

Getting the Most Out of Your School Board Counsel

Not Your Father's (or Mother's) School Legal Climate:

- Erosion of Doctrine of Sovereign Immunity
- Expanding Employee Rights Legislation:
 - ADA
 - Gender, Age and other protected classifications
 - Harassment/Hostile Environment Case Law
- Employee Collective Bargaining Rights

Other Challenging Legal Issues:

- Expanded First Amendment and Due Process Rights of Students and Staff
- Privacy Legislation – Federal Education Rights and Privacy Act (FERPA)
- Student Disability and Special Education Rights
- Complexity of School Funding and Budgeting Laws
- School Levy Election Law
- “School Choice” Initiatives
- Litigation by Tea Party Groups over political activity and school levies
- Real Estate Valuation and Tax Abatement Issues

Traditional Areas of Legal Service:

- Contracts with Vendors
- Purchase, sale and lease of real estate
- Board Governance Issues
- Teacher and Administrator Contracting and Termination

Role of Board Lawyer

- Trusted advisor and counselor
- Negotiator
- Mediator
- Educator on legal issues, rights and duties
- Draftsman
- Litigator
- Spokesman
- Trainer

In House vs. Outside Counsel:

- Considerations in hiring a staff attorney:
 - District size and resources
 - Historical Legal Expenses
 - Anticipated legal needs
 - Costs, including salary, benefits and support staff
 - Part-time vs. full time
 - Independent contractors

Advantages of In-House Counsel:

- Potentially less expensive than paying by the hour
- More available to be “at the table” for important decisions
- Able to develop a deeper understanding of District issues and working relationships with personnel
- Expertise to manage outside counsel when needed

Potential Disadvantages of In-House Counsel:

- As public employees, more difficult to terminate the relationship than with outside counsel.
- Hard to find In-House counsel with skills and experience to handle full range of district legal issues.
- Will a strong In-House counsel cause legal considerations to dominate educational policy considerations?
- Compromising protection of attorney/client privilege.

Advantages of Outside Counsel:

- Heightened levels of expertise
- Specialization
- “A la carte” options from one or more outside counsel or firms
- District can create more PR “space” between outside lawyer and Board or administrative staff
- Attorney-Client Privilege
- Easier to Fire!

Skills to Look for When Shopping for a Lawyer:

- Background or Interest in Education Laws
- Familiar with State and Federal Education Laws
- Knows How to Prepare Contracts and Bidding Documents
- Familiar with Administrative Law
- Collective Bargaining Experience
- Litigation and Appellate Experience
- Arbitration Experience
- Familiar with Parliamentary Procedures, Open Meeting and Public Records Law

Intangibles:

- Responsiveness
- Communication Ability
- Accessibility
- Confidentiality
- Anticipating Problems Before They Explode

Selecting and Managing Outside Counsel:

- Requests for proposals
- Identifying lawyers or firms with the expertise you need
- Retention Agreement
- Ask for a budget and plan for handling complex litigation or collective bargaining matters
- Regular reporting and reporting formats for litigation matters

Outside Counsel Fee Arrangements:

- Competitive RFP's
- Hourly Rates: Discounts and blended rate options
- Fixed fees for discrete projects
- Monthly retainers to cover a specific category of service
- Other alternative fee arrangements

Alternate Fee Arrangements (AFAs)

- Consider negotiating an AFA for legal services such as:
 - Day-to-Day counseling on administrative matters
 - Collective Bargaining and Contract Negotiations
 - Employee Trainings and Professional Development Presentations
 - Run of the Mill administrative matters/hearings

Lawyer's Obligations to the School District

- Independent Judgment
- Preserve Attorney Client Privilege
- Disclose/Avoid Conflicts of Interest
- Duty to the District, not Individual Board Members or Administrators
- Charge Only Reasonable Fees

Communicating With Your Lawyer:

- Who Has Access?
 - Board Chair
 - Superintendent
 - Treasurer
 - Other Board Members
 - Other District or Building Managers
- Need Procedures to Allow and Control Access

Points of Contact

- Limiting the # of People that can engage outside counsel = controlling costs.
- Consider limiting the individuals who can directly contact outside counsel without pre-approval:
 - Board President
 - Superintendent
 - In-House Counsel
 - HR Director

Communication With Your Lawyer

- What is Confidential?
 - Attorney-Client Privilege
 - Who is “The Client”?
 - Can a District Attorney withhold information from the School Board?

Who Does Your Outside Counsel Represent?

- Superintendent or other District Administrator may be the direct point of contact, but outside counsel represents, reports to and serves at the pleasure of the Board of Education.
- Cannot directly represent staff, teachers and administrators because of potential and/or actual conflicts of interest.
- Can create difficulty when administrators have issues with the Board.
- Outside Counsel should proactively manage these issues and address any potential conflicts immediately.

When and How to Involve Your Lawyer:

- Full Disclosure
- Get your Lawyer the Information He needs
- Expect Probing Questions
- Waiting until the “Eve of Destruction”

Evaluations

- Timely Communicate Concerns About Quality, Responsiveness and Costs
- Involve Those Who Interact with Counsel in Regular Evaluations
- Consider Regular RFP's and Re-Openers

Budgeting for Legal Services

- Anticipating Likely Demand
- Understanding Your Lawyers Rates or Billing Methods
- Obtaining Budgets for Litigation or Other Matters From Your Counsel
- Anticipating the Unknown

Managing Litigations

- Guidelines for Handling Litigation
- Bi-Monthly or Quarterly Reports
- Prompt “New Development” Reports
- Early Analysis of Issues, Likelihood of Success and Scope of Potential Liability
- Requiring a Litigation Budget and Updates if Budget Likely to Vary
- Evaluation of Key Witnesses
- Recommendations in Settlement and Alternative Dispute Resolution

When To Terminate Your Lawyer:

- Failure to Timely Respond
- Not Prepared
- Failure to Disclose Conflicts of Interest
- Unsatisfactory Billing Practices
- Failure to Act in Board's Best Interest
- Disclosing Confidential Information
- Bad Value Proposition
- Include Method of Termination in Retainer Agreement

DONALD J. MOONEY, JR., ESQ.

ULMER & BERNE LLP

600 Vine Street, Suite 2800

Cincinnati, Ohio 45202

513-698-5070

dmooney@ulmer.com

EDMUND F. BROWN, ESQ.

Edmund F. Brown & Co., LLC

P.O. Box 1066

New Albany, Ohio 43054

edmundfbrown@gmail.com

