

# Texas School Performance Review

March 2003

## Navigating the Legal Maze: A Practical Guide For Controlling the Cost of School District Legal Services

*Common sense solutions to help school districts address the challenges of managing legal services.*

As the daughter of the former Dean of the University of Texas Law School, Page Keeton, Texas Comptroller Carole Keeton Strayhorn understands the importance of legal counsel to school districts. Whether issuing bonds, complying with purchasing laws, responding to a lawsuit or writing employment contracts, all school districts need help navigating an increasing complex legal maze.

According to Public Education Information Management System (PEIMS) reports, Texas school districts spent more than \$45 million from their maintenance and operation's budgets on legal services in 2000-01. This equates to \$11 per child for each of the four million Texas students. While many of these expenses are necessary and appropriate, Comptroller Strayhorn is committed to her goal of driving more of every education dollar directly into the classroom for teachers and students. Some districts are effectively controlling their legal costs, while costs in some districts have soared to more than \$200 per student. Because of legal fees associated with issuing bonds and large construction projects, fast growth districts and districts in the midst of building programs experience higher than average legal fees. However, all districts can and should work to control legal costs.

One of the eight statutory public responsibilities assigned Comptroller Strayhorn is reviewing the effectiveness and efficiency of the budgets and operations of the state's school districts. Through the Texas School Performance Reviews (TSPR), the Comptroller has identified thousands of ways for school districts to save hundreds of millions of dollars. To share the lessons learned during these reviews, the Comptroller produced this report to provide school districts ideas for controlling legal expenditures.

### **Background**

School districts operate under a wide array of local, state and federal laws, rules and regulations. Administrators and boards must ensure compliance with the Texas Education Code and pertinent sections of Texas statutes including the Family, Government, Insurance, Local Government, Tax, Transportation and Utility Codes and the Texas Constitution. School districts also must comply with federal laws, Attorney General opinions, Education Commissioner decisions and State Board of Education and Texas Education Agency rules.

Mitigating circumstances such as lawsuits brought against a school district can dramatically impact its ability to control legal costs. In one district, TSPR discovered attorneys who actively encouraged families of students with special needs to file suit on behalf of the children whenever a dispute arose.

Government or sovereign immunity from lawsuits originated from the idea that “the king can do no wrong.” School districts can claim sovereign immunity in most cases, but there are exceptions.<sup>[1]</sup> For example, the Texas Tort Claims Act<sup>[2]</sup> waives sovereign immunity for damages caused by the wrongful acts or negligence of employees arising from the use of a motor vehicle.<sup>[3]</sup> Immunity also may not apply to certain criminal acts or federal litigation concerning alleged violations of federal law such as the Americans with Disabilities Act, the Civil Rights Act or violations of constitutional rights.<sup>[4]</sup> Many employment disputes result in lawsuits based on allegations of discrimination or breach of employment contract, which may be as actionable under state or federal law.

Sovereign immunity also does not prevent individuals from filing suit against a school district. For example, a school district has immunity if someone is injured while on school property unless a motor vehicle is involved. The injured party can still file a suit and attempt to prove that the school district is liable. Although the district can claim immunity under the Act, it will still have to retain attorneys to prepare and assert that defense. While some judges have required the complainant to pay legal fees if a suit is determined frivolous, most judges often conclude that the plaintiffs filed suit in good faith. School districts may also incur legal expenses to consult with an attorney concerning compliance with the Open Meetings Act and the Public Information Act.

After reviewing more than 80 school districts, TSPR has developed a Top 10 list of innovative and common sense methods Texas school districts have used to control legal costs.

## 1. Write and enforce effective policies

Clear, concise policies and procedures that comply with the law and are equitable for all employees and students provide the best protection from excessive legal expenses. Administrators should frequently monitor procedures and practices to ensure that the staff follows the policies. Administrators should take immediate action when an employee is not complying with policy.

Employee-related policies and procedures offer the greatest protection against a district's exposure to litigation. Although grievance policies that present employees a fair system for complaint resolution can help limit exposure to litigation, equally important is the fair application of the policy. Board members and administrators should closely monitor complaints and identify negative trends on a campus or within a department. They should take seriously the need for management training or retraining. Although some administrators may feel disloyal in siding with an employee against a manager, it is their responsibility to assess the manager's actions to determine if corrections are necessary to help the manager become more effective. Proper policy enforcement can prevent thousands of dollars in legal expenses to defend the district against alleged discrimination or sexual harassment, wrongful termination suits, breach of employment contract cases or alleged violations of procedural due process.

TSPR has consistently found that while school districts generally evaluate teachers annually, they are not as diligent about evaluating administrators and support staff. District policy may require annual evaluations for some but not all employees. When policies do call for employee evaluations, they may not be conducted annually as prescribed nor are they always as truthful about the employee's performance. Such situations can lead to litigation if a district terminates an employee or does not renew the employee's contract for poor performance.

The Austin Independent School District (ISD) reduced its legal costs per-student from \$21.71 in 1998-99 to \$9.52 in 2000-01. Administrators said poor staff training and unwise decisions contributed to the high cost of district litigation. To address these problems, the district now requires each law firm that contracts with it to provide eight hours of staff training. Attorneys conducted more than 80 hours of training one summer on critical personnel functions for campus and central office administrators.

Appropriate interaction with students and adherence to all state and federal laws, rules and guidelines can also mitigate the risk of litigation. For example, special education testing and services must be provided within strict guidelines. If diagnosticians do not complete the required testing within the federally prescribed time period, parents can initiate legal action against the district. District administrators must monitor the system

to identify weak links in the process and necessary corrective actions. Today's parents have the availability of detailed Web sites and committed advocacy groups to help educate them about the law and their rights. It behooves a district to not only know and follow the laws, rules and regulations, but to work closely with parents to ensure that they view the district as a partner in the child's education and not a legal adversary.

Finally, if a district determines that an employee has violated policy, circumvented procedures or purposefully infringed upon the rights of a fellow employee or a student, the district should immediately ensure that its actions demonstrate that the behavior is not condoned.

By adopting and enforcing policies against inappropriate behavior, a school district employs the best defense to legal action. The district should also conduct employee training on the policies and laws. If employees fail to comply with policies and procedures, they should be held accountable for their actions.

## 2. Shop around for the appropriate legal counsel.

While school districts are authorized to seek competitive bids for legal services, the law does not mandate competitive bids. Section 44.031(f) of the Texas Education Code specifically requires competitive procurement of contracts totaling more than \$25,000. However, the permissible procurement method, "does not apply to a contract for professional services rendered, including services of an architect, attorney, or fiscal agent."<sup>[5]</sup> Attorneys are not listed in the Professional Services Procurement Act, Texas Government Code Section 2254.002, as a professional service for which the use of competitive bidding is specifically prohibited.<sup>[6]</sup> Therefore, districts may choose their method of procurement.

While cost proposals may offer more flexibility and enable the district to identify reasonably priced alternatives, cost alone should not be the sole factor used in selecting an attorney. Experience should also be considered. For example, a novice lawyer might charge a rate of \$100 per hour versus an experienced lawyer who charges a rate of \$200 per hour. However, the district might find it takes the inexperienced lawyer three hours to research the issue for a cost of \$300 in contrast to the experienced lawyer being able to address the question in 15 minutes for \$50. When selecting a lawyer, a district should evaluate the firm's experience, training and reputation in the school law community, as well as the cost.

Before shopping for legal services, the board, with input from administrators, must decide the scope of services to be provided. For

example, will the primary service be the area of employment law, such as personnel contracting, termination and grievances; assisting with school law compliance issues, such as special education; or helping to issue bonds? The board also needs to determine its expectations of the attorney. For example, will the attorney attend all board meetings; report to the board or to administrators; and be available to answer legal questions from board members, administrators or some other specified employees?

Further, if the district is selecting more than one firm, the district must be careful to maintain a consistent legal policy to ensure that similar matters are handled in similar ways.

Although price should not be the sole determinant, the district should know the market rates in the community and negotiate rates that reflect the local rate. To determine a fair hourly rate the district can call a number of firms in the area and also survey area school districts and the Regional Education Service Center to determine their attorney rates and legal fees. By comparing the fees and charges that area law firms charge, the district can ensure it is receiving legal services at a fair and competitive price.

In 1999, the Texas Association of School Boards (TASB) Legal Services published an article entitled, *A Lawyer for Your District: The How, When and Why of Obtaining Legal Counsel*. In this publication, TASB advises a board to consider:

- the attorney's commitment to public education;
- attorney's experience and expertise in the major areas of school law and the expertise and experience of other members of the attorney's firm (if any) available to assist the school district as needed;
- the personality and style of the prospective counsel in comparison to that of the board, administration and staff;
- other school districts the attorney represents and the quality of references;
- availability and accessibility, including willingness to attend board meetings or hearings when necessary or desired by the board and to consult with board members or administrators as needed;
- mutually agreeable fee arrangements;
- quality of work product;
- the nature and purpose of professional associations to which the prospective counsel belongs;
- any other clients who might present a conflict of interest in the future;
- the percentage of the prospective counsel's practice devoted to school law; and,

- whether the specific attorney will perform or supervise the district's legal work and the nature and extent of the role to be played (if any) by other attorneys, law clerks, and legal assistants.

In the November 2002 Texas Lone Star magazine, TASB Legal Services published an article entitled Governance = 8 + 1: School District's Attorney is Essential to the "Team of Nine" that also described criteria to use in selecting a school attorney. The criteria included the attorney's experience in school law and membership in attorney professional organizations that represent school districts such as TASB's Council of School Attorneys and NSBA's Council of School Attorneys. The article also discussed the role of in-house counsel, access to the attorney and identifying the client. The article also recommended the National School Boards Association's Council of School Attorneys publication, "Selecting and Working with a School Attorney: A Guide for School Boards" (1997).

Districts should check prospective attorneys' references; their status with the State Bar of Texas to ensure their licenses to practice law are current and not suspended; and whether any grievances have been filed against the attorneys. Districts should be cautious in hiring a firm that has never represented a school district in the past since the laws, rules and regulations under which school districts operate require an attorney with very specific knowledge. The district should also resist selecting counsel on familial or political affiliations. The selected attorney must exercise independent legal judgment to represent the interests of the district, not to favor any one person or faction within the district.

In one district reviewed by TSPR, the board had issued and signed a new contract for an attorney whose license to practice law had been suspended for a period of time. The State Bar of Texas Web site <http://www.texasbar.com/> provides advice on how to select a lawyer. An individual can search the Web site by attorney name to determine when the attorney was first licensed to practice law; whether that attorney is in good standing and eligible to practice law in the state; and if prior disciplinary actions have been taken against the attorney and the year in which that occurred. If the attorney's status record indicates prior disciplinary action, additional detail or certification of this information can be obtained through the State Bar of Texas Office of the Chief Disciplinary Counsel toll free at 1-877-953-5535.

Districts might seek the assistance of lawyer referral services in the local telephone directory. The State Bar has a Lawyer Referral Information Service (1-800-252-9690 or 1-877-TEXBAR) to help find lawyers in counties with no local lawyer referral service.

### 3. Negotiate contract provisions and always sign a contract.

A district can retain an attorney to represent it in legal matters without a written agreement, but a written agreement or contract can protect both parties from lapses in memory, clearly define expectations and ensure appropriate payment. Contracts should, at a minimum, contain:

- the effective dates of the contract including a beginning date, an ending date and/or a provision for terminating the contract by either party with some reasonable notice;
- a description of the fee structure, including the amount of any retainer and the activities that will be performed within the parameters of the retainer;
- the attorney's duties and responsibilities;
- the parties (by title rather than name) within the district with whom the attorney is authorized to communicate and receive assignments;
- professional liability insurance requirements;
- billing and payment schedules, including the frequency and level of detail expected on each invoice for monitoring and verification purposes;
- the terms and conditions under which the contract can be terminated by either party; and
- any other agreed to terms or conditions of the relationship not otherwise noted above.

Normally, it is desirable for the contract to provide for termination by either party with some reasonable notice. With a multi-year contract, the district may feel compelled to continue the relationship even when that relationship becomes strained. Both parties to the contract need to be comfortable and confident of the advice being given and taken, therefore whether the contract is for a set period of time or remains open-ended it is in the district's best interest to include a provision for termination with some reasonable notice.

If a district uses legal counsel to assist it on federal grant programs, it should be aware of the allowable and unallowable costs for legal services associated with each grant. To the extent possible, the district should ensure that contracts comply with the grant's federal guidelines.

The district should be cautious about paying any miscellaneous fees and charges other than those legal fees and direct expenses incurred in representing the district. A lawyer should normally pay for his or her own continuing legal education expenses. School districts should not agree to

pay for a lawyer to attend a continuing legal education conference. A school district should avoid any contractual provisions committing it to pay for an attorney's library expenses, professional journals, membership fees or a portion of the law firm's overhead and support staff costs. The district should pay only for professional legal expertise and not use tax dollars to subsidize a law firm's normal operating expenses.

Except in the area of delinquent tax collection, school districts should normally be leery of contracts based upon contingent fees, which allow attorneys to retain a percentage of any revenues collected as a result of legal action. Contingent fee arrangements are normally used when the district becomes a plaintiff (e.g. suing a defendant for breach of a construction contract). In this type of case, the district might receive a large monetary recovery for its damages; however, the costs of litigation are potentially high or uncertain. While contingent fees might motivate an attorney to obtain more revenues overall, the contingency fees can be 30, 40 or even 50 percent of the recovery. The anticipated time required to file the necessary paperwork and manage the litigation needs to be weighed against the likely outcome to determine if a contingency arrangement is better than a "fee-for-services-rendered" contract. For example, if an attorney spent 40 hours to initiate and pursue the district's action to obtain a \$2 million settlement based on a stated contingency fee of 30 percent, it would cost the district less to contract on a fee-for-services-rendered basis (40 hours X \$200 hourly rate = \$8,000 versus \$2 million X 30 percent = \$600,000). In this example, only if the attorney's estimated time to complete this activity took 3,000 hours or more would the contingency fee be warranted.

On the other hand, if the district might gain nothing or perhaps only \$1 million in recovery if it does not hire an attorney on a contingent fee basis, the district increases its potential recovery to \$1.4 million (\$2 million less the \$600,000 contingency) by agreeing to a contingency contract. A district should explore all of the options before entering into a contingent fee arrangement with an attorney and compare prices. Because competition for solvent, paying clients is fierce in today's tight legal market, lawyers will often be flexible in their charges and willing to negotiate fees with the district.

Pursuant to Texas Property Tax Code, Section 6.30, if a school district decides that it will not collect its own delinquent taxes, it may enter into a contract for the services of a competent attorney to enforce the collection of delinquent taxes.<sup>[7]</sup> The attorney's compensation should be set forth in the contract, but the total amount of compensation may not exceed 20 percent of the amount of delinquent tax, penalty, and interest collected.<sup>[8]</sup> Furthermore, a contract with an attorney that does not conform to the requirements of section 6.30 is void.<sup>[9]</sup> If the district has entered into a

contract with a private attorney for delinquent tax collection pursuant to Section 6.30, the district may impose an additional penalty on the delinquent taxpayer to defray the costs of collection.<sup>[10]</sup> The amount of the additional penalty may not exceed the amount of the compensation specified in the contract with the collection attorney.<sup>[11]</sup> Section 33.07 of the Property Tax Code allows a taxing unit to charge the additional penalty to the delinquent taxpayer (up to a maximum of 20 percent of taxes, penalty and interest that are owed) for taxes that become delinquent on or after February 1 of a year but not later than May 1 and that remain delinquent on July 1 of the year in which they become delinquent, if the school district has:

- adopted the additional penalty in the manner required by law for official action by the district;
- entered into a valid contract with the tax collection attorney according to the provisions of Section 6.30 of the Property Tax Code, and
- the taxing unit delivers a notice of delinquency and penalty to the property owner at least 30 days but not more than 60 days before July 1.<sup>[12]</sup>

For taxes that become delinquent on or after June 1, Section 33.08 of the Property Tax Code outlines similar requirements authorizing the imposition of an additional penalty to defray the costs of collection by a private attorney.<sup>[13]</sup> The absence of a contract with a private attorney makes the taxing unit ineligible to take advantage of the penalty provisions of Sections 33.07 and 33.08. Attorney General Opinion No. JM-857 (1988) found that a taxing unit may not apply any of the Section 33.07 penalty to cover any additional costs of collection that it incurs; it must use the entire penalty solely to compensate the attorney with whom it has contracted.<sup>[14]</sup>

## 4. Hedge against excessive legal costs through insurance policies.

*Note: The information in this publication does not serve as legal advice nor replace the independent judgment of a district's governing body concerning insurance and laws that affects its purchase. A district should consult its attorney to resolve questions about insurance requirements and purchasing authority.*

A school district may purchase insurance policies to cover certain types of claims. For example, school districts are required to provide health coverage either through insurance or a risk pool.<sup>[15]</sup> Districts must provide workers' compensation, either self-funded or through insurance.<sup>[16]</sup> School

districts must also maintain liability insurance if a volunteer physician or registered nurse administers medication to a student.<sup>[17]</sup>

Districts may elect to purchase insurance policies protecting the districts and their employees against tort claims under the Texas Tort Claims Act,<sup>[18]</sup> as well as coverage for bodily injuries sustained by students while training for or engaging in athletic competition or while engaging in school-sponsored activities on campus.<sup>[19]</sup> A school district can also opt to participate in a risk management pool to insure against liability for district acts and omissions.<sup>[20]</sup> A district can also participate in an excess liability pool to provide excess liability insurance coverage.<sup>[21]</sup>

Several types of insurance might help a district control legal costs; however, the final decision on the cost benefits is an issue each district must weigh. Many of these policies include legal defense fees and costs for any resulting judgments against the district or individuals, including court costs up to the coverage limits on the policy.

Commercial automobile policies cover only damages, injuries and other losses specified by the policy. The district needs to know the policy's exclusions, which describe occurrences and items the policy won't cover. The Texas Business Automobile Policy offers several common types of coverage from which a district can choose. Districts are required to provide only liability coverage to pay other people's expenses for accidents caused by drivers covered under the district policy. Liability insurance covers the district and anyone driving with the district's permission, even if the driver doesn't have his or her own liability insurance. It also covers a district when employees drive other people's automobiles, including rental cars. The insurance company will pay claim amounts for which the district is legally responsible, up to the district's policy dollar limits. However, the Texas Tort Claims Act limits a district's liability. There is a cap of \$100,000 per person/\$300,000 per occurrence for injury or death and \$100,000 for every occurrence of property damage.<sup>[22]</sup>

Districts can choose to purchase the following automobile insurance coverages: collision (damage to an automobile); comprehensive (physical damage other than collision); and rental reimbursement. School districts are not allowed to purchase some forms of automobile insurance coverage. The Texas Attorney General has determined that school districts are prohibited from purchasing personal injury protection and uninsured/underinsured motorist coverage because providing such coverage at the expense of the district would amount to granting public money to a private individual which violates the Texas Constitution.<sup>[23]</sup>

General liability insurance protects an insured against bodily injury and property damage losses to others arising from certain operations. Coverage is subject to the exclusions and conditions of the policy. A general liability policy will not apply to bodily injury or property damage caused by the use of aircraft, watercraft, automobiles, school buses or transportation of students.

Before procuring any general liability insurance policies, the district should consider whether the proposed purchase of insurance would be an authorized expenditure of public funds consistent with Attorney General Opinion No. H-70 (1973).<sup>[24]</sup> This opinion holds that a district may purchase insurance to protect against the costs and expense of litigation, and to protect itself from damages where the district is not immune. However, where the district is protected from risk by governmental immunity, it is an improper expenditure of public funds to purchase insurance to cover those risks.

The rates for general liability coverage are typically based on average daily attendance for students. Aggregate limits may apply to the entire district or each campus.

Professional/Educators Legal Liability (ELL) coverage protects employees, staff, board members, volunteers and the educational institution itself against loss from a claim of alleged negligent acts, errors or omissions in the performance of professional services. ELL is commonly known as “school leaders errors and omissions, school board legal liability and directors and officers liability” insurance. Employment-related allegations are the most common source of ELL claims including, but not limited to, improper demotion, failure to promote, the failure to hire and wrongful termination.

Districts also face breach of contract claims. Most often such claims assert that an employee’s contract was wrongly breached when the district terminated the employee.

Individuals may assert that a district has violated their civil rights. These claims can involve denial or infringement allegations of free speech, press or prayer. Civil rights allegations also can be made in conjunction with employment-related claims. Individuals have made claims against districts alleging that specific school policies or lack of policies fail to protect or supervise (both faculty and students). Such claims may allege sexual abuse, molestation or harassment.

Claims involving policing or security may not be covered by a district’s ELL policy. If the district employs a police officer, ELL should cover the district’s liability arising from the officer’s acts. If another governmental

entity such as a municipality or county employed the officer, the officer's professional liability policy likely would exclude coverage for any moonlighting activities. If the district contracts with a security firm, the district should verify that the firm maintains its own professional liability coverage. Because of potential situations that may arise, a district should discuss ELL coverage for policing activity with its agent.

Other casualty coverages might include a performance bond to guarantee performance according to a contract and a payment bond to guarantee payment to subcontractors or suppliers. Two coverage forms specifically insure public or governmental entities against employee dishonesty involving public funds or property. Coverage can be written to apply regardless of the number of employees involved, money, securities or other property loss or may have a limit applicable to each employee. If a district purchases public employee dishonesty coverage, it is important to select the proper limit under either form.

Another coverage that protects against loss of public funds or property that does not involve employees is Forgery or Alteration Coverage. This coverage insures against forgery or alteration of checks, drafts, promissory notes or other directions to pay.

Theft, Disappearance and Destruction coverage includes coverage for money, securities and other property against loss either on premises or in the custody of a messenger (usually an employee) while off district premises. Covered losses include theft, disappearance and destruction.

Additional information can be found in Insurance Decisions for Texas School Districts, available on the Texas Department of Insurance Web site at: <http://www.tdi.state.tx.us/consumer/sdguide/assign.html>.

## 5. Negotiate a retainer for routine and ongoing legal matters.

Common legal service fee arrangements include percentage fees, contingent fees, hourly rates and flat fee arrangements, or a combination of these.<sup>[25]</sup> Instead of paying an attorney for every hour spent monitoring monthly board meetings or answering routine questions, school districts negotiate a fair retainer that covers routine matters for a fixed or capped fee.<sup>[26]</sup> A contract should clearly define the services the attorney provides as part of the retainer and differentiate between those items covered by the retainer and those that will be billed at the attorney's hourly rate.

A retainer agreement differs from the usual attorney-client agreement for several reasons. First, unlike the usual agreement, a retainer covers more

limited legal service(s), rather than the complete array of services that lawyers might provide clients in the prelitigation and litigation phases of a lawsuit. Second, the district normally agrees to perform a number of actions to assist the attorney in completing these tasks, limiting the scope of attorney's services. Third, because of the limited scope of services, the total fee will be less than the attorney's normal full-service attorney's fee.

The final list of services covered in a retainer agreement will depend upon the final negotiations with the attorney. However the types of services that could be provided under a retainer agreement might include:

- reviewing board meeting notices and agendas to determine compliance with the Open Meetings Act;
- attending board meetings to ensure compliance with the Act, provide answers to legal issues and advice and counsel the board and administration regarding proposed actions;
- assisting the district to respond to requests for information under the Public Information Act;
- providing advice regarding alternative means to settle disputes between board members and/or district employees;
- reviewing correspondence, bid documents, contracts and court documents prepared by the district;
- drafting contracts, bidding documents, correspondence or court documents of a routine legal nature;
- investigating facts: interviewing individuals involved in a dispute or other matters to ascertain the facts and public record searches;
- performing legal research and analysis; and
- answering routine legal questions regarding compliance with Texas Education Code requirements, or rules of the State Board of Education or Texas Education Agency.

This list gives districts a range of possible services but is not intended to be all-inclusive. To determine what might be best covered under a retainer agreement, the district should review prior legal billings and determine what recurring and routine legal services it has needed in the past, as well as the number of billable hours for those services.

The services that the district supplies to obtain the lower costs through a flat fee retainer agreement might vary widely, depending on the resources available. Services that districts could consider providing include:

- helping the attorney obtain all information (in whatever form it may appear) relevant to a particular legal issue that the district possesses, including any information from someone who has a direct relationship with the district;

- providing board packets in advance of board meetings so that the attorney can review them and alert the district to any potential legal issues before the meeting begins;
- making administrators or board members available for any meetings, interviews or other events that the attorney requires, including at the attorney's office if requested;
- carefully considering the attorney's advice before making any major decisions;
- making administrators or board members available to provide sworn testimony, e.g., in a deposition, affidavit, trial or other proceedings, as requested;
- notifying the attorney if and when major organizational, governance or physical changes occur, including addresses, phone numbers or other electronic means of communication, that might otherwise make it difficult for the attorney to communicate with the district;
- informing the attorney about any new developments or information, e.g., court notices, employee grievances, letters, new factual developments or other similar developments; and
- responding to the attorney's communications (letters, telephone calls or other forms of electronic forms of communication) as soon as reasonably possible.

A district might consider two types of fee structures: a monthly "flat fee" or a "not to exceed" monthly fee.

Because the district pays the monthly retainer regardless of what services the attorney actually renders for that month, the flat monthly fee is less than an hourly fee arrangement. The attorney agrees to accept less of a fee, in exchange for the certainty of being paid a set fee each month. Clients normally do not receive any refunds for "unused hours" under a flat fee retainer. Under this arrangement, the client gambles that the legal workload required will equal or exceed the monthly flat fee, while the lawyer gambles that the workload will be equal to or lower than the monthly flat fee. In any case, the lawyer agrees to accept lower monthly flat fees than he or she could charge on an hourly basis in exchange for the certainty of the regular income stream.

The district and the attorney could also negotiate a "not to exceed" price based upon an estimate of the legal services the district has used in the past, what fees were associated with those routine matters and what the district expects from the attorney in the future. The "not to exceed" price actually amounts to an hourly fee arrangement with a monthly maximum limit. The district pays only for the hours actually worked. The fee agreement based the initial retainer fee on an estimated number of hours at the attorney's hourly rate with any unexpended portion returned to the

district, or given as a credit, at the end of a specified time period such as one year. A monthly settle-up might be cumbersome, whereas over a quarter or year the averages might be more appropriate. The district can negotiate the specifics with the attorney. Under a “not to exceed” fee arrangement, lawyers have less incentive to lower their rates, since they will have to refund any amounts of the retainer in excess of the hours actually worked.

To be successful, a retainer agreement should be beneficial to both the district and the attorney. The district should expect to receive quality services at a reasonable cost that it can predict for budget purposes. The attorney should expect to receive fair compensation for services rendered. If the district expects to get something for nothing, or if the attorney uses the retainer as a “loss-leader” to simply gain access to other more lucrative areas of the district’s business, the retain arrangement will not be satisfactory in the long run.

A district must also determine how to address additional legal costs and expenses in any agreement. For example, filing fees; the costs of transcribing testimony taken at a hearing or trial; subpoena costs; an expert’s fees; the costs of an investigator or of other methods to discover and obtain factual information; document-reproduction expenses; discovery costs; travel, lodging and meals while traveling; the costs of long-distance phone calls, facsimile transmissions; other forms of communication; and the costs required to reasonably conduct on-line legal research. The agreement needs to state which party will be responsible for these costs, as well as any limits agreed to on those costs to prevent misunderstandings.

## 6. Hire in-house counsel to handle routine legal matters—if feasible.

Because of the complexity and diversity of issues, a school district can not possibly handle all of its legal matters in-house. At various times, a district may need experts in specific fields to handle bond issuances or litigation. However, some districts such as Houston and Dallas ISDs, choose to employ a capable in-house legal staff, but still understand that litigation and certain other issues require outside legal expertise.

While a district’s size may help determine whether to hire in-house counsel, ultimately the amount and nature of the district’s legal fees may dictate the decision. When the aggregate amount being paid to external counsel for routine matters exceeds the cost of hiring in-house counsel and providing them administrative support, equipment, and reference materials, the district should consider hiring in-house counsel.

The district should examine the actual expenditures, current year's budget and invoices for legal services for the past two to three years and create a chart detailing the name of the external law firms representing the district, the nature of the work done by each firm and the amount paid to each firm. Since costs in one year could be an anomaly, cost trends must be observed to ensure that the costs can actually be avoided by hiring a person full-time.

The district should also scrutinize any major lawsuits, judgments or litigation and determine the associated costs. If the district had employed in-house legal counsel could any of these matters have been avoided? In other words, could a staff attorney provide preventive measures to help the district avoid costly problems in the future?

The district should list all legal issues causing it the most difficulty and then determine if the issues could be handled by one individual. For example, the list might include governance, open meetings, open government, contracts and purchasing, personnel and special programs. The district could obtain assistance from the State Bar of Texas or its local affiliates to determine who is available for each type of specialization and which firms might handle a broad spectrum of issues.

Once the district develops the list, determines it to be reasonable and has clear indications regarding the current amount being paid for outside counsel, the district should determine what it will cost, including benefits, to hire in-house legal counsel with the expertise needed. The costs must include administrative support, general overhead, office space (if needed) and equipment, reference materials, law library, licensing fees, dues for professional organizations and fees for continuing legal education, required by all attorneys. If the cost for in-house staff amounts to less than the costs that the district determined can be avoided by hiring this person or persons, then the decision will be a fairly simple one. If not, the district should go back to the early steps and try to negotiate a better contract for services with the current outside counsel.

Fort Worth ISD uses a staff attorney to provide direct legal support and advice to administrators and school personnel regarding contractual matters, employee grievances, student disciplinary hearings, interpretation of board policy and employment matters, Workers' Compensation, Open Records and Open Meetings Act issues and special education matters. The staff attorney coordinates and monitors services provided by outside legal counsel, particularly services related to special education matters, litigation and special legal matters requiring outside expertise.

In addition to the services conducted in Fort Worth, the Fort Bend ISD staff attorney conducts investigations of alleged incidents of serious

misconduct, including sexual harassment, employee assaults of students or fellow employees, felonies or offenses involving moral turpitude.

Corpus Christi ISD's greatest legal need focused on the area of special education. Through a cooperative arrangement for one part-time attorney and by hiring one staff attorney, the district has dramatically reduced special education costs by assigning these cases to the in-house counsel.

## 7. Manage legal costs internally.

In addition to general administrative policies and procedures that ensure the district complies with the law, larger districts and some smaller districts with a significant level of legal activity need litigation or legal cost management policy or procedures. In other words, the district needs policy and/or procedures to control and minimize costs. A local policy can clarify expectations regarding the use of legal counsel and directly impact the costs incurred by the district for legal services. This local policy could, for example, include:

- requiring written contracts of all legal counsel be approved by the board in advance of services rendered;
- clarifying the reporting relationship of the attorney with the administration and the board;
- designating individuals within the administration with the express authority to contact the attorney(s) and incur costs;
- stipulating that only requests of the board majority are to be directed to the attorney(s);
- determining how and when an individual board member can seek legal assistance and advice, to be paid from district funds; and
- authorizing Professional/Educators Legal Liability or errors and omissions policies.

Administrative procedures would certainly clarify and institutionalize board policy, but might also include explaining to employees:

- proper notification procedures to use when informed of a possible lawsuit or served notice of a lawsuit;
- procedures for handling routine legal matters such as contracting, open records requests and open meetings postings;
- training programs on sexual harassment, employee hiring practices, employee appraisal practices and employee grievance procedures; and
- procedures on obtaining advice on potentially litigious issues.

Limiting the number of people with direct access to the attorney can eliminate frivolous calls and the cost of monthly legal bills. During one

week, the TSPR found that individual board members in the Donna ISD had made more than 60 hours of calls to the district attorney. If all inquiries must be channeled through key administrators, simple or similar questions may be answered without the need for legal counsel. But, even more important are the preventative policies and procedures that can prevent legal issues from arising for districts as discussed in the first section of this report.

## 8. Monitor monthly legal bills.

A well-written and carefully negotiated contract ensures the first step in monitoring legal expenditures. In order to monitor legal bills, the bills must contain a level of detail necessary to determine the person providing the service (attorney, legal assistant, etc.), the number of hours being billed, the billing rate, the case name or number (if applicable) or the particular matter or legal issue and the nature of the work performed. For the district to obtain this detail on an ongoing basis, the billing criteria must be stipulated in the contract. The district should ensure it gets sufficient detail in the bills stating exactly what services the attorney rendered. A generalized statement such as “Statement for legal services rendered” is unacceptable. The bill should state specifically what work was performed, or the district should return the bill for more explanation.

There should be one person, such as the superintendent’s secretary, financial staff member or staff attorney, charged with the task of monitoring bills in order to become familiar with the bills, the terminology and the cases or matters being referenced in the bills. The individual should also have enough direct contact with the superintendent to be able to alert him or her regarding any questionable items or concerns identified in the bills. If the district authorizes more than one person to request legal services, the person monitoring the bills must be kept informed of new requests. The person monitoring the bills should check with the individuals in the district working directly with the attorneys on a given case to validate the bills or to determine if the work has actually been performed and performed satisfactorily.

The reviewer also needs to have a copy of the attorney contract and be familiar with its terms and conditions. If the negotiated billing rate is \$100 per hour, then the bill should be for \$100 per hour. If the district agreed to pay for mailing expenses, while the attorney agreed to absorb the cost of copying, then copying expenses should not be included. If certain services were to be provided under the umbrella of the retainer, but are billed separately, this should be questioned.

Building a simple spreadsheet of each bill will allow for periodic analysis of the type of work performed and the average number of hours spent on

each type of litigation or legal service. This tracking system is discussed in greater detail under section 9 of this report, but a simple spreadsheet will make future cost/benefit analyses of services easier to perform, while providing the district useful trend data.

This monitoring becomes very important to delinquent tax collections. In one district reviewed by TSPR, the level of detail available on the collecting attorney's bills made it difficult to ascertain whether the correct fee was being retained from the amount of tax collected. Eventually, TSPR confirmed that amounts paid to or actually retained by the attorney were correct, but it was difficult to reconcile that amount to the district's financial records. Files were in disarray, and copies of some bills were missing from the files. Poor recordkeeping and lax monitoring of bills put the school district and the tax collecting attorney at risk, particularly since it involved millions of dollars in delinquent tax collections.

Strong procedures for monitoring bills can help to identify internal procedural issues such as individuals who may be calling the attorney without express authorization and increasing legal costs for the district. Monitoring can also identify clerical errors or inaccuracies in billing that can occur in any business. A district should never pay a bill without knowing exactly what it is paying for and ensuring that it agreed to pay for that particular service.

## 9. Establish a tracking and document retention system.

If a district's legal expenses have been low, it may not believe that tracking and documenting legal expenses or legal matters is warranted. However, in today's litigious environment, good documentation helps the district adhere to records retention and open records requirements; comply with court orders; analyze trends in legal costs and modify policies, procedures or practices to control those costs; and ensure that costs are accounted for from appropriate funds.

### **Document retention and open records**

Every school district should know what must be kept on file and for how long, which documents should be accessible as open records and what must be kept confidential. Maintaining a good filing and document retention system can help the district avoid some major legal problems. Paper files should be maintained in a fireproof cabinet with other valuable district papers and electronic files should be backed up periodically so that they can be recovered in the event of a disaster.

## **Compliance monitoring**

If the courts ruled that the district must take certain action as a result of a lawsuit, a system must be in place to closely monitor compliance. The most common example is court-ordered desegregation. Often these orders contain annual reporting requirements or other major components such as campus demographic requirements or methodologies for requesting attendance zone changes. Should the district need to request that the order be set aside, the desegregation files should contain all vital pieces of information regarding the case, not just for monitoring the current plan, but also provide a historical reference for the future.

Not all cases involve long-term or extensive reporting requirements, but still require some form of compliance. For example, if the order requires the district to publish certain information in the local newspaper, the file should contain proof that the district completed the action required.

## **Trend analysis and monitoring**

As previously noted, a simple spreadsheet of each bill for legal services will allow the district to periodically analyze the type of work performed and the average number of hours spent on each type of litigation or legal service. The district can use this information when, and if, it decides to change attorneys, renegotiate contracts or bring some portion of the work in-house. Also, when the board or members of the public ask for details on expenditures, the district has the answers readily available. Sometimes those answers can help the board see how its decisions have resulted in savings or costs to the district in relation to legal expenses.

The district should track each case filed by the district or against it separately and add notes to the tracking system each time a contact is made with any of the parties involved, including legal counsel. The tracking can alert the district to pending deadlines, provide the basis for reports to the board and help the district detect trends so that remedies can be proposed to prevent future occurrences. For example, if a number of cases are filed dealing with similar employment issues, perhaps the district needs to modify its employment policies, practices, training and procedures. Similar cases may employ a comparable defense if the earlier defense was successful.

## **Accurate accounting**

Charging the cost of legal services to the correct fund, function and object code can mean the difference between a balanced budget and deficit spending in a given category or fund. For example, with bond and construction projects, certain attorney fees can and should be paid from

bond proceeds and be included in the cost of capital projects, rather than being paid strictly from the maintenance and operations budget.

Understanding the relationship of the cost for counsel to the overall project(s) also can provide the district vital information when planning future projects.

Grants are another instance where accurate accounting for legal costs is important. Some grants may stipulate that no legal services can be charged against grant proceeds, while others may allow limited legal expenditures. If applicable legal fees are not appropriately charged, the district could lose grant funding for non-compliance with the grant's terms and conditions or spend maintenance and operations funds for something that should have come from the grant monies.

A good tracking system can be fairly easy to maintain for even the smallest districts because of the low volume of information required. Whether small or large, every district can benefit from a good tracking and document retention system.

## 10. Resolve the problems before they turn litigious.

Districts would do well to follow that old adage, "Treat others as you would like to be treated." Having well-trained managers and supervisors, sound policies and procedures and following the recommendations mentioned in this report offer districts ways to control legal costs. However, sometimes just being a good listener and a responsive manager can do more to mitigate legal actions than any other single act.

In most cases, administrators should heed the warning signs long before a lawsuit is filed. An unhappy employee approaches a supervisor or an angry parent talks to a teacher and principal but can't seem to reach agreement. If the district takes those warning signs seriously and deals with them early, a lawsuit might never arise.

Even after a defining event has occurred and the district appears headed for a rough ride, administrators can still attempt to mitigate the problem.

The tragedy at Columbine High School in Colorado a few years ago provides an illustration of how one school district took proactive measures that ultimately helped to reduce litigation. Although the shootings at Columbine High School resulted in a number of serious and some fatal injuries to students and staff, only seven families out of a much larger group of injured parties actually filed suit against the school. While district administrators said that there is no direct correlation between their actions

and the low number of lawsuits against the district, they believe there may have been an indirect cause and effect. The executive director of Communications and one of the crisis response team leaders to the Columbine tragedy observed that “you can’t worry about every word you say during such a tragedy—thinking only about whether or not the district will be sued will most certainly backfire.” He believes people would see through this and assume that the district was holding back or covering up. The primary interest has to be on people; treating them like you would want to be treated if the situation were reversed. In the end, he said that he felt immediate action, caring and follow-through was the key during the Columbine tragedy.

Local control allows local districts to operate with wide latitude. Complaints can be filed and letters sent to TEA. However, parents or employees may see the court system as the only recourse, particularly if a district appears unresponsive or insensitive to their concerns.

Employee grievances, discrimination claims and employment disputes often occur because managers, employees, teachers or principals don’t treat each other with respect, don’t listen to the other side of the story or just don’t take time to see the bigger picture.

District employees need to be sensitive to the liability and risks to the district when working with parents and fellow employees. Administrators need to establish formal and informal communication mechanisms for parents, students and employees. Any employee who places the district at risk through his or her actions needs to be dealt with swiftly. For example, if an employee sexually harasses another employee, proper documentation of disciplinary steps taken can provide the district some protection in the event a lawsuit is filed.

When parties involved in the conflict cannot resolve the issue among themselves, a third party might be appointed to help facilitate timely and objective resolution. Formal and informal negotiation, mediation and arbitration may provide districts with a less costly alternative to litigation. While the informal processes may involve attorneys to some degree, the resolution may be more palatable for all involved in the dispute, negative publicity might be avoided and legal costs kept to a minimum. It is also important to note that mediation and arbitration are not limited to attorneys. Other trained professionals are also arbitrators and mediators.

Open and honest two-way communication and sensitivity toward the other person can go a long way toward preventing a long and expensive legal process where no one really wins.

Finally, early consultation with legal counsel, often no more than a phone call, can save the district money in the long run by preventing the matter from developing into litigation. The district should seek legal advice when the warning signs of a conflict begin to emerge — good legal advice up front can prevent a protracted and expensive conflict in the future. When in doubt, particularly in employment, open records and special education matters, the district should seek counsel sooner rather than later.

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## Endnotes

<sup>[1]</sup> See, e.g., *LeLeaux v. Hamshire-Fannett Ind. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (stating that a school district, as a governmental unit, is immune from liability unless that immunity has been waived by the Texas Tort Claims Act).

<sup>[2]</sup> Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001 et.seq. (Vernon 1997 and 2002 Supp.). The Texas Tort Claims Act was enacted in 1970 and provided for a waiver of governmental immunity for the use of publicly-owned motor vehicles, premises defects, and injuries arising out of conditions or use of property. However, with respect to the liability of school districts, the legislature provided a more limited waiver of immunity. Under the Act, a school district's waiver of immunity is limited to causes of action arising from the use of a motor vehicle. See *Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978).

<sup>[3]</sup> *Id.* §§ 101.021, 101.025, 101.051 (Vernon 1997).

<sup>[4]</sup> Injured parties often allege that conduct by school officials violates their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Suits of this nature are generally filed in federal court under 42 U.S.C. § 1983. In cases brought under Section 1983, the state law tort concepts of governmental and official immunity do not apply.

<sup>[5]</sup> Tex. Educ. Code Ann. § 44.031(f) (Vernon Supp. 2002).

<sup>[6]</sup> See Tex. Gov't Code Ann. § 2254.002(2) (Vernon Supp. 2002) (definition of "professional services" does not include legal profession).

<sup>[7]</sup> Tex. Tax Code Ann. § 6.30(c) (Vernon 2001).

<sup>[8]</sup> *Id.*

<sup>[9]</sup> *Id.* § 6.30(e).

[10] Tex. Tax Code Ann. § 33.07(a) (Vernon 2001).

[11] *Id.*

[12] Tex. Tax Code Ann. § 33.07 (Vernon 2001).

[13] *Id.* § 33.08.

[14] Tex. Att’y Gen. Op. No. JM-857 (1988).

[15] Tex. Educ. Code Ann. § 22.004 (Vernon Supp. 2002); *id.* § 22.005 (Vernon 1996).

[16] Tex. Labor Code Ann. §504.011 (Vernon 1996).

[17] Tex. Educ. Code Ann. § 22.052(b) (Vernon 1996).

[18] Tex. Civ. Prac. & Rem. Code Ann. § 101.027(a) (Vernon Supp. 2002). See also *Barr v. Bernhard*, 562 S.W.2d 844, 847-848 (Tex. 1978) (holding that a school district’s purchase of a general liability insurance policy does not waive governmental immunity); Tex. Att’y Gen. Op. No. M-989 (1971) (concluding that a school district might purchase with public funds an all-risks automobile liability insurance policy protecting its officers and employees against tort claims arising from their official duties).

[19] Tex. Educ. Code Ann. § 33.085 (Vernon Supp. 2002).

[20] Tex. Ins. Code Ann. Art. 21.49-17 (Vernon Supp. Pamph. 2002).

[21] Tex. Ins. Code Ann. Art. 21.49-13 (Vernon Supp. Pamph. 2002).

[22] Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (b) (Vernon Supp. 2002).

[23] Tex. Att’y Gen. Op. No. H-602 (1975).

[24] Tex. Att’y Gen. Op. No. H-70 (1973).

[25] 7 TEX. JUR.3d *Attorneys at Law* §280 (1997); Tex. Disc. R. Prof. Conduct 1.04 cmt 3 (codified at Tex. Gov’t Code Ann. Title 2, Subtitle G-App. A., Art. 10, § 9 (Vernon 1998).

[26] A classic “retainer” is a sum of money paid by a client to secure an attorney’s availability over a given period of time. See *S.E.C. v. Interlink Data Network of Los Angeles, Inc.*, 77 F.3d 1201 (9th Cir. 1996). In this publication, we are using the word “retainer” to mean a prepayment to

engage the lawyer's services for a specific period of time that also acts as a flat fee for the monthly services rendered. The retainer agreement should specify the purpose of the retainer fee and what services are covered by the retainer.