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**Serving as Outside Counsel to a Government General Counsel's Office:
Special Considerations in Selection, Service, and Retention**

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**SERVING AS OUTSIDE COUNSEL
TO A GOVERNMENT GENERAL COUNSEL'S OFFICE:
SPECIAL CONSIDERATIONS IN SELECTION, SERVICE, AND RETENTION**

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I. FACTORS IN SELECTION

a. *THE GENERAL COUNSEL'S OFFICE.* In deciding whether to seek business as outside counsel to a government general counsel's office, first consider the characteristics of the general counsel's office.

i. A small or solo office will generally outsource all of its litigation and most of its major projects to private firms. Small general counsel offices often develop long-term relationships with specific outside counsel based on satisfactory past service, economies of scale due to reduced learning curve time, and well-honed expertise in the kinds of legal services that the particular government client needs.

1. If your firm is not already counsel, it can be hard to break into this kind of representation. Another firm or series of firms has already won the confidence of the general counsel, who may not have an immediate reason to look elsewhere for legal services.

2. Nonetheless, an important competing consideration may arise from the simple fact that the client is a public client. Over time, a prudent general counsel in government will seek to avoid any appearance of undue favoritism, and may seek from time to time to distribute work among competent firms with expertise in

the agency's area of responsibility. If you are interested in this kind of work, the same principles apply as with large general counsel's offices, discussed below. You may just have to wait longer for an opportunity.

ii. In a large general counsel's office, the presumption is that most legal work will be done in-house.

1. It saves money. In-house lawyers who know the client well have no learning curve in understanding the client's basic mission, processes, and desires. Further, in-house lawyers bring to the table a wide perspective of historical and pending legal issues faced by the client, providing context that outside counsel can rarely duplicate. Finally, outside counsel must necessarily charge for resources that the general counsel's office already has on-site, including existing support staff and systems. These realities, among others, tilt most decisions away from hiring outside counsel.

Saving money makes taxpayers, and therefore elected and other public officials, happy. In turn, happy public sector clients make for more career satisfaction and stability for the general counsel's office, and often a more financially rewarding experience.

2. Keeping work in-house continues to develop in-house expertise that carries over to future litigation or transactions. That saves money. See (1) above.

3. Having interesting, respected legal work in-house attracts good hires. Good hires, when they gain expertise and experience, can handle more sophisticated work more efficiently and save money. You get the idea.

b. REASONS A GENERAL COUNSEL SEEKS OUTSIDE COUNSEL

i. *Expertise.* Again, consider the characteristics of the general counsel's office.

1. Do the in-house lawyers lack expertise in the general area?

a. If so, outside counsel is being sought at least to provide that service. They will be expected to bring immediate depth of experience and ability that the general counsel's office could not develop within the time required for the engagement. This requirement means that you should not take such an engagement intending to learn on the job. Doing so will frustrate the general counsel who is signing off on your bills and reviewing your work. Falling short will reduce or eliminate future opportunities for you. Remember, your first line client here is a lawyer who is in a better position than most lay clients to judge the quality of the work you deliver and the efficiency of the delivery.

b. If you are clear about your potential role and ready to seek the representation, think about how your firm will demonstrate the specific expertise needed.

i. If you are a construction litigation firm, great. But the general counsel is going to want to know about your depth in particular types of construction contracts – roads, bridges, runways, courthouses, jails and prisons, fire stations, runways, or any number of other types of construction. Government facilities often have peculiar characteristics. The laws and regulations governing their procurement also are unique to government law practice. Those circumstances bring specialized legal challenges to match. Be ready to show why your firm has the special expertise and experience needed.

ii. Try also to show bench depth in the specialty. Does your firm have more than one lawyer who can handle the specialty, even if only for the time you are on vacation? Remember, the general counsel is the first line client. He or she wants to be able to rely completely on your firm for expertise that the office does not have. His or her

reputation is on the line in choosing you. Making sure that you have back-up goes a long way in providing reassurance, even if you are the main contact.

iii. Try to show that your firm has expertise in related legal disciplines that have the possibility of becoming relevant to the legal services for which the firm is directly being retained. Expertise in related areas can save time and insure delivery of even better legal services, should the unanticipated need arise. For example, outside counsel seeking to serve as municipal bond counsel might demonstrate depth in relevant federal and state tax laws, thereby indicating an ability to access potential but as yet unanticipated needs for related expertise.

iv. Showcase your firm's recent experience, especially successful experience. The more similar and the more recent your service to another client, and the more similar the prior client to the one now seeking outside counsel, the more attractive your firm will be to the general counsel who is hiring. That experience is a valuable tool in explaining to the agency head the reasons your firm was selected.

c. Think about whether the subject is one that is likely to recur for the agency.

i. If the subject is likely to recur but not with enough frequency to justify developing in-house expertise, outside counsel may be hired not only for that matter, but, based on exceptional performance, potentially for repeat engagements. The likelihood of repeat engagements is enhanced if you can demonstrate ability to deliver reliable service at an ultimate cost savings over hiring in-house.

ii. If the subject is not likely to recur, consider whether a single engagement is worth the lower fees that government agencies usually request.

1. If your firm will incur no or little loss on the engagement, you still may want to take the matter, if only for the opportunity to demonstrate depth of expertise that will make you attractive for other similar engagements – whether for this agency or for another. Caution is advised here, however, because government processes tend to be less direct and more time-consuming than comparable processes in the

private sector. As one example, settlement of a legal dispute may require mediated proposed settlements to be voted on in public by the agency board. In that situation, settlement cannot occur at the mediation and may even be derailed after public testimony is taken. You may be back in litigation mode or back at mediation for reasons that would not occur in the private sector.

2. Some firms have yet other reasons for taking on such an engagement, such as a longstanding political relationship with elected officials or with an agency head. Caution is advised if this factor is the motivation, for reasons described below.

2. Alternatively, does general competence already exist in the general counsel's office? If so, outside counsel is likely being sought for different reasons, outlined below.

ii. *Resources.* If expertise in the general area already exists in the general counsel's office, outside counsel may be sought because resources are not adequate within the general counsel's office.

1. The shortage may be short-term, due to current overload that will eventually resolve itself, such as for attorney absences for health or other reasons, for temporary budget reasons, or for any number of other reasons that require immediate outside help, yet are insufficient to hire permanent additional attorneys in-house. If this is the situation, have clear communications with the general counsel about what your role will be after the situation resolves itself. The good news is that if your firm has provided superior legal services at an economically attractive rate, the general counsel will not necessarily curtail your services. Doing so would necessitate bringing an in-house lawyer up to speed on the matter, an inefficient event, and could expose the public client to risk while the matter is in transition. If the general counsel can rely on you, it is much easier to leave the matter in the hands of the firm already on the case, all other circumstances being equal. You should not, however, anticipate repeat business if this is the reason for hiring your firm, as it will be more economical to bring the next matter in-house. Accordingly, this is not the kind of representation you would want to take a loss leader on.

2. Sometimes there is plenty of attorney expertise in-house, but there is a shortage of other resources in the client's business. A classic example might be a general counsel's office that is more than capable of handling negligence liability cases, but whose

public client does not have adequate risk management support to support the litigation, e.g., paralegals with medical knowledge or investigators. Those situations more often than not are long-term. If your firm represents a number of public agencies or private businesses and has the resources on staff to handle the need, a general counsel may look favorably on your firm because it can provide what his or her client cannot.

3. If the reason for bringing outside counsel on board is long-term, your firm can anticipate the potential for an excellent business relationship. Be careful, however, not to kill the goose that has laid the golden egg. If your firm's bills reach the point at which it is more financially favorable to hire an in-house attorney to handle the work, then the general counsel is very likely to do that as soon as the situation becomes apparent. Further, he or she may not immediately raise the possibility with you, in part because it is an uncomfortable topic and in part to keep you committed while trying to find an appropriate in-house attorney. So you may want to raise the topic of fees yourself with the general counsel from time to time, to be sure that you are not billing in excess of expectations.

iii. *Reputation.* For reasons that may not be intuitive to some private practitioners, a general counsel may seek outside counsel for politically sensitive matters.

The most successful government general counsel remain outside the political fray. They do not take sides in policy choices or disputes. They often avoid press or any public attention, because these are things that can distract them from their professional mission, their objectivity, and their reputation as straight-shooting, honest brokers in the law. From time to time, however, issues and cases arise that thrust the general counsel's office into the spotlight. The general counsel's office can become the defender of a policy choice made by the majority of an agency board, but dissented from by a substantial minority with strong contrary feelings.

In that setting, a general counsel may seek outside counsel with a sterling professional reputation, a firm widely recognized as having expertise, so that if a case is lost, or the majority decision is later overturned, there can be no question among lay members of the client agency that the representation was honest, vigorous, and wholly consistent with the client's direction.

A related but slightly different reason arises when it appears that members of an agency board, especially dissenting board members, may be subjected to depositions or other discovery. Outside counsel may be sought to avoid the awkward situation when the general counsel would be required to depose or even cross-examine a client board member.

Finally, a legal case or matter may be of such massive community interest or controversy that losing could devastate the public client's

reputation and even the board members' political careers. If your firm is recognized throughout the state or even the nation as one of the very best in the subject area, the agency's reputation for vigorous defense of its position is less easily questioned. The press is less likely to question the agency if the overwhelming public perception is that the legal defense was sound and vigorous. Naturally, this representation is available only to those firms whose practices are widely known and respected.

If you are concerned at all about being retained for your reputation, speak candidly to the general counsel about the potential for offending agency board members or placing your firm at risk of future potential conflict. For example, if the agency reverses itself during the representation, will your firm be unable to continue the representation, due to positional conflict with new position? Or, if you are successful in representing the agency, will the dissenting members be unhappy with future representations?

If you are aware of the circumstance and willing to take on the risk, and, especially if you prevail, the general counsel will almost assuredly become one of your biggest fans. Only time will tell whether that translates directly into more work with that agency, but that general counsel will be very likely to recommend your firm to other in-house offices facing similar circumstances.

II. ESSENTIALS OF REPRESENTING A GOVERNMENT AGENCY

a. *LOYALTY.*

i. Your firm must have no conflicts, no appearances of conflict, and no positional conflicts with respect to the matter for which you have been retained – ever. Once selected, your firm represents the public interest. Neither the bar, the press, the courts, the public agency, nor the general counsel who retained you will be in the least sympathetic to the demands of your firm’s other present or future clients. Note that a positional conflict is a legal position taken in a matter that does not involve the public agency, but is nonetheless inconsistent with its legal position in the matter in which you have been retained. Further, if your firm takes a position inconsistent with other policies of the agency, even policies unrelated to the matter for which you have been retained, the agency will not be happy and your firm may lose opportunities to represent the agency in the future. If your firm is not in a position to guarantee no conflicts, it will be better not to seek the representation.

Be careful to study any more stringent conflict requirements that may be found in the agency’s particular regulations. Some of these regulations are more stringent than professional ethics rules.

It is also expected that your firm will show loyalty and commitment to the state or community represented by the agency. That may mean a variety of things, but one example might be favor toward a firm that has a long-term presence in the state or community, not a temporary office set up to take advantage of a big case or transaction. There are many talented law firms throughout the country; all other things

being equal, public agency board members will prefer selection of outside counsel that is committed to the same state or community the agency serves. Many agencies also favor firms that reflect that diversity of the state or community served by the agency. That reflection of diversity can provide additional credibility with the state or community and the press, because the firm is seen as one that hears the full range of voices in the policy choices being defended.

Perhaps most essential to an effective representation is loyalty to the general counsel who has selected you. The general counsel has the confidence of the agency staff and board members and can encourage cooperation and enthusiasm for your representation. The general counsel can be a rich source of “inside baseball” at the agency and can warn of pitfalls in taking certain positions or enlisting certain witnesses. Further, most agencies rely on the general counsel to select, or at least vet, outside counsel. The general counsel has placed a great deal of trust, as well as his or her own reputation, in the selection of your firm. If the general counsel perceives that you are disloyal to the agency or to the general counsel’s office, he or she will not be comfortable endorsing you for future work and may even indicate a preference to terminate your services in an ongoing matter. If the general counsel does not believe that your firm is 100% committed to the agency, it will be exceedingly difficult to have an effective representation.

b. *RESPONSIVENESS*. In this respect, the public agency and its general counsel are like any other client. They need to know that they can reach you, rely on you, and know that you are totally engaged in representing the agency at the best of your game.

i. Stay fully engaged in the matter. Check in, or at least offer to check in, with the general counsel on a regular basis, even if only an email that offers to drop by or schedule a conference call to catch up on the latest developments in the matter. Be aware of the most recent developments and be ready to discuss them immediately.

ii. Be available. Be sure that the senior members of your team stay updated and available. The partner or partners who brought in the business should be reachable in the event the general counsel has questions about developments. Younger partners and associates, you should not be dismayed by a request to speak with the most senior lawyers on the matter. If that request comes, it is most likely that the outside counsel wants to be sure that the entire firm is fully committed to the position taken. Alternatively, it may mean that there is something bothering the general counsel about the matter, and the best way to express the depth of the concern is to speak with the senior people on the team. That concern is best addressed with the most senior, and presumably the most experienced and expert, members of the team.

iii. Allow the general counsel to participate in strategy and case management. The extent to which the general counsel's office will be

involved should be clearly communicated. If the general counsel initiates increased involvement above that initially contemplated, there may be something wrong. Outside counsel are retained to take a burden off in-house counsel. If the general counsel takes a portion of the burden back, the reason might only be to save costs, but another possible reason is an indication of lost confidence. If it happens, a conversation about it is in order, right away.

iv. From time to time, your firm may be requested to make a presentation before the agency head or board, to update them on the status of the matter. In this event, coordinate closely with the general counsel, who will likely be most aware of those who do not favor the policy choice being defended, or who prefer to settle, or who otherwise seek to modify the position being defended. If your presentation is made in public before an agency board, do not lightly take offense from comments made by the board members; on occasion, a position may be expressed in a public forum for reasons other than the merits of the representation provided.

c. *FEES.*

i. Your fees will rarely if ever be the same as when representing a private client. The government, however, does have the taxing power and even in these difficult economic times will have the means to pay the bill.

ii. Your fees must be defensible to the taxpayer, who would likely be shocked by the standard private practice fees of several hundred dollars per hour. If you cannot operate on a reduced fee, there is no need to go

into the representation. To find out what the agency is paying, call the general counsel, who will almost assuredly provide you with information about rates paid to current outside counsel.

iii. Be scrupulous about your hours billed. Again, remember that your primary client contact is a lawyer who knows what legal services are necessary and the number of hours and staffing needed to deliver those services.

iv. Do not nickel-and-dime the public agency. Try not to bill separately for legal research computer time, minimal photocopying, or other creative expenses. Excessive costs are not a good way to keep the legal business of the agency.

v. Depending on the laws of your state or community, you may have a legal right to be paid after invoice within a 30-day or other prescribed timeframe. While it is not suggested that you sue an agency that gets behind on its bills, it may be that merely mentioning prompt payment requirements may get the payment back on track and expedited.

d. *THE END GAME.* Never lose sight that the ultimate goal of a public agency may or may not be to prevail in a particular action, or to win the largest dollar recovery. The goal is to achieve the overall policy choices made by the agency. At any given point, you may be instructed to disengage, even when your firm is on the verge of complete victory. You may have a sure-fire way to win a large construction delay claim victory, but find that the agency wishes to settle, or to retain a contractor in breach, just to keep jobs in place and expedite

construction of a much needed public facility. If this happens, it does not mean that the representation was not successful. It was a successful means of getting to a desired end that may differ from what a private client might want.

III. TIPS

a. *POLITICS.* Getting outside counsel work does not require political glad-handing and campaign contributions. In fact, a general counsel who sees you or your firm as more political than substantive will likely be less inclined to retain or recommend you. In the end, the reputation of the general counsel will turn on the effectiveness of your representation, in court or elsewhere. The fact that a firm may have political ties to the general counsel's client will do little to protect his or her reputation if the matter does not turn out well.

b. *GETTING NOTICED.* Getting noticed as a possible outside counsel selection is much the same as getting noticed for a private representation. Be excellent, be diligent, be involved in the legal and greater community, gain a reputation for superior legal work. If appropriate, you may certainly make an appointment to meet the general counsel, to offer your services should the occasion arise.

c. *SHARING THE WORK.* If you are retained by a government agency, you probably cannot have all the work. Even in the unlikely event that your firm has all the expertise required by the agency, it is usually important for the general counsel to divide compensated work among several firms, to avoid any appearance of favoritism with taxpayer monies.

d. *DIVISION OF RESPONSIBILITIES.* Be clear about how responsibilities will be shared between the general counsel's office and outside counsel. Be clear, too, about who has ultimate responsibility for the outcome of the matter. That will help prevent stepping on each other's toes.

e. *PRESS.* Unless you are extremely sophisticated in dealing with the press on behalf of government, try to avoid press. Dealing with the press regarding a public agency's project or policy choice is a very risky proposition, because the press plays an important role in challenging government actions. No presumption exists that government is doing the right or wisest thing, and careless comments can work to the grave detriment of the public client. In every instance, even if you are very sophisticated in such matters, try to speak with the general counsel before talking to the press, or, if that is not possible, as soon as possible afterward, so that the public client can be informed about the press contact. Public agency heads and board members should rarely if ever be surprised by what they read in the press, especially by comments by their own outside counsel.

f. *WRITTEN COMMUNICATIONS.* As a corollary to the prior point, practice extreme discretion in everything you write in connection with the matter for which you are retained. Even if the writing is not discoverable during the course of litigation, it may become public as a matter of law in some jurisdictions, and by chance or leak elsewhere. Do not embarrass the public agency, the general counsel, your firm, or yourself by reducing to writing any thought that you would not want to see on the front page of the paper, because you very well might.

g. *BILLING.* Keep an eye on your firm's running bill. You likely agreed upon a rough budget with the general counsel when you were retained. If you see a trend that will take you beyond your anticipated fees, let the general counsel know right away, so that any necessary arrangements can be made to increase funding or else to terminate services to conserve resources.

h. *REPRESENTING A LAWYER CLIENT.* Never forget that your primary client contact is a lawyer. In spite of the fact that the general counsel can test your work and challenge your proposed strategies, it can be a real advantage to work with a good general counsel's office. The lawyers there want you to succeed; they selected you to do the work they could not perform for their clients, and they hope that you can prevail where lack of expertise or resources prevented their representation.

i. *ENJOY THE REPRESENTATION.* Representing a public agency can be one of the most interesting opportunities you will come across in your career. The whole community of interest may well be interested in the matter you are engaged in, and the feeling of contributing to the long-term betterment of the public is invigorating and fun.