

How to work with government clients: tips for outside counsel

By Kate R. Cook and Jamie D. Hoag

Most government agencies have highly qualified in-house counsel. For a variety of reasons, however, these agencies occasionally have to look outside for legal representation. As a result, there often are opportunities for private sector attorneys to represent public sector clients.

Although private and public sector clients have similar legal needs, there are some important issues and distinctions you should know before taking on a government client. Understanding these nuances will help you avoid some common pitfalls that may trap lawyers new to public sector practice.

If you are interested in representing a government client, here are 10 practice tips to help you get the work and win the case.

1. Understand the public records law. If a party is unsuccessful in getting its hands on public documents through the normal discovery process, or simply does not want to wait for discovery, it might try an alternate route: the public records law, G.L.c. 66, §10. It is, therefore, important to have a general understanding of this complex area of law, especially as it intersects with discovery rules. A good place to start is

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the recent Supreme Judicial Court ruling in *DaRosa v. New Bedford*. In that case, the court held that the public records law cannot be used as an end run around traditional work product protections to obtain “opinion” work product. The SJC, however, concluded that a public agency would be required by the public records law to disclose certain “fact” work product contained within a reasonably completed factual study or report even if that product would otherwise be protected by the discovery rules. As the case demonstrates, while the rules of discovery might close the door on disclosure, the public records law might open a window. An understanding of the law, and what documents your client might have already produced in response to a public records request, is essential to a successful outcome.

2. Rethink “winning.” Government clients might define a legal victory differently than your private clients would. From the beginning, it is essential to understand what your client considers a successful outcome; it might not be winning a court case many years down the road. Public employees and elected officials have a responsibility to weigh public policy considerations and serve the greater good. Although some cases will take

the standard adversarial posture, depending on the facts, politics and law, a public client might have greater incentives to seek a compromise or creative solution. Take the time to understand what your client’s definition of victory is in the matter, and be prepared to offer constructive, holistic options.

3. Prepare for media coverage. The public is understandably interested in lawsuits involving elected officials and government institutions. As a result, you should prepare for press coverage by working with your client to develop a media strategy. Even routine legal disputes that otherwise would be ignored if private parties were involved might attract significant media attention. It is important, therefore, that you be sensitive to the fact that reporters might appear at court hearings and review court filings. In extreme cases, reporters might be aware of new lawsuits or developments in a case before you are. You and your clients will need to be prepared for that reality and determine whether and when it is appropriate to comment and, if you do, how to comment without negatively impacting the litigation or running afoul of Massachusetts Rule of Professional Conduct 3.6, which governs trial publicity

4. Prepare to take a reduced fee. If you want to represent a government client, you must be prepared to be flexible on your fee structure. Tax dollars are used to pay outside counsel fees and, as a result, government clients are understandably sensitive to costs. Therefore, many cities, towns and state agencies often set a fee ceiling that

might be less than even your reduced billable rate. Nonetheless, there are many reasons it is worthwhile to take a government case even if it means taking a haircut. Representing state or local government provides a unique view of the intersection of law and policy and exposes attorneys to new areas of law. The increased exposure that comes along with media coverage might also help your firm attract more business.

5. Don't assume the client understands the legal chess game. Even if your clients have a law degree or are high-level public officials, do not assume they understand what is going on in the case or the risks they face. Your clients are relying on your legal expertise and your ability to see past the political issues that might interfere with their legal analysis. It is critical to walk your clients through the significance of the legal matter and the various ways the case could unfold. It is important not to ignore the politics (see next tip), but it is equally important for you not to let the politics cloud your clients' understanding of the law.

6. Don't assume you understand the political chess game. The political and public policy issues surrounding the case you are handling for your government client might be more complicated than the legal ones, and your client's decisions as the matter unfolds might seem counter-intuitive. While the law should control, don't underestimate the political dynamics involved or overestimate your ability to control them. As you become familiar with the

facts of your case, make sure you also develop an understanding of the politics. This will help you better appreciate your client's perspective.

7. Foster a good relationship with in-house counsel. As is always the case, it is wise to develop a strong relationship with in-house counsel. The government's in-house attorney likely has helpful institutional knowledge, both about the case itself and the politics involved. Even if the in-house lawyer did not work directly on the case you are now handling, he or she likely played a role in procuring outside counsel and will be supervising your work. For obvious reasons, establish open lines of communication and, when appropriate, keep the in-house counsel apprised of all developments in the case, including any unforeseen costs and unanticipated developments, particularly those that might attract media coverage.

8. Understand the impact on your private sector clients. Before you take on a government client, understand how the Massachusetts conflict of interest law (G.L.c. 268A) and Rules of Professional Conduct (particularly Rule 1.11) might apply to you and, if applicable, members of your partnership, both before, during and after your representation. In some cases, representing a government agency might restrict your ability to represent private clients before that agency now and in the future.

9. Remember the gift ban. When you are trying to forge a good

relationship with agency in-house counsel (see No. 7), remember that your clients are government employees and can't accept gifts of substantial value, defined as worth \$50 or more. The State Ethics Commission regulations provide a clear overview of the rules, including disclosure requirements and some exceptions.

10. Understand the procurement rules. Before you can represent a government client, you have to be hired. Chapter 30, Section 65 outlines the process an executive branch state agency must follow when looking to retain outside legal services. With very limited exceptions for emergency legal needs, agencies must comply with those rules. Among other things, the governor's chief legal counsel must certify in writing that no other state employee can provide the legal services that the outside lawyer is to provide, and the Attorney General's Office also must sign off. The Operational Services Division within the Executive Office of Administration and Finance is the best starting point if you're interested in learning more about the procurement process, as well as potential opportunities to contract with the state. For contracting with a municipality, check with the individual city or town.

We know how rewarding it is to represent a government client. Even if you don't work for the government directly, you can still have that same professionally rewarding experience. Hopefully, these tips will help you get started. 

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