Lawyering Up

Considerations when Selecting and Working with Outside Counsel

Rocci Aguirre, Executive Director, Adirondack Counsel
Jeff LeJava, VP & Associate General Counsel, OSI
Phillip Oswald, Partner, Rupp Pfalzgraf
John Barone, Partner, Tooher & Barone, LLP

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Why does a land trust need a lawyer?

- Most land trusts do not have in-house counsel
- Fiduciary well-being and overall legal health of the organization
- Accreditation and sound best management practices
Why does a land trust need a lawyer?

Land Trust Standards & Practices

- Standard 2 – Compliance with Laws
- Standard 9 – Ensuring Sound Transactions
- Standard 10 – Tax Benefits and Appraisals
- Standard 11 – Conservation Easement Stewardship
- Standard 12 – Fee Land Stewardship
Considerations for Selecting Counsel

- Size of the organization
- Available internal resources
- Expertise of staff or board
- Internal bylaws, policies, guidance
- Complexity of issue
- Severity of violation
  - Routine occurrence
  - Moderate/Major Violation
- Cost/Pro bono assistance
- Specialized legal assistance
- Distance
- Insurance; Terrafirma
Considerations for Selecting Counsel

- Prior experience – see Hiring an Attorney Checklist from LTA
- Resources
  - Referral from a trusted source
  - State and local bar associations
- Why not ask your board member who is also an attorney?
  - Role confusion
  - Loss of independence
  - Conflicts of Interest
  - Loss of attorney-client privilege
  - Competence
Special Insurance Considerations

Insurance & the Tripartite Relationship

• The Role of Insurance
• Selection of Counsel, Reservations of Rights, & SIRs/Deductibles
• What to Expect in the Tripartite Relationship
Special Insurance Considerations

The Role of Insurance

• When you purchase insurance, carriers owe two obligations in the context of litigation:
  
  > The “Duty to Defend” - Carriers must retain an attorney and expert witnesses as necessary for your defense if a lawsuit is brought against you for matters covered under the insurance policy

  > The “Duty to Indemnify” - Carriers must provide indemnity if you are found liable in a lawsuit and a judgment is taken against you. This includes paying a settlement on your behalf

• Insurance is critical if you are involved in litigation, so submit a claim or get policies, carrier information, and underlying facts to defense counsel so that she or he can submit a claim ASAP
Special Insurance Considerations

The Duty to Defend – Selection of Counsel

• Generally, under the terms of most insurance policies, the insurance carrier retains the right to select counsel.

The Company shall have the right and duty to defend any Claim covered by this Coverage Section, even if any of the allegations in such Claim are groundless, false or fraudulent. Defense counsel shall be selected by the Company. The Company's duty to defend any Claim shall cease upon exhaustion of the applicable Limit of Liability.

Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.
Special Insurance Considerations

Selection of Counsel – Exception No. 1

- Reservation of Rights: Often, when an insurance carrier responds to your request for coverage, the carrier will agree to provide a defense, but will also reserve its right to deny indemnity depending on the facts developed in the litigation. This gives rise to an inherent conflict of interest that allows the insured to select counsel to be paid for by the insurer.

> “[I]nasmuch as the insurer’s interest in defending the lawsuit is in conflict with the defendant’s interest -- the insurer being liable only upon some of the grounds for recovery asserted and not upon others -- defendant [] is entitled to defense by an attorney of his own choosing, whose reasonable fee is to be paid by the insurer. Pub. Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 401 (1981).
Special Insurance Considerations

Selection of Counsel – Exception No. 2

• Self Insured Retention ("SIR”)/Deductible: Occasionally, the insured has to pay a certain amount towards defense and/or indemnity before insurance coverage will begin. In these circumstances, the insured often will have rights in the selection of counsel under the terms of any policy.

• Terrafirma:

The Company and the Named Insured shall select mutually agreeable counsel from among Company-approved counsel or counsel proposed by the Insured and subsequently approved by the Company. The Company’s approval of counsel may be conditioned on counsel’s agreement to abide by the Company’s retention terms and requirements and its billing and payment policies. If the Company and the Named Insured cannot agree, the Company’s choice of counsel shall prevail. The Insured shall have the right, at its own expense, to hire independent counsel to participate with the Company in the investigation, settlement and defense of any Claim, including any appeal from any Claim.
Special Insurance Considerations

The Tripartite Relationship – An Overview.

Client-Insured

Counsel

Insurer
Special Insurance Considerations

The Tripartite Relationship – What to Expect

• Duty of Loyalty: Counsel is your attorney and has a duty to act in your best interest. Often, the carrier’s and your interests are aligned, but counsel must act in furtherance of your interest when they are not.

• Reporting: Counsel must keep you updated and promptly respond to your inquiries, requests, concerns, etc.

• Cooperation: You must cooperate in your defense, including cooperating with requests from counsel. This can mean providing documents, materials, information, appropriate staff members as witnesses, etc.

• Good Faith: The carrier must act in good faith in agreeing to proceed according to counsel’s advice, such as paying for motions, appeals, expert witnesses, etc.
Retaining Counsel

Considerations

- Engagement Letter
- Conflicts
  - Prior or concurrent representation
  - Joint representation
- Billing
Retaining Counsel - The Engagement Letter

- What are the expectations for the Scope of Representation?
  - Narrow or broad?
  - Litigation or transactional?
- Separate engagement agreement required for litigation?
- Rates? Inquire as to whether the law firm offers nonprofit rates
- If seeking project-based representation, what are the timing requirements. Confirm that the law firm is capable of a quick turnaround if necessary.
Retaining Counsel - Conflicts

• Potential conflicts should be raised with any new firm

• Depending upon the scope of representation, dual representation may be acceptable
  
  o For instance, a land trust that utilizes a firm for transactional and litigation matters may prefer that the law firm avoids dual representation. However, if a land trust retains a firm for a particular transaction, if an issue arises during that transaction, the law firm will not be able to represent either party. The loss of representation from such firm for a single transaction may be a risk worth accepting.
The method of billing is important to establish at the outset and whether the law firm will require a retainer fee payment prior to initiating work.

- Hourly billing is most common.
- Some real estate firms may provide a flat rate for a real estate transaction.
- Some firms bill litigation using a contingency rate. However, a contingency approach is generally not offered by law firms for the types of legal actions for which a land trust may find itself involved.
The Land Trust
Attorney Working Relationship

• Who speaks for the land trust?
• Attorney-client privilege
  • Who is the client?
  • Protecting the attorney-client privilege
  • How does this work?
• Document retention and information sharing
• What should you expect from counsel?
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Navigate to the session you are attending within the Rally App and click on 'Surveys'.