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What Are the Duties of the General Counsel to the Pa. Supreme Court?

Although the Pennsylvania Supreme Court does not have a general counsel, it recently created the position of counsel to the court which is similar.

By **Peter Vaira** | May 13, 2019



Peter F. Vaira.

This column discusses the duties of a general counsel to a state Supreme Court. Although the Pennsylvania Supreme Court does not have a general counsel, it recently created the position of counsel to the court which is similar. Several states including Texas, Missouri, Michigan and Rhode Island have a formal position of general counsel to the Supreme Court, which has advantages that I will discuss below.

The general counsel, in the states listed above, is more than a lawyer employed to answer legal questions propounded

by the justices. The duties of the general counsel in the states indicated above have the following responsibilities in common:

- The general counsel is the personal lawyer to the justices for official administrative matters of the court, not involving a case or controversy.
- The general counsel may respond, orally or in writing, to one or all members of the court.
- There exists an attorney-client privilege between the general counsel and the justices. The advice sought by and given to the court members is confidential and is not made public.
- The general counsel does not file an appearance in litigation when the court is a party; however, the general counsel may offer advice to the court in selecting outside counsel to represent the court. The general counsel may also give advice to the outside counsel representing the court.
- The general counsel may bring to the attention of the justices, matters of administration, personnel, or potential litigation that may eventually involve the Supreme Court, the Commonwealth Court or the Common Pleas Court of the individual counties.
- The general counsel may advise individual justices regarding their own conduct in running for election in those states where the justices must run for election or retention.
- The general counsel may advise the court regarding public statements to be made by the court regarding matters before the court or matters between the court, the Legislature, the attorney general or the governor.

Individual justices seeking the advice of counsel is not a new issue. As a historical fact, justices of state Supreme Courts have often engaged private counsel for official matters not involving a case or conflict.

Many Supreme Courts employ a person designated as counsel to respond to questions from the justices. This is the case in Pennsylvania. Chief Justice Thomas Saylor said, "Our court recently created the position of full-time counsel to the court, following the lead of other jurisdictions. Our most immediate interest was to improve oversight of the various Supreme Court boards. We also recognized that the Supreme Court has needs and interests that are distinct from those served by counsel to the Administrative Office of Pennsylvania Courts." Former Superior Court Judge Geoff Moulton was appointed as counsel to the court in early 2018. Saylor noted that Moulton's contributions are expanding. This has been the experience of the general counsel in the other states.

The difference in employing a person with the formal title of general counsel is that the general counsel stands ready to respond to individual requests, but also has the capacity to bring issues to the attention of the court on his own initiative. Equally important in state government, is that the general counsel has the position to officially deal with other branches of state government or federal government. The appointment of a general counsel has occurred in other states, in part, as a result of courts having to deal with a growing number of administrative issues. Supreme Courts are no longer the isolated third part of the three branches of state government. The Supreme Court must respond to the legislature's initiatives regarding supervision of the courts or proposed legislation or initiatives from the attorney general or agency heads in their rule-making power. A justice on the Texas Supreme Court said that one of the reasons for appointing a general counsel was to send someone to deal with those agency heads, who had the title and the authority to speak for the court, rather than sending a person with the position of staff attorney or counsel. Texans understand political horsepower.

When do the justices seek advice of the general counsel? Julie Hamil, the general counsel to the Rhode Island Supreme Court said, "Just because they are judicial officers does not mean they do not need to consult counsel on matters outside active cases that involve the administration of the justice system." Hamil is in her second year as general counsel, after having served eight years as assistant general counsel. Joseph Baumann, former general counsel to the Michigan Supreme Court, said the justices often do not fully recognize the need for individual advice until the opportunity is offered to them. Baumann served as general counsel to the Michigan Supreme Court for three years. He is now general counsel to Wolverine Power Cooperative in Michigan.

Baumann said he had overall administration over any proposed amendments to Supreme Court rules, although the day-to-day issues raised by counsel to parties is dealt with initially by an administrative counsel. The area of amendments to Supreme Court rules varies with each Supreme Court; however, all general counsel have input into final changes in the rules. Baumann said he had the duty of speaking on behalf of the supreme court in dealing with legislative issues involving the court

being considered by the legislature. He also was the voice of the court when dealing with state agencies and their agendas or rule making procedure. He took no formal part in litigation when the court was included in a lawsuit but was active in advising the Michigan attorney general who represented the court. Hamil said she takes an active role in engaging outside counsel for the Rhode Island Supreme Court when the court is a party to litigation. In emergency situations, she has entered her appearance on behalf of the court until outside counsel could be engaged. The Texas Supreme Court general counsel deals with the Texas attorney general, who represents the court in litigation, when the court is included as a party to a lawsuit.

Does the general counsel have the duty to identify issues that may be presented to the court prior to the court being presented with them? Baumann, the former general counsel of the Michigan Supreme Court, said it was part of his responsibility to inform the court of possible violations of the separation of powers when the role of the judiciary was compromised. A justice of the Texas Supreme Court felt that the court expected the general counsel to bring such incidents to the court's attention. An observer of Pennsylvania politics only needs to recall three years ago when it was discovered that attorneys from the Pennsylvania Attorney General's Office were sending ex parte emails containing pornographic photos, ethnic or racial slurs to judges their agency appeared before. This was not a one-time incident, but a concentrated effort to compromise the judiciary. Ex parte communications are in violation of the Rules of Professional Conduct and the Code of Judicial Conduct. No one sought to bring this issue of compromise of the judiciary to the court's attention.

The Pennsylvania Supreme Court has vast unlimited powers. The Pennsylvania Constitution, Article V, Section 10, gives the court general supervisory and administrative power over all the courts. A general counsel can assist the court in using this power in dealing with compromising situations such as described above, or situations when the court itself is the subject of complaints. A general counsel can assist the court in dealing with the legislature, state agencies, or the governor, on an arm's-length basis. The general counsel can assist the court in assessing the reports of various committees and the report of the grand jury task force that is due to be presented in a few months.

Peter Vaira *is a member of Greenblatt Pierce Funt and Flores. He is a former U.S. Attorney and the author of a book on Eastern District practice. He acts as special hearing master for Pennsylvania courts and clients. He can be reached at p.vaira@gpfflaw.com.*

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