleanup, cost recovery and natural resources damages. 15 From Tobacco litigation to today's "Big Chicken" suits, and even "Big Climate" lawsuits – a steady stream of never ending creative approaches to litigation that will surely increase the need for specialized outside counsel for those government entities that decide to participate. 16

We have reviewed some of the threshold questions involved in retaining outside counsel to represent government and individuals connected with government. Pitfalls and problem areas exist, but with careful investigation, planning, proper management, and control, you are much more likely to achieve your goal -- a working partnership with outside counsel that results in a successful outcome for the client.

1. See the Patrick J. Casey Memorial Award, 1974-1984, presented annually by the Office of People's Counsel to the Maryland Public Service Commission to the biggest Commission or Staff mistake of the year.

2. A Guide to Partnering with Outside Litigation Counsel, by Harry Payton, ABA Section of Litigation, Corporate Counsel, February 13, 2013

3. Webster's, New World College Dictionary, 4th Edition

4. See Guide to Partnering to Partnering with Outside Litigation Counsel, op. cit.

5. Association of Corporate Counsel, 2003, "504: Best Practices in Hiring Outside Counsel, Michael R. Booden, et al.

6. Legal Services Contracting at the Local Level, November 2001, Bureau of Governmental Research, Louisiana.

7. Ibid, p. 11

8. League of California Cities, "Practicing Ethics: A Handbook for Municipal Lawyers, 2nd Edition, 2004, 2014, Chapter 6.

9. Ibid, p. 34

10. Ibid, p. 35

11. Hiring of Private Attorneys, Administrative Conference of the United States, Recommendation 87-3, Adopted June 11, 1987).

12. Ibid, p. 3

13. Jared Page, "Mediation Sought in Bluffdale Dispute," *Desert News*, February 27, 2007

14. "Retaining Outside Counsel-- The Private Practitioner's Perspective", Andrew W. Lester, Lester Loving & Davies, P.C. Edmond, Oklahoma 73013).

15. Vol. 51, Santa Clara Law Review, Julie E. Steiner, 858

16. Ibid, p. 858