



Judicial Council of California · Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: February 26, 2013

Title	Agenda Item Type
AOC Restructuring: Independent Review of Use, Selection, and Management of Outside Counsel	Action Required
	Effective Date
	February 26, 2013
Rules, Forms, Standards, or Statutes Affected	Date of Report
None	February 20, 2013
Recommended by	Contact
Hon. Steven Jahr, Administrative Director of the Courts	Jody Patel, 916-263-1333
Ms. Jody Patel, AOC Chief of Staff	jody.patel@jud.ca.gov

Executive Summary

To implement the Judicial Council directive regarding review of the Administrative Office of the Courts (AOC) Legal Services Office's use, selection, and management of outside legal counsel to determine whether outside counsel is being used in a cost-effective manner, the Administrative Director of the Courts and the AOC Chief of Staff recommend that the Judicial Council members assigned by the Chief Justice as council liaisons to the Legal Services Office (LSO), with assistance from the Litigation Management Committee chair or members as the liaisons deem appropriate or necessary, conduct the review. Doing so is consistent with the liaison program objectives that the assigned council liaisons familiarize themselves with the programs, budgets, and resources of their assigned areas and their service to the judicial branch and others, and then provide information to the Judicial Council.

It is also recommended that the AOC be directed to obtain information about industry practices regarding use of outside legal counsel by large service organizations and provide such information to the LSO council liaisons for their consideration as they conduct their review.

In addition, it is recommended that the council liaisons report the results of these efforts to the Judicial Council for its review and for any further direction regarding the cost-effectiveness of the use of legal counsel by the LSO.

Finally, two other options for conducting this review are provided for consideration should the Judicial Council not concur in this recommendation.

Recommendation

The Administrative Director of the Courts and the AOC Chief of Staff recommend that the Judicial Council:

1. Direct that the Judicial Council members assigned as council liaisons to the Legal Services Office, with assistance from the Litigation Management Committee chair or members as the liaisons deem appropriate or necessary, review the LSO's use, selection, and management of outside legal counsel to determine whether outside counsel is being used in a cost-effective manner;
2. Direct the AOC to obtain information about industry practices regarding use of outside legal counsel by large service organizations, e.g., liability insurers, and provide such information to the Judicial Council liaisons to the LSO for consideration by the council liaisons as they conduct their review; and
3. Direct the Judicial Council liaisons to the LSO to report back to the council on the results of their review for any further direction regarding the evaluation of the cost-effectiveness of the use of outside counsel by the LSO, such as additional review by the AOC's Internal Audit Services unit or an outside consultant or other means that the Judicial Council liaisons recommend.

Previous Council Action

At its August 31, 2012, meeting, the Judicial Council approved all recommendations made by its Executive and Planning Committee (E&P) regarding the Strategic Evaluation Committee's (SEC) report and recommendations. Of the 145 E&P recommendations, 17 focused on the AOC Office of the General Counsel, now renamed—consistent with E&P recommendation—the Legal Services Office. As approved by the council, E&P's recommendations were recast as council directives. Judicial Council directive 122 states:

E&P recommends that the Judicial Council direct the Administrative Director of the Courts to order an independent review of the Office of the General Counsel's use, selection, and management of outside legal counsel to determine whether outside counsel is being utilized in a cost effective manner. Before initiating the independent review, the Administrative Director of the Courts must provide a proposal with options for conducting the review, including the associated costs.

The council has taken no further action concerning this directive.

Rationale for Recommendation

Background regarding the Legal Services Office use of outside legal counsel

The AOC Legal Services Office (LSO) currently¹ utilizes outside legal counsel for the following purposes:

- To provide legal representation for judicial branch entities under the Judicial Council's Litigation Management Program, consistent with applicable statutes and rules of court;
- To provide legal representation to trial courts, upon their request, in labor arbitrations and complaint proceedings before the Public Employment Relations Board (PERB), consistent with policy direction as communicated to trial court leaders in 2004;
- To provide legal advice and services in specialized areas of practice—e.g., copyright, tax, employee benefits—in which LSO attorneys do not have expertise; and
- To augment LSO staff in the Real Estate Unit in light of staff reductions, and for facilities-related work that requires outside counsel's unique skill set (e.g., complex environmental issues, specialized construction law issues, and consultation on bond-financing issues).

Each of these areas is addressed further below.

Judicial Council's Litigation Management Program

The Litigation Management Program was approved by the council in the fall of 1999 to provide adequate funding to respond to litigation arising out of trial court operations and to provide an efficient, accountable way to manage such litigation. The council established a litigation fund in the amount of \$4.5 million from the Trial Court Improvement Fund,² to be used for attorney fees and costs, settlement obligations, and judgments incurred on or after January 1, 2000, in all cases or claims arising out of trial court operations.

On January 1, 2001, Government Code section 811.9 took effect, codifying the responsibility of the Judicial Council to provide for representation, defense, and indemnification of judicial officers and employees of the trial courts. Section 811.9 also directed the council to adopt rules of court requiring the AOC to manage all actions, proceedings, and claims that involve trial courts and their judicial officers and employees. The council accordingly adopted rule 6.800 (now rule 10.202) and rule 6.14 (now rule 10.14), both of which took effect January 1, 2001. Extensive amendments to the Government Claims Act (Act) took effect on January 1, 2003. The Act now explicitly establishes that the council is to take action on claims against the Judicial

¹ In prior years, LSO used outside counsel for major projects requiring specialized legal services, for example, in connection with the Long Beach Courthouse Public-Private Partnership transaction and with the transfers of over 500 court facilities pursuant to the Trial Court Facilities Act of 2002.

² The Trial Court Improvement Fund is now the State Trial Court Improvement and Modernization Fund. The \$4.5 million annual allocation from the fund has remained constant since the program's inception.

Council, the AOC, trial and appellate courts—referred to as “judicial branch entities”³—and judicial officers and employees of those entities.

Also effective January 1, 2003, amendments to rule 6.800 (now rule 10.202) require the LSO, under the direction of the Administrative Director of the Courts, to develop, manage, and administer a program for investigating and resolving all claims and lawsuits affecting the appellate courts as well as the trial courts. Rule 10.202(b)(3) specifies that the LSO “must . . . [s]elect and direct any counsel retained to represent” judicial branch entities or their judicial officers and personnel who are provided legal representation under the council’s program.

Rule 10.14 describes the role and responsibilities of the Litigation Management Committee. The committee has oversight responsibility for cases against judicial branch entities that seek recovery of \$100,000 or more⁴ or that raise issues of significance to the judicial branch. The committee is responsible for reviewing and approving any proposed settlement, stipulated judgment, or offer of judgment in such cases and for consulting with the Administrative Director of the Courts or the Chief Counsel,⁵ on request, about important strategy issues.

Outside legal fees and costs for Litigation Management Program. Fees and costs for outside legal counsel retained under the council’s Litigation Management Program represent a large component of LSO’s expenditures for outside legal counsel. Annual expenditures for outside legal counsel to defend the trial courts, trial court judicial officers, and trial court employees in government claims, prelitigation, and litigation matters, including judicial subpoenas, disqualification motions, and writs for the last five fiscal years are shown below, along with other program information.⁶

³ Government Code section 940.3 states: “A ‘judicial branch entity’ is a public entity and means any superior court, court of appeals [sic], the Supreme Court, the Judicial Council, or the Administrative Office of the Courts.”

⁴ When initially adopted, the rule provided for committee oversight of cases seeking recovery of \$50,000 or more. That threshold was increased to \$100,000, by amendment, effective December 9, 2008.

⁵ The rule refers to “General Counsel”; that position is now referred to as “Chief Counsel,” consistent with E&P’s recommendation regarding organizational and staffing changes.

⁶ The expenditure information included in this report is consistent with information provided to the SEC in February 2012 except as indicated in footnotes 8 and 9. Year-end reconciliation among different funds and other adjustments due to later made payments or corrections for data entry errors may result in slightly different figures depending upon when data are captured.

Table 1

Annual Reporting Period by Fiscal Year (FY)	Total Outside Counsel Fee and Cost Expenditures for Trial Court Matters	# of Trial Court Claims Managed	# of Trial Court Lawsuits Managed	# of Trial Courts Receiving Program Services
FY 2007–08	\$ 3,575,974	238	272	43
FY 2008–09	\$ 2,877,450	249	250	45
FY 2009–10	\$ 3,247,301	230	247	39
FY 2010–11	\$ 2,871,193	227	238	38
FY 2011–12	\$ 2,784,765	152	272	36

Also included in the Litigation Management Program are expenses for outside counsel to defend the Supreme Court, Courts of Appeal, Judicial Council, and AOC in government claims, prelitigation, and litigation. Annual expenditures for those outside counsel fees for the last five fiscal years have been less than \$200,000 per year.

Legal representation for trial courts in labor arbitrations and PERB complaint proceedings

With limited exceptions, labor arbitrations are not covered by the council’s Litigation Management Program.⁷ The Judicial Council established a fund, however, that is used by LSO to provide legal services to trial courts upon their request, including representation of trial courts by outside counsel in labor arbitrations not covered by the Litigation Management Program, such as arbitrations relating to the interpretation and implementation of language in memoranda of understanding (MOUs). The fund is also used to retain outside counsel to represent trial courts upon their request in complaint proceedings before PERB.

The LSO has offered legal assistance in labor arbitrations and PERB complaint proceedings since September 2004, when trial court leaders were informed that these additional services were available to the courts. Because these matters are not covered by the council’s Litigation Management Program, courts retain final authority on settlement and are responsible for the ultimate disposition of the matters.

⁷ Labor arbitrations that raise the same legal claims as contemporaneous employment litigation are included within the Litigation Management Program for continuity and efficiency on request by the trial court employer. For example, if after termination a former court employee files both a discrimination lawsuit and a grievance under the court/union labor contract, the LSO engages one attorney to represent the court’s interests in both proceedings.

Outside legal fees and costs for labor arbitrations and PERB complaint proceedings. Fees and costs for outside legal counsel retained for trial court labor arbitrations and PERB complaint proceedings for the last five fiscal years are shown below:

Table 2

Fiscal Year (FY)	Total Fees/Costs for Arbitrations and PERB Complaint Proceedings⁸	# of Trial Courts Receiving Services
FY 2007–08	\$375,650	18
FY 2008–09	\$521,934	18
FY 2009–10	\$217,827	18
FY 2010–11	\$285,671	18
FY 2011–12	\$414,072	20

Legal advice and services in specialized areas of law

From time to time, LSO retains outside legal counsel for assistance in areas of substantive law in which LSO staff do not have expertise or where outside counsel can provide needed services more efficiently. For example, LSO has retained outside counsel to assist in the following areas of law: complex technology transactions (CCMS-related), a complex financing/public-private partnership transaction (Long Beach courthouse), tax-exempt leasing/finance, equipment lease finance debt restrictions, government procurement law, and copyright protection. Where the legal work is for the benefit of trial courts, legal counsel are retained using the same fund that is used for counsel in labor arbitrations and PERB complaint proceedings. For non-trial court assistance, LSO uses money allocated in its internal budget for consultation services. As reported to the SEC in February 2012, these expenditures have varied depending upon the needs of the branch, with outside counsel fees of approximately \$200,000 to \$1,000,000 annually over the five-year reporting period.

Facilities-related outside legal services

The LSO’s Real Estate Unit provides a variety of legal services to support the AOC’s facilities-related activities with its current legal staff of one supervising attorney and two staff attorneys. Outside counsel are used mainly for work that requires specialized skills and experience (for example, complex environmental issues, specialized construction law issues, and consultation on bond-financing issues) and where workload exceeds the capacity of LSO’s legal staff.

⁸ Two amounts reported to the SEC in February 2012 have been corrected. The amount reported to the SEC for fiscal year 2007–2008 of \$482,920 represented encumbrances rather than expenditures. The correct amount of \$375,650 represents actual expenditures. In addition, the amount reported for fiscal year 2010–2011 in this table reflects a correction of a \$300 typographical error.

Fees for facilities-related outside legal counsel. Annual expenditures for facilities-related work performed by outside counsel for the last five fiscal years are shown below:

Table 3

Fiscal Year (FY)	Expenditures for Facilities-Related Outside Counsel⁹	Nature of Work Performed by Outside Counsel
FY 2007–08	\$1,596,444	SB 1732 Implementation/transfers
FY 2008–09	\$2,670,516	SB1732 Implementation/transfers
FY 2009–10	\$1,283,654	SB 1732 Implementation/transfers/development agreements
FY 2010–11	\$ 344,041	Transfers/development agreements/construction documents
FY 2011–12	\$ 665,128	development/litigation Development agreements/bond-related issues/construction documents development/litigation

Note that the transfers of court facilities from county to judicial branch responsibility were completed during fiscal year 2009–2010, resulting in reduced outside counsel expenditures in subsequent years.

Options for conducting review of use, selection, and management of outside legal counsel

As noted, the Administrative Director of the Courts must provide a proposal with options for conducting the review of outside legal counsel, including associated costs. The process for obtaining cost information on all options, however, would be extensive and require significant resources. For that reason, the Administrative Director and Chief of Staff present three options for consideration by the Judicial Council and, for the reasons stated below, recommend option 1.

Option #1: Direct the council’s liaisons to the Legal Services Office,¹⁰ with assistance from the Litigation Management Committee chair or members as the liaisons deem appropriate or necessary, to conduct review of the LSO’s use, selection, and management of outside legal counsel to determine whether outside counsel is being used in a cost-effective manner, consider additional information about industry practices regarding the use of outside counsel, and report back to the council regarding their review.

⁹ Two amounts reported to the SEC in February 2012 have been corrected. In this table, the figures in fiscal years 2007–2008 and 2010–2011 reflect corrections for clerical errors (\$2 and \$18,000, respectively.)

¹⁰ The council members currently assigned as liaisons to the AOC Legal Services Office are Justice Douglas P. Miller and Ms. Edith R. Matthai. Terms of current liaison members end September 14, 2013.

The benefits of this option include:

- Liaison review of the use of outside counsel is consistent with liaison responsibilities to familiarize themselves with the LSO's programs, budget, and resources needed to implement the council's policies and directives and its service to the judicial branch and others and will enhance the liaisons' knowledge and understanding of the work of the LSO.
- Liaison review would allow for expeditious review and attention to areas of interest/concern to the council.
- Liaison review, with assistance from the Litigation Management Committee chair or members as the liaisons deem appropriate or necessary, will avoid issues relating to attorney-client privileged information regarding specific claims and lawsuits.
- Liaison review avoids the need for an RFP and associated costs.
- Costs should be minimal.
- Results from liaison review would help inform whether further analysis of the selection, use, and management of outside counsel to determine whether outside counsel is being used in a cost-effective manner is desired.

The negative aspects of this option include:

- Burden on liaisons and Litigation Management Committee chair and members.
- Some work could be in excess of rule-based responsibilities of Litigation Management Committee.
- Not a comprehensive review.

Option #2: Direct the AOC's Internal Audit Services unit (IAS) to conduct review.

The benefits of this option include:

- Using internal AOC resources would not require expenditure of additional funds.

The negative aspects of this option include:

- Uncertainty as to whether IAS has resources sufficient to conduct review in timely manner.
- Uncertainty as to whether IAS has subject matter expertise to conduct review.
- Uncertainty as to whether review by IAS would satisfy direction for an independent review.

Option #3: Retain outside consultant to conduct review.

The benefits of this option include:

- Independence of outside consultant.
- Possibility of a more comprehensive review.
- Less use of AOC resources.

The negative aspects of this option include:

- Necessity of competitive process (e.g., RFP) to select consultant, with attendant demands on reduced contracts staff in the Fiscal Services Office as well as LSO.

- Uncertainty as to whether scope of review matches experience of potential consultants.
- Inability to ascertain costs without expending resources on process.

Implementation Requirements, Costs, and Operational Impacts

The implementation requirements, costs, and operational impacts will vary significantly depending on the manner in which the council directs that the review of the AOC Legal Services Office use of outside counsel proceed. For example, if Option #3 is selected, a competitive selection process would be required to retain an outside consultant (or consulting firm) to conduct the review, the costs of which would not be known until such process were undertaken. In contrast, Options #1 or #2 involve internal council or AOC efforts that would not require immediate expenditure of additional funds. Any option would necessarily require staff time to compile information as requested by the reviewers, the extent of which would vary depending on the scope of the review.