Making the Best Use of Your City Attorney

Iowa League of Cities
2012 Annual Conference
Questions Regarding the Role of the City Attorney

1. When is a city REQUIRED to use the services of a city attorney?

2. When SHOULD the city consult with or involve its city attorney in city business, and what types of legal services do city attorneys typically perform?

3. What other types of legal services do city attorneys perform on behalf of cities?

4. When SHOULD the city attorney attend a council meeting?

5. Who conducts the city attorney search and selection process?

6. Should the city attorney be an independent contractor or an employee of the city?

7. What search and selection process should a city use in selecting its city attorney?

8. Who determines what legal services the city attorney will perform, and who can request the city attorney to perform legal services for the city?

9. Mr. General Counsel, why won’t the city attorney answer my question or call me back?

10. Mr. General Counsel, this is what our city attorney told me, but I want your opinion.

1. When is a city REQUIRED to use the services of a city attorney?

The Iowa Code does not require cities to appoint a city attorney, but it does require cities to have a city attorney in order to:

- conduct eminent domain proceedings (Sec 6B.2)
- give a formal opinion that it is appropriate for the city council to go into a closed session for a given purpose (Sec 21.6)
- prepare special assessment documents (Secs 384.52 and 384.54)
- conduct criminal misdemeanor prosecutions of city ordinance violations (Sec 801.4)

The Iowa Supreme Court Defines What is the Practice of Law

In Commission on the Unauthorized Practice of Law v. Sturgeon (2001), the Iowa Supreme Court ruled that “…the practice of law includes, but is not limited to, representing another before the courts; … and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding.”
The Supreme Court prohibits the practice of law by non-lawyers and the Court has appointed a Commission on the Unauthorized Practice of Law which can enforce the rule by bringing suit to enjoin the unauthorized practice of law. Under Iowa Supreme Court precedent, the city attorney must represent the city in district court, but cities may be represented by a non-lawyer employee in actions where the relief sought is within small claims jurisdiction, which actions are most frequently handled before a magistrate.

Accordingly, under Iowa Supreme Court precedent and Iowa Code provisions:

- The **city attorney** -
  - **must represent** the city in court in a lawsuit to collect a debt or damages owed to the city if the city is seeking to recover in excess of $5,000;
  - **must prosecute** city municipal infraction violations if the city is seeking to recover civil penalties or nuisance abatement costs in excess of $5,000; and
  - **must prosecute** city ordinance violations that are charged as misdemeanors (Iowa Code Sec 801.4).

- A **non-lawyer** city employee -
  - **may represent** the city in a small claim action in magistrate court to collect a debt or damages owed to the city if the amount the city is seeking to recover does not exceed the $5,000 jurisdictional limit of a magistrate;
  - **may prosecute** a city municipal infraction violation in magistrate court if the amount the city is seeking to recover as a civil penalty or for nuisance abatement costs does not exceed the $5,000 jurisdictional limit of a magistrate; and
  - **cannot represent** the city in district court to collect debts or damages or to prosecute a municipal infraction.

Under Iowa Supreme Court precedent, the **city attorney** must **prepare and oversee the use** of all city contracts, deeds and easements involving the transfer of an interest in real property, or **must closely supervise** those activities.

2. When **SHOULD** the city consult with or involve its city attorney in city business, and what types of legal services do city attorneys typically perform?

- Defense of lawsuits brought against the city
- Consultation / assistance with the termination of a city employee
- Assistance with procedures for the purchase or sale of real property or of an interest in real property (e.g. easement, lease)
- Consultation / assistance in the preparation of ordinances
- Consultation / assistance in the negotiation or preparation of contracts **NOT** involving real property, such as
  - Contracts for the purchase of goods or services
  - Chapter 28E agreements with other cities, counties, etc. for joint governmental action
  - Contracts with state and federal agencies
• Preparation or review of resolutions, notices, documents required in support of -
  ➢ The appointment of persons to city employment
  ➢ The discipline or discharge of city employees
  ➢ The award of public improvement contracts
  ➢ Responding to unusual, difficult or non-recurring open records requests
  ➢ The removal of a city official from appointed position

3. What other types of legal services do city attorneys perform on behalf of cities?
• Assistance in the preparation of ordinances
• Assistance in the preparation or negotiation of contracts NOT involving the transfer of interests in real property
• Legal advice or written opinions providing guidance as to the legality of certain courses of conduct or action
• Preparation or review of resolutions, notices, documents required in support of -
  ➢ The appointment of persons to city employment, and the discipline or discharge of city employees
  ➢ The removal of council appointees
  ➢ The purchase or sale of property by the city
  ➢ The declaration of nuisances and the issuance of an abatement orders
  ➢ The grant of variances or special exceptions by the board of adjustment
  ➢ The award of public improvement contracts
  ➢ The granting, denial, suspension or revocation of alcohol and beer permits

4. When SHOULD the city attorney attend a council meeting?
• To answer legal questions or clarify procedural requirements relating to –
  ➢ A pending or potential lawsuit involving the city
  ➢ The appointment of a person to city employment, or discipline or discharge of a city employee
  ➢ The purchase or sale of property by the city
  ➢ The declaration of a nuisance or the issuance of an abatement order
  ➢ The zoning or rezoning of property, including any discussion or action with respect to the grant of variances or special exceptions by the board of adjustment
  ➢ Discussion or formal consideration of the terms of a proposed ordinance or contract
  ➢ The award of a public improvement contract
  ➢ The granting, denial, suspension or revocation of alcohol and beer permits
• To give a formal oral opinion that it is appropriate for the city council to meet in closed session (unless such opinion was given in writing prior to the closed session meeting)

5. Who conducts the city attorney search and selection process?
• Section 372.4 provides that –
“The mayor shall appoint a council member as mayor pro tem, and shall appoint and dismiss the marshal or chief of police…. Other officers must be selected as directed by the council.”

- Section 372.13 provides that –
  “…the council may appoint city officers and employees, and prescribe their powers, duties, compensation, and terms.”

6. Should the city attorney be an independent contractor or an employee of the city?

Many smaller cities do not have a need for enough hours of legal services to justify the employment of an attorney on a full or part-time basis. Such cities typically contract with an attorney to be the city attorney, and in that situation the city is but one of many clients of the attorney.

Larger cities typically employ the city attorney and assistant city attorneys on a full or part-time basis. Attorneys who are employed to provide legal services are typically on the city’s payroll, participate in the city’s employee benefit programs on the same basis as other employees, are subject to the city’s employment policies and receive a W-2 form from the city at the end of the year.

**City Attorney is City Employee**

**Advantages:**
- Legal services immediately available to the city
- Greater opportunity for attorney to develop expertise in municipal law
- Fewer opportunities for conflict of interest

**City Attorney is Independent Contractor**

**Advantages:**
- City incurs fee expense only when the city attorney is requested or required to perform legal services

**Disadvantages:**
- City must compete with other clients for access to legal services
- More opportunities for conflict of interest
- Greater difficulty in engaging an attorney with expertise in all phases of municipal law

7. What search and selection process should a city use in selecting its city attorney?

If the city attorney will be an employee of the city, then the veterans preference law applies, and –
- the city must give 10 days’ public notice of the application deadline for that position by posting the notice in the same manner as notices of meetings are posted;
Applicants who are veterans are entitled to preference in appointment and employment over other applicants of no greater qualifications.

If the city attorney will not be an employee of the city, the veterans preference law doesn’t apply. If there is a consensus by the city council as to an obvious choice for city attorney, the city can initiate a conversation with and try to negotiate the terms for engaging the services of that attorney. If not, then the city will have to conduct a search and selection process.

City Attorney Search Process:
Identify attorneys in your area with prior experience in the practice of municipal law. The League can assist by putting together a list from its membership database.

City Attorney Selection Criteria: Applicants to -
1. Provide name of each undergraduate institution attended, cumulative GPA obtained in each institution, undergraduate degree(s) received from each institution.
2. Provide name of institution(s) attended in pursuit of law degree, cumulative GPA obtained in each institution, and degree(s) received from each institution.
3. Indicate number of years engaged in the practice of law; list of places worked / firm or company names and years of practice in each place / firm / company; contact information for each firm / company; references from each place / firm / company where the attorney practiced.
4. Provide list of municipal clients, years in service to each municipal client, contact information for each municipal client listed; references from each city where the attorney practiced.
5. Indicate the municipal law practice areas where they have experience, and describe that experience:
   - Prosecution of municipal ordinance violations
   - Nuisance abatement
   - Planning and Zoning and Board of Adjustment
   - Economic development
   - Purchase and sale of property
   - Public bidding for the construction of public improvements
   - Employee relations, collective bargaining, employee discipline and discharge, civil service
6. Provide their suggested contract for legal services or retainer letter.

City Attorney Contract Forms:
Legal Services Contract
Looks like any other contract, with terms for providing legal services and payment for services, and a signature line for the attorney and for the mayor. After approval by the city council, the contract is signed by the attorney and the mayor.
Legal Services Retainer Letter
A retainer letter is a signed letter from an attorney proposing terms for providing legal services as city attorney. There is a city acceptance paragraph and signature line at the end of the letter. If the city council agrees to the terms proposed, the mayor signs the acceptance paragraph. The letter then becomes the legal services contract.

What to look for in a Legal Services Contract or Retainer Letter for City Attorney:
The typical legal services contract / retainer letter is -

a) open-ended,

b) does not create an employment relationship or any expectation of continuing services for a period of time, and

c) can be terminated by either party at any time without cause.

The Fee for Legal Services: Alternatives
1. **Hourly Fee.** All services are billed on an hourly fee basis. If no services are provided during a billing period, no fee is charged.

2. **Hourly Fee and Retainer.** Certain basic services (e.g. attending council meetings, answering phone questions) are charged under a flat retainer fee, averaged out in each monthly bill. Additional services are billed on an hourly fee basis.

8. Who determines what legal services the city attorney will perform for the city, and who can request the city attorney to perform legal services for the city?

- Section 372.13 provides that “…the council may appoint city officers and employees, and prescribe their powers, duties, compensation, and terms.”

- Some cities do not give themselves or their city attorneys any direction or guidance on these issues.

- Other cities give explicit direction and guidance on these issues in an ordinance or in the city attorney’s contract for legal services.

City council should clarify what legal services it expects the city attorney to perform

- Provide legal advice or written legal opinions
- Provide written reports
- Prepare ordinances or amendments to ordinances
- Prepare contracts
- Prosecute or defend lawsuits on behalf of the city

City council should clarify who can request the city attorney to perform legal services for the city

- City Council
- Mayor
- City manager or city administrator
- City clerk
• City department heads
• City boards or commissions
• Other city officials or employees
### Ordinances Establishing:
Who Appoints, Sets Compensation of, or Is
Authorized to Request the Services of, the City Attorney

<table>
<thead>
<tr>
<th>CITY OFFICIAL OR BODY THAT:</th>
<th>Appoints</th>
<th>Sets Compensation</th>
<th>Can Request Advice / Opinion</th>
<th>Can Request Report</th>
<th>Can Request Preparation of Ordinance</th>
<th>Can Request Preparation of Contract</th>
<th>Can Authorize Lawsuit Prosecution or Defense</th>
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9. Mr. General Counsel, why won’t the city attorney answer my question or call me back?
The question asked, or the person asking the question, may pose a dilemma for the city attorney because -
• there is concern that the response will be distorted when it is reported to other city officials; or
• it is apparent the person asking the question is going to use the city attorney’s response for a surprise attack on other city officials; or
• the city attorney is looking for “the rest of the story” or “the other side of the story” before responding; or
• the city ordinance or its legal services contract only allows the attorney to respond to a request for legal services made by the mayor or by a majority of the city council.

10. Mr. General Counsel, this is what our city attorney told me, but I want your opinion.
This question poses a dilemma for League General Counsel.
• Is the person asking the question legitimately concerned that the city attorney is in over his / her head and is looking for assistance for the city attorney?

OR

• Is the person asking the question “forum shopping” – looking for a different, more palatable answer than the one given by the city attorney?