

Local Government Law Bulletin

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COUNTY LEGAL REPRESENTATION

Retained or Full-Time County Attorney?

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EVERY BOARD OF COUNTY COMMISSIONERS in North Carolina must appoint an attorney to be its legal adviser (G.S. 153A-114). All counties in fact have a county attorney, but the arrangements that they have made for legal representation are notable for their variety; the diversity reflects the varied legal needs of the state's 100 counties.¹ The typical county attorney in North Carolina is an independent practitioner or member of a law firm who works for the county on a contractual basis. About ten counties, however, have at least one full-time attorney--the county attorney or an assistant or staff attorney--who is an employee of the unit, is paid a salary, and works only on county legal matters. The number of full-time attorneys has increased steadily though slowly over the last decade. This bulletin will review some of the considerations that might prompt a county's board of commissioners to consider employing a full-time attorney.

The typical county attorney is an independent contractor. He is paid a yearly retainer to provide agreed-on basic services. This fee can run as high as \$30,000, but the most common range is from \$5,000 to \$12,000. The retainer usually covers such services as attending all meetings of the board of commissioners, being available for routine consultation with commissioners and department heads, drafting ordinances

1. See, generally, E. Pace & B. Hiatt, County Salaries in North Carolina, 48-49 (Institute of Government, April 1980).

and resolutions, preparing routine legal documents like deeds and simple contracts, and preparing legal advertisements. In some counties, all of a retained attorney's work is charged against the retainer on a per-hour basis; the retainer then is a minimum annual fee for legal representation. Services beyond retainer services are reimbursed on a per-hour fee basis. Hourly charges run roughly from \$35 to \$60 an hour. (As an independent contractor, the attorney is responsible for providing his own health and hospitalization insurance, disability insurance, life insurance, and pension plan; his retainer and hourly charges also pay his office and secretarial expenses.) An experienced full-time county attorney in an urban county can receive a salary in the \$30,000 to \$40,000 range. In addition, the county provides his fringe benefits, his office space and supplies, secretarial assistance, and sometimes a car. Some counties retain as county attorney a member of a law firm but also employ a full-time staff attorney as an assistant. This arrangement gives the county the benefit of a valued legal counselor while providing a full-time lawyer on hand for day-to-day legal matters. One distinction between full-time and retained county attorneys, of particular significance to the attorneys themselves, is the current exclusion in current legal malpractice insurance policies of coverage for full-time local government attorneys.

The counties with full-time attorneys tend to have large populations: Brunswick, Buncombe, Cumberland, Durham, Forsyth, Gaston, Guilford, Mecklenburg, and Wake. Wake County has a law department with a county attorney who supervises four other attorneys. Forsyth, Durham, and Guilford counties have three attorneys in their respective law departments. Cumberland, Buncombe, Gaston, and Mecklenburg counties retain a county attorney who is a member of a law firm but employ a full-time staff attorney. Brunswick County has one county attorney who is salaried.

A number of counties have "hybrid" arrangements for legal representation. Several, for instance, retain as county attorney a law firm or attorney who is an independent contractor and not an employee even though the attorney spends upward of 80 per cent of his time exclusively on county legal matters. The advantage of this arrangement for the attorney quite often is that he can remain a partner in his law firm and thus share in its overall economic success. The advantage to the county is the knowledge of the county's affairs that one person who has represented the county over a period of time and knows its personalities, issues, and operations brings to his legal service. Still other counties classify their attorney as an employee even though he may devote less than half his time to county matters. This arrangement may be advantageous to the attorney in the area of fringe benefits like insurance and pension provisions.

Whether a full-time attorney will provide a county better or more economical service depends on the individual county's legal needs. Apparently most counties' legal matters have become steadily more costly over the last decade. For some counties, this rise in legal expense has been sharp; a number of counties have incurred legal expenses of \$100,000 or more in some years because of litigation costs or other factors. The proliferation of state and federal laws and programs and their consequent demands on local governments suggest that the trend will not reverse itself in the foreseeable future. County commissioners and managers are reviewing their budgets to eliminate every unnecessary expense. Though outlays for legal matters are not completely predictable or controllable, many commissioners and managers wonder whether significant savings in legal expenses can be achieved without an adverse effect on the quality of the county's legal representation.

The answer depends on a number of factors. Take the issue of "better service." The quality of service a county attorney provides depends primarily on his professional capability and his personality. Whether the county attorney is an independent contractor or an employee, the county is best served by a capable lawyer who is well-versed in a variety of general legal subjects and also is familiar with the specific legal principles and statutes that apply to local governments. Thus ideally he should be both a generalist and a specialist. He should be knowledgeable in such general legal areas as contracts, civil procedure and litigation, torts, and constitutional law, and he should also feel at home with such local government legal matters as governing board procedure, open meetings, public records, purchasing, property tax assessment and collection, budget and financial procedures, and federal civil rights, equal opportunity, and environmental regulations and laws.

In addition, a county attorney should be able to work and communicate effectively with public officials, county employees, the press, and the public. Commissioners want to rely on the attorney's judgment and his ability to articulate when he is asked an unanticipated question during a public meeting. Also, the attorney must represent all commissioners effectively even if those commissioners do not agree among themselves. The attorney must be able to understand the job requirements of administrators like the county manager and department heads and give them accurate and practical legal advice. He must develop a relationship with separately elected county officials like the sheriff and the register of deeds. He may also represent the county social services board and/or the county board of health, and he must be able to represent them effectively even when those boards and the commissioners do not see eye-to-eye. The attorney must be both forthright and discreet in dealing with representatives

of the news media, who often assume a watchdog role over the affairs of his client, the county. He must maintain credibility while not disclosing his client's confidences. Finally, he should be able to represent the county to the public on occasion, even though it is not his role to be a spokesman for the county.

All of this suggests that an ideal county attorney should be well-rounded and talented. In practice, most county attorneys who are retained as independent contractors place emphasis on advising the commissioners and the county manager and on attending their meetings. To minimize their retainer fee, some county attorneys provide routine legal service to only those parties. A full-time county attorney, on the other hand, handles the full range of the county's legal needs. This might be "better" service in the sense that a full-time attorney is available to consult with and provide advice to all county departments and offices (such as a purchasing or recreation department), to other county boards and commissions (such as a social services board or a board of adjustment), and to other elected county officials (such as the sheriff and the register of deeds).

Officials and employees in a county with a full-time attorney may also feel that legal consultation is more convenient when the attorney is full time. The attorney may be more accessible simply because he is in an office close to other county offices. Or they may not feel the constraint they might experience consulting with an independent-contractor attorney, which may involve escalating legal fees as the consultation becomes more complex or extensive. In a county with a full-time attorney, county personnel know that his client is the county and that they will not be interrupting him while he is handling matters for other clients. Similarly, on occasion a retained county attorney may not be readily available because he is entirely occupied with a major matter--perhaps a trial--for another client. A full-time attorney should be in closer touch than retained counsel with developments affecting the county's business because of his day-to-day presence and exposure. He will not need to be briefed as extensively on certain matters because he is already somewhat familiar with their background. Of course, since he is a full-time salaried employee, no additional charges are associated with legal consultations.

Whether having a full-time county attorney will save the county money depends on whether it has "full-time" legal needs--which in turn may depend significantly on the amount and type of litigation the county is engaged in. If it is frequently in court, a full-time attorney may be justified. Court cases tend to raise the cost of a county's legal services sharply. A full-time attorney ordinarily can handle much of the county's recurring litigation such as tax fore-

closures, social services child support suits, and zoning disputes. If the commissioners are contemplating a full-time county attorney, they should also keep in mind the nature of the county's litigation as they decide what experience and capabilities that attorney should have.

A county may sometimes employ specialized counsel for a matter like a title search for a major acquisition of real estate. A county with a full-time attorney may also retain outside counsel for specialized or unusually complex litigation. Certain civil rights, tax, or environmental cases might fall into this category. Litigation like this requires either professional specialization in the field or the full-time attention of the attorney, or both. A full-time county attorney could not devote himself to complex or unusual litigation, as he would need to do, without impairing the quality of his services to the county in routine and day-to-day matters. While retaining specialized counsel will raise the county's overall cost for legal representation, litigation of this nature would in any event probably involve significantly higher legal costs with a retained county attorney. The retained attorney or his law firm might itself have to seek special counsel or might charge as much over its retainer as specialized counsel would charge.

Other matters should be considered. Will county departments and commissions need legal consultation frequently enough to keep an attorney busy throughout the year? A great advantage of an "in-house" attorney is that he can practice "preventive law": counsel county personnel regarding appropriate policies and practices, explore legal considerations before disputes erupt into law suits, advise employees regarding courses of action when problems suddenly arise, and so on. The daily presence of an attorney can have an intangible value in avoiding legal expenses that might otherwise occur without legal advice before the fact.

Does the cost of the county's litigation fluctuate sharply from year to year? If so, (assuming that a full-time attorney is justifiable in other respects) having a salaried attorney can give the county a more predictable measure of its annual legal expense. A retainer is more likely to represent a minimum cost of legal representation. Even if complex or time-consuming litigation is routed to specialized counsel, a full-time attorney may be better able to absorb much of the county's unforeseen legal requirements without a major corresponding increase in legal fees. The county can better anticipate and estimate its budget requirements for legal representation if a full-time county attorney can handle most of its routine legal affairs. The attorney's salary, plus a contingency reserve for outside counsel's representation in extraordinary litigation, will be a fair measure of the county's annual budget requirement for legal services.

Are the personalities in county government and its legal needs such that the county can hire an unseasoned or inexperienced attorney? His salary will be lower, but to some degree he will be training and acquiring experience on the job. Will the county commissioners give due weight to his legal advice? Will they respect his judgment and counsel? Will an unseasoned attorney become rattled when suddenly confronted in a public meeting with an unanticipated query? There are mature young attorneys in North Carolina who are very capable county attorneys, but character and potential should be more carefully evaluated when a candidate is young than when he has years of experience summarized on a resumé.

Hiring a younger full-time staff (or assistant) attorney when the county needs more legal services than a retained attorney can provide may be an appropriate arrangement for some counties. The county that follows this plan continues to retain an outside attorney, at a reduced retainer. Its cost rises at first as it picks up the salary for a full-time younger attorney. The retained county attorney can devote most of his time to his private law practice, which is typically more remunerative than representing local government, while still being available as counsel to the commissioners on policy questions. He will also be available to the staff attorney when the staff attorney feels that guidance or supervision would be appropriate for certain questions. As the staff attorney gains experience, the commissioners, manager, and department heads should come to rely on his advice in his areas of expertise.

Other considerations emerge if a county decides that it wishes to hire a more experienced lawyer as its full-time county attorney. Since such a person's salary requirements will be substantially more than a younger attorney's, yearly cost-of-living adjustments will have more impact because they are made from a substantially larger base. A policy will have to be agreed on for merit increases. Pension arrangements may have to be examined closely. The shorter funding period for an older attorney in the Local Government Employees' Retirement System may result in less than optimum retirement payments if an inflationary environment follows retirement. If a more experienced attorney is taking a significant cut in remuneration, the county should satisfy itself that he will devote an appropriate amount of continuing energy and initiative to employment on a public salary.

The question of political affiliation and relationships may arise when the commissioners contemplate hiring a full-time county attorney. While a board or a dominant faction on the board may feel comfortable with a political ally as county attorney, appointing a county attorney with his political qualifications in mind is unwise. Commissioners can come and go with each election, but the board and the county

will be best served by impartial advice that is not unduly influenced by close party affiliation nor by fear of partisan retribution.

WHEN CONTEMPLATING THE ESTABLISHMENT of a law department, the commissioners should consider some basic estimated cost figures set out below. Besides an attorney, the law department will need a secretary, a word-processing typewriter, and a basic set of law books. The salary range for an attorney with perhaps from three to five years of experience in local government law (maybe as an assistant city or county attorney) is currently about \$23,000 to \$28,000. This amount will go up from year to year to reflect cost-of-living adjustments and perhaps efficacious service. Fringe benefits will cost about 15 to 20 per cent of the basic salary annually. A full-time secretary's salary will be \$7,500-10,000 annually (perhaps more in the larger metropolitan areas), again with cost-of-living and merit increases and fringe benefits. A specialized word processing operator may have a higher entry-level salary. A modest set of law books will require a one-time investment of \$5,000 to \$10,000. Thereafter a budget for law books and periodicals will run about \$1,000-\$1,500 a year.

An efficient law office truly needs a word-processing typewriter. Typing, correcting, and revising lengthy or repetitive legal documents takes too long on an ordinary typewriter. The word-processing market is remarkably varied and fiercely price-competitive. A county's actual cost for this equipment will depend on what it decides will meet its specific needs. Appropriate word processors can be rented for roughly \$1,000-\$2,500 a year (with or without service or operator training, or both) or can be purchased outright for \$8,000 and over. Lease-purchase arrangements are also common.

When the investment in law books and a typewriter is amortized, these figures suggest that the cost of a one-attorney law department could range at first from just under \$40,000 to about \$50,000 a year. A budget reserve of from \$5,000 to \$15,000 annually should be established against unanticipated litigation that might require the services of outside counsel. Thus if a county is now spending \$40,000 to \$60,000 a year for retained legal representation, switching to a full-time county attorney may save it some money. In addition, having a readily available attorney may avoid legal costs that might otherwise arise if retained legal counsel were consulted only when a dispute has crystallized. A full-time county attorney might possibly also reduce the rate of future increase in a county's legal costs, although against this must be balanced the prospect of regular annual salary increases for the attorney and secretary.

A COUNTY THAT is now spending \$40,000 to \$50,000 a year for legal representation may be able to justify hiring a full-time county attorney and establishing a law department. Whether that action is appropriate for a particular county depends on the county's specific legal needs, its county commissioners, and other relatively subtle questions such as the type of litigation a county anticipates or whether an unseasoned attorney will be effective with county officials and personnel. Perhaps the salient advantages of a full-time attorney are his intimate knowledge of the county's day-to-day affairs and his ability to practice preventive law. Because of the economics of legal fees and because of the social environment within which local government law is practiced, one can expect a steady increase in the number of counties with full-time attorneys. But not all counties will need such an attorney--particularly those without continuous, recurring legal needs.

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