

Letter Report

Use of Outside Legal Counsel
Wisconsin Technical College System

August 2005



Legislative Audit Bureau

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Janice Mueller
State Auditor

August 2, 2005

Senator Carol A. Roessler and
Representative Suzanne Jeskewitz, Co-chairpersons
Joint Legislative Audit Committee
State Capitol
Madison, Wisconsin 53702

Dear Senator Roessler and Representative Jeskewitz:

At your request, we have completed a limited-scope review of the use of outside legal counsel by Wisconsin's 16 technical college districts. The districts spent a total of \$8.2 million for outside legal services from fiscal year (FY) 1999-2000 through FY 2003-04. Three districts—Milwaukee Area, Lakeshore, and Gateway—accounted for 53.4 percent of that total.

While a few of the districts, including Waukesha County and Lakeshore, used a formal request for proposals process to secure outside legal counsel, others did not. We have included a recommendation that all districts develop annual letters of engagement with their outside legal counsel that describe the services to be provided and the rates to be charged.

Two districts—Milwaukee Area and Gateway—have established retainer agreements, which establish fixed amounts to be paid monthly for legal services, without regard to the level or type of services rendered. Both arrangements appear to result in higher costs than if services had been billed directly on an hourly basis. In addition, we have serious concerns about the Gateway retainer agreement, under which a former employee is now paid a salary of \$120,000 annually, but typically provides fewer than 80 hours of legal services per month. In addition, the district is required to provide health, dental, and life insurance benefits to the former employee and his family until January 31, 2008, and to provide these benefits to his spouse in the event of his death. The inclusion of such benefits in a retainer agreement raises serious questions about the propriety of the agreement and may have future tax implications for Gateway. We have recommended that the retainer be terminated immediately.

We appreciate the cooperation of the 16 technical college districts and state board staff in completing this review.

Sincerely,

A handwritten signature in cursive script that reads "Janice Mueller".

Janice Mueller
State Auditor

JM/DB/ss

Enclosure

USE OF OUTSIDE LEGAL COUNSEL

The Wisconsin Technical College System provides educational and training programs at 16 technical colleges located throughout the state. It is governed by the 13-member Wisconsin Technical College System Board, which establishes statewide policies and standards for educational and training services. Each technical college serves a geographical area, called a district. The technical college districts are shown in Figure 1.

Figure 1

Wisconsin Technical College Districts



Each district is governed by a nine-member board that is appointed by a committee composed of county board chairpersons or school board presidents, subject to approval of the state system board. The district board has the authority to provide educational programs, levy a property tax, employ staff, and enter into contracts for that district.

In varying degrees, all technical college districts use outside legal counsel to review contracts, represent them in union grievances and litigation, provide advice to their governing boards, and assist in collective bargaining negotiations. Only three districts—Chippewa Valley, Gateway, and Milwaukee Area—have also used in-house attorneys for these and other purposes. To assess the nature of legal services provided and the process by which outside legal counsel is procured and monitored, we contacted officials from each district and obtained expenditure information related to their use of outside legal counsel from fiscal year (FY) 1999-2000 through FY 2003-04.

Expenditures for Outside Legal Counsel

For the five-year period shown in Table 1, total expenditures for outside legal counsel ranged from \$35,500 for Chippewa Valley Technical College to nearly \$2.5 million for Milwaukee Area Technical College. A number of factors influence district expenditures for outside legal counsel, including:

- the role of outside legal counsel in providing advice for district operations;
- the number of employee grievances filed against a district;
- collective bargaining agreement negotiations with faculty and staff, which typically occur every two or three years;
- the number of properties purchased or leased by a district; and
- the number of district employees authorized to contact outside counsel for legal advice and services.

Table 1

Expenditures for Outside Legal Counsel¹
FY 1999-2000 through FY 2003-04

District	1999-2000	2000-01	2001-02	2002-03	2003-04	Total
Blackhawk	\$ 128,200	\$ 92,800	\$ 33,800	\$ 71,000	\$ 46,100	\$371,900
Chippewa Valley	7,700	500	16,000	6,500	4,800	35,500
Fox Valley	48,200	43,600	101,400	144,300	126,100	463,600
Gateway	19,000	58,300	308,500	285,900	280,300	952,000
Lakeshore	273,000	173,700	205,100	269,800	61,500	983,100
Madison Area	132,300	165,700	232,100	193,400	146,000	869,500
Mid-State	39,800	27,600	47,500	46,200	66,600	227,700
Milwaukee Area	475,500	519,500	513,100	476,400	480,700	2,465,200
Moraine Park	28,800	42,100	55,200	42,400	59,500	228,000
Nicolet Area	7,300	4,800	13,700	33,400	9,200	68,400
Northcentral	53,100	79,700	58,200	83,700	113,900	388,600
Northeast Wisconsin	27,400	68,000	86,600	64,300	71,800	318,100
Southwest Wisconsin	38,500	32,300	35,900	3,900	24,800	135,400
Waukesha County	126,300	87,100	152,900	80,100	131,000	577,400
Western Wisconsin	9,500	12,300	11,100	11,900	25,000	69,800
Wisconsin Indianhead	42,300	13,500	9,500	6,000	13,600	84,900
Total	\$1,456,900	\$1,421,500	\$1,880,600	\$1,819,200	\$1,660,900	\$8,239,100

¹ Excludes expenditures for in-house and bond counsel and lobbying expenditures.

Although districts use outside counsel to provide legal opinions for bond issues, these expenditures were not included in the legal expenditure totals. Similarly, the cost of legal counsel used for lobbying purposes was not included in the totals. Districts reported \$195,800 in lobbying expenditures for FY 2003-04, which included services provided by both law firms and contracted lobbyists. In addition, the Wisconsin Technical College District Boards Association reported spending \$53,000 in FY 2003-04 for lobbying efforts on behalf of the districts.

Although some cost factors for legal services are outside a district's control, close monitoring of outside legal counsel can reduce overall expenditures. For example, in the past, the Lakeshore district allowed employees direct access to outside legal counsel engaged to address district issues for two days per week. When the district reduced both the amount of time outside counsel was available and the number of employees who were authorized to consult with counsel, its outside legal expenditures declined 77.2 percent, from \$269,800 in FY 2002-03 to \$61,500 in FY 2003-04.

All districts reported monitoring expenditures related to outside legal services on a monthly basis. In general, when an invoice is received, it is reviewed by district staff to determine the:

- names of legal staff with billed hours;
- number of hours billed for various projects;
- hourly rates charged; and
- charges for copies, faxes, transcripts, and other services.

Seven of the 16 districts reported that they occasionally found billing errors, but no significant overcharges were detected.

Annual or biennial reviews of expenditure trends may assist districts in planning for the most appropriate use of outside legal counsel and help to control costs. For example, several districts reported that they use their own staffs to conduct labor negotiations in an effort to reduce outside legal expenditures. Similarly, while some districts have their legal counsel review board meeting agendas and attend regular board meetings, others do not. However, none of the districts indicated they had developed written guidelines on when to assign tasks to district staff or to outside legal counsel.

Recommendation

We recommend that technical college districts develop written procedures to clarify the circumstances in which they will engage outside legal counsel.

Table 2 shows the firms that provided services to the technical college districts. As shown in the table, 63.4 percent of all expenditures for outside legal counsel in FY 2003-2004 were paid to two firms.

Table 2

Expenditures for Outside Legal Counsel Services Provided to Technical College Districts¹
 FY 2003-04

Law Firm	District(s)	Payment	Percentage
Michael Best & Friedrich	Fox Valley, Gateway, Lakeshore, Nicolet Area, Mid-State, Milwaukee Area, Moraine Park	\$ 801,600	48.3%
LaFollette, Godfrey & Kahn	Blackhawk, Fox Valley, Madison Area, Nicolet Area, Northeast Wisconsin, Southwest Wisconsin	251,600	15.1
William Nickolai	Gateway	136,900	8.2
Ruder, Ware & Michler	Northcentral	111,300	6.7
Quarles & Brady	Moraine Park, Waukesha County	95,800	5.8
Melli, Walker, Pease & Ruhly	Milwaukee Area	63,900	3.8
Edgarton, St. Peter, Petak & Rosenfeldt	Moraine Park	49,100	3.0
Davis & Kuelthau SC	Fox Valley, Northeast Wisconsin	42,600	2.6
Wisconsin Association of School Boards ²	Waukesha County	37,100	2.2
Hale, Skemp, Hanson, Skemp & Sleik	Western Wisconsin	24,900	1.5
Weld, Riley, Prenn & Ricci	Chippewa Valley, Wisconsin Indianhead	18,300	1.1
Dow, Lohnes & Albertson, PLLC	Lakeshore, Milwaukee Area	13,700	0.8
Remley, Sensenbrenner & Stein	Fox Valley	6,600	0.4
Other ³	Fox Valley, Nicolet Area, Northcentral, Milwaukee Area, Southwest Wisconsin, Waukesha County, Western Wisconsin	7,500	0.5
Total		\$1,660,900	100.0%

¹ Excludes payments to bond counsel and lobbying expenditures.

² Attorneys from the association were used for collective bargaining negotiations.

³ Law firms paid \$5,000 or less.

To determine hourly charges for outside legal services, we reviewed all FY 2003-04 legal invoices for eight districts. Because many of the invoices did not distinguish between the billable hours for attorneys and paraprofessionals, we calculated an average of the hourly charges for both. As shown in Table 3, average rates for attorneys and paraprofessionals ranged from \$122 per hour for Madison Area Technical College to \$193 per hour for Milwaukee Area Technical College.

Table 3

Average Hourly Rates for Outside Legal Services¹
FY 2003-04

District	Average Hourly Rate
Madison Area	\$122
Western Wisconsin	130
Gateway	156
Moraine Park	161
Waukesha County	177
Fox Valley	184
Mid-State	187
Milwaukee Area	193

¹ Based on all invoices for legal services provided by attorneys and paraprofessionals to eight technical college districts in FY 2003-04.

Our review also allowed us to determine the range of legal services typically provided by outside counsel. As shown in Table 4, employment issues represented the largest amount of billable hours, at 37.9 percent. Miscellaneous issues, which represented 14.5 percent of billable hours, included addressing a tax issue with the Internal Revenue Service, helping to create a business incubator, and addressing open records requests. Although board services represented 7.5 percent of billable hours, the range of services provided to district boards varied. For example, the Mid-State and Western Wisconsin districts used outside legal counsel for limited, occasional board support. In contrast, the Madison Area and Moraine Park district boards used outside legal counsel more actively for support that included reviewing board agendas and minutes and attending board meetings to respond to requests for legal advice.

Table 4

Outside Legal Services Provided¹
FY 2003-04

Type of Legal Service	Billable Hours	Percentage
Employment Issues	2,604	37.9%
Labor Negotiations	1,135	16.5
Miscellaneous ²	995	14.5
Property / Real estate	529	7.7
Board Services	515	7.5
Litigation	436	6.4
Immigration Issues	196	2.9
Intellectual Property	149	2.2
Contract Issues	108	1.6
Student Issues	92	1.3
Training	70	1.0
Federal Communications Commission Issues	38	0.5
Total	6,867	100.0%

¹ Based on all invoices for legal services provided to eight technical college districts in FY 2003-04.

² Includes issues such as addressing tax issues and helping to create a business incubator.

Procurement of Outside Legal Counsel

Districts obtain outside legal counsel by following their general purchasing and procurement policies, which typically allow for competitive selection of professional services if it is in the best interests of the district. We found that districts have used a variety of procurement methods to acquire outside legal counsel. For example, a formal request for proposals process for outside legal services was used by the Waukesha County district in 2002 and the Lakeshore district in 2004. In addition to specifying the legal services to be provided and the hourly rates to be paid, this procurement method allowed each district to solicit proposals from several firms. The Madison Area district uses the law firm identified in a Dane County Procurement Bulletin. Most districts, however, have developed long-standing relationships with particular firms that have familiarity with district issues. The firms provide legal services to the districts on a regular basis, but because the financial structures of these relationships are not actively reviewed and evaluated by the districts, their cost-effectiveness is difficult to assess.

While it may be cumbersome for districts that make only limited use of outside legal counsel, a formal request for proposals process would appear to be the best method of identifying law firms that can provide comparable legal expertise at the best rates. For example, the Waukesha

County district's request for proposal process clearly identified legal needs, formalized the types of legal services to be provided, established set fees for services, and required notification of fee changes. We believe that all districts could, at a minimum, benefit from developing an annual letter of engagement with their outside legal counsel to establish the types of services that will be provided and the rates that will be charged.

Recommendation

We recommend technical college districts that do not use a request for proposal process develop annual letters of engagement with their outside legal counsel that describe the types of services to be provided and the rates the district will be charged.

Retainer Agreements

All but 2 of the 16 technical college districts pay for outside legal counsel through direct billing on a fee-per-hour basis. In contrast, the Milwaukee Area and Gateway districts have entered into retainer agreements to pay fixed amounts to their outside legal counsel each month, regardless of the amount of services rendered. Under its retainer agreement with Michael Best & Friedrich, the Milwaukee Area district's FY 2003-04 payments were \$36,000 per month from July through December 2003, and \$34,200 per month from January through June 2004. In July 2004, the district's monthly payment was renegotiated to \$27,950 because an Assistant General Counsel was hired to reduce the need for outside counsel. Under another retainer agreement with a law firm based in Washington, D.C., the Milwaukee Area district also spent \$350 per month in FY 2003-04 on issues related to the Federal Communications Commission.

The Gateway district's retainer agreement began in October 2002 and expires January 31, 2006. However, the retainer agreement can be extended for up to two additional one-year terms upon mutual agreement by all parties. This agreement is with a former district employee who is to provide a range of services, including property, student and board issues, and contract review. Gateway's FY 2003-04 expenditures under the retainer agreement totaled \$136,896, which includes a \$10,000 monthly payment to the attorney, as well as the costs of various fringe benefits. The Gateway district also obtains legal services from another firm that bills the district on an hourly basis.

Some contend that retainer agreements can reduce costs when the types of outside legal services needed are consistent and ongoing. However, based on our review of monthly invoices submitted by the firm on retainer with the Milwaukee Area district, we determined that, in FY 2003-04, the Milwaukee Area district would have paid only \$347,239 under direct billing, or 17.6 percent less than the \$421,200 it paid under a retainer agreement. We also found that under direct billing, the Gateway district would have paid 18.7 percent less, or \$111,313 at an hourly rate of \$125, rather than the \$136,896 it paid under its retainer agreement.

The Gateway retainer agreement indicates the attorney will be available for a minimum of 80 hours per month for legal services. However, our analysis indicates that between January 2003 and December 2004, the number of hours the attorney actually worked in each month typically was less than stipulated in the agreement with Gateway and ranged from

44 to 92, which is equivalent to an hourly rate ranging from \$227 to \$109. In July 2004, the attorney on retainer provided Gateway with 73 hours of service, the most hours provided in any month in 2004. Gateway officials stated that the number of hours declined because the district's legal needs diminished.

☑ Recommendation

We recommend technical college districts ensure the cost-effectiveness of any retainer agreements they enter by carefully monitoring the types and amounts of outside legal services provided under these agreements.

The salary and fringe benefit provisions included in Gateway's retainer agreement raise additional concerns, because they exceed what the former employee was paid for legal services while a district employee. Gateway's records show that during his last year as a full-time district employee, the attorney under retainer spent 50 percent of his time on district-related legal work, and his full-time salary and fringe benefits equaled \$135,568. The retainer agreement, which was negotiated while this individual was still an employee, paid him \$136,896 in FY 2003-04 for legal services on a half-time basis.

Under the terms of the retainer agreement, the district also provides family health, dental, and life insurance to the attorney through January 31, 2008, which is two years beyond the term of the contract. The agreement indicates this benefit will remain in effect until the attorney reaches age 65, and it retains the benefit for his spouse in the event of the attorney's death before age 65. The agreement also contains a non-performance clause that indicates these benefits will remain in effect regardless of whether the attorney performs his contractual obligations. The inclusion of such benefits in a retainer agreement raises serious questions about the propriety of the agreement and whether state and federal taxing authorities would consider the attorney to be an independent contractor, as the agreement states. Were he to be found by these taxing entities to be an employee, and not an independent contractor, there may be Social Security and tax implications for the district.

☑ Recommendation

We recommend Gateway Technical College District immediately terminate the retainer agreement negotiated with its former employee and seek a more cost-effective means to meet its needs for outside legal counsel.

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