

Legal Services for Municipalities

All cities and towns have occasions when the need for legal services arises. For some in local government, a conversation with an attorney is an event that occurs almost every day. For others, a call for legal advice is periodic and prompted by town meetings, major decisions or questions on the interpretation of law. In any case, there are considerations and options for municipalities when determining how to structure a relationship with legal counsel.

Evaluate Need. The first step in the process is to assess your community's level of need. This is best accomplished by reviewing and analyzing invoices for legal services over prior years. Basic information to extract includes the hourly rate and payment amount, billable hours, a description of the service provided and the date it was provided. A next step involves anticipating future events that are expected to require the input of legal counsel. Of particular note in both the historical experience and looking forward is use of and need for specialty services, e.g., from labor lawyers, real estate lawyers and litigators. In many instances, in-house or contracted municipal counsel is expected to provide these services as part of its regular hourly rate.

Organize Data. Payment detail customarily resides in the municipality's financial management software and is accessible by the accountant or auditor. The information is most useful if entered into an electronic spreadsheet or data base that allows sorting by department, case, date, etc. It is also possible that the management software can generate reports in the desired format. Note that any absence of payment detail in the financial system suggests that the community may not be receiving the information. This represents a deficiency in the community's contract with its legal counsel and should be corrected.

Consider Relationship. The projected volume and scope of future legal services can help a municipality determine whether to create an in-house staff position or enter a contractual relationship. The staff position might be full or part-time, require office space, benefits and possibly administrative support. Potential advantages are that legal advice is immediately at hand, responses may be provided more timely, costs are reasonably certain, and the attorney would have a fuller understanding of the specific needs of the municipality. However, if legal issues are beyond the expertise of the staff attorney, the municipality can expect to incur additional costs for special counsel.

Contracting with an individual attorney raises similar issues, but without an on-site presence, although limited office hours in town hall or city hall might be negotiable. A shared full-time position, with benefits, with another community might also attract a qualified attorney at a cost savings. Alternatively, a multi-service firm is likely to have sufficient resources to provide the full range of legal services. Representation is remote and unless the municipality is assured the services of an attorney of choice, various other lawyers or paralegals might handle the municipality's business. This might also be a higher cost option as the firm's overhead will be built into the fee for services.

Solicit Services. Contracts with attorneys are exempt from the procurement requirements of G.L. c. 30B, meaning neither fee quotes nor requests for proposals are necessary to solicit legal services. However, a prudent course is to issue a request for qualifications (RFQ) on the State's Central Register and through other outlets, such as statewide legal publications, municipal professional associations and newspapers of statewide circulation, in order to cast a wide net for appropriate responses. The municipality's current legal counsel should not participate in the drafting of the RFQ, since that would pose a conflict of interest. The RFQ should request, without limitation, such information as experience providing municipal legal services, attorney biographies, and significant court cases pertaining to municipal law. Respondents should provide a certificate of insurance denoting coverage limits for general liability, workers compensation and malpractice; and a list of municipal clients served by the firm, in order to research client satisfaction. Pertinent financial information including hourly rates, costs and expenses should be required and may be submitted in a separate envelope. Through an RFQ, a municipality can set, in advance, its performance expectations and score responses from multiple firms or individual practitioners. Each candidate must be evaluated according to the same, predetermined scoring system.

Attracting the most qualified candidates to an in-house staff position starts with an accurate job description and a realistic salary. An open hiring process must then conform to personnel ordinances, bylaws or policies. Cities, more often than towns, employ a staff attorney (a city solicitor), or even a multi-lawyer legal department.

Select Fee Basis. Compensation for legal counsel under contract, regardless of how calculated, must be on a pay-as-you-go basis. Agreement on an hourly rate is the norm, but it is possible that a flat fee might be negotiated in the instance of a narrowly defined assignment. Expect to provide reimbursement for travel and all out-of-pocket costs. Like any

other municipal expense, an invoice for payment is submitted, reviewed by the accountant or auditor, and approved on a warrant.

Not permitted is a retainer arrangement where the municipality pays a pre-set monthly amount, in advance, to the attorney or law firm, which then charges against the retainer at the hourly rate. This practice violates G.L. c 41, §56 which prohibits payments by municipalities before services or goods are actually received. Exceptions are only allowed by special statutory authority. This prohibition, however, does not prevent the accountant or auditor from encumbering anticipated pay-outs under an executed contract for legal services.

Establish Contract Terms. State law does not authorize a municipality to enter a personal service contract with in-house legal counsel. Like other employees, his or her compensation and benefits, if any, are appropriated in the line item budget and represent a one-year obligation. Duties and responsibilities are set out in a job description and employee obligations are enumerated in personnel bylaws, ordinances or policies. Contracts for outside legal services are typically provided in draft by the individual attorney or law firm. The agreements tend to be inclusive and relatively straight-forward. However, each community should negotiate whatever terms ensure that local needs are met and that fees are no more than those paid by other municipal clients.

Among other topics, a contract describes included and excluded services; an hourly fee for partners, associates and support personnel; specific out-of-pocket costs; the frequency of billing and invoice detail; and statements pertaining to client property. It addresses termination, conflicts of interest, indemnification clauses and recourse to resolve fee disputes and malpractice claims. If a conflict of interest arises, the municipality must be prepared to retain additional counsel to cover for the attorney with a conflict. A certificate of insurance denoting coverage limits for general liability, workers compensation and malpractice must be attached. The contract must specify that disputes are resolved under the jurisdiction of the laws of the Commonwealth of Massachusetts, in court or by arbitration.

Manage Legal Services. Whether provided by in-house counsel or under contract, legal services must be managed. Among key points, lines of communication must be clear. In cities, the city solicitor should report to the mayor and, in towns, in-house counsel is best treated as a department under the jurisdiction of the town manager, town administrator or, if none, the selectmen. If counsel is on staff, access is not a significant issue. However, when a municipality contracts-out for its legal services, cost control warrants attention. Employee access must run through the mayor's office, town manager, town administrator or the select

board chair. That person is also the designated contact for outside counsel. One option is to utilize a Request for Legal Services form to be submitted by anyone seeking access to counsel. If approved, the local designated contact may submit it to outside counsel. It is worthy of note that, under G.L. c. 41, § 26A, the board of assessors may employ legal counsel at the expense of a town that does not employ in-house counsel for matters pertaining to G.L. c. 58A and under G.L. c.71, §§ 37E and 37F. A school committee is permitted to retain its own legal counsel; and in some cities, the city council hires the city solicitor. Otherwise, unless a department has a budget line-item for legal services, it is precluded from engaging an attorney to represent its interest.

When determining whether to consult counsel, it is important to distinguish between matters of legal substance and matters of policy, which are not within the purview of counsel. Also, a process for annually evaluating the performance of counsel is advised. This involves a municipality's satisfaction with responsiveness, quality of the work and professionalism. Critical to this process is invoice detail. The municipality must insist that invoices for payment be submitted on at least a monthly basis to ensure the legal budget stays on track. Invoices must identify billable hours, the person expending the hours, the date of each service, his or her hourly rate, work completed, and municipal official contacted, if applicable. Further, a municipality benefits if it maintains a number-based, legal document filing system. If all correspondence, opinions, emails and other legal materials are also listed in an electronic format, then following case threads and searches are simplified. Lastly, the municipality must manage its contract for legal services to ensure that all obligations are met.

(The content of this article is drawn in part from the 2010 report entitled "Independent Review of Legal Services" completed for the Town of Nantucket by Financial Advisory Associates, Inc., Michael Daley, President. Attorney John Gannon, DLS Bureau of Municipal Finance Law, also contributed to this article)