

THE ART AND SCIENCE OF MANAGING LEGAL SERVICES*

by Leonard Kopelman

Your town counsel or city solicitor works for you. This statement is obviously true, but, in practice, many communities take a far more laissez-faire approach to the management of their legal counsel than to other individuals or firms that work for them. The situation is understandable: counsel possesses highly specialized knowledge and skills; sometimes municipal counsel has held the position for many years and seems more firmly entrenched in local affairs than the chief elected officials; and, finally, there is the fairly common view (fostered, in part by some legal practitioners) that “your lawyer knows what is best” and that the client should not be overly meddlesome.

Of course, it would not be productive for municipal officials, or clients generally, to substitute their own legal opinions for those of their legal counsel, but there are still a number of controls over counsel that must be exercised. The need for aggressive management of legal services will become more pronounced in the future because of increasing municipal litigation and the growing complexity of public life.

Your lawyer really does work for you and this means his or her activities should be subject to the same management controls as others. You have the right, indeed the responsibility, to monitor how much time counsel devotes to particular matters and to tell him or her what should be the highest priorities. There is no impropriety in insisting that legal work be performed at as low a cost as is practically possible. The chief governing board of the community can demand accountability of its lawyer and should regularly review his or her performance. It can set down operational guidelines concerning records kept by counsel, contact between counsel and other local committees, and routine practices of counsel. It can, and should, insist that counsel not espouse policy recommendations veiled as legal opinions. In short, the relationship between a community and its lawyer is one that must be managed by the political leaders for the benefit of the community. Your attorney should be an expert in municipal law – and there is a big difference between municipal law and municipal policy.

This article will explore some of the ways in which municipalities can make more effective use of legal services.

Politics

Having underscored the role of municipal counsel as a legal expert and not as a local political force, it may now appear contradictory to suggest that a good municipal legal counsel will display political sensitivity. It is no contradiction to say that legal counsel should not take sides in political disputes while at the same time insisting that a

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truly competent municipal counsel understands the political process and understands the particular political forces at play within your community.

Your municipal lawyer, in addition to knowing what the law requires, also needs the ability to react to the personalities and circumstances that arise in a situation. This should not necessarily influence his or her legal opinion, but should influence how their legal opinion is presented. An opinion can be rendered in two ways. In general a short opinion – one that immediately gets to the bottom line without citing many cases – is preferable. If the issue is one that has excited local controversy, though, a lengthier opinion containing the background and legal reasoning may be appropriate. Your counsel should understand what situations call for the efficient opinion and which demand the lengthier one.

Another area where sensitivity is required is when action is being taken in connection with a resident of the community. Your counsel should be a zealous advocate for the interests of the local government, but must understand how important it is for local citizens to feel that they are being treated fairly and courteously by their city or town. In the appeal of a tax bill, for instance, a citizen may be aggrieved because he or she feels that their property has been over-assessed or disproportionately assessed. Your counsel appears on behalf of the Board of Assessors, but you must remember that the community must continue to function with the goodwill of the taxpayers who pay the bill. This means that municipal counsel must not only be an effective advocate, but also a conciliator under some circumstances.

In order for your counsel to be an honest and objective advisor, it would be preferable if he or she did not live within the community. There is too much of a temptation for the weak department heads, the “town nuts,” and the angry one-issue individuals constantly to be at the office of town counsel or contacting him or her at home. Such pressure can sometimes skew your lawyer’s advice and may increase the number of billable hours or retainer for which you will be charged.

Managing Activities

If counsel is constantly in town hall, you will find department heads shirking their jobs and allowing town counsel to substitute his or her judgment for that of the department head. Also, you will find that department heads will ask town counsel all sorts of “what if” questions. These are nothing more than difficult hypothetical questions that cost the town money to answer and may be of no practical use.

Similarly, I believe it is not a good idea to require counsel to be present at all selectmen’s or council’s meetings. First, such meetings are usually lengthy and it will be costly to the community to pay the lawyer for such time. Second, governing boards tend to defer to counsel for advice that is not truly legal advice. It is easy, when a thorny issue comes up that may involve some aspect of the law, to turn to a lawyer and say, “Well, counselor, what do you think?” What is really needed in most cases is a

political decision or a policy decision. It is the elected officials who possess the expertise and the responsibility to make these decisions. I have seen, in any number of communities, a marked change in the decision-making process when legal counsel regularly attends the governing body's meetings. After a few years, it also seems that the lawyer is an ex-officio member of the board. This ultimately hurts the lawyer, the executive body and, more importantly, the community. Third, legal counsel should not be required to attend all board or council meetings because at such meetings the best you will get is an off-the-cuff opinion that may or may not be correct. If you really want your lawyer's opinion, give him or her time to formulate a professional one, making use of the resources in the legal office.

Finally, by having counsel present at board meetings, you lose one otherwise available tactic for delaying a commitment on a controversial issue. When you are handed a hot potato, you can always say, "This is a matter on which we need legal advice. We'll refer it to counsel." You can use your lawyer in this way to get off the hook and provide you with valuable time to prepare a reasoned response.

However, there are some specific occasions on which you should make sure your lawyer is present. For example, he or she should attend hearings at which a licensee might have a license revoked. The lawyer will make sure that the rights of such licensee are observed properly and that the correct procedure is followed to avoid lawsuits against the town if in fact the license is revoked.

The governing board should establish ground rules for communication between legal counsel and department heads and other municipal officers. What is important to avoid is the situation in which any town employee thinks he or she can go directly to town counsel for advice. Too often a town counsel will end up giving advice over the telephone in response to a poorly described situation, and then just a small portion of counsel's advice is discussed at a public meeting. One way to ensure that questions to counsel are well-framed and worthwhile is to require a formal vote to refer a question in writing to counsel by any board or committee. Another way is to require that all legal business be conducted through the manager/administrator. Depending on circumstances, it may be appropriate to authorize direct communications between counsel and a department head regarding a particular problem.

In any event, when an opinion is solicited of counsel, it is best to give him or her as much information as possible. Describe the context in which the question has arisen and cite as many specifics as possible in describing the issue. A copy or summary of all business with counsel should be kept centrally by the chief executive or manager/administrator. You can require your lawyer to keep a log of town business and to send copies of it, along with all written communications, to be kept in the central file. This will enable the chief governing board to determine how much time counsel is devoting to various issues.

Your counsel may delegate certain assignments to another member of his or her firm. This frequently occurs in matters where specialized knowledge is required. Even if municipal officials come in contact with other members of counsel's firm, they should always address their questions and concerns to the individual who officially serves as

the community's counsel. This person knows the strengths and weaknesses of those who work at the firm, as well as their overall workloads, vacation schedules, and so on.

It is interesting to note that even in communities with a "strong manager" form of government, it is the chief elected officials that are usually responsible for hiring the town counsel. In such communities where there is an executive secretary or an administrator, the professional manager and the counsel work for the same boss. They must be able to work well with one another. The manager/administrator should offer the municipal attorney guidance on how to be more effective for the community.

Routine Practices

During the highlight of the political year, other than elections, your counsel should be in constant contact with the manager/administrator and elected officials in order to anticipate any issues or procedural questions that may arise at important official meetings. Carefully reasoned answers should be prepared in advance to questions that are anticipated.

Every year, counsel should have an executive session with the governing board to discuss active cases. Counsel should prepare a log by having the case name, the town body involved, the position of the community as plaintiff or defendant, the type of case (construction, zoning, tort, etc.), the dollar relief sought, status and comments. Some communities, in order to save the expense of having counsel present at numerous status meetings, will appoint one member of the governing board to be kept fully informed of a given case. That person then reports back to the full board. I find that managers and administrators serve this function well.

As a matter of routine, your counsel should review all of the community's contracts, insurance coverage, and leases. He or she should regularly keep the chief governing board and department heads informed of changes in the law and court cases that would affect municipal operations.

In addition to representing the town or city as a whole, your municipal lawyer should represent each selectman, councillor or the mayor individually by taking the initiative of informing them if they are about to enter the realm of potential liability for slander or conflict of interest. There is, however, a fine line here that must not be crossed because the counsel's ultimate responsibility is to the governing body as a whole. In essence, the majority of the governing body at a given time is the lawyer's client.

The cornerstone of your relationship with municipal counsel is that you will stay out of the municipal law business and your lawyer will stay out of the municipal policy business. Your legal advisor should give you objective counsel, not advocate policy.

Remember, also, that in contrast to officers of the state government who are required to follow the attorney general's opinions, you are not bound by your lawyer's opinion. The opinion is not a sword over your head, but merely a helpful tool to

productively attain municipal goals. If you don't like your lawyer's advice, ask how certain he or she feels about the opinion. Is he or she 95% sure or 55% sure?

Money-Saving Ideas

While economy in government has always been important, attention to legal costs is especially appropriate at this time. With the removal of sovereign immunity and the advent of civil rights actions against municipal leaders, legal costs have been escalating. Also, as our cities and towns increase in population density, more work is generated for the planning board, the board of appeals, the assessors, engineers, building inspector, licensing board, and the whole panoply of municipal decision-makers. This in turn creates more work for counsel.

Some municipal counsel work on a retainer basis, with fixed payments made each month, but some types of work – litigation, labor relations and tax takings – are confined outside the scope of services covered by the retainer. Moreover, time spent in litigation will be billed separately at an hourly rate. Don't be fooled into thinking that because counsel is paid a retainer that you can ask him or her for any amount of work. Lawyers keep good track of their time; if the retainer is not adequately compensating the firm for the work being done for the client, you can be sure that counsel will want to renegotiate the retainer. If you believe that your community is not receiving adequate legal services for the money it pays or that the amount of time spent in litigation is excessive, it is sometimes advisable to bring in a consultant to examine the situation. Retainers also create the overuse of town counsel/city solicitor since services appear free.

It is up to the governing body to make the ultimate decision as to whether cases should be settled out of court, but your lawyer should recommend settlement when appropriate as opposed to putting the town through lengthy litigation with its attendant cost, which may only benefit the lawyer and use up time of local officials as well. If your community has a great deal of small litigation, the governing body should consider empowering counsel to settle cases, including real estate tax cases, up to an amount of \$3,000.

In general, your town counsel or city solicitor should not be going to court to defend a variance or permit granted by the Zoning Board of Appeals. Remember, a variance does nothing more than vary the zoning law enacted by the community. When properly granted, the variance means an individual or entity has the legal right to break the zoning rules. The statute that enables municipalities to grant variances lists the criteria under which they can be granted, none of which involves a benefit to the community, but rather a hardship to the person seeking the variance. Therefore, the applicant who is granted a variance or permit, and then sued by an abutter, should defend its own variance or permit at its own cost.

Another way of saving legal costs is to have your counsel educate department heads in the use of the Small Claims Court. Claims of up to \$2,000, including unpaid fees, may be brought to Small Claims Court, which is generally considered a "people's court" in which lawyers are not required. Almost all small claims matters can be

handled by local officials, unless they involve an important precedent-setting issue in which the town could suffer exposure.

Perhaps the most basic method cities and towns should use to control legal costs is to have an accurate picture of what they are really paying for counsel's services. Many communities, especially those with budgets greater than \$10 million, do not have a single line item that accounts for all legal costs. Instead, legal costs may be allocated by department and thus are easy to lose track of. Indeed, the selectmen of one Massachusetts community with a population of 21,000 several years ago conducted a thorough investigation of all legal expenses hidden away in the town budget under various departments and to their horror found that they were spending in excess of \$180,000 per year.

Evaluation

The chief governing board should periodically evaluate the legal services the community is receiving. Feedback from the manager/administrator and other department heads will be helpful. Many of the items discussed above will help to provide criteria for such an evaluation. Some of the questions you may wish to ask are:

- Does your counsel constantly keep the community, either through the governing board, manager or administrator, updated on new relevant laws? One-third of the new laws coming out of the state legislature involve cities and towns directly. Has he or she brought you up-to-date on the new areas of liability exposure for municipal governments?
- More generally, has your counsel reviewed the local government's insurance policies to ensure that they are adequate? Does he or she look at contracts and leases?
- Is your lawyer willing to commit that he or she will not represent anyone within your community in order to avoid the slightest appearance of impropriety?
- Does your counsel come before your meetings requesting settlement of some cases which would be more costly to try, especially if such cases could create exposure for the town and settle no important issue?
- Does your counsel display a sensitivity to the need to keep the cost of legal services as low as possible?
- When you ask for an opinion, do you get it quickly, and is it easy to understand? Does the opinion make sense?
- Does the community win the cases that go to litigation that it should win?
- Is counsel sensitive to the political dynamics of the community?

Your municipal counsel is nothing more than your assistant in helping you formulate your ideas into good governing actions. In evaluating your counsel, the most important question is, "Is he or she helping us to govern?" Is your lawyer a "nay-sayer" to good ideas, or does he or she say, "In my opinion, we can't do it that way, but let me show you another way that your objective can be accomplished"? You are charged with serving the public well. Your counsel serves you well to the extent that he or she enables you to fulfill your charge. Does your counsel have the necessary expertise? As will be further explained below, the expertise required of a municipal counsel is a complex consideration.

Recruiting and Hiring

- At the outset, you may wonder if it would be wiser to have an in-house, full-time counsel. Discard this idea unless your community is a large city with a legal budget of over \$500,000. A single person cannot possibly be familiar with all areas of the law with which he or she will have to work as town counsel and would only have to hire other attorneys. Between sick leave and vacation, an in-house counsel may be away one month of every year. Additional costs would most likely be prohibitive: skilled secretarial help, office space, law library, pension, and health insurance costs, to name a few. Also, how can you sue your own full-time staff member if he or she is negligent?
- How much experience in municipal law should your counsel have? In the general Boston law firms, one does not become a partner until he or she has spent approximately nine years in the full-time practice of the law. It is felt that it takes this amount of time to become a competent practitioner in a specialty and to understand how that specialty fits into the general practice of the law. You should look for nine years of experience in municipal, land use, and trial law in the candidates you consider.
- As noted above, one lawyer cannot possibly be an expert in all the fields necessary to service the needs of a municipality. Look not only for a qualified attorney, but also for a qualified firm – one in which several members have municipal experience and one in which there are several areas of expertise such as litigation, contracts, and land use. Nodding acquaintance is not sufficient in today's high-stakes legal environment.
- Make sure the lawyer and his or her firm spends at least 90 percent of their time on municipal matters. Make sure the firm has a good support staff, including paralegals, law clerks and an excellent municipal library. Your lawyer and firm should have the highest rating in the national list of lawyers entitled, Martindale-Hubbell. This is called an "AV" rating. Your lawyer should have his or her billing on a computer system to give detail. Regardless of whether your city or town has a bylaw hiring counsel for a year, three years, or indefinitely, your counsel should be willing to serve at the will and pleasure of the board. They should have a minimum of two million dollars of malpractice insurance.

There is a great temptation to have local counsel. However, municipal law is extremely complex and has great exposure both to the community and the officials running it. You should be seeking the best municipal services available, looking throughout the whole state, not just your local community. Many times the best lawyers in the community will not take the position because they will then be in conflict when their clients need to go before various town boards. Therefore, the most desirable local lawyers quite often do not apply for the position.

Most importantly, make sure you hire a municipal lawyer who is currently on the firing line as town counsel or city solicitor to at least two other communities and has served one of them and preferably both for at least five years. Don't let a non-town counsel or non-city solicitor learn the slippery ropes at your city or town's expense, and now with personal exposure of municipal officials, at your expense. Go only with proven experience.