C.A. No. 09-55514
Date of Decision: September 9, 2010
Before: Hon. Goodwin, Rawlinson, CJJ: Bennett, DJ

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS B. DELIA,

Plaintiff and Appellant,

v.

CITY OF RIALTO, a Public Entity; et al.,

Defendants and Appellees.

Appeal From The United States District Court
For The Central District of California
Honorable Manuel L. Real, District Judge
USDC Case No. CV 08-03359 R (PLAX)S

AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEE STEVE A. FILARSKY'S PETITION FOR REHEARING EN BANC

[FILED WITH CONSENT OF ALL PARTIES—CIRCUIT RULE 29-2(a)]

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CIRCUIT RULE 29-2(a) STATEMENT OF CONSENT

All parties to the appeal have consented to the filing of this amicus curiae brief.

INTRODUCTION

In this section 1983 action, the panel's published opinion ("Opinion") concludes that a city firefighter's Fourth Amendment rights were violated during an internal affairs investigation. Recognizing, however, that there was no clearly established authority that the investigating conduct would constitute a Fourth Amendment violation, the Opinion holds that all the individuals involved in conducting the investigation are entitled to qualified immunity—all except one that is.

The one participant the Opinion concludes is not entitled to qualified immunity is a private attorney—appellee Steve A. Filarsky—whom the City employed to assist it in conducting the investigation. According to the Opinion, the panel was bound by existing Ninth Circuit precedent holding that private attorneys hired by government agencies are not entitled to qualified immunity. (Op. at 13790-91 (citing *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003) (per curiam)).)

Mr. Filarsky has petitioned for rehearing en banc. The Court should grant his petition and rehear this case en banc for the following reasons:

- The availability of qualified immunity for private attorneys hired by cities is vitally important to municipalities, like the City of Rialto in

this case, and to other local government units, which commonly engage private attorneys in various capacities in an effort to obtain the most effective legal services and representation possible for the public in a fiscally responsible manner.

- Only two Supreme Court opinions address qualified immunity to private parties: *Richardson v. McKnight*, 521 U.S. 399 (1997) and *Wyatt v. Cole*, 504 U.S. 158 (1992). Contrary to the Opinion's passing references to these decisions, they do not foreclose—but rather support—qualified immunity for private attorneys hired by municipalities.

- This Court's per curiam opinion in *Gonzalez* offers virtually no analysis beyond the mere fact that the defendant attorney was a private party and not a government employee. The instant Opinion too offers little by way of reasoning. It acknowledges a conflicting Sixth Circuit opinion—*Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997) (relying on *Richardson*)—but the panel says that is bound by *Gonzalez*. (Op. 13790-91.)

- Flatly denying qualified immunity to private attorneys—as this Court has done in *Gonzalez* and now this case—is not just legally wrong but will harm cities and other government units by making it less effective and more expensive to utilize private attorneys. This, in turn, will force many cities and counties to forego the considerable advantages of using private attorneys or to pay considerably more to do so.

INTEREST OF AMICUS CURIAE

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The League, as representative of municipalities throughout California, has a vital interest in ensuring that cities continue to have the ability to make effective and cost-efficient use of private attorneys in providing legal services and representation on behalf of the public. As explained in greater detail below, use of private attorneys on ad hoc bases similar to the circumstances in this case is commonplace, desirable, and sometimes necessary—for smaller cities in particular, but even for larger cities—and, in fact, a majority of California cities, for financial and other beneficial reasons, employ outside counsel to serve as their city attorneys in lieu of employing in-house city attorneys.

ARGUMENT

I. CITIES AND OTHER GOVERNMENT UNITS RELY HEAVILY ON THE SERVICES OF PRIVATE ATTORNEYS SUCH AS MR. FILARSKY FOR REPRESENTATION AND ADVICE IN PERFORMING GOVERNMENT FUNCTIONS.

"In an era of ever-increasing fiscal consciousness brought on by financial constraints, local government agencies are constantly exploring methods of continuing to provide public services at their traditional level yet, at the same time, reducing if not stabilizing service costs." Philip D. Kahn, *Privatizing Municipal Legal Services*, Local Government Studies (Volume 10, Issue 3) 1, 1 (1984) (*available at* http://www.informaworld.com/smpp/content~db=all~content=a789131048).[1/] Although this observation was made more than 25 years ago, it resonates loudly and clearly today. Today, just as then, one commonplace means for cities to meet their needs for legal services in a cost-effective and fiscally responsible manner is to hire private attorneys either to serve as city attorney or to provide more specific services on ad hoc bases.

Hundreds of cities in California contract out the position of city attorney to a private attorney or law firm. *See* Kahn, *supra*, at 2 (in 1984, "[i]nformation maintained by the League of California Cities indicate[d] that out of 435 member cities surveyed, 340 of them—approximately 78 per cent—ha[d] contract city

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[1/] For the Court's convenience, a copy of this article is included as an attachment to this brief.

attorneys"). Cities also frequently utilize private attorneys on ad hoc bases for a variety of other purposes, including "litigation matters, criminal prosecution, special appearances before other government agencies, extensive research projects, preparation of contracts and agreements other than those routinely used by the city in the ordinary course of business, and other projects of an unusual or time consuming nature." Kahn, *supra*, at 3.

Municipalities are not the only government units that frequently utilize private attorneys. Private attorneys are similarly hired by "other local government agencies such as water districts, school districts, redevelopment agencies, and counties." Kahn, *supra*, at 2 & n.8. Federal government agencies too use private counsel on ad hoc bases for litigation and various other purposes. *See* William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L. Rev. 399, 463 (1988) (surveying various federal departments and agencies and concluding that "legal work of all types, from the purely advisory to litigation, is contracted out").

"The first and most obvious potential advantage of outsourcing legal services is cost savings." Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 Pub. Cont. L.J. 443, 444 (2004). "Although substantially similar from a functional stand-point, in-house and contract city attorneys differ primarily with regard to financial considerations." Kahn, *supra*, at 2. Using private attorneys rather than in-house staff provides substantial savings to cities on myriad expenses, from employee benefits to law

libraries to various administrative overhead costs. *Id*. "The economies associated with a contract city attorney are particularly evident in the case of cities whose legal needs are insufficient to warrant the fulltime permanent employment of one or more attorneys; however, even cities with substantial legal needs nonetheless still benefit from contracting out some or all city attorney services (and the attendant administrative overhead) to the private sector." *Id*.

Saving costs is not the only reason cities and other government units hire private attorneys. *See* McFadden, *supra*, at 453 (summarizing "the possible benefits of outsourcing legal work in terms of cost savings, improved service, and more pragmatic decision making"). "Value includes not only the absolute cost, but also the quality of service. At its most basic level, the decision to outsource government attorneys is not so different from the 'make-or-buy' decision that corporations face with respect to the size of their in-house legal departments." *Id*. at 444-45; *see also id*. at 445 & n.8 (noting, in context of private firm outsourcing of legal services, advantage of outside firms' exposure to new legal issues and developments).

Specifically, other pragmatic and beneficial reasons for cities to utilize private outside counsel include:

- limitations on in-house staff resources and time to do the necessary work—many smaller municipalities simply lack the legal staff to complete even relatively small tasks, and even larger municipalities may lack sufficient legal staff for especially large tasks, *see* Kahn, *supra*, at 2

(noting that some cities are so small that their legal needs do not warrant full-time employment of even one or more attorneys); *see also* Luneburg, *supra*, at 405, 463 (noting these limitations in corporate context and that same considerations apply to federal agencies); *id*. at 459 (noting that "[t]he FDIC explains its use of private attorneys largely as a matter of lack of staff resources to handle the volume of work");

- to avoid actual or potential conflict-of-interest issues, *see, e.g.*, *Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal. 4th 731, 737-42, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (discussing conflict of interest issues arising where agency attorney acts as both advocate before and advisor to the agency); and, relatedly,

- "a particular need for 'independence' in the rendering of the opinion or as a check on an opinion rendered internally in an area where the inside lawyer may have less experience than outside counsel and some 'comfort' might be obtained by confirmation of the inside view," Luneburg, *supra*, at 405; *see also id*. at 463 (noting that this consideration, arising in corporate context, also applies to federal agencies).

An especially prevalent reason for using private counsel is the need for specialized expertise that in-house attorneys for a city or other government unit—small or large—may lack. "Private attorneys with significant, specialized expertise in various sectors can provide improved service to government agencies." McFadden, *supra*, at 445; *see also* Luneburg, *supra*, at 405 (noting "lack of

in-house expertise" as reason to outsource legal work); *see also id*. at 463 (noting that this consideration, arising in corporate context, also applies to federal agencies); *id*. at 459 (noting that the FSLIC's contracting is required for both lack of staff resources and need for expertise in areas of local law).

Indeed, this case well illustrates these concepts. The City of Rialto is a relatively small city that does not employ an in-house city attorney but hires outside counsel for that purpose. Additionally, like other cities small and large, the City of Rialto sometimes needs to hire private counsel on ad hoc bases and to hire counsel with specialized knowledge in areas such as labor law. Mr. Filarsky, a private attorney, had served as an independent outside counsel for the City over a period of more than a decade, "to participate in internal affairs investigations concerning personnel issues," to conduct interviews of City employees "in connection with the investigative process of the City's personnel/internal affairs matters," and to provide legal advice to the City in connection with disciplinary proceedings. (Excerpts of Record ("E.R.") 176, ¶¶ 3-4 (Filarsky declaration); *see also* Op. 13776 ("Filarsky had previously represented the City in conducting interviews during internal affairs investigations."); E.R. 119, ¶ 4 (declaration of the fire chief at the time of the events explaining that for a number of years Mr. Filarsky "ha[d] represented the City in labor litigation, labor arbitrations, union negotiations and had also rendered legal advice on City personnel matters" and "had previously conducted internal affairs investigations for the City").)

In short, use of private attorneys, such as Mr. Filarsky, is a common and vital component of municipal and other forms of local governance in California and even in the federal government. Given the prevalence of section 1983 actions, the issue of whether private attorneys hired by cities enjoy qualified immunity has the potential to significantly impact each of the League's 474 members, not to mention federal government agencies in the context of *Bivens* actions.[2/]

II. PRIVATE ATTORNEYS, SUCH AS MR. FILARSKY, WHO ARE HIRED BY AND WORK WITH CITY OFFICIALS TO REPRESENT AND ADVISE CITIES AND PERFORM MUNICIPAL FUNCTIONS, ARE ENTITLED TO QUALIFIED IMMUNITY EVEN THOUGH THEY ARE NOT PUBLIC EMPLOYEES.

In this case, the panel determined that it was bound by this Court's earlier, per curiam opinion in *Gonzalez*, which held that a private attorney representing the County of Los Angeles was not entitled to qualified immunity. (Op. at 13791, citing *Gonzalez*, 336 F.3d at 834-35.) The entire reasoning of *Gonzalez* for

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[2/] *See Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (discussing qualified immunity of federal agents in context of Fourth Amendment action for money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65 (2001) (leaving open question "whether a *Bivens* action might lie against a private individual"); *Pollard v. GEO Group, Inc.*, 607 F.3d 583, 592 (9th Cir. 2010) (noting open question under *Malesko* and finding that "private prison employees could act under color of federal law and therefore face *Bivens* liability").

rejecting the private attorney's claim of qualified immunity was that (1) she was "a private attorney, not a government employee," and (2) she pointed to "'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." 336 F.3d at 835 (quoting *Richardson*, 521 U.S. at 412). However, the result in *Gonzalez*, and now this case, is not required, or even supported, by the two Supreme Court opinions that address qualified immunity of private parties—*Wyatt* and *Richardson*.

Foremost, neither *Wyatt* nor *Richardson* can be read to categorically preclude qualified immunity to private parties. Though *Wyatt* declined to afford qualified immunity to private party defendants, its holding was expressly limited to parties "invoking a state replevin, garnishment, or attachment statute." 504 U.S. at 168-69. And *Richardson* declined to provide qualified immunity to prison guards in a private prison setting, making clear that it "answered the immunity question narrowly, in the context in which it arose," i.e., "one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." 521 U.S. at 413.

Richardson, in fact, strongly supports a finding of qualified immunity here. It distinguished "lawyers who performed services at the behest of the sovereign," 521 U.S. at 407, and emphasized that the case did "not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id*.

at 413. That description fits Mr. Filarsky's role in this case to a tee. As the Opinion states, he "is a private attorney, who was retained by the City to participate in internal affairs investigations." (Op. at 13790.) The opinion also describes Mr. Filarsky conducting the internal affairs interview in the presence of two fire battalion chiefs, and conferring with the fire chief during a break in the interview. (Op. at 13776-77.) Mr. Filarsky, like many private attorneys retained on ad hoc bases by cities, was not performing anything like the kind of long-term, largely autonomous administrative function addressed in *Richardson*.

As *Richardson* explained, the Supreme Court "look[s] both to history and to the 'special policy concerns involved in suing government officials'" in determining whether private defendants enjoy immunity. 521 U.S. at 404 (quoting *Wyatt*, 504 U.S. at 167.) In terms of history regarding private attorneys, *Richardson* points out that "[a]pparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed at the behest of the sovereign." 521 U.S. at 407 (emphasis in original). And as the panel in this case acknowledges, the Sixth Circuit relied in part on this point to conclude that a private attorney hired by a municipality was entitled to qualified immunity. (Op. at 13790, citing *Cullinan*, 128 F.3d at 310; *but see Cooper v. Parrish*, 203 F.3d 937, 952 (6th Cir. 2000) (declining to extend qualified immunity to private attorney prosecuting nuisance abatement actions and distinguishing *Cullinan* on grounds that attorney was not acting at behest of the state and not paid by the state for his services).) While the Opinion dismisses this point as just dictum in

Richardson (Op. at 13790), ordinarily this Court "do[es] not treat dicta from the Supreme Court lightly." *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc).

More importantly, the Supreme Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. What is most important is that the key policy concerns identified by the Supreme Court favor granting, not denying, qualified immunity here. As *Richardson* recaps, qualified immunity serves the purposes of:

- "protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service";
- "protecting the public from unwarranted timidity on the part of public officials by, for example, encouraging the vigorous exercise of official authority"; and
- "by contributing to principled and fearless decision-making[.]" 521 U.S. at 408 (internal quotation marks and citations omitted).

These purposes are all thwarted by denying qualified immunity to private attorneys who are hired by government officials to represent, advise, and work with cities on matters of municipal governance and who effectively perform

municipal functions. Denying qualified immunity likely will make some talented private attorneys stop performing services for cities and other government units. The public benefits from cities utilizing talented attorneys with special expertise, but denying them qualified immunity solely because they are private will discourage them from doing so.

Private lawyers who do continue to perform services for cities and other government units will likely exhibit "unwarranted timidity" in governmental decision making, one of the very pitfalls that qualified immunity is intended to prevent. *Richardson*, 521 U.S. at 408; *see also DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) ("[D]enying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service."). And, inevitably, the cost of hiring private lawyers will increase if they are categorically disqualified from receiving qualified immunity in section 1983 lawsuits, which directly implicates cities' and other government units' abilities to cost-effectively "serve the public good." *Richardson*, 521 U.S. at 408.

While the majority opinion in *Richardson* opined that competitive market forces would serve some of the same purposes that qualified immunity serves, *id.* at 409, that rationale does not apply here. Unlike private prison companies, whose only potential clients are government units, private attorneys can take their business elsewhere—namely to private clients. Nor will mechanisms such as

indemnity and insurance, *see id*. at 410-11, cure the problem. If private attorneys cannot avail themselves of qualified immunity, then the costs to indemnify and insure their services will increase and will ultimately be borne by the cities and government units that utilize their services. As Justice Scalia pointed out in *Richardson*, there is no "free lunch"; "as civil-rights claims increase, the cost of civil-rights insurance increases." *Id*. at 419 n.3 (Scalia, J., dissenting).

As the panel acknowledges, the Sixth Circuit in *Cullinan* "s[aw] no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." (Op. at 13790, quoting *Cullinan*, 128 F.3d at 310.) That observation applies equally here, yet, other than relying on *Gonzalez*, the Opinion does not provide any such reasons.

In sum, more than ample special reasons favor immunity for attorneys, such as Mr. Filarsky, who are hired by city officials to work for and with them in representing cities and performing municipal functions, as demonstrated above. Therefore, the en banc Court should limit or overrule *Gonzalez*. As we now explain, failing to do so will harm cities and other government units that utilize private attorneys.

III. DENYING QUALIFIED IMMUNITY TO PRIVATE ATTORNEYS HIRED BY CITIES WILL HAMPER CITIES' ABILITIES TO OBTAIN HIGH-QUALITY AND COST-EFFECTIVE LEGAL SERVICES.

As established above, many smaller cities do not have sufficient legal needs or cannot afford to employ in-house attorneys, and even larger cities may not be able to afford sufficient in-house legal staff to handle all their legal needs. Moreover, cities of all sizes sometimes require attorneys with specialized skills. The unavailability of qualified immunity to private attorneys will inhibit zealous representation by private attorneys and thereby force these cities to forego the vigorous advocacy that could be provided by attorneys to whom qualified immunity is available.

Moreover, if private attorneys who presently work for cities decide to opt out of such service altogether, this will hamper the ability of small cities, and even larger ones, to obtain the services of talented lawyers with needed expertise in areas of municipal governance.

And as the fees charged by experienced private attorneys who continue to provide services to cities go up—due to the increased costs that will inevitably follow from the lack of qualified immunity—all cities will be adversely affected. Smaller cities with little or no in-house legal staff will have to pay more for private attorneys or bear the financial burden of hiring in-house counsel. Larger cities that have significant in-house counsel staff will pay more when the need arises for

attorneys with specialized expertise or else bear the financial burden of obtaining and maintaining in-house counsel with such expertise. And, while less qualified, less experienced, and less talented private attorneys may step forward to offer their services at cheaper rates, cities will then be getting less value for the money spent on private attorneys.

In short, denying qualified immunity will cost cities substantially in terms of both the value and costs of legal services. These negative consequences are not even remotely required by Supreme Court authority; on the contrary, *Richardson* paves the way for this Court to recognize that qualified immunity is available to private attorneys, such as Mr. Filarsky, who act as adjuncts to government agencies.

CONCLUSION

For the foregoing reasons, amicus curiae the League of California Cities supports the Petition for Rehearing En Banc filed by appellee Steve A. Filarsky.

DATED: October 15, 2010

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland
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CERTIFICATE OF COMPLIANCE

Under Circuit Rule 29-2(c)(2), I certify that this Amicus Curiae Brief of the League of California Cities in Support of Appellee Steve A. Filarsky's Petition for Rehearing En Banc is proportionately spaced Times New Roman, has a typeface of 14 points and contains 3,626 words.

DATED: October 15, 2010

GREINES, MARTIN, STEIN & RICHLAND LLP
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CERTIFICATE OF SERVICE

I certify that on **October 15, 2010**, I electronically filed the foregoing Amicus Curiae Brief of the League of California Cities in Support of Appellee Steve A. Filarsky's Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kent J. Bullard

ATTACHMENT TO

AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEE STEVE A. FILARSKY'S PETITION FOR REHEARING EN BANC

FORUM

Ideas and Innovations for Community Government

PHILIP D. KAHN
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Privatizing Municipal Legal Services

In an era of ever-increasing fiscal consciousness brought on by financial constraints, local government agencies are constantly exploring methods of continuing to provide public services at their traditional level yet, at the same time, reducing if not stabilizing service costs[1]. The first response is typically an internal belt-tightening exercise by which the local agency attempts to reorganize and streamline its organizational structure to consolidate functional programs and eliminate unnecessary or overlapping personnel positions. Another option is for the local agency to enter into agreements with other governmental agencies (national, state, regional, county or municipal) providing similar services, underpinned by the assumption that several agencies are doing the same and that certain economies of scale will consequently be realized.

A third alternative arrangement is where the local agency contracts away the provision of public services to the private sector[2]. While the local agency remains financially liable for the services, actual provision is undertaken by a private entity. This third method of public service provision, the so-called "privatization" of municipal services, is the general subject of this commentary; more specific will be the focus on contracts for legal services[3].

Before investigating and assessing the costs and benefits attributable to a program of contracting out public services to the private sector, it is first necessary to ascertain the applicable legal parameters on such arrangements[4]. Is the arrangement in concept valid pursuant to the law relating to the formation, organization and operation of local agencies[5]? Does the law limit the types of public services that can be contracted out? Does the law require such contracts to be the subject of competitive bidding? California cities, for example, are expressly authorized by state

law to "contract with any specially trained and experienced person, firm or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.[6]"

California cities are not required by law to appoint a city attorney[7], but doing so is the clearly predominant if not universal practice. For the purposes of this paper, a distinction can be made between, on the one hand, full-time, "in-house" city attorneys and, on the other hand, part-time, "contract" city attorneys. Information maintained by the League of California Cities indicates that out of 435 member cities surveyed, 340 of them – approximately 78 per cent – have contract city attorneys[8].

While the nature and scope of services rendered by a city attorney, whether in-house or by contract, varies somewhat between jurisdictions, the essential duties commonly performed are represented in the provisions of the Laguna Beach Municipal Code: (1) advising members of the city council and city officers in all legal matters pertaining to the business of the city, (2) preparing all ordinances and resolutions required by the city council, (3) attending all regular meetings of the city council, (4) prosecuting and/or defending all judicial actions in which the city or any city official is a party, (5) prosecuting violations of city ordinances, (6) drafting and/or approving all contracts in which the city may be a party, and (7) performing such other acts as may be required from time-to-time by law or by the city council[9].

Although substantially similar from a functional stand-point, in-house and contract city attorneys differ primarily with regard to financial considerations. Contract city attorneys and their supporting staff are not considered employees of the city for the purpose of salary, benefits (insurance, holidays, vacation, etc.), pension or retirement plans, and other incidents of employment. This obviously is a substantial source of cost savings for the city. Additional savings are realized when the city is not required to provide equipment, machinery, supplies (most notably, a law library), and other administrative costs to the contract city attorney. The

cities with substantial legal needs still benefit from contracting out some or all city attorney services

economies associated with a contract city attorney are particularly evident in the case of cities whose legal needs are insufficient to warrant the full-time permanent employment of one or more attorneys; however, even cities with substantial legal needs nonetheless still benefit from contracting out some or all city attorney services (and the attendant administrative overhead) to the private sector.

The city attorney is ordinarily designated by resolution of the city council, who may also appoint assistants or deputies as needed. Where, as in the author's case, the city's contract for legal services is with a law firm rather than an individual[10], benefits often accrue by virtue of the number of attorneys available to perform services and the breadth and depth of their

experience and expertise. The typcial contract for city attorney services is for the duration of a fiscal year period. A fixed monthly rate of compensation is established for basic and general services such as meeting attendance, regular consultation with and advice to city council members and officers, periodic city hall office hours, and review and approval of required resolutions, ordinances, contracts and other normal municipal legal documents[11]. Legal services other than the above are provided at a fixed hourly composite billing rate[12]. Such services would include litigation matters, criminal prosecution, special appearances before other government agencies, extensive research projects, preparation of contracts and agreements other than those routinely used by the city in the ordinary course of business, and other projects of an unusual or time consuming nature. In addition to the foregoing contract fees, the city is normally responsible for most associated costs such as court fees, service of process, long distance telephone calls, messenger service, and other necessary out-of-pocket costs. Finally, the contract may be terminated by either the city or the attorney/law firm at any time by notice to the other party.

Few, if any, problems inherently flow from contract city attorney arrangements. While not permanently officed at city hall, accessibility to the city attorney is rarely a problem. Most matters are readily and easily disposed of over the telephone. Furthermore, with the city attorney being

not having the luxury or temptation to wander over to the city attorney's office for every single matter or inquiry

physically removed from city hall, city officials become more judicious and efficient in their requests for legal services (usually in writing), not having the luxury or temptation to wander over to the city attorney's office for every single matter or inquiry. That separation can also lead to enhanced perceptions of the city attorney as independent and objective.

In closing, from the standpoint of both service costs and quality, many cities have discovered and are enjoying the advantages offered by contracting for legal services rather than providing such services in-house. Reliability and accountability are closely monitored by the cites to ensure that the services are being performed at a satisfactory level and in an acceptable manner. The flexibility of the arrangement permits for as many or as few services as the city needs or desires. Contracts for legal services are but one example of the "privatization" of municipal public services whereby limited financial resources can be maximized without sacrificing proficiency or control.

REFERENCES

1. R.L. Kemp, "Managing Government in Hard Times," *Local Government Studies,* July/August 1982, p. 4.
2. M. Lynch and U. Wright, "Providing Municipal Services — Methods, Costs and Trade-

offs," *1982–83 Current Municipal Problems,* Callaghan & Company, pp. 9–26; reprinted from the February 1981 issue of *Civic Affairs,* a publication of the Bureau of Municipal Research (Toronto, Canada).

3. Lynch and Wright (note 2) distinguish between areas of special expertise, such as management consulting, planning and legal work, and areas of labor intensive work, such as public works construction and maintenance. Their article concerns itself with the latter and presents two case studies on the cost efficiency of contracting out garbage collection services.
4. In the legal scheme of things in the United States, cities are deemed to be "creatures of the states" rather than adjuncts of the federal government. "Generally speaking, cities possess and can exercise only such powers as are expressly granted to them by constitutional, charter or statutory provisions, are necessarily or fairly implied as incidental to such express powers, or are necessary or indispensable (not merely convenient) to the accomplishment of the declared objects and purposes of the city." *California Jurisprudence 3d,* Municipalities Volume 45, 195.
5. Many states proscribe the delegation of public authority or responsibility to private persons.
6. California Government Code Section 37103. In such cases, the city "may pay such compensation to these experts as it deems proper." See also California Government Code Section 53060 for similar provisions. State law competitive bidding requirements do not apply to contracts for the provision of personal services. Cities ordinarily request proposals for legal services before selecting a particular individual or law firm.
7. California Government Code Section 36505.
8. The author is the contract city attorney for the City of Laguna Beach. By way of background, the author's private law firm currently provides contract city attorney services to 7 California cities on a regular basis, to 4 cities on a recurring basis, and to over 35 cities on an ad hoc basis. In addition, the firm provides legal services on regular, recurring and ad hoc bases to numerous other local government agencies such as water districts, school districts, redevelopment agencies, and counties. The law firm consists of approximately 75 attorneys, 23 of whom are grouped into a Public Law Department to advise and represent public and private clients alike in government-related matters.
9. Laguna Beach Municipal Code Section 2.12.010.
10. See note 8 above.
11. The sum of the monthly retainer fee remains constant regardless of the actual amount of work performed (in terms of hours).
12. Composite billing rates are fixed and applied against the hours worked without reference to the differing billing rates of the individual attorneys involved.

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The Politics of Municipal Reform: West Bengal*

At independence, India inherited two contradictory features in its municipal government: firstly a system of Anglo-Saxon type local government for its urban areas which was seemingly "detached" from the then provincial, now state, governments, and secondly the executive supremacy of

*This paper was originally presented at a seminar on "The Status of Municipal Government in India Today", organized by the Indian Institute of Public Administration, New Delhi, July 1983.