



Working with Your School Attorney: The How, When, and Why of Obtaining Legal Counsel

Public schools operate in a complex legal context. A host of state and federal laws and rules govern virtually every detail of school operations—who works for the school district, what they teach students, what instructional materials they use, how the school buildings are built, what food is served in the cafeteria, who is eligible to attend school, how students’ academic performance will be assessed, and how their misbehavior will be punished. The laws that govern public schools are constantly changing and growing more complicated. To keep up and stay in compliance, the average public school district frequently requires the assistance of legal counsel.

The high cost of seeking legal advice is a concern to every public school district. But the cost of not seeking timely advice can be even higher. Without adequate information and advice, a school board, a school board member, a district administrator, or other district employee can expose the district to legal claims, threats of litigation, or even legal liability. In some circumstances, district personnel or board members may expose themselves to personal liability for damages. In addition, several applicable laws, including the Open Meetings Act and conflict of interest laws, carry criminal penalties for violations. A competent school attorney will advise the board and district personnel in conducting the business of the district. Working together, the attorney and school officials can ensure compliance with applicable laws and minimize the risk of litigation and liability.

When does your district need a school attorney?

Of course, a school attorney can be called upon to help when a school district finds itself in legal trouble. Call your school attorney promptly if the district receives a court summons or other legal document; if the district has been accused of violating the rights of an employee, student, parent, or other citizen; if the district is dissatisfied with a vendor’s performance; if a supervisor discovers a potential violation of law by a school employee; or if an investigation is brought by a regulatory agency.

Better yet, don’t wait until after problems arise to call an attorney. School districts should seek the advice of counsel before major events, such as issuing bonds, buying or selling real property, signing contracts involving large sums of money, signing insurance contracts, or terminating an employee. School districts are also wise to seek on-going legal advice to spot potential problems before they develop. School attorneys can perform periodic audits of local policies, personnel, and open government practices that can help ensure compliance with legal requirements.

How does a school district find a school attorney?

Competitive procurement is not required. The Texas Education Code specifically states that the requirement for competitive procurement of contracts over \$50,000 “does not apply to a contract for professional services rendered, including services of an . . . attorney.”¹ In addition, attorneys are not listed in the Professional Services Procurement Act as professional services for which the use of competitive bidding is specifically prohibited.² Therefore, a district may procure the services of an attorney or a law firm by any means the board deems appropriate.

Send a request for proposals or qualifications. To ensure that the district is getting the best value and a well qualified attorney, the board should use some type of procedure to elicit information from potential candidates. Most boards use either a “request for proposals” process or a less formal “request for qualifications” process, inviting firms to submit materials describing their professional qualifications to provide legal services to the district. Written submissions should be followed by interviews with the top candidates. The information gathered from potential candidates aids the board in determining whether the district’s needs can best be met by a local attorney or firm or by an attorney or firm in another location.

Consider recommendations and check other resources. When searching for the right attorney, the board should consider recommendations from other school districts. In addition, the board should consider the experience of district personnel who have worked with attorneys representing the district in the past; they may be able to identify areas where legal services have been most used and useful.

Although TASB Legal Services does not recommend specific attorneys, the membership list of the Texas Council of School Attorneys is available on the Internet through a link from the TASB Legal Services’ Website at www.tasb.org/services/legal/council/index.aspx. The Council is an organization of attorneys who represent at least one school district client. Together, these attorneys represent over 90 percent of the school districts in Texas. The Council promotes relationships among school attorneys and offers continuing education programs and other assistance to the attorneys.

In addition, biographical information on attorneys is available in directories published by Martindale-Hubbell online at www.martindale.com and the State of Texas Bar Association online at www.texasbar.com. Law firms also maintain websites that contain biographical and firm information.

¹ Tex. Educ. Code § 44.031(f).

² Tex. Gov’t Code §§ 2254.001-.006.

In a report, entitled “Navigating the Legal Maze: A Practical Guide for Controlling the Cost of School District Legal Services,” the Comptroller suggests double checking the State Bar of Texas Website before hiring a new attorney, to ensure that the attorney is licensed and remains in good standing.³

What to look for in a school attorney. In interviewing and evaluating prospective counsel, the board will want to consider relevant factors, such as the following:

Quality: What is the quality of the legal services provided by the attorney or firm? What other clients does the attorney represent? What do these clients say about the attorney?

Cost: Can the attorney and district arrive at a mutually agreeable fee arrangement?

Experience and expertise: How much experience and expertise does the attorney have in the major areas of school law? What expertise and experience could be provided by other members of the attorney’s firm, if any? What percentage of the attorney’s time is spent representing school districts? If the attorney is hired for a particular purpose, such as bond counsel or collection of delinquent taxes, what is the attorney’s expertise in that area?

Professional organizations: Does the attorney participate in professional organizations, such as the State Bar of Texas School Law Section, the Texas Council of School Attorneys, or the NSBA Council of School Attorneys? Has the attorney demonstrated a commitment to public education?

Accessibility: Is the attorney available and willing to attend board meetings or hearings at the district’s request, either in person or by telephone conference? Will the attorney be available for prompt phone consultation? Is the attorney committed to keeping the appropriate district representatives fully informed about developments in cases involving the district? Will the attorney personally perform or supervise the district’s legal work? What role will be played, if any, by other attorneys, law clerks, and legal assistants?

Personality: Will the attorney’s personality and style complement those of the board, the administration, and staff?

Conflicts of interest: Does the attorney or firm represent any other clients that might present a conflict of interest in the future? Does the attorney have a family or other relationship with a board member or administrator that may present a conflict between the interests of the district and the interests of the individual board member or administrator?

³ Texas School Performance Review, *Navigating the Legal Maze: A Practical Guide for Controlling the Cost of School District Legal Services* (2003), www.lbb.state.tx.us/Documents/Publications/Primer/Navigating_the_Legal_Maze.pdf.

How does a school district hire a school attorney?

The board votes. The board, acting as a body corporate, selects and retains the district's attorney. While the superintendent's recommendation is valuable, the board is the "client" which ultimately makes this critical decision.

Discuss in open session. Discussions and deliberations regarding the retention of an attorney, interviews with prospective counsel or discussions of their qualifications, and discussions or negotiations of the contract between the district and its attorney *may not* be conducted in closed meetings. All such discussions must be conducted in properly posted open meetings. An outside attorney or law firm is an independent contractor; therefore, the personnel exception in the Open Meetings Act does not apply.⁴ Of course, if the district is employing an attorney to serve as a member of its staff, then the attorney will be an employee of the district and his or her employment may be discussed in closed session pursuant to the personnel exception.

Nepotism laws may apply. The attorney general has determined that the nepotism laws applicable to school districts apply to independent contractors as well as to employees.⁵ Accordingly, a school district may not hire an individual related to a board member within a prohibited degree to provide legal services, regardless of whether the individual is hired as a regular employee or as an independent contractor. The attorney general has opined, however, that the nepotism laws may not apply to prohibit the retention of a law firm in which a board member's relative owns an interest.⁶

How should the relationship between the district (the board members, administration, and employees) and the school attorney function once it is established?

The person or persons designated to communicate directly with the school attorney will vary from district to district. To control the flow of information and the cost of legal services, most districts choose to limit who has access to the district's attorney. Both the district and the attorney need a clear understanding of who is authorized to call the attorney and under what conditions. The specifics generally should be spelled out in the written agreement between the attorney and the district, in local policy BDD or other written procedure, or both.

A school district's attorney represents the district as an entity, not any single person associated with the district. The board of trustees, acting as a body corporate, governs the district. Consequently, the attorney owes his or her allegiance to the district, not to any individual board member, board officer, or employee, including the superintendent.⁷ Under certain conditions, the attorney may also provide limited representation of individuals acting for the district. Such circumstances may arise when a lawsuit is filed against the district and individual administrators or trustees are named as co-defendants.

⁴ Tex. Gov't Code § 551.074; Op. Tex. Att'y Gen. No. MW-129 (1980).

⁵ Op. Tex. Att'y Gen. No. DM-76 (1992).

⁶ Tex. Att'y Gen. LO97-028 (1997).

⁷ Tex. Disciplinary R. of Prof'l Conduct 1.12.

In conclusion, taking a proactive approach to retaining legal counsel before the district finds itself in desperate need of a lawyer may ultimately save the district money in legal fees by ensuring that the district is aware of and in compliance with all applicable laws and by allowing the district to anticipate and avoid potential problems.

For sample forms and more detailed information on the issues addressed in this article and other issues pertaining to the selection of and relationship with a school attorney, see *Selecting and Working with a School Attorney: A Guide for School Boards*, published by the National School Boards Association in April 1997.⁸

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.

⁸ For more information on this or other NSBA publications, call NSBA at 800-706-6722 or go to www.nsba.org.