

Legally Speaking

Best Practices for Using Your Legal Counsel

By **David Westman**



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Michael E. Reed has practiced trade and professional association, corporate and tax law since 1968. He represents a wide variety of trade and professional associations, accrediting organizations, public charities and private foundations. Reed has served as a member of Vedder Price's Board of Directors and Executive Committee and currently serves as head of the firm's Trade and Professional Association group. He was selected by his peers from 2006 to 2016 for inclusion in The Best Lawyers in America®. He has also been selected by his peers from 2011 to 2016 as a Leading Lawyer in Association & Non-Profit Law and Health Law.



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Counsel is vital in helping associations navigate the often murky waters of the legal landscape. However, properly utilizing said counsel presents its own set of uncertainties. Following, four attorneys provide insights on best practices for using your association's legal counsel.

FORUM: What are the keys to success in a "healthy" working relationship between an association's attorney and its leaders—board and staff?

Mandel: The key is communication. The association board and staff should tell their attorney everything and tell him or her early and often. I would rather keep the association out of trouble than get the association out of trouble. It's both easier for the attorney and, believe it or not, more cost-effective for the association to get legal advice early in any process—before a contract is fully negotiated, before a project has started or before the association gets set on a new name, for example.

One sign of a healthy working relationship is that the attorney is affirmatively interested in what the association is doing and is regularly thinking of ways to assist the association. That can only be done when the attorney knows what the association is doing and why. It's also important for the board and staff to tell the attorney all the relevant information. Asking me to put on blinders and only look at one discrete aspect of a potentially larger legal problem is not a good way to have something understood, let alone well-analyzed.

An association needs to think carefully about what kinds of things to ask its attorney to do. Lawyers are service providers and want to be helpful. If an association asks its lawyer to draft a policy manual for the association, they will likely do it, but it may be neither prudent nor cost-effective for them to develop all the association's policies. On the other hand, the association should have its lawyer review the policy manual. The key to determining how and when to use the attorney begins and ends with having the kind of relationship that allows the client and attorney to determine together what is and what is not appropriate for the lawyer to do.

Goedert: Both board and staff must understand the nature of their relationship with the association's legal counsel. We get most of our assignments from the staff, but we ultimately work for the association, and the association is managed by the board. The board needs to feel comfortable that legal counsel is available to it. If push comes to shove, it is the board's direction that legal counsel must follow rather than that of the staff.

Reed: With respect to staff, an understanding with the CEO as to who has the ability and authority to request legal services and to interact with counsel is critical to a good working relationship. If the CEO prefers that all requests for legal services be routed through him or her, that understanding needs to be reached at the outset. In my experience, a more effective relationship is to have direct interaction between department heads, such as those of publications, education, and meetings, and counsel, with the CEO being copied on such communications. Similarly, there needs to be an understanding as to whether board leaders, such as the president or chair, can or should contact counsel directly other than in instances directly affecting the compensation or tenure of the CEO.

Howe: For there to be a "healthy" working relationship between the association's attorney and its leaders, the board and staff need to recognize and acknowledge that the attorney is accountable to and represents the association. The association is represented by its board of directors. It is key for staff and counsel to have an understanding of that and to know the parameters within which they can work effectively and efficiently. All parties should recognize the need for counsel to have a very close working relationship with staff on a day-to-day basis but also recognize that as counsel for the

association it is imperative that all parties respect and understand what the various conflicts could be.

FORUM: What role should an association's attorney play in the board orientation process, including specific topics you believe the attorney should address?

Goedert: Legal counsel is an excellent resource for the board orientation process. There are many myths in the nonprofit world, and legal counsel can help dispel those myths.

Reed: It's appropriate for the association's attorney to present to the board on the board's fiduciary duties, including the duties of care, loyalty and obedience. That presentation should also focus on the confidentiality obligations of the board and the association's conflict of interest policy disclosure and management processes. The

presentation could also highlight key elements of other policies, including the compensation policy, record retention policy and whistleblower policy. HR issues are typically addressed in a separate presentation to either senior staff or all staff.

Howe: As for board orientation, one thing that should be noted at the get go is that many associations do not make board orientation a priority. It will make life easier for all once the board has an understanding of the relationship that exists between staff, counsel and members. Issues that need to be addressed are antitrust; understanding the bylaws and policies of the association; the fact that the board has only one employee, the executive; and that the board is not there to be logistic but needs to be strategic in helping provide guidance to and understanding of the direction for the association.

Mandel: Ideally, the association's attorney should play an integral role in the board orientation process. I often provide orientation on the legal and fiduciary duties of directors, including duty of care, duty of loyalty, and duty of obedience—what those duties mean and what carrying out those duties looks like in the real world. Typically, conflicts of interest, the duty to maintain confidentiality of board discussions, and the duty to support decisions of the board are hot topics and often not well-understood in practice. The association's attorney can bring experience gained from his or her dealings with other associations to make the board orientation discussions come alive and be a meaningful learning experience for both new and returning board members.

FORUM: What guidance do you have regarding how often, and under what circumstances, the association's attorney should attend board meetings? What role should the attorney play during those board meetings?

Reed: With larger associations the attorney should attend all board meetings. The role of the attorney should be to review the agenda in advance to ensure that there are no antitrust-sensitive topics and to review the conflict of interest

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disclosure statements of board members. At the meeting the attorney can and should respond to governance questions including conflict of interest disclosure and management and bylaw interpretation matters. If the board addresses membership disciplinary issues, the attorney should help manage that process.

Howe: The role of legal counsel at board meetings is important. Many times, regardless of the sensitivity of issues, legal counsel can help the board work its way through subjects and issues that may be difficult at best. The easiest word from a lawyer's mouth is "no," but what an effective counsel will instead say is, "No, we cannot do it that way, but let's see how we can make it happen this way." There are, of course, limitations. The lawyer does not want anybody that they represent to go to jail.

Mandel: The association should think of and use its attorney not only as a legal advisor but also as a business advisor. From that perspective, the more meetings the attorney attends, the better-equipped the attorney will be to provide both legal and business advice. In my experience, attending board meetings allows me to spot issues early on and work with the staff and board to achieve their goals in the best way possible.

Also, even though the attorney represents the association, his or her principal (and sometimes sole) contact may be with the staff. There are benefits to promoting contact with the elected leadership and even the general membership. Such contact enables the lawyer to better understand the dynamics of representing the association. When members and leadership know the association's attorney, they will be more likely to seek and follow her advice. This obviously benefits both the association and the lawyer. It also should be a boon to the staff, who can use the neutrality and credibility of the association's counsel to help

carry a message that might not otherwise be easily presented solely by the staff.

Having the association's attorney at board meetings can be a very efficient way to operate.

Goedert: The answer to this question varies greatly depending on the nature of the association. Some associations require, and fully utilize, the talents of legal counsel during the entire board meeting, and at every board meeting. Others bring in legal counsel only for topics with legal implications. Legal counsel is there to provide legal advice but may offer other observations based on experience in the association world or the broader business environment. A wise legal counsel will know when broader advice will be welcome.

FORUM: To what extent, and for what purposes, should association board members and staff be given independent access to the organization's attorney?

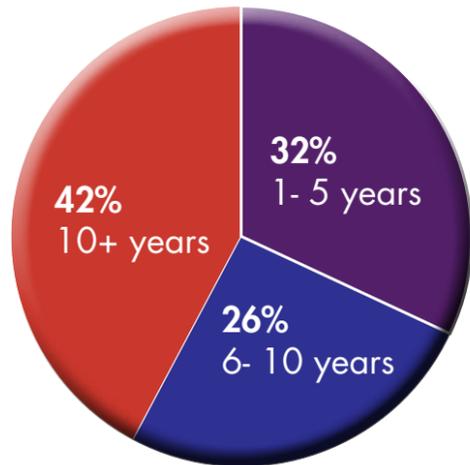
Howe: Independent access to counsel is a tricky issue. Board members should always feel free to work with legal counsel, but effectively it should be directed through the chief elected officer of the association. As for staff, similarly, it should be consistent with what the chief staff officer considers appropriate. In other words, there should be a policy established by the board regarding board members and by the chief executive officer regarding staff members for access to counsel.

Mandel: The organization's chief staff officer always should be the primary access and point of contact for the association's attorney. But board members—particularly the association's chief elected officer or its executive committee members—also should know the association's counsel and be able to contact them directly, particularly for any potential improprieties or concerns regard-

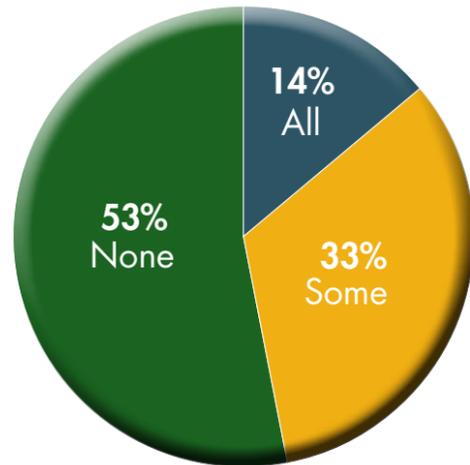


To learn more about associations' use of attorneys, interns Courtney Baker, Sierra Thiery and Gabriel Tucker from Augustana College in Rock Island, Ill., conducted a telephone survey of a sample of 21 Chicago-area associations. The responses to the survey follow.

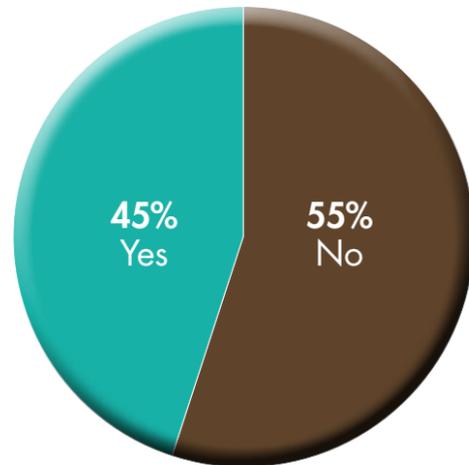
How long has your primary legal counsel served your association?



Does your legal counsel attend your board meetings?



Does your legal counsel participate in person or telephonically in orienting your new board members?



ing the chief staff officer. The number of individuals authorized to contact the association's attorney will vary with the organization and may range from C-suite only to operations, finance, meetings and human resource staff, as well.

Goedert: The officers of an association absolutely must have independent access to the organization's attorney. Some organizations grant each board member this access while others require

that director-at-large inquiries go through an officer. Requiring all inquiries to go through staff or through only one officer, such as the president, is a recipe for mischief. Transparency is the key to a strong working relationship between legal counsel and the board, and that transparency will not exist if one person is given the role as sole interpreter of legal advice.

Reed: The response to question No. 1 links to question No. 4. On balance, key staff members should be given independent access to the organization's attorney rather than to have all requests be channeled through the CEO. The president or chairman of the association should not be precluded from contacting the attorney directly on matters in addition to those addressing the employment or compensation status of the CEO. In my experience, contact on other issues is rare, and typically both the CEO and president or chair are jointly involved in a call to the attorney.

FORUM: What is the biggest mistake association leaders make in utilizing or engaging with the association's attorney? Perhaps include an example.

Mandel: The biggest mistake association leaders make is not recognizing who the attorney represents. In the association context, the attorney represents the association. The association's attorney does not represent the officers, the staff, the CEO or individual members. While the attorney may report to and take direction from the chief staff officer, the chief elected officer, both or someone else altogether, that does not change who the "client" is: that entity to whom the attorney owes all of his or her duties. So, association leaders must be aware that when disputes arise among officers, members, employees and the association, the association's attorney can only represent the association's interests.

Goedert: The biggest mistake I see in utilizing association legal counsel is to put legal counsel in the middle of political disputes. It frequently happens that boards are divided on key issues. Legal counsel is sometimes asked to render opinions in a manner that will elicit the answer desired by the party requesting the advice. This is done sometimes by withholding facts, putting double negatives in the question or threatening legal counsel with termination if the "right" answer isn't given. Legal counsel is there to serve the association as a whole, not any political faction.

Reed: The answer to question No. 5 ties back into the responses to access. Limiting the attorney's contact solely to the CEO, particularly with larger associations, limits the attorney's effectiveness and diminishes his or her ability to appropriately and promptly respond to the association's legal needs and concerns. Typically, with a larger association, key staff members are as or more knowledgeable about specific factual issues and concerns than the CEO.

Howe: The biggest mistake that association leaders make relative to counsel is not utilizing counsel.

FORUM: What other words of wisdom do you have to maximize an association's return on investment pertaining to its attorney?

Goedert: Both staff and leaders should look to maximize meeting time at which legal counsel is present. Moving items on the agenda so that legal counsel can be present for what's important, and then depart, respects the time of legal counsel and, more importantly, reduces fees.

Reed: An agreed-upon monthly retainer with an exclusion for unusual events, such as litigation, disciplinary hearings, a regulatory investigation or a building acquisition, is an approach that can work effectively for both parties.

Howe: Words of wisdom are "lawyers are there to advise," and the key issue is for clients to recognize that it is advice. The ROI for an association as to counsel is finding an attorney who truly wants to understand the dynamics of the organization and who will work with the organization to help it direct its strategic approaches toward a successful conclusion.

Mandel: Plan ahead. An association needs to recognize that it likely will need legal services at some time. It should plan and budget for that likelihood and have a relationship with an attorney in place so that they are available when needed. Try to establish reasonable deadlines. If something is really an emergency, the attorney should address it as such. But associations should avoid making everything an emergency by waiting until the last minute. When an association does consult with its attorney, reasonable expectations should be established about the desired outcome so that all available options can be explored. 

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