Recommendation 87-3

Agency Hiring of Private Attorneys

(Adopted June 11, 1987)

In 1985 the Federal Government employed over 20,000 lawyers in various positions. At the same time it spent millions of dollars to retain private attorneys to provide diverse legal services. The Federal Deposit Insurance Corporation (FDIC) and the Federal Home Loan Bank Board/Federal Savings and Loan Insurance Corporation (FHLBB) accounted for most of these expenditures. The attorney fees paid by the FDIC and the FHLBB have increased rapidly since 1982 and have been incurred primarily in their capacities as receivers or liquidators of failed financial institutions for which they have provided deposit insurance. In those cases, the legal fees and other expenses are borne by the estate of the failed bank. However, many other Federal agencies, including government corporations, utilize the services of private attorneys—in some instances on a regular basis—and the fees are usually paid from appropriated funds.

This recommendation results from a survey of the use of private attorneys by government agencies and consideration by the Conference of the process that should be employed in deciding whether to retain outside counsel, including the ethical concerns that may arise when outside counsel are retained. The recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established. The scope of the recommendation accordingly does not extend to instances where an agency hires an individual who may be an attorney but is clearly not being hired to act in that capacity. The scope may therefore exclude some persons who are hired to do independent research, arbitrators hired to decide personnel or other disputes, or persons hired to provide mediation or similar services in connection with negotiated rulemaking.[1]

Retention of private attorneys for litigation, where, lawfully authorized, is within the scope of this recommendation. Congress has generally vested the power to litigate in the Department of Justice, although several agencies have been granted independent litigating authority by statute. Unless an agency is granted such authority, the consent of the Department of Justice is required for another agency to retain outside counsel for those purposes (5 U.S.C. 3106).

[1] The Administrative Conference has not studied the appointment of independent counsel under the Ethics in Government Act, 28 U.S.C. 591-598, and this recommendation does not address the selection of such counsel.

While some elements of the recommendation may state principles that are relevant to obtaining the services of other professionals, the Conference has studied only the retention of private attorneys. The focus of this recommendation on attorneys recognizes the role of the lawyer in implementing and enforcing government policy and the ethical requirements that are peculiarly applicable to attorneys.

In the private sector, it is cost-effective both to employ a full-time legal staff and to contract out some legal assignments. Many corporations have focused attention on methods to ensure that the size of the in-house staff is optimal and that work is contracted out only when necessary or for certain categories of work. Corporations have developed guidelines, criteria, and procedures to control the cost and ensure the quality of legal services.

In the public sector, concern for cost-effectiveness, a multi-faceted goal which does not look at the factor of price in isolation, is also clearly appropriate. The Conference has considered whether there should be a fixed cap on hourly fees to be paid to private attorneys hired by agencies, and has concluded that a government-wide limitation is inadvisable because it may prevent the government from obtaining high quality legal services. In many cases, the aggregate cost of legal services does not depend on hourly rates alone, and all relevant facts should be considered in determining the economic efficiency of a proposed contract for legal services. It may, however, be appropriate for individual agencies to limit hourly rates for certain types of services, if such limits are set at realistic levels. In hiring private counsel, agencies can also take into consideration the attorney's willingness to negotiate fees, seeking the most competitive fees available, while securing the skills and efficiency required.

Important additional considerations bear on the decision of the Federal government to rely on outside counsel. An agency should be acutely aware of the need for control over the activities of outside counsel to ensure, among other things, that the constitutional vesting of governmental authority in "officers" of the United States is observed in fact. The need for close control may vary with the circumstances, but it must assume preeminent importance in litigation.

In procuring the services of attorneys, agencies must also scrupulously avoid favoritism, or the appearance of favoritism, which can erode public confidence in the integrity and fairness of the government. Competitive procedures, whether mandated by procurement statutes or imposed as a matter of agency policy, will reduce the prospect or appearance of favoritism and result in higher quality legal services and savings in cost. Depending on the circumstances, the requisite procedures may range from a public solicitation of formal proposals to informal

telephone requests to several sources for information relating to qualifications, availability, and fees. Appropriate competitive procedures should consider both cost and the more subjective elements of professional skill and efficiency.

Attorneys performing work for the government must maintain the highest ethical standards. They should be particularly sensitive to questions of appearances and propriety. Neither the circumstances of their retention nor their conduct of their engagement should provide the slightest basis for loss of public confidence in the administration of justice or the integrity of the governmental process.

The hiring of outside counsel may raise important questions regarding conflicts between the interests of the government and others, which federal criminal law (18 U.S.C. 202 *et seq*.), ethics rules applicable to federal employees, and codes of professional responsibility seek to guard against. The principal ethical problem for outside attorneys involves simultaneous representation of the agency and, in a separate matter, a private party whose interests are adverse to the agency or the related interests of another agency. An important additional question is presented when an attorney or firm appears before an agency in a non-adversarial role on behalf of one client while simultaneously acting as attorney for the agency in a different matter.

The government, like any client of a private attorney, may consent to representation of adverse interests by its outside counsel. Any such consent, however, should be fully informed. Accordingly, to afford full protection to the government and the public, every effort must be made to identify conflicts or potential conflicts before work is contracted out, and to assure that, during the course of the representation, previously unanticipated problems are immediately disclosed so that the agency may take appropriate action.

Retainer agreements should identify the "client" with specificity and address questions related to existing or potential adverse representations. In many instances, only the agency that retains the private attorney will have an interest in the subject matter of the engagement, and in those instances that agency should ordinarily be considered the "client." This would have the effect of allowing outside counsel to appear before, or represent interests adverse to, other Executive Branch agencies in unrelated matters. Where broader interests of the government may be implicated, the agency retaining outside counsel will need to take those interests into account when drafting the retainer agreement.

To assure that all of these concerns are taken into account, any agency that anticipates a need to hire private attorneys should prepare written public guidelines concerning when and how it will seek outside counsel. As an element of agency control and to avoid later misunderstandings, appropriate written instructions should be given to attorneys when they are retained. The FDIC, FHLBB, and the Department of Justice have developed documents for these purposes, and agencies drafting guidelines and instructions should refer to them as possible models. Agencies may also find useful models in the private sector for some elements of their guidelines.

To respond to the concerns surrounding government use of outside counsel, agencies should prepare an annual public report listing basic information relating to legal service contracts awarded.

Recommendation

1. Scope of Recommendation

This recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established.

2. Use of In-House Government Attorneys

(a) Government agencies should continue to obtain most of the legal services that they need from government attorneys.

(b) When agencies cannot develop the necessary legal resources in-house, they should explore the possibility of utilizing the expertise found at other agencies of the government, on a temporary or short-term basis. The Office of Personnel Management should establish a procedure for sharing information among agencies on the kinds of legal resources available within the government.

3. Guidelines for Hiring Outside Counsel

Each agency that anticipates a need to hire private attorneys should prepare written public guidelines detailing: (a) The criteria for deciding whether or not to seek outside legal assistance, (b) the factors relevant to the choice of attorney or firm, (c) the procedures for procurement,

(d) appropriate limitations on counsel's authority, (e) conflict of interest and other ethical considerations, (f) billing practices, and (g) procedures for review of fees.

4. The Decision to Hire Outside Counsel

When an agency is considering whether to hire outside counsel, the agency should first assure itself (a) that it is authorized by law to hire outside counsel for the particular matter, (b) that it can exercise sufficient control over the performance of the services to be obtained, and (c) that such employment is cost-effective. The price of the services should not, however, be the sole test of cost-effectiveness. Also of importance in assessing the benefit to be gained from the use of outside counsel are the quality of the services provided, the availability of necessary expertise within the agency, and the need for an outside independent perspective.

5. Competition

In obtaining outside counsel, the agency should employ appropriate competitive procedures to assure that the requisite quality of service is obtained at a reasonable price without the fact or appearance of favoritism. The Office of Federal Procurement Policy should review the existing provisions of the Federal Acquisition Regulation to ensure that legal services can be procured consistently with the objectives of this recommendation.

6. Control of Performance

The contracting agency should retain such control over the performance of outside counsel as is necessary to assure that the governmental and public interests at stake are fully protected. To facilitate control, the agency should at the outset provide the attorney with specific written instructions regarding the conduct of the professional representation. Control is particularly important where the outside counsel is engaged to represent an agency in litigation.

7. Public Reports

Each agency that hires outside counsel should prepare and maintain in the office of its chief legal officer an annual public report, listing for each occasion on which outside counsel has been retained: (a) The attorney or firm and the type of work involved, (b) the reasons for engaging outside counsel, (c) the competitive procedures used, if any, (d) the fee range or other basis for compensation, and (e) the actual fee paid. For cases involving small amounts, aggregate figures would be acceptable.

8. Ethical Considerations

(a) An agency should require outside counsel whom it plans to hire to disclose fully and in writing all existing or potential conflicts of interest. The disclosure should include all matters that the attorney's firm has pending before, or reasonably expects to come before, that agency. The agency should then decide whether to proceed with the hiring in light of the information provided. If the attorney-client privilege or other rules prevent outside counsel from making full disclosure to the agency, then the outside counsel should not be employed. The agency's agreements with outside counsel should specifically identify the types of professional employment that cannot be undertaken because of the attorney's service to the agency.

(b) Federal agencies and such private attorneys as they retain should be mindful of the constraints imposed by statutes, regulations, executive orders, codes of professional conduct, and any applicable guidelines that pertain to conflict of interest and other potential ethical problems. Such provisions and guidelines should be explicitly identified and incorporated in the agency's contracts with outside counsel.[2]

(c) When an attorney retained by an agency is not a special government employee within the meaning of 18 U.S.C. 202(a), at a minimum those restrictions which apply to such employees should be adopted by the contract with the attorney unless they are clearly inappropriate. Such restrictions include rules of employee responsibilities and conduct contained, for example, in 5 CFR Part 735.[3]

(d) The Department of Justice and the Office of Government Ethics should provide guidance on the applicability of 18 U.S.C. 203-208 to agency hiring of outside counsel. Subject to that guidance, agency guidelines should provide that, for purposes of disqualification based on prohibitions against simultaneous or sequential representation of opposing parties, different departments or independent agencies of the Federal Government should normally be considered to be different clients.[4] The guidelines should also provide that, if more than one

[2] The contract should indicate whether and to what extent outside counsel may take inconsistent positions on behalf of an agency and a private client.

[3] See 5 CFR 735.301-306, which prescribe ethics and conduct rules for special government employees. See, particularly, 5 CFR 735.301, which advises agencies that appropriate ethics and conduct rules for regular employees, stated elsewhere in part 735, may also be made applicable by regulation to special government employees.

[4] This paragraph of the recommendation refers to "clients" solely for the purpose of determining disqualification. The implicit premise of the recommendation is the Executive Branch is a unitary entity whose interests and legal positions are determined by the President or his delegates, including the Attorney General.

agency has a common interest in the matter, then the definition of "client" should include any such agency or agencies. The guidelines should also make clear that all lawyers in the firm, including all branch offices of the firm, are subject to the applicable restrictions on simultaneous or sequential representation, and that these restrictions apply not merely to litigation, but to all matters in which an attorney-client relationship has been established.[5]

(e) The guidelines should also address the varying circumstances in which an attorney may represent other clients in matters involving the agency. The guidelines should identify those situations that should be avoided.

(f) If a private attorney represents the same agency frequently, then their relationship should be considered as a continuing one. In such a situation, neither the attorney nor the attorney's firm should agree to represent another client in a matter involving the client agency without the agency's explicit consent, even if, at that time, the attorney is not representing or advising the agency on a specific matter.

9. Limitations on Hourly Rates

No government-wide limitation on hourly rates should be established for hiring of private counsel. It may be appropriate for agencies to set a fixed cap on hourly rates they pay to private attorneys for routine legal tasks; a higher fee cap may be appropriate for unusual or complex legal work. Such limits, if adopted, should be set at realistic levels, in line with fees typically charged for similar services in the same locale, so that agencies hiring outside counsel will be able to obtain the needed degree of expertise.

Citations:

52 FR 23632 (June 24, 1987)

__ FR _____ (2012)

1987 ACUS 15 (vol 1)

[5] The Department of Justice should consider, in accordance with Recommendation 84-5, 1 CFR 305.84-5, whether to issue a regulation that explicitly preempts any state rule of attorney practice that is in conflict with its guidance.