



*Attorneys and Counselors at Law*

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## WORKING WITH AN ATTORNEY

*A charter school's guide to effective communication and use of legal counsel.*

There are myriad state and federal laws and rules that affect nearly every aspect of public school operations, in addition to the unique concerns for charter schools. Laws govern nearly every detail of a school's operation, for example: employment, students, charter performance and implementation, facilities, discipline (students and employees), governance, finances, and a host of other matters.

Charter school budgets are always tight, and carving out a sum for attorneys can seem painful. However, **not** anticipating legal expenses that may be used to cover an opportunity to seek timely advice upfront can result in higher legal and related costs down the line (e.g. disputes over onerous contracts). Significantly, violation of laws such as the Open Meetings Act and the Procurement Code can result in criminal penalties and violations. An experienced and competent school attorney can help guide the governing body and the school's administration in the business of operating a school and help minimize disruption caused by threatened legal actions or unintended missteps.

### **THIS GUIDE COVERS:**

1. Contracting the services of an attorney
2. Roles of the school attorney
3. Defining the client
4. Effective communication/Attorney-client privilege

### **1. CONTRACTING THE SERVICES OF AN ATTORNEY**

New Mexico law permits charter schools to contract for professional services. Who signs the contract and the defined scope of work should be discussed with the attorney prior to signing a professional services agreement. It is common for charter school administrators to execute these agreements, but it is just as common for the agreement to be presented to the governing body ("GB") for approval. Unless there is an emergency, it is recommended that the head administrator raise the necessity for hiring counsel at an open meeting of the GB. Some schools sign contracts annually as a preventative measure, which is recommended to avoid a delay when urgent responses are needed.

The New Mexico Procurement Code limits the total amount of a professional services contract to \$60,000 per year. If you anticipate needing legal counsel, it is critical to consider this when creating your annual budget. You must have budget authority to enter into a contract for services of any kind. It is important to remember that schools cannot prepay for services rendered, and thus paying a retainer is inappropriate. Moreover, it is obviously inappropriate to

pay an attorney for services not rendered. In short, the school is not and should not be charged for services unless the attorney is consulted and performs requested services.

Most attorneys bill monthly. Attorney bills should include sufficient detail to apprise the school's administration of the services rendered and that the services provided were within the scope of the contract. Should you have any questions about your attorney's bill, you can and should contact the attorney immediately for clarification and discussion. The New Mexico Procurement Code requires a public entity to either dispute or pay invoices within a certain amount of time after receipt of the invoice. If you have questions, ask!

Finally, public school law is fairly specialized, but includes areas of even greater specialty, such as bond matters and litigation. Both the administrator and the GB should feel comfortable asking for references, credentials and the experience of the attorneys who are being considered to represent the school in the context of the issue at hand.

## **2. ROLES OF THE SCHOOL ATTORNEY**

Ultimately, an effective attorney's role is to assist the school in achieving its goals; obviously, within legal parameters. It is important that "prevention" does not create "inertia." It is the attorney's role to advise the client of legal ramifications of decisions and to assist in shaping outcomes in the most favorable way, within the bounds of the law. The ultimate decision as to whether or not to take a particular action, however, remains with the client.

Generally, school counsel will act as an advisor to school officials on an 'as-requested' or 'on-call' basis; that is, unless your attorney is 'in-house' (e.g. an employee of the school), he/she is not and should not be presumed to know everything about your school's situation – you must proactively seek legal assistance from your lawyer when you think you might need it for particular situations. Some of the situations that may give rise to attorney involvement are listed below. These situations typically arise within the context of school administration and, thus, are examples where the head administrator is likely to need to consult counsel directly.

However, governing bodies also need the freedom to contact the school's lawyers. Frequently questions arise about open meetings, facilities, relationships with the charter's authorizer, and other questions concerning implementation of the charter.

The role of a school attorney includes that of an advisor-counselor, educator, facilitator or mediator, advisor to management/administration, draftsman (policies, etc.), advocate in disputes, spokesperson and negotiator. Here are some specific instances where schools should consider attorney involvement:

- ❖ Providing legal opinions;
- ❖ Creating, updating and advising on school policies and procedures (employment, student and others);
- ❖ Attending governing body meetings (when necessary and requested);
- ❖ Drafting and reviewing contracts;
- ❖ Assuring compliance with state and federal laws affecting, finance, personnel, student rights, etc.;
- ❖ Negotiating and assisting with charter authorizer relationships;
- ❖ Faculty and staff discipline, reductions in force and dismissals;
- ❖ Assistance with Open Meetings Act and Inspection of Public Records compliance;

- ❖ Review circumstances that may give rise to legal actions;
  - ❖ Conduct in-service seminars or training for GB members, faculty and staff;
- IN THESE CIRCUMSTANCES IT IS STRONGLY RECOMMENDED THAT YOU CONTACT COUNSEL AS SOON AS POSSIBLE to allow for scheduling;
- ❖ Served with a legal demand letter, court order (includes subpoenas) or a lawsuit;
  - ❖ Threat or suggestion of revocation or nonrenewal of charter contract;
  - ❖ Accident or incident involving a student or employee resulting in bodily injury;
  - ❖ Contemplating discharge of a contracted employee.

This list is not exhaustive, and you should contact your attorney whenever you believe that his/her advice, counsel and involvement would assist or be beneficial to the School.

### 3. DEFINING THE CLIENT

It is important to understand that if retained by the charter school, the attorney represents the institution, not any single member of the faculty, staff or the GB. An attorney often establishes a relationship with the administrator because the administrator deals with the day-to-day running of the school and this can be confusing to GB members. It is critical to understand, however, that an attorney is ethically obligated to clarify his or her role in this regard should a situation arise. It is essential that the head administrator be transparent with the GB about his/her contacts with the attorney to avoid any misunderstanding about the attorney's role.

### 4. EFFECTIVE COMMUNICATIONS/ATTORNEY-CLIENT PRIVILEGE

- ❖ To avoid confusion, and escalating legal fees, it is important to identify the "authorized" school representatives who may contact the attorney directly. This will avoid misunderstandings by both counsel and the client. Generally, experience shows that for charter schools the head administrator and GB chair are the primary initiators of contact. For budget reasons, the frequency of these contacts should be considered.

- ❖ Occasionally, it may be appropriate for other school personnel or GB members to directly contact the attorney; however, advise your lawyer if you have previously established authorized contacts and that others have been given permission to contact counsel.

- ❖ The attorney client privilege allows clients to speak freely to their attorney. It is the "client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney." This privilege can be waived, and because there are multiple persons who serve the school, it is important that the privilege be protected.

**NOTE:** This guide is intended to give a brief overview of how to work with your school's attorney; it does not contemplate every scenario that may arise where legal assistance or advice may be recommended or advisable. If you are unsure whether the matter demands legal attention, it is better to contact your lawyer out of an abundance of caution and determine that you've handled the situation correctly, rather than to later learn that earlier legal intervention would have simplified the outcome.