

Governor's Office Onboarding Guide: Legal Counsel

Overview

A strong, credible legal counsel will help the governor realize his or her vision. He or she also can help the administration execute the governor's goals while meeting the needs of the state's citizens.

Governors face varied, complex and numerous legal issues. Some of these issues relate to formal responsibilities of the office such as making appointments to the state judiciary branch, deciding whether to grant clemency to state prison inmates and preparing the state to deal with emergency and crisis situations. Other legal issues are less predictable, including investigations related to ethics standards the governor has established for his or her administration. The governor's legal counsel manages these issues for the governor and the governor's office. Therefore, it is essential for the counsel to fully understand and effectively address the many diverse legal questions and problems that will arise during an administration. The resolution of legal issues often results in significant consequences statewide and produces broad and lasting effects on state citizens.

To be effective, the governor's legal counsel must balance many roles simultaneously. The legal counsel's chief role is to serve as the governor's attorney; the governor is his or her client. He or she must interpret state and federal laws, rules and regulations; protect the legal interests of the governor and the governor's office; monitor litigation that has an effect on the governor and the administration; and serve as the legal advocate for the governor at all times. The legal counsel is also one of the governor's key advisors. Legal counsels can provide governors with thoughtful legal viewpoints unlikely to be provided by other staff. They also serve governors as strategists. Typically, they contribute heavily to developing policy and legislative strategies for the

administration, often to help prevent legal challenges to important legislation and policy initiatives.

An effective legal counsel will provide the governor with many opportunities to enhance the positive effects the administration has on the state. Counsels enable their governor to avoid many pitfalls and potentially damaging situations that can severely limit the governor's success.

Organization and Staffing

The legal counsel advises the governor directly on the functions, powers and duties of the governor's office. He or she often assumes policy, political and professional roles; maintaining a delicate balance among them is difficult but imperative. The governor must be able to trust completely the legal advice provided by his or her legal counsel. Therefore, the governor will want to name a discreet, sympathetic and politically seasoned attorney of sterling reputation to the position. The legal counsel must possess good instincts for the many spur-of-the-moment decisions that are required. The governor also needs to define his or her working and reporting relationships with the legal counsel.

Defining the Legal Counsel's Relationship with the Governor

The working relationship between the governor and the legal counsel largely depends on the history and personalities of the two individuals. They may share a longstanding, close personal relationship or a more traditional arm's-length attorney/client relationship. Regardless, the governor must be able to rely on the counsel to provide candid advice. A veteran legal counsel advises that "as your governor's legal counsel, you must guard your credibility; it is the most important thing." Legal counsels typically report to the governor either directly or through the chief of staff.

Establishing the Legal Counsel's Staff and Network

Governors' legal counsels carry a significant workload, with tight schedules and a heavy flow of paperwork. Legal counsels must provide thoughtful, thorough, easily understandable legal advice to the governor on many diverse issues within a very short time.

In states with small governor's offices, legal counsels often operate solo with no immediate assistants. In states with large governor's offices, legal counsels often have several subordinate associate counsels and staff. The largest governor's offices have several associate counsels, each assigned to monitor certain policy or subject areas. Such staffing patterns greatly reduce the pressure placed on the legal counsel to handle all the governor's needs personally.

It is difficult for a legal counsel to be effective if he or she alone is responsible for all office responsibilities. Veterans of this job recommend that the legal counsel build trust with and rely on associate legal counsels to perform certain duties. Along with performing support work, associate legal counsels can function much like judicial clerks to the legal counsel by:

- Examining issues in a death penalty case;
- Writing an overview of the legal issues tied to a major piece of legislation; and
- Researching and drafting the governor's executive orders.

One veteran legal counsel uses his staff, along with agency counsels, as a simulated law firm serving the governor.

Working with State Agency Chief Counsels

The legal counsel may play a role in recruiting and selecting cabinet agency chief counsels. He or she can develop a system for working closely with these counsels, through monthly meetings and written reports, among other methods. Such a system enables the governor's legal counsel to communicate key policy or legal decisions statewide and to receive

updates on important legal issues occurring in each state agency. Furthermore, agency chief counsels are afforded an opportunity to share common concerns, coordinate approaches within the context of the administration's agenda and learn from one another.

Roles and Responsibilities

A governor's legal counsel is an extremely important member of the governor's senior team. He or she can most effectively serve the governor by working cooperatively with the chief of staff and other key advisors. To be most effective, the legal counsel must be viewed by the governor and the governor's staff as a partner. For example, although the legislative relations staff member often is responsible for shepherding the governor's legislative agenda and tracking all proposed legislation, the legal counsel likely will play a major role in reviewing and redrafting bills to remedy any legal concerns. Cooperation between the legal counsel and other staff and offices will maximize the opportunities for the governor's agenda to be implemented.

The job of the governor's legal counsel is multifaceted. It is oriented toward managing legal issues for the governor and the governor's office. The responsibilities of the legal counsel require wearing many hats, among them legal expert, policy advisor and strategist, politician, watchdog and emergency responder.

Providing and Communicating Legal Advice to the Governor

The legal counsel is charged with providing legal advice to the governor. The all-encompassing responsibilities of the legal counsel require him or her to provide advice on everything from executive pardons and judicial appointments to administrative procedures and personnel issues.

To provide sound legal advice, the legal counsel needs to be able to work comfortably with the governor. The legal counsel must:

- Anticipate potential legal problems for the governor;

- Be candid about present and potential legal problems when meeting privately with the governor; and
- Be a strong advocate for the governor on all legal issues relating to the administration when speaking in public.

A legal counsel also must determine in what form the governor wants legal advice and recommendations communicated. When providing legal advice on an important issue, it often is useful for the legal counsel first to define the issue's central legal aspects. After learning how the governor wants to proceed on the issue, the counsel must develop a strategy that best enables the achievement of the governor's goals in a legally acceptable manner while minimizing negative effects. An effective legal counsel masters the ability to render accurate, concise opinions on diverse subjects in a short period.

Legal counsels generally should avoid giving legal advice to governors regarding personal matters. Governors should seek advice regarding personal matters from private attorneys. However, for circumstances in which private and public interests intersect (for example, restrictions on employment when leaving office) advice from the legal counsel is appropriate.

Access to the Governor and Other Key Administration Officials

It is essential for the legal counsel to have access to the governor on an ongoing basis. Access to meetings of the cabinet and the governor's senior staff enables the legal counsel to keep abreast of major issues facing the governor and provides an opportunity to warn the governor of potential legal hurdles on the horizon.

Legal counsels also can access the governor via written memorandum, which gives the governor time to digest and comment on information. In situations with obvious legal ramifications that require a gubernatorial decision, such as the consideration of important judicial nominations or capital case decisions, the legal counsel must have full and immediate access to the governor.

Confidentiality and Sensitivity of Communications

Maintaining the confidentiality of communications between the governor and the legal counsel is an issue all legal counsels must address. Sensitive information is always vulnerable to press leaks. A general rule followed by one legal counsel is this: Always assume that whatever you communicate to the governor will appear in the newspaper within a week's time. This is especially true in states with strong freedom-of-information statutes that allow the media to obtain a copy of virtually any written communication.

The legal counsel must be sensitive to the scope of executive privilege and attorney-client confidences within the state and the interaction of these privileges with the public records and open meeting statutes. A legal counsel should be cautious when preparing written communication for the governor; the most sensitive communications should be reserved for private conversation.

The communications of the legal counsel must not commit the governor to a legal position for the state without proper authorization. Counsels need to recognize the public will not distinguish the legal counsel from the governor, and some advice—while legally correct—could place the governor in an unnecessarily awkward position.

Providing and Communicating Policy Advice to the Governor

The legal counsel may play a major role in developing and reviewing policy issues and decisions. States with small governor's offices often require staff members to assume multiple roles. In such cases, the legal counsel's roles may include legal and policy advisor to the governor.

Even if the legal counsel does not play a central role in the governor's policymaking process, he or she still can offer valuable legal insight via the governor's policy agenda. The gathering of all relevant facts and information is central to the development of good public policy. The legal counsel is best suited to provide the governor and the rest of the policy team with the information necessary to ensure that legal

Important Duties of Legal Counsels

Veteran legal counsels identify the duties they consider most important:

- Provide and communicate accurate and thoughtful legal advice to the governor;
- Provide and communicate policy advice to the governor;
- Interpret state and federal laws, rules and regulations;
- Serve as a liaison with the state attorney general;
- Review and draft legislation and veto messages;
- Coordinate and review the governor's executive orders;
- Manage various criminal justice issues such as clemency and extraditions;
- Advise the governor on state judicial appointments;
- Monitor and respond to ethics problems;
- Review requests for public records and the governor's private papers; and
- Prepare the state's legal response to emergency and crisis situations.

constraints and implications are considered during the development of the governor's policy initiatives.

Interpreting State and Federal Laws, Rules and Regulations

Interpreting state and federal constitutions, statutes and administrative rules and regulations is a key responsibility of the legal counsel. To fulfill that responsibility effectively, the legal counsel must have a thorough familiarity with state law, including recurring topics such as:

- Separation of powers;
- Protection of the governor from encroachments on his or her constitutional powers by the judiciary or legislature;
- Administrative procedures;
- Personnel issues;
- Management of state lands; and
- Responses to emergency and crisis situations.

The legal counsel also researches issues that are likely to surface and advises the governor on matters of authority, alternative strategies and state traditions.

Administrative Rules and Regulations

State administrative rules and regulations often require the governor's approval. The legal counsel measures proposed rules and regulations against the state's constitution and statutes and the governor's policies to ensure they do not conflict.

Legal Research and Information

Legal issues may arise that were not considered by the state's previous governor, the courts or the legislature. With a potential legal challenge always in mind, the legal counsel must conduct comprehensive research to:

- Assess whether existing state law is in conflict with a proposed question;
- Determine whether federal law/preemption issues apply; and

- Examine whether the issue has been addressed in other states.

Answers to emerging legal questions are needed very quickly and require multijurisdictional research. The need to conduct legal research and access legal information necessitates a good relationship with the state attorney general. The attorney general's office usually has a significant number of attorneys and resources for legal research.

Serving as a Liaison with the State Attorney General

The interaction between the governor's legal counsel and the state attorney general (AG) varies greatly among states. In most states, the AG is a statewide elective office while some are appointed by the governor. A number of appointed attorneys general also serve as the governor's legal counsel. In states where the AG is elected, there is great potential for conflict between the AG's office and the governor's office, especially if they represent different political parties or have different philosophies. Even without political tension, the AG and the governor's legal counsel can be at odds with each other for institutional reasons.

The AG is constitutionally mandated and has the duty to appear in court as the lead lawyer on behalf of the state and represent the state's agencies in formal legal proceedings. The governor's legal counsel closely tracks statewide legal issues but must balance these issues against the desires of the state's chief executive.

A strong working relationship between the attorney general and the governor's legal counsel is critical for the business of the state to proceed. Both the governor and AG may retain outside attorneys when it is deemed proper or necessary to represent the state's interests. In those cases, the legal counsel coordinates such that critical issues are addressed and that strategies are consistent with the governor's agenda.

To minimize the potential for political or institutional conflict between the two statewide offices, the legal counsel should establish a good working relationship with the AG from the outset. Dealing personally with the AG and clarifying each other's roles will help maintain civility between the two and minimize institutional rivalries during the term. It often is helpful for the legal counsel to establish close working relationships with the professional staff in the AG's office, where most of the ongoing legal work is performed.

The governor's legal counsel should review and approve all state agency requests for AG opinions, because many requests concern matters that combine policy and law. Agency officials do not always realize the broader political implications of an issue or may not be sensitive to the practical statewide ramifications of a generally applicable AG opinion.

Reviewing and Drafting Legislation and Veto Messages

The governor's legal counsel typically assumes some important responsibilities with respect to legislation and veto messages.

Legislation

The legal counsel plays operational and strategic roles as the governor's office develops its legislative agenda. On the operational side, the legal counsel often is designated to review proposed legislation for legal problems and consistency with the governor's policy initiatives. Many legal counsels help draft legislation for the governor and often work with the governor's legislative relations office.

The legal counsel often has responsibilities on the strategic side of the legislative process. Some legal counsels are used as a high-profile player within the governor's office to help shepherd legislation through the state legislature and act as an additional go-between for the governor and state legislators. In some states, legal counsels are used to explain the legal intricacies of important legislation to legislators and the media.

Veto and Other Messages

Governor's senior staff members often are able to communicate with key legislators to prevent bills likely to be vetoed from reaching the governor. In cases where the governor decides it is necessary to veto a bill, particularly for legal flaws or weaknesses, the legal counsel may be best suited to explain a governor's veto decision to the media. In addition, the legal counsel may prepare written explanations for the general public and legal community regarding a gubernatorial decision to veto, not sign, or sign a bill. The legal counsel can use three tools to expand on the governor's reasoning: a veto message, a transmittal message and a signature message.

Coordinating and Reviewing the Governor's Executive Orders

The governor typically uses executive orders to set policy within the executive branch or create commissions, task forces or executive boards. The office of the legal counsel generally serves as the clearinghouse for all executive orders that the governor issues. The purpose of this review is to ensure all proposed orders are necessary, legally adequate and stylistically consistent.

At the beginning of the administration, the legal counsel should review the status of executive orders still in effect. The legal counsel should prepare an omnibus order to extend the expiration dates of any orders that the governor wants to continue, rescind any orders no longer useful or in conflict with the governor's agenda and make minor amendments to any orders as required.

Managing Criminal Justice Legal Issues

From the day a governor takes office, he or she faces many issues regarding the administration of criminal justice within the state. Central among these are whether to grant clemency to state prisoners and whether to extradite fugitives to and from the state. The legal counsel can develop orderly, manageable processes to help deal with these issues.

Executive Clemency

In most states, governors have limited powers of executive clemency to grant pardons, commute sentences or grant last-minute reprieves to death-row inmates. Within the governor's office, the responsibility for processing applications for the various types of executive clemency lies primarily with the legal counsel. Executive clemency does not apply to parole decisions, which are generally made by parole boards outside the direct control of the governor who base their decisions on sentencing and parole eligibility guidelines. The public often thinks the governor has ultimate control of parole decisions, but usually this is not true. Clarifying the governor's authority regarding clemencies and pardons can help reduce the flow of frivolous applications for clemency while creating better public understanding of the governor's role in the criminal justice system.

The legal counsel should keep close track of all cases that can result in execution. This enables the legal counsel to brief the governor about the pending cases and enhances the ability of the governor's office to address issues when necessary.

Regardless of whether the state has its own clemency or capital pardon committee, capital cases should be reviewed within the governor's office. This process should include examining all relevant information on the cases that could affect the defendants' qualification for commutation of the death sentence. Thereafter, the legal counsel should make a presentation to the governor in a private meeting that enables the governor to knowledgeably discuss the applications with the legal counsel before reaching a final decision.

Extradition

Criminal extraditions often are handled by an extradition secretary in the attorney general's office or the governor's office. In either case, the extradition staff member prepares requisitions and supporting documents for the transfer of the fugitive to the home state. Most states have passed the Uniform Criminal Extradition Act, which means they have fairly uniform processes for extradition. Even so, some extradition practices vary among states (for example,

many states will not extradite for misdemeanors). The legal counsel guides the governor on extradition requests.

Advising the Governor on State Judicial Appointments

The legal counsel is the primary advisor to the governor on state judicial appointments. He or she will gather and provide information on other appointments as requested.

In most states, when a judicial vacancy arises it is the governor's responsibility to select a replacement. Usually the governor chooses nominees from a list developed by a neutral state judiciary commission or state bar committee.

It is the responsibility of the legal counsel to analyze and supplement information from the commission or committee on the nominees, including anything in the nominee's background that could prove embarrassing to the governor. Background checks of nominees are greatly facilitated if performed in conjunction with the system used by the governor's appointments office. If legislative confirmation is required, consultation with the state legislature's judiciary committee leadership may prove helpful.

After the background check is completed, the legal counsel should prepare a summary fact sheet for the governor that includes:

- The nominee's relevant professional, political and personal data;
- The results of the official background check; and
- The names of individuals who support or oppose the nominee's appointment.

The legal counsel should discuss the fact sheet and offer advice to the governor, who then makes the final nomination decision.

Monitoring and Responding to Ethics Problems

When developing an ethics policy for the governor's

office and the administration, the legal counsel should make it clear that a strong ethics policy starts at the top. To communicate the message of a strong ethics policy, the legal counsel needs the full support of the governor. Without support and direction from the governor, the legal counsel is likely to be perceived as a nuisance or an ethics cop whose direction and advice is easily ignored.

Legal counsels often track potential ethics problems for the governor and the administration. Once potential problems are identified internally, the governor, legal counsel, the governor's senior staff and the governor work to address these issues and prepare for possible press inquiries by having consistent, defensible responses.

Many legal counsels have developed an ethics policy to clearly define what is and is not acceptable ethical behavior. Approaches to drafting this policy include translating the state ethics code into plain language and offering examples for clarification and using internal policies that expand on state law. Regardless of the approach taken, legal counsels frequently communicate and distribute the policy during formal ethics training.

Reviewing Requests for Public Records and the Governor's Private Papers

Thorough research should be conducted to determine which of the governor's papers, computer documents and handwritten papers are legally public. This determination will be based on state public record statutes and precedent regarding previous governors. Public record laws should be clarified as early as possible to ensure that requests do not become major legal problems throughout the governor's term of office.

The definition of "public" and "private" also should be clarified in order for staff to help limit the possibility of sensitive information or communications unnecessarily becoming public knowledge. In addition, the legal counsel or his or her designees should review any freedom-of-information requests filed by the media or other organizations. These

requests can be constant and plentiful, and they require monitoring by staff members who understand state law. Veteran legal counsels advise it is important to respond to freedom-of-information requests in a thoughtful, thorough and timely manner to demonstrate the governor's and administration's commitment to being open with the citizens of the state.

Public documents created or received by the governor's office, including electronic documents, should be handled according to a schedule for the destruction, transfer or disposition of records; this schedule should be developed with the help of the state archivist.

Many of the documents determined to be legally private or personal papers of the governor often are given to another organization, a university library or the state archives to manage at the end of the governor's term. When this is done, however, the legal counsel should help define the rules and negotiate the agreements by which these documents are to be accessed, including who can access them and on what date.

Responding Legally to Emergency and Crisis Situations

The successful response to a major natural or man-made emergency involves all levels of government and the coordination and collaboration of different government programs and services. Governors must be prepared to undertake several critical tasks such as using their powers to declare emergencies and fulfilling their responsibilities as commander-in-chief of the National Guard.

A natural or manmade emergency can occur at any time during an administration; it is imperative for the legal counsel to prepare the governor's office and the administration to respond to the emergency legally and in a timely manner. The legal counsel likely will be responsible for or heavily involved in preparing declarations of emergencies, disaster relief agreements between the state and the Federal Emergency Management Agency, as well as memorandums of understanding between the state

and other states and the state and the federal government.

The legal counsel should become familiar with Dual Status Command, which governors as a group were successful in codifying in 2012 for the purpose of coordinating state and federal military forces during response to a domestic disaster. Under Dual Status Command, a single National Guard officer is appointed federal-state coordinator in emergency circumstances.

The legal counsel also should become familiar with the Emergency Management Assistance Compact, a congressionally ratified organization that provides form and structure for interstate mutual aid. Through this compact, a disaster-affected state can request and receive assistance from other member states quickly and efficiently.

Techniques and Tools

Legal counsels employ a number of techniques and tools to help ensure that legal matters are handled appropriately and efficiently for the governor and governor's office. Attorney general opinions, proposed legislation, clemency and ethics are specific areas that can benefit from additional thought and consideration.

Monitoring Requests for Attorney General Opinions

One of the greatest sources of potential conflict between the AG's office and the governor's office is state agency requests for formal AG opinions. Most legal counsels carefully monitor and authorize these requests because of the permanence of an opinion issued by the AG. To minimize any problems, legal counsels in several states direct agencies to request informal, nonbinding opinions from the AG. Another approach many counsels use is to request only advisory opinions from the AG when his or her legal opinion can be predicted reasonably. In addition, some legal counsels in larger states receive periodic updates and synopses from the AG's office on opinions that have been issued for executive branch agencies.

Some legal counsels find they can use a formal AG opinion to the governor's advantage. An independent opinion sometimes can help convince the legislature of the need to take action on a specific issue. Under these circumstances, the formal AG opinion becomes another tool of persuasion to promote the governor's agenda.

Communicating Gubernatorial Intent and Action on Proposed Legislation

The legal counsel can use a veto message, transmittal message or signature message to communicate the governor's thoughts and actions on legislative bills.

A veto message is a written explanation of why the governor decided to veto a bill. The obvious benefit of using a veto message is to articulate the problems with the bill. The veto message also prepares the governor to meet any attempt by the legislature to override the veto. Because the governor's position is stated clearly, the governor and legal counsel leave little room for interpretation. Any attempt to override or openly criticize the decision must address the governor's position squarely.

A transmittal message is used when legislation is enacted without the governor's signature. This tool may be used in circumstances where the governor has reservations about the bill but allows it to become law. The transmittal message is an opportunity for the governor to communicate to the public and the legislature that the bill, as written, may be subject to interpretation. Through the transmittal message, the legal counsel can explain the governor's interpretation of the bill.

A signature message is used when the governor signs a bill into law. The signature message anticipates legal challenges to the bill and provides an explanation of the governor's interpretation of the bill. A signature message contributes to the legislative history of the bill, thereby guiding the judicial system.

Establishing a Process to Manage Clemency

At the beginning of a governor's term, the legal counsel is inundated with applications for executive clemency.

Many legal counsels create a formal clemency review process within the governor's office for capital and noncapital cases. In addition, legal counsels often develop a companion legally defensible case review process that limits the opportunity for subsequent challenges by defendants.

Some states stem the flow of applications by requiring every applicant to complete a standardized form. A standardized form places the burden on the applicant to prepare his or her case according to the criteria for granting clemency the governor has established. The legal counsel screens all applications for executive clemency. Applications deserving gubernatorial consideration often are presented to the governor in the form of a brief fact sheet that includes all central issues of the case.

With the help of the legal counsel, the governor usually establishes the standards to apply when granting executive clemency. In considering general clemency, one governor weighs these factors:

- The circumstances of the crime;
- The youthfulness of the offender at the time of commission of the crime;
- The offender's family and criminal history; and
- Signs of rehabilitation (for example, stable employment, steady religious influence, charitable works, educational attainment and lack of prison infractions).

Holding Ethics Training

The legal counsel can reinforce the message that the governor and administration are committed to ethical conduct by distributing copies of the ethics policy and providing ethics training. To ensure that public officials and employees take the ethics policy and training seriously, some legal counsels require them to sign a form acknowledging receipt of the policy during special training. It is important to provide the policy and training throughout the

administration for new staff members and gubernatorial appointees.

Some states have included an ethics module in training sessions for gubernatorial appointees. Because many appointees, especially cabinet-level appointees, have a political background, they understand ethics best when it is explained to them from a political point of view. For this reason, it is useful for the training to emphasize that ethics violations result in heavy political costs for the governor and the administration. This approach has a more lasting effect on appointees than a legalese explanation of the dangers of violating ethics standards. Other states conduct ethics orientations and training for sub-cabinet appointees, new personnel, temporary staff and interns.

Given the importance of developing an effective ethics policy, the governor's legal counsel is well served to work on the policy in conjunction with the governor's director of appointments and the chief of staff.

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