

Nielsen Legal Consulting

1170 Mendocino Drive
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MEMORANDUM

To: Don Banning, Mayor

From: David L. Nielsen

Date: February 7, 2012

Re: City Attorney Contract

Thanks for sending me copies of the City Attorney Contract (“Contract”), the City Charter (“Charter”) and copies of email correspondence concerning codification efforts of city ordinances. I have reviewed them and also Title 7, chapter 4, part 41, MCA. You also provided additional background information verbally.

QUESTIONS POSED

The questions that I understand being asked are:

1. Who has the authority for the City to initiate the termination provision in Section 9 of the Contract?
2. Is there “good cause” on the part of the City to terminate the Contract?

SHORT ANSWERS

The short answers to the questions are:

1. The Council has the authority for the City to initiate the termination provision in Section 9 of the Contract.
2. Considering the close relationship between an attorney and client, if the Council has a lack of trust or confidence in the representation by the City Attorney, this would be good cause.

DISCUSSION

Authority for Termination of Contract

In reviewing the contract the first question is whether this is a contract for employment or a contract for legal services through an attorney acting as an independent contractor. The distinction between employee and independent contract is always an important one because of differing legal ramifications. For city employees an employer must provide Workers’ Compensation coverage, group health insurance, PERS contributions and is liable for unemployment insurance assessments. These are not required in contracts for professional services by independent contractors. They make their own arrangements for Workers’ Compensation coverage, health insurance, retirement and pay their own unemployment insurance assessments.

In contracts for professional services I recommend the contract contain a provision stating that the contracted service provider is an independent contractor and will provide either proof of coverage or approved exemption from coverage. Even though an independent contractor, the City would be liability

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to the independent contractor's employees if the contractor failed to provide them with Workers' Compensation coverage. This is why I recommend the contract contain provisions dealing with the Workers' Compensation coverage. My caution on these types of contracts is that contracts for personal services are considered to be contracts for employment unless shown otherwise. Having a contract with conflicting language might be interpreted against a finding of exemption as independent contractor.

In reviewing the Charter the Mayor as the executive officer may appoint with the consent of Council the department heads and may appoint other department employees without the consent of the Council. Unless the City's ordinances provide otherwise, the City Attorney would not be considered a department head. If the City Attorney is an employee, as a non-department head, the Mayor has the Charter powers to initiate discharge.

If the City Attorney is not an employee but is an independent contractor providing professional legal services, the Contract's termination would rest with the Council. The Mayor has Charter powers to execute contracts and written obligations subject to the approval of the Council. If the Council approved the Contract for the City Attorney as an independent contractor, the Council would have to approve its undoing and termination. I understand here the Council approved the appointment of the City Attorney but did not specifically approve the Contract and its terms. The Contract was drafted and executed subsequent to the Council's action and was the completion of the action. I opine that legally the Council's approval of the appointment constituted an approval of the follow up Contract.

In reading the Contract, I find conflicting language as to whether this is a contract for employment or contract for legal services from an independent contractor. In the Compensation section the City Attorney is paid a set annual amount, based upon pay periods, "together with any customary and standard benefits." "The inclusion of benefits gives this Contract the appearance of being a contract for employment. However, paragraph 3., which makes the City Attorney responsible for office costs and overhead, makes the contract appear to be one for an independent contractor providing legal services. Also the "supervising official" is the Mayor. For an independent contractor, it is atypical to have a "supervising official." That sounds more like an employment agreement.

Paragraph 7. states that the Contract is for personal services. This paragraph is not determinative in resolving the question of whether the City Attorney is an employee, subject to discharge by the Mayor, or a contractual termination by the Council but is relevant in "good cause" determinations in either case.

Even though the City Attorney maintains a private practice and has other clients, that fact alone does not prevent the attorney from being a part-time employee of the City as City Attorney if he is otherwise treated as an employee.

I understand both the City Attorney and the City have interpreted the Contract as one for professional services by independent contractor and the City has not included the City Attorney as an employee by providing health insurance benefits, paying Workers' Compensation premiums, retirement contributions, unemployment insurance or other employee benefit. This implementation of the Contract, coupled with the fact that the City Attorney maintains an independent private practice, leads me to conclude that the Contract is one for independent contractor services and not as an employment agreement. Since the

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Council had approved the concept of an independent contract in its action to approve the City Attorney appointment, the Contract would be considered as having been approved by the Council.

Therefore since the City Attorney is acting as an independent contractor under a Contract approved in concept by the Council, any action to terminate the Contract would require Council approval.

“Good Cause”

The Contract allows for either the City Attorney or the City to early termination of the Contract for “good cause.” Nothing in the Contract defines this term. Since the undefined “good cause” standard applies both to termination by the City Attorney and the City, the standard would apply equally to both. What is “good cause” for one side would be “good cause” for the other.

The Contract is for personal services. This restriction on the Contract implies that the services may only be provided by the City Attorney personally and may not be delegated or assigned to another. Personal services contracts imply that there is a special relationship between the parties and that there is a trust and confidence that cannot be performed by others. Personal services involving a special level of trust and confidence are typical in attorney-client relationships. The competence or skill of the attorney is not a factor in early termination if the client does not have trust or confidence in the attorney’s ability to provide acceptable legal representation.

The “good cause” in this Contract does not need to be a showing of egregious misconduct or incompetence but can be fulfilled simply by the City’s lack of confidence or trust in the City Attorney’s ability, even though there are no specific instances of malpractice or malfeasance. This “good cause” would be reciprocally available to the City Attorney to early termination of the Contract. If the City Attorney does not have trust or confidence in the City to support his work or follow his counsel, that lack of trust or confidence would be sufficient for his termination of the Contract. A breakdown in the special attorney-client relationship for whatever reason, or no reason, would be “good cause.”

Codification

I have been furnished copies of emails giving instruction to Sterling, as codifier for the City, to include non-ordinance materials in the City Code. I would not recommend including in city code extraneous materials or declarations of Council policy, whether written or not.

A city governing body can set city policy by three different methods—oral motion at meeting, written resolution or ordinance. Of these three only the ordinance is considered law and enforceable as such. Generally, violations of an ordinance may be punished by criminal or municipal infraction civil penalties. For this reason ordinances may only be adopted after two readings at least 10 days apart and after public notice. Ordinances are not effective until 30 days after second passage. See §7-3-1222, MCA. Ordinances are subject to repeal through a timely-filed citizen referendum.

Instructing a codifier to include non-ordinance materials at worst is an attempt to illegally elevate a non-ordinance to the status of a properly enacted ordinance.

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For ease in finding ordinances through an organized and indexed book, Montana law allows for cities and towns to codify the ordinances. Section 7-3-1226, MCA, provides:

“(1) Ordinances may be revised, codified, rearranged, and published in book form under appropriate titles, chapters, and sections, and such revision and codification may be made in one ordinance containing one or more subjects. The publication of such revision and codification in book form as aforesaid shall be held to be a sufficient publication of the ordinance or several ordinances contained in such revision and codification.

(2) Any such publication of a revision or codification of ordinances in book form shall contain a certificate of the president and clerk of the correctness of such revision, codification, and publication; and such book so published shall be received in evidence in any court for the purpose of proving the ordinance or ordinances therein contained, the same and for the same purpose as the original book, ordinances, minutes, or journals would be received.”

As you will note, codification is only for ordinances. It is not for other types of council action such as resolutions, meeting procedures not adopted as an ordinance and other extraneous information such as inclusion of Montana statutes. If a council wanted to adopt its own version of Montana statutes it can certainly do so through the ordinance adoption process. It cannot simply instruct a codifier to include these in the City Code. The law of the City is the ordinance. The codification is only for organization and ease in finding the ordinance law.

Commingling ordinances with non-ordinance materials in the City Code is legally dangerous and would be harmful to the legal viability of the City Code. If a person were charged with a violation of the City Code that was not a properly adopted ordinance, that charge would not be legally enforceable and the City could be subject to liability for malicious prosecution and maybe even false arrest and imprisonment. Also, non-ordinance material would prevent the admissibility of the City Code in evidence in court since the certification of the president and clerk could not honestly state that it was codification of ordinances.

I strongly advise against including any non-ordinance material in the City Code. Ordinances and non-ordinances must be organized and treated separately.

City as Client

Though I was not asked a question concerning paragraph 8 of the Contract, professionally and ethically I must provide a comment. A city attorney has as the client the city. The client is not the mayor, city manager, commissioners, council members or city employees. The conflict of interest paragraph discusses situations when there is a conflict of interest between different members or employees of the City. If the attorney is aware that the client is the city, these conflicts cannot arise. A city attorney does not represent one employee against another. Nor does the city attorney represent one council member against another or the mayor against the counsel. The ethical loyalty is to the client, which is the entity and not its individual members or employees. All city attorneys appreciate that the direction of this client is given through the voices of the policy makers, whether mayor, council, commission or chief executive officer but that does not make any one person in these capacities as the “client.”

Future Contract Recommendations

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In future contracts for city attorney services, I recommend:

1. The contract clearly state whether it is a contract for employment or for legal services provided by an independent contractor. Many cities and towns use a professional services agreement that has been developed for use by municipalities and was part of a contract package distributed at the last League of Cities and Towns meeting by MMIA.
2. The contract replace the current Conflict of Interest paragraph with a clarification chat the City attorney represents the city as the client.