

MEMORANDUM

To: Cook County State's Attorney's Office

From: Zachary T. Fardon
Patrick M. Collins
Patrick M. Otlewski

Re: Recommendations for the Selection,
Engagement, and Management of
Outside Counsel

Date: May 25, 2018

I. EXECUTIVE SUMMARY

In December 2017, the Cook County State's Attorney's Office ("CCSAO") retained King & Spalding on a *pro bono* basis to provide prospective recommendations regarding the selection, engagement, and management of outside counsel. For context to provide these recommendations, King & Spalding reviewed how the CCSAO selected, engaged, and managed outside counsel historically, with a focus on the time period from December 2016 to December 2017.

On December 15, 2017, Chaka Patterson resigned as Civil Actions Bureau ("CAB") Chief. At the outset of the review, King & Spalding learned that engagements of outside counsel predominantly arose in civil cases handled by the CAB. As a result, King & Spalding's review focused on the CAB.

During the review process, King & Spalding gathered and reviewed information from multiple sources internal and external to the CCSAO.¹ In particular, King & Spalding reviewed internal CCSAO memoranda, documents and records, communications, engagement letters, invoices submitted by outside counsel, court filings, as well as materials relating to the Cook County Board of Commissioners Finance Subcommittee on Litigation (the "Litigation Subcommittee"). King & Spalding

¹ The CCSAO provided full access to records and personnel throughout King & Spalding's review process. King & Spalding appreciated the cooperation and courtesy extended by CCSAO personnel while conducting this review, including their willingness to provide timely access to materials when requested.

also interviewed seventeen people from the CCSAO, as well as the Chairman of the Litigation Subcommittee. King & Spalding requested an interview with Chaka Patterson, but Patterson, through his lawyer, declined. In lieu of the interview, Patterson's lawyer provided information that Patterson deemed relevant, which King & Spalding considered in preparing this report.

With respect to the time period from December 2016 to December 2017, King & Spalding observed that the CCSAO significantly increased its reliance on outside counsel for civil cases. This increased reliance happened at a time when the CCSAO experienced a decreasing number of CAB Assistant State's Attorneys ("ASAs"), growing caseloads, and layoffs of two ASAs in the Conflicts Unit due to budget constraints.

Outside counsel engaged by the CCSAO received appointments either as a Special State's Attorney ("SSA"), or a Special Assistant State's Attorney ("SASA"). For SSAs, the CCSAO obtained court appointments and involved the Litigation Subcommittee in the engagement. For SASAs, the CCSAO issued letter appointments signed by the CAB Chief, but did not involve the courts or the Litigation Subcommittee. King & Spalding observed that, prior to December 2016, SASA appointments rarely occurred, but increased significantly in 2017.

King & Spalding further observed that, despite the 2017 increase in outside counsel engagements, the CCSAO acted informally and on an *ad hoc* basis when selecting and engaging outside counsel. At an operational level, CAB personnel did not consistently notify and report to CCSAO executive management when selecting and engaging outside counsel, and often did not create or retain documentation of this process. When identifying potential candidates to serve as outside counsel, CCSAO personnel often sent informal requests by email or telephone to outside counsel they knew, worked with in the past, or with whom they had favorable experience. Also, the CCSAO personnel responsible for deciding whether to send a matter to outside counsel varied and were inconsistent, as were the personnel responsible for evaluating candidates' qualifications. When evaluating candidates' qualifications, CCSAO personnel did not use formal criteria and instead relied on their own personal experience and judgment. In some cases, candidates were not even interviewed. Once outside counsel was engaged, the CCSAO did not have policies and procedures to guide management and oversight of outside counsel's case activity and invoices.

The CCSAO's practice of selecting and engaging outside counsel on an *ad hoc* and informal basis, with inconsistent personnel involvement, allowed for the payment of billing rates that often exceeded the billing rates established by Cook County's municipal ordinance, as well as lax oversight. Furthermore, acting informally and *ad hoc* made the CCSAO vulnerable in the event questions arose about its objectivity and independence when selecting and engaging outside counsel.

In light of past practices observed during the review, King & Spalding recommends that the CCSAO implement a series of written policies and procedures to govern the selection, engagement, and management of outside counsel. Policies and procedures implemented by the CCSAO should be designed to stand the test of time, and allow for transparency and accountability within the process.

Specifically, and as detailed in Section V *infra*, King & Spalding makes the following recommendations for the CCSAO in the selection, engagement, and management of outside counsel:

1. Obtain court authorization for all outside counsel engagements, with notice to and involvement by the Litigation Subcommittee for all engagements. The CCSAO may consider requesting legislative action by the Illinois General Assembly to formalize the process for State's Attorneys to obtain appointments of SASAs.
2. Have panels, consisting of three to five people, select outside counsel.
3. Provide clear policies and procedures for selection panels to determine whether a case is appropriate for outside counsel, and whom to select as outside counsel. The policies and procedures should:
 - a. Identify cases or circumstances appropriate for engagements of outside counsel;
 - b. Provide selection panels with methods for identifying candidates; and
 - c. Establish criteria for selecting outside counsel from the pool of candidates.
4. Implement clear policies and procedures to manage cases assigned to outside counsel that address:
 - a. Oversight of the cases assigned to outside counsel; and
 - b. Case budgeting and the review of outside counsel's invoices.
5. Implement additional measures when contemplating contingency fee arrangements with outside counsel.
6. Document the selection, engagement, and management of outside counsel.
7. Make publicly available, either on a website or similar platform, information about all outside counsel engagements, including the name of outside counsel

and the case(s) assigned, the date of the engagement, outside counsel's billing rates, and amounts paid to outside counsel.

King & Spalding submits that these recommendations will help the CCSAO maintain objectivity and consistency when selecting, engaging, and managing outside counsel. These recommendations will also enhance transparency and the public's confidence in the integrity and fairness of the selection and engagement process, while avoiding favoritism and the appearance of favoritism.

II. INTRODUCTION

A. Initiation

On or about October 30, 2017, a local Chicago news outlet sent the CCSAO a FOIA request for CCSAO records related to the use of outside counsel, requesting information about the "name of the lawyer or law firm doing the work," the "hourly rate charged by the outside counsel," the "cost of work done," and the "nature of the work."

In preparing the response, certain members of the CCSAO executive team learned that CAB Chief Chaka Patterson entered two engagements with Jones Day, his former law firm, at an hourly rate of \$500 per hour for partners, which exceeded the standard Cook County rate of \$185 per hour. The CCSAO executive team later learned that Patterson entered into six more engagements with Jones Day with similar billing rates. On December 15, 2017, Chaka Patterson tendered his resignation to the CCSAO. On December 21, 2017, King & Spalding agreed to provide this *pro bono* counsel to the CCSAO.

B. Objective

The CCSAO asked King & Spalding to provide, on a *pro bono* basis, prospective advice regarding the selection, engagement, and management of outside counsel, including areas of improvement, as well as recommendations for policies and procedures. To provide context for this advice, King & Spalding reviewed how the CCSAO engaged outside counsel in the past, focusing on the time period from December 2016 to December 2017. During this review, King & Spalding did not investigate whether CCSAO personnel historically violated any laws or ethical rules in the selection, engagement, or management of outside counsel.

King & Spalding's review focused on the CCSAO's CAB, both because the issues precipitating King & Spalding's engagement emanated from the CAB, and because the involvement of outside counsel historically and predominantly has arisen in civil cases within the purview of the CAB.

C. Review Process

King & Spalding conducted an independent review of the CCSAO's past practices when engaging outside counsel in civil cases under the current administration as well as past administrations. In carrying out this work, King & Spalding gathered information from multiple sources, both internal and external to the CCSAO.

King & Spalding collected and reviewed the following records from the CCSAO: (1) email communications and text messages by and between CCSAO personnel, including all email communications of Chaka Patterson; (2) records related to the CCSAO's selection and engagement of outside counsel; (3) invoices from outside counsel, (4) other related records in the custody of the CCSAO; and (5) records the CCSAO provided to the Litigation Subcommittee related to outside counsel.

King & Spalding also interviewed seventeen CCSAO personnel, consisting of staff and attorneys from the CCSAO executive team, the CAB, and the Conflicts Unit.² From the CCSAO executive team, King & Spalding interviewed: (1) then-First Assistant State's Attorney Eric Sussman; (2) Chief of Staff Jennifer Ballard Croft; (3) Director of Operations/Purchasing Bob Ryan; and (4) FOIA Officer Chloe Rasmus. From the CAB, King & Spalding interviewed (1) Interim CAB Chief Kent Ray; (2) Special Litigation Division Chief James Hanlon; (3) Civil Rights Section Supervisor Anthony Zecchin; (4) Civil Rights Section Deputy Supervisor Allyson West; (5) Civil Rights Section Deputy Supervisor James Chandler; (6) Medical Litigation Supervisor William Ragen; (7) Workers' Compensation Section Acting Supervisor Suyon Flowers; (8) Municipal Litigation Section Supervisor Sisavanh Baker; (9) Municipal Litigation Section Deputy Supervisor Jayman Avery; (10) Assistant State's Attorney Paul Castiglione; (11) Assistant State's Attorney Paul Fangman; and (12) Administrative Assistant Jose Trujillo. From the Conflicts Unit, King & Spalding interviewed Supervisory Assistant State's Attorney Cathy McNeil Stein.

King & Spalding also reviewed records associated with the Litigation Subcommittee, including agendas and meeting minutes, as well as audio and video recordings of Litigation Subcommittee sessions from March 2017 through January 2018. King & Spalding also interviewed Commissioner Peter Silvestri, Chairman of the Litigation Subcommittee.

² Don Pechous, who served as interim CAB Chief prior to Chaka Patterson, declined King & Spalding's request for an interview.

III. BACKGROUND REGARDING THE CCSAO

A. Overview of the CCSAO and the CAB

The CCSAO is charged with upholding public safety within Cook County, through criminal prosecutions and civil proceedings, and with representing the County and various agencies within the County. Seven CCSAO bureaus carry out these functions: (1) the Criminal Prosecutions Bureau; (2) the Juvenile Justice Bureau; (3) the Civil Actions Bureau (CAB); (4) the Narcotics Bureau; (5) the Special Prosecutions Bureau; (6) the Administrative Services Bureau; and (7) the Investigations Bureau. King & Spalding focused its review on the CAB.

Generally speaking, the CAB represents Cook County in civil proceedings in state and federal court litigation (both when Cook County stands as a plaintiff and as a defendant), defends county office holders and employees in lawsuits arising from their official duties, represents Cook County in actions brought to collect funds owed for taxes and fees, and provides legal advice to officeholders on a range of matters. *See* 55 ILCS § 5/3-9005(a)(1)-(4), (7), (12).

B. The Organization and Structure of the CAB

The CAB is led by an ASA who holds the title of Chief. Kent Ray is interim CAB Chief. Chaka Patterson was CAB Chief from February 2017 to December 15, 2017. Don Pechous was CAB Chief from October 2015 to February 2017. Dan Gallagher was CAB Chief from December 2013 to October 2015, and Pat Driscoll was CAB Chief from July 1999 to December 2013. The CAB Chief reports to the CCSAO executive team.³ Historically, a Deputy CAB Chief has been assigned to assist the CAB Chief. Currently that position is vacant; it was vacant under CAB Chief Patterson.

The CAB is divided into three Divisions: (1) the Special Litigation Division; (2) the General Litigation and Advice Division; and (3) the Child Support Enforcement Division. Each Division has an ASA who serves as Chief, reporting directly to the CAB Chief. King & Spalding focused its review on the Special Litigation Division and the General Litigation and Advice Division, as these Divisions were identified during the review process as having the highest potential for retention of outside counsel as a historical and practical matter.

CAB Divisions are divided into Sections. Each Section specializes in a particular area of law. Sections traditionally have a Supervisor and Deputy Supervisor(s). From

³ King & Spalding views the CCSAO executive team as consisting of the Cook County State's Attorney, the First Assistant State's Attorney, the Chief Deputy State's Attorney, the Chief of Staff, Deputy Chief of Staff, Director of Policy, Senior Advisor for Intergovernmental Affairs, and any other senior advisors specific to the administration.

time to time, these positions have been vacant. ASAs with non-supervisory and supervisory responsibilities within the Sections handle and manage litigation. ASAs typically handle dozens of cases at a time – up to 60 cases per ASA in the Civil Rights Section, and over 200 cases per ASA in the Workers’ Compensation Section, for example. While there is a clear chain of command from the CAB Chief down to the ASAs, administration and management is not rigid.

The Special Litigation Division consists of (1) the Medical Litigation Section, (2) the Civil Rights Section, and (3) the Labor and Employment Section. ASAs in the Medical Litigation Section defend Cook County hospitals and medical staff facing lawsuits for, among other things, medical malpractice. ASAs in the Civil Rights Section defend Cook County agencies and individuals in their official capacities who are alleged to have committed a tort or constitutional violation, including federal claims under 42 U.S.C. § 1983. Labor and Employment ASAs typically defend Cook County agencies in labor and employment disputes.

The General Litigation and Advice Division consists of (1) the Municipal Litigation Section, (2) the Workers’ Compensation Section, and (3) the Real Estate Taxation Section. ASAs in the Municipal Litigation Section defend Cook County and elected officials in government-related matters, as well as cases involving building and zoning, revenue recovery, ordinance violations, contracts, and healthcare law. ASAs in the Workers’ Compensation Section defend county agencies when employees bring workers’ compensation claims. ASAs in the Real Estate Taxation Section assist in the collection of delinquent taxes.

C. The CCSAO’s Conflicts Unit

Beginning in or about late 2009, the CCSAO formed the Conflicts Unit to defend parties in civil proceedings who have a conflict of interest with another party represented by the CAB. In performing this function, the Conflicts Unit operates parallel to, but separate from, the CAB.

Conflicts of interest tend to arise in civil rights cases due to inconsistent defenses. For example, in a typical federal lawsuit alleging violations of 42 U.S.C. § 1983, the CAB may represent a county agency defendant, which may have a defense inconsistent with that of a county employee defendant. The CAB would continue to represent the county agency, while the Conflicts Unit would represent the employee. The Conflicts Unit also handles conflicts of interest that arise in cases handled by other Sections, including the Medical Litigation Section, and Labor and Employment Section.

The CCSAO walls off the Conflicts Unit from the CAB to maintain litigation integrity and to prevent confidentiality breaches. The CCSAO does not allow the CAB to oversee the Conflicts Unit. Instead, the Conflicts Unit reports directly to the CCSAO

executive team. The Conflicts Unit also has its offices and records physically separated from the CAB.⁴

When initially constituted, the Conflicts Unit had four assigned ASAs. In 2017, two supervisory ASAs were laid off due to County budget cuts, and the two remaining ASAs subsequently resigned. When the vacancies occurred, the CCSAO sent some of the Conflicts Unit's cases to outside counsel, while a CAB ASA handled the remaining cases on a temporary basis. By November 2017, the CCSAO hired a supervisory ASA and two ASAs for the Conflicts Unit.

IV. THE CCSAO'S USE OF OUTSIDE COUNSEL

King & Spalding observed that the CCSAO engaged outside counsel to assist with cases that fall within the CAB's purview or that of the Conflicts Unit. While not memorialized in a document, CCSAO personnel reported that the CCSAO typically relied on outside counsel in three circumstances: (1) when a case involved a conflict of interest; (2) when the CCSAO needed specialized expertise or experience with an area of the law that the CAB did not have; or (3) when the CCSAO determined the CAB lacked the resources necessary to handle a case or group of cases consistent with its ethical obligations.

On two occasions in 2017, the CCSAO engaged outside counsel to serve as plaintiff's counsel on a contingency fee basis.⁵ While these cases historically have arisen infrequently, they are high profile matters and potentially lucrative. King & Spalding addresses these engagements below.

Based on information obtained from the CCSAO, King & Spalding observed an increased reliance by the CCSAO on outside counsel in 2017 compared to prior years. This increase appears across the entire range of civil cases, from conflict-of-interest cases to cases where the CCSAO determined the CAB lacked expertise in a particular area of law or had insufficient resources. Unfortunately, King & Spalding could not determine the exact magnitude of this increase because the CCSAO did not have a recordkeeping system to reliably track outside counsel engagements arising before March 2017.

In or about March 2017, the CAB began tracking outside counsel engagements and payments to outside counsel. Despite the lack of a prior recordkeeping system, CAB personnel devoted considerable time to retrieve and provide data and records for

⁴ The CAB has its offices at the Richard J. Daley Center, 50 West Washington Street, Chicago, Illinois. The Conflicts Unit has its offices in the Cook County Administration Building, 69 West Washington Street, Chicago, Illinois.

⁵ Specifically, the CCSAO obtained the assistance of outside counsel to assist with the November 2017 data-breach lawsuit against Uber, and the December 2017 lawsuit filed against manufacturers of prescription opioid painkillers.

prior years. Based on information made available to King & Spalding, there were more than twice as many outside counsel engagements in 2017 than in the prior five years combined.

King & Spalding observed that engagements of outside counsel took one of two forms. In some cases, outside counsel served as a Special State's Attorney (SSA). In other cases, outside counsel served as a Special Assistant State's Attorney (SASA). These two categories are discussed in greater detail below.

A. Special State's Attorneys (SSAs)

1. Overview

Outside counsel has authority to prosecute or defend a case as a Special State's Attorney (SSA) when the CCSAO obtains a court appointment pursuant to 55 ILCS § 5/3-9008 (2016). The appointed attorney stands in for the State's Attorney herself, with "the same power and authority in relation to the cause or proceeding as the State's Attorney would have if present and attending to the cause or proceeding." 55 ILCS § 5/3-9008(a-20).

Under Illinois law, a court has the power to appoint outside counsel to stand in for the State's Attorney only in three limited circumstances: (1) when "the State's Attorney is sick, absent, or unable to fulfill his or her duties;" (2) when "the State's Attorney has an actual conflict of interest in the cause or proceeding;" or (3) when the State's Attorney seeks to recuse himself or herself "for any other reason he or she deems appropriate" *Id.* at § 5/3-9008(a-5), (a-10), (a-15).

To obtain court appointment of a SSA, the CAB files a petition with the Chancery Court of the Circuit Court of Cook County, with an affidavit from the CAB Chief attesting to facts establishing that one of the above-described statutory bases precludes the CCSAO's representation in the case. The CAB serves a copy of the petition on the Cook County President's Office, the Chair of the Litigation Subcommittee, the Illinois Attorney General's Office, and the Cook County Public Defender. *See id.* at § 5/3-9008(a-20).

When outside counsel receives a court appointment to serve as a SSA, Cook County must be "provided with a detailed copy of the invoice describing the fees, and the invoice shall include all activities performed in relation to the case and the amount of time spent on each activity." *Id.* at 5/3-9008(c). Cook County has a series of municipal ordinances that delegate this supervisory responsibility to the Litigation Subcommittee and that address, among other things, advance notice of the appointment, case management procedures, billing rate schedules, fee petitions, and payment protocols. *See Cook County Muni. Code* § 2-331-337.

2. Court Appointments of Outside Counsel

King & Spalding observed that historically the CCSAO only obtained court appointments of outside counsel when a case presented a conflict of interest. Following Chaka Patterson's December 15, 2017 resignation, the CCSAO has been obtaining court authorization for all appointments of outside counsel (both SSA and SASA), regardless of the reason for the appointment. The CCSAO has continued to do so during the pendency of King & Spalding's review.

3. Selecting Outside Counsel to Serve as SSAs

Because King & Spalding observed that outside counsel received SSA appointments only when a conflict of interest arose, the following discussion addresses (1) how the CCSAO identified conflicts of interest, and (2) how the CCSAO decided to obtain outside counsel to represent the conflicted party.

CAB personnel reported that often a CAB ASA, at times with a supervisory ASA, assessed whether a case presented a conflict of interest. On occasion, the conflict of interest was raised by a county agency or individual defendant. After determining that a conflict of interest existed, CCSAO personnel and the county agency or individual defendant decided whether to seek representation by the Conflicts Unit or outside counsel. The CCSAO did not have criteria to guide that decision, although the Conflicts Unit's capacity was an ongoing concern because of its limited staffing. CCSAO personnel reported, consistent with records obtained, that county agencies sometimes preferred outside counsel over the Conflicts Unit, and the CCSAO often deferred to the agency's preference. The Conflicts Unit was not involved in the decision to send conflict-of-interest cases to outside counsel. But, as discussed *infra*, for a period of time in 2017 a CAB ASA was temporarily assigned to the Conflicts Unit. As a result, the Conflicts Unit's role would have been limited in that process.

CAB personnel provided an example of how outside counsel may become involved in a civil rights case. In a typical civil lawsuit alleging violations of 42 U.S.C. § 1983 against the Cook County Sheriff's Office, and a Cook County Sheriff's Deputy, a conflict of interest may arise between the Cook County Sheriff's Office and a Sheriff's Deputy. The CAB would represent the Cook County Sheriff's Office, while separate counsel would represent the Sheriff's Deputy. The CAB would involve the Sheriff's Deputy and a representative from the Cook County Sheriff's Office in deciding whether to bring in the Conflicts Unit or outside counsel.

CAB personnel also provided an example of how conflicts of interest arise in medical malpractice cases. In a typical case, the assigned ASA may observe a conflict of interest between a medical facility and medical staff, or between two staff members. The ASA would present the conflict to a supervisory ASA. The ASA and supervisory ASA would decide whether to obtain representation for the conflicted party from the

Conflicts Unit or outside counsel, based on the complexity of the matter. If outside counsel was chosen, the supervisory ASA would provide input on lawyers capable of handling the matter.

King & Spalding observed that CCSAO personnel approached the selection of outside counsel in conflicts-of-interest cases informally and on an *ad hoc* basis. For instance, when soliciting lawyers, CCSAO personnel often did so informally through email or telephone calls to outside lawyers with whom they had worked in the past, knew of from prior work experience, or with whom county agencies had worked. When deciding who to select as outside counsel, the CAB Chief frequently made the final decision with input from his subordinates and involved county agencies, but no criteria appeared to be employed. On occasion, the CCSAO executive team was involved, but it was not clear that the CAB Chief made it a practice to provide prior notice or to seek advance authorization from the CCSAO executive team when selecting outside counsel.

4. Payment and Case Management for SSAs

a. Payment

CCSAO personnel reported that the funds used to pay outside counsel with SSA appointments came from Cook County's Self-Insurance Fund, not the CCSAO's budget. According to publicly available Cook County policies, the Self-Insurance Fund is established through tax funds for "employee health benefits, life insurance, unemployment compensation, worker's compensation and liability related claims and expenses arising from operations." See Cook County Executive Budget Recommendation Vol. 1 (2018), available at https://www.cookcountyil.gov/sites/default/files/v1-policies_presrec_web.pdf. The purpose of the Self-Insurance Fund "is to centralize and mitigate risk to the County and provide certainty to the operating units, while properly allocating indirect costs to operational units." *Id.* The Finance Committee oversees the Self-Insurance Fund.

Cook County has a municipal ordinance that establishes the billing rates for outside counsel who receive SSA appointments. Specifically, outside counsel is to "be paid reasonable fees and costs based on the type and nature of the case." Cook County Muni. Code § 2-334(a). The ordinance allows partners to charge \$170 to \$185 per hour, associates \$140 to \$155 per hour, and paralegals and law clerks \$65 per hour. *Id.* at § 2-334(e). The ordinance allows for "alternative fee structures[,] such as blended, flat or contingent rate upon approval of the [Litigation] Subcommittee." *Id.*

Cook County's municipal ordinances place restrictions on expenses incurred by outside counsel with SSA appointments for, among other things, photocopying, messenger service, and travel. See *id.* at § 2-334(a)-(c). Outside counsel's invoices must be billed to the one-tenth of an hour, with time recorded "in detail, describing the work performed by each individual during that time period." *Id.* at § 2-334(d).

Records from the CCSAO reflect that outside counsel with SSA appointments had, by and large, billing rates consistent with Cook County's municipal ordinance. There was one case in 2017 where outside counsel received SSA appointments to represent defendants in *Evans v. County of Cook, et al.*, 2017 CH 15851, at rates exceeding the municipal ordinance rate. Specifically, the CCSAO obtained court approval to pay outside counsel an attorney rate of \$275 per hour and a paralegal rate of \$140 per hour. The CCSAO's court petition identified the basis for requesting billing rates that exceeded the rates set by ordinance.

Cook County has a municipal ordinance that lays out the mechanics of fee payment. Outside counsel with SSA appointments submit invoices quarterly to the Litigation Subcommittee. After obtaining approval of the invoices from the Litigation Subcommittee, the Chancery Division of the Circuit Court of Cook County then receives the invoices for final approval. *See* Cook County Muni. Code § 2-334(d).

b. Case Management

Because outside counsel with SSA appointments represent parties who have conflicts of interest with Cook County, the CCSAO recuses itself from overseeing outside counsel's performance in those cases, and does not review outside counsel's invoices. Instead, the Litigation Subcommittee performs those tasks. *See* Cook County Muni. Code § 2-331 *et seq.*

The Litigation Subcommittee is chaired by Cook County Commissioner Peter Silvestri. The other members are Commissioners John Fritchey (Vice Chairman), Richard Boykin, Bridget Gainer, Timothy Schneider, Larry Suffredin, and Jeffrey Tobolski. Outside counsel with SSA appointments must submit to the Litigation Subcommittee a case budget and case summary within 30 days of appointment. *See id.* at § 2-334(a)(1). The case summary must identify "the major activities anticipated for the successful defense or prosecution of the case," and "include estimates of potential liability, whether the case is appropriate for settlement, and the assessment of the probable outcome of litigation." Any modifications or deviations must be reported to the Litigation Subcommittee chairman. *Id.* at § 2-334(a)(3). The Litigation Subcommittee reviews and approves the case summary and budget. *See id.* at § 2-334(b). Outside counsel with SSA appointments submit fee petitions to the Litigation Subcommittee quarterly, with time recorded on a daily basis to the one-tenth of an hour with detailed descriptions, and with amounts charged for each attorney and paraprofessional. *See id.* at § 2-334(d).

Based on a review of recorded sessions of the Litigation Subcommittee, and through interviews of CCSAO personnel, King & Spalding observed that the Litigation Subcommittee actively oversaw outside counsel with SSA appointments. The Litigation Subcommittee received written and oral updates on cases, engaged in active and

detailed questioning of outside counsel, and also conducted its own review of the invoices submitted.

B. Special Assistant State's Attorney (SASA)

1. Overview

At times, the CCSAO sought outside counsel to serve – rather than stand in for – the State's Attorney. In these cases, outside counsel received SASA appointments through letters issued by the CCSAO. The CAB Chief typically signed these letters. The CCSAO did not obtain court authorization when outside counsel received a SASA appointment, and no notice was sent to the Litigation Subcommittee of the appointment. Based on CCSAO records and interviews of CCSAO personnel, King & Spalding observed that the practice of SASA appointments began prior to 2008 and continued into 2017.

The Illinois statute discussed previously, 55 ILCS § 5/3-9008, does not address appointments of attorneys to assist State's Attorneys. Instead, the CCSAO relied on 55 ILCS § 5/3-9006(b), which governs internal operations of State's Attorney's Offices, to obtain SASA appointments. That statute generally provides that "[t]he State's Attorney shall control the internal operations of his or her office and procure the necessary equipment, materials, and services to perform the duties of that office." 55 ILCS § 5/3-9006(b); *see also* 55 ILCS § 5/4-2003.

2. The CCSAO's Reliance on SASAs

a. Pre-December 2016

CCSAO personnel reported that the CAB had, beginning no later than 2008 and continuing through 2016, engaged outside counsel with SASA appointments. CCSAO personnel also reported that SASA appointments in those prior years were infrequent and not routine. However, King & Spalding was unable to determine exactly when the practice began. As indicated earlier in this memorandum, the CCSAO did not track outside counsel engagements in a way that allowed King & Spalding to accurately determine exactly how many SASA appointments occurred before December 2016. The CCSAO only began tracking outside counsel engagements in March 2017.

CCSAO searched its historical records and provided the following data on SASA appointments for the years 2012 through 2016: (1) one SASA appointment in 2012; (2) zero SASA appointments in 2013; (3) five SASA appointments in 2014; (4) eight SASA appointments in 2015;⁶ and (5) five SASA appointments in 2016.

⁶ One 2015 SASA appointment was for a Chicago law firm to provide *pro bono* representation in federal civil litigation.

CCSAO personnel reported that the overwhelming majority of SASA appointments prior to December 2016 involved a need for expertise in a specialized area of law. Examples follow:

- In 2012, a law firm received a SASA appointment for insurance coverage litigation. CCSAO records reflect attorney billing rates ranged from \$445 to \$555 per hour.
- In 2015, a law firm received a SASA appointment to assist with the negotiation of “ERP system software and implementation contracts.” CCSAO records reflect a blended billing rate of \$485 per hour for attorneys working on this project.
- In 2016, a law firm received a SASA appointment to represent Cook County in insurance-coverage litigation related to the Englewood Four cases. CCSAO records reflect the attorney billing rates ranged from \$210 to \$500 per hour.

King & Spalding learned of only one case prior to 2017 where the CCSAO engaged outside counsel with a paid SASA appointment due to a lack of resources. In 2015, a law firm received a SASA appointment to represent the Sheriff of Cook County in *Backpage.com, LLC v. Dart*, N.D. Ill. Case No. 15-CV-6340. The CCSAO obtained that SASA appointment because of voluminous and extensive discovery in the case. *See id.*, Dkt. No. #112 at ¶2. CCSAO records reflect that outside counsel’s billing rates for that case ranged from \$75 to \$185 per hour. Those billing rates are consistent with Cook County’s municipal ordinance. *See Cook County Muni. Code § 2-334(e)*.

b. January 2017 to December 2017

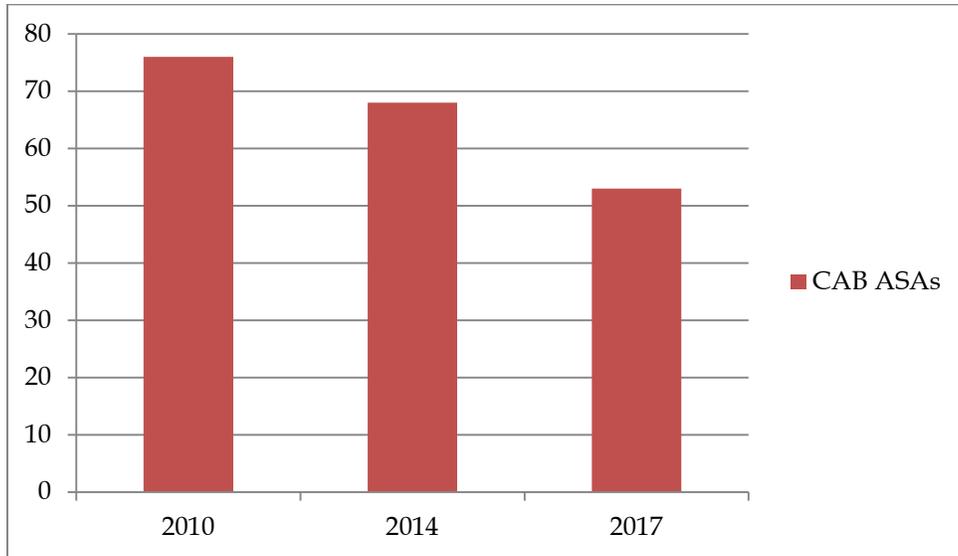
From January 2017 to December 2017, CCSAO records reflect 38 SASA appointments in civil cases, of which 34 were paid.⁷ This should not be read to mean that outside counsel received paid engagements for only 34 cases. Instead, some of the 34 SASA appointments involved multiple case assignments. For instance, a law firm received 70 civil rights cases in three paid SASA appointments. Another law firm received 103 workers’ compensation cases in one paid SASA appointment. Another law firm received eleven Cook County Sheriff’s Merit Board cases in one paid SASA appointment.

CCSAO personnel reported, consistent with records received, that the CCSAO increased the number of SASA appointments for civil cases in 2017 for a number of reasons, including: (1) a high attrition rate within the CAB and loss of the ASAs in the Conflicts Unit; (2) to improve the quality of representation, as ASAs had increasingly heavy and unmanageable caseloads; (3) a lack of resources afforded to ASAs to appropriately manage discovery and litigation; and (4) as a response to budget

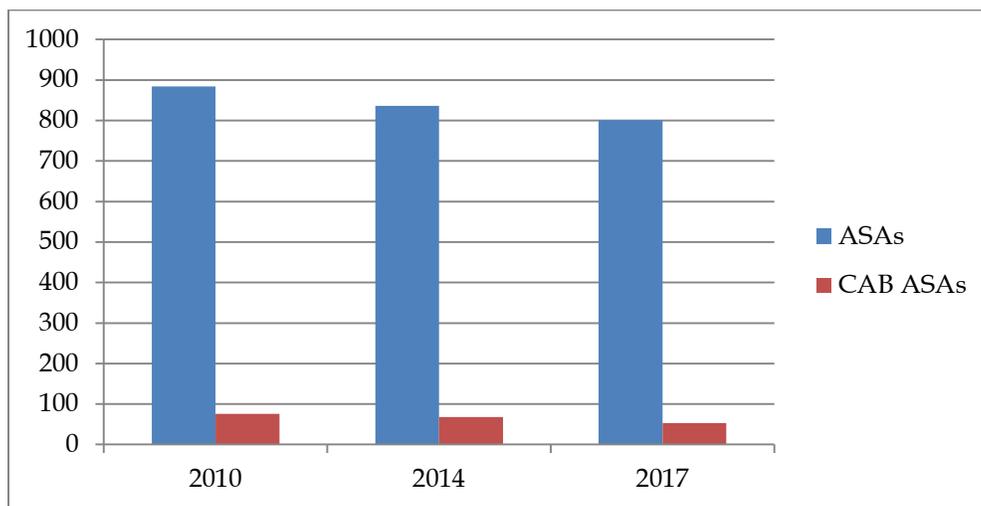
⁷ Four of the 38 SASA appointments in 2017 were to Chicago law firms for *pro bono* representation.

pressures that kept the CCSAO from hiring more ASAs because of the sweetened beverage tax.

CCSAO data bear out the increasing caseloads for ASAs and the corresponding decrease in ASAs available to handle civil cases. The CAB experienced a significant decrease in ASA staffing over the past eight to ten years. In 2010, 76 ASAs were assigned to the CAB. By 2014, that figure dropped to 68. By the beginning of 2017, the CAB had approximately 53 ASAs, a 30% decrease.



The significant decrease in CAB ASA staffing levels was consistent with decreasing overall ASA staffing levels from that same time period. CCSAO data reflects that the total number of CCSAO ASAs decreased from 884 in 2010, to 836 in 2014, to 801 in 2017.



While the number of CAB ASAs decreased over time, the CAB's caseload did not. Instead, data indicate the number of civil cases increased. For example, the Civil Rights Division opened 291 cases in 2011; that increased to 374 cases opened in 2017.

CCSAO personnel reported that CAB ASAs' capability to litigate cases has been strained by limited support and resources. The CAB has only one paralegal. The CAB does not have a docketing system, and does not have a document management system. Bates labeling for discovery must be done on one of two terminals or manually. E-discovery is typically done manually, and on the rare occasions where vendors are used, limited budgets apply. ASAs do not have laptops and are not able to work remotely.

Additionally, in 2017, the CCSAO laid off the two supervisory ASAs in the Conflicts Unit due to required budget cuts by the County, and the two ASAs remaining in the Conflicts Unit subsequently resigned. The loss of those four ASAs required the CCSAO to temporarily assign a CAB ASA to the Conflicts Unit for a period of time.

CCSAO personnel reported that in 2017 CAB Chief Patterson expressed interest to others within the CAB and the CCSAO executive team about expanding the CCSAO's use of outside counsel. The belief was that obtaining outside counsel would help ease CAB ASAs' workloads and improve the quality of representation.

CCSAO personnel reported that in February 2017, the same month Chaka Patterson was hired as CAB Chief, *Patrick v. City of Chicago, et al.*, N.D. Ill. Case No. 14-CV-3658, a case alleging malicious prosecution in violation of 42 U.S.C. § 1983, was set for trial, but lacked sufficient ASA staffing. Patterson took the lead on the case and quickly prepared it for trial. Patterson asked Jones Day for *pro bono* assistance with the trial, and the firm agreed. CCSAO records reflect that Jones Day's engagement began February 25, 2017. Trial in that case began March 6, 2017, and concluded April 12, 2017.

CCSAO personnel reported that, when that case concluded, CAB Chief Patterson expressed interest in sending more Section 1983 cases alleging malicious prosecution against ASAs to outside counsel. Patterson's email communications reflect that he informally solicited several law firms, including Jones Day, about their interest in engagements as outside counsel.

CCSAO personnel reported that CAB Chief Patterson selected Jones Day as outside counsel in two Section 1983 cases in or about June 2017. The first case was *Serrano v. Guevara, et al.*, N.D. Ill. Case No. 17-CV-2869. The SASA appointment letter to Jones Day for this case was dated June 7, 2017, and signed by Patterson. The second case was *White v. Cunningham, et al.*, N.D. Ill. Case No. 14-CV-7215. The SASA appointment letter to Jones Day for this case was dated June 19, 2017, and signed by Patterson. According to the engagement letters for both cases, partner billing rates were \$500 per hour, associate \$300 per hour, and paralegals/legal staff \$95 per hour.

King & Spalding did not locate any records discussing the selection of Jones Day for these two engagements, and also did not locate any records regarding the agreed-upon billing rates. CAB personnel reported that Chaka Patterson handled the selection of Jones Day and negotiation of Jones Day's billing rates. Then-First Assistant State's Attorney Eric Sussman recalled Patterson discussing with him that Jones Day agreed to provide representation in the *Serrano* case, but Sussman did not recall receiving prior notification from Patterson about Jones Day's engagement in the *White* case. Sussman recalled discussing with Patterson that the billing rates for Jones Day in *Serrano* would be above the \$185 per hour rate set by Cook County's ordinance, but did not recall discussing or agreeing to a billing rate of \$500 per hour for partners in the *Serrano* case, and did not recall discussing rates for the *White* case. Through a lawyer, Chaka Patterson declined King & Spalding's request for an interview, but the lawyer provided information from which the lawyer argued that Patterson received approval from Sussman for the engagements.

CCSAO personnel reported that they considered outside counsel necessary in both cases due to conflicts of interest. Specifically, CCSAO personnel reported that *Serrano* involved an allegation of malicious prosecution against an individual defendant who was a sitting judge in the Circuit Court of Cook County hearing criminal matters. For *White*, CCSAO personnel explained that the lead defendant was the Public Defender for Cook County, who is regularly adverse to the CCSAO in criminal cases.

As discussed above, the CCSAO's practice was to obtain SSA appointments through the courts for outside counsel in conflicts-of-interest cases. But King & Spalding observed that CAB Chief Patterson did not obtain SSA appointments for Jones Day in either *Serrano* or *White*. Instead, CCSAO records for both engagements reflect that Jones Day received SASA appointments, in letters signed by Patterson.

By December 2017, Jones Day submitted invoices totaling \$464,252.15 for *Serrano* and *White*. Those invoices accounted for approximately 60% of the total amount invoiced by outside counsel in 2017.

CAB Chief Patterson's email communications reflect that, throughout the remainder of 2017, Patterson arranged for Jones Day to receive SASA appointments for six more Section 1983 cases, with the same billing rate structure as *Serrano* and *White*. CAB personnel reported that Patterson led the negotiations for these engagements. Other CCSAO personnel reported that Patterson did not have authorization from the CCSAO executive team for these six appointments, and did not have authorization for the \$500-per-hour billing rates. After Patterson resigned, the CCSAO terminated Jones Day's engagements in the six cases. Jones Day did not receive any fees in connection with these six cases.

3. Selecting Outside Counsel to Serve as SASAs

King & Spalding observed that the CCSAO lacked established and consistent practices and procedures for selecting outside counsel who received SASA appointments. Instead, selections were informal and *ad hoc*. That said, prior to December 2016, SASA appointments were infrequent and accompanied by memoranda from the CAB Chief to the CCSAO executive team identifying the basis for SASA appointments and the reasons for the choice of outside counsel. From December 2016 to November 2017, SASA appointments increased significantly, but the CAB Chief did not prepare any such memoranda for SASA appointments.

Based on interviews with CCSAO personnel and CCSAO records, King & Spalding observed that the CCSAO did not maintain internal lists of qualified counsel, nor did the CCSAO issue public requests for qualified counsel. Instead, King & Spalding observed that the CCSAO often informally solicited law firms for assistance. No guidelines or criteria guided which law firm received such a solicitation, and no record was kept of who was solicited.

CCSAO personnel provided examples of how outside counsel was selected for different types of cases. In a typical civil rights case, the CAB Chief, an agency representative, and at times the Division Chief or Section Chief, informally solicited firms based on whom they believed was qualified. Interested firms indicated their interest and were considered. Often firms were not interviewed, and materials about the firm's qualifications and capacity were not solicited. The selection decision then occurred informally. Personnel based their selection on personal experience with the firm, the firm's handling of cases in the past, and/or a general understanding of the firm's capabilities. These decisions often were not recorded or documented.

In contrast to the civil rights cases, King & Spalding observed some instances when a request for qualifications ("RFQ") was employed in other types of cases. For instance, King & Spalding observed that when Cook County sought legal representation in connection with the further development, funding, construction, management, use, and operation of Cook County Hospital Stroger Campus, the CCSAO issued solicitation letters to seven law firms with requests similar to what appear in a traditional RFQ. Additionally, Cook County has a municipal ordinance that provides for an RFQ process for legal counsel and finance teams in debt transactions. *See* Cook County Muni. Code § 34-201.

Without established processes and personnel designated to select outside counsel, the CAB was at risk of criticism that certain selection decisions were not fully informed. For instance, a supervisory CAB ASA reported that a matter was sent to outside counsel by CAB management without the supervisory ASA's involvement. It was not clear why the supervisory ASA was not involved, as the case was under the supervisory ASA's management, the supervisory ASA had expertise in this area, as well

as experience with the chosen firm. The supervisory ASA's input may have been valuable in making the selection decision.

Similarly, a matter originally assigned to the Conflicts Unit was reassigned to outside counsel by CAB management. This case fell within the scope of the Conflicts Unit, but CAB management did not involve the Conflicts Unit in the decision to transfer the case to outside counsel.

King & Spalding also observed that, from December 2016 through November 2017, the CAB Chief did not prepare memoranda to the CCSAO executive team for authorization to obtain outside counsel on a particular matter. This stands in contrast to the practice from prior years. Prior to December 2016, the CAB Chief sent the CCSAO executive team written memoranda that (1) identified the case, (2) articulated the reason for retaining outside counsel, (3) discussed the different outside counsel that had been considered, (4) identified the reason for selecting the chosen outside counsel, and (5) set forth the proposed billing rates. King & Spalding observed that a similar memorandum process was re-implemented in or about November 2017.

King & Spalding observed that the CCSAO did not have policies and procedures to determine what billing rates were appropriate to pay outside counsel receiving SASA appointments. CCSAO personnel reported that they relied on their own experience and familiarity with the marketplace to make judgments about what rates to pay. Furthermore, King & Spalding observed inconsistent involvement by the CCSAO executive team in determining what rates would be appropriate. Without established criteria and even the most basic level of uniformity and managerial involvement, the CCSAO was open to criticism that it lacked objectivity when engaging outside counsel through SASA appointments.

King & Spalding reviewed CCSAO records regarding 2017 SASA appointments, and observed that outside counsel often agreed to accept hourly rates below the rates those firms normally charged, and often consistent with Cook County's municipal ordinance. Nonetheless, cases of a similar nature, like those involving Section 1983 claims, often had wide discrepancies in rates paid to outside counsel without any documentation setting forth the rationale for that decision.

While the CCSAO provided the Litigation Subcommittee with prior notice of outside counsel who received SSA appointments, that did not occur with outside counsel who received letter appointments as SASAs.

4. Payment and Case Management for SASAs

a. Payment and Source of Funds

CCSAO personnel reported that funds to pay outside counsel's invoices who had both SASA and SSA appointments came from Cook County's Self-Insurance Fund. The CCSAO's budget was not impacted.

The Cook County Office of the Chief Procurement Officer's Procurement Manual permits direct payment of "[f]ees for Special State's Attorneys and Special Assistant States Attorneys." Cook County's Budget Office and Comptroller's Office provided the CCSAO with detailed guidance since July 2014 for submitting invoices for SSAs and SASAs, which the CCSAO followed. After the CAB Chief reviewed and approved invoices, the CCSAO's Accounting Department received the approved invoices. The CCSAO's Director of Purchasing and Operations or the CFO reviewed the invoices and assigned accounting codes. CCSAO Accounts Payable staff then entered the invoices into the County's Payment System. The County Comptroller's Office approved the invoices, and then issued payments.

While the CCSAO provided the Litigation Subcommittee with the invoices submitted by outside counsel with court appointments as SSAs for review, the CCSAO did not submit SASA invoices to the Litigation Subcommittee for review and approval.

b. Case Management

King & Spalding observed that the CCSAO did not have processes and internal controls to manage outside counsel who received SASA appointments. For instance, the CAB did not employ case management tools, like budgets and regular status updates, to monitor outside counsel's work and efficiency. Similarly, the CCSAO did not provide outside counsel with written litigation and billing guidelines. King & Spalding also found that the CAB lacked comprehensive and uniform policies governing its review of invoices submitted by outside counsel.

In terms of CCSAO personnel responsible for management and review, King & Spalding observed inconsistent practices within the CAB for deciding who had the responsibility for overseeing outside counsel's work, and who would be reviewing invoices.

For example, King & Spalding observed that one CAB Section Chief assigned specific ASAs in the Section to review the work and invoices of SASAs. After the ASA reviewed the invoice, the Section Supervisor conducted an additional review before submitting the invoices for final review and payment. During this process, the Section Supervisor communicated with ASAs about billing practices and protocols to ensure ASAs properly reviewed invoices.

Jones Day submitted invoices for its two SASA appointments in *Serrano* and *White* directly to CAB Chief Chaka Patterson. Based on interviews with CAB personnel, King & Spalding learned that Patterson directed a Division Chief to review the invoices prior to payment, and did so to avoid the appearance of impropriety. But it was not clear that the Division Chief had sufficient familiarity with the matter to review the appropriateness of the charges in the invoices.

C. Outside Counsel with Contingency Fee Arrangements

King & Spalding learned that twice in 2017 the CCSAO sought the assistance of outside counsel to serve as plaintiff's counsel: (1) the November 2017 data-breach lawsuit against Uber; and (2) the December 2017 lawsuit filed against manufacturers of prescription opioid painkillers. While cases such as these may arise infrequently, they tend to be high profile and potentially lucrative. Outside counsel received letter appointments from the CCSAO to serve as SASAs in these cases.

With respect to the opioid litigation, the law firm Simmons Hanley Conroy approached the CCSAO about this case, and was recommended by the chairmen of McHenry County and Kane County, who previously retained Simmons Hanley Conroy to represent their counties in opioid litigation. The CCSAO interviewed four law firms with representatives from the Office of the Cook County Board President and counsel for the Cook County Health and Hospital System. The CCSAO ultimately selected Simmons Hanley Conroy and Meyers & Flowers to represent Cook County. Those two firms agreed to represent Cook County on a contingency basis. Before making the final selection of these firms, the CCSAO sent a memorandum to Commissioner Peter Silvestri, Chairman of the Litigation Subcommittee, and Commissioner Stanley Moore, identifying the firms selected, the selection process, the basis for the selection, and the agreed-upon billing rate structure. The CCSAO then moved forward with the retention, and subsequently provided information regarding the retention of these two firms to the Litigation Subcommittee during the December 20, 2017 meeting. According to CCSAO records, the two firms agreed to share a 25% contingency fee out of any gross recovery, plus reimbursement of reasonably incurred expenses and costs of litigation.

With respect to the Uber litigation, the CCSAO reached out to a number of law firms informally, including Edelson PC, the law firm authorized by the City of Chicago to file its lawsuit against Uber. The CCSAO then made the decision to retain that law firm. In November 2017, Edelson PC filed a lawsuit on behalf of the City of Chicago and Cook County against Uber. According to the retention agreement, Edelson PC agreed to attorneys' fees paid out of any recovery on a schedule that allowed for 12% after filing, but before discovery, 15% after filing through 60 days before jury selection, 20% through verdict, and 25% through appeal, plus reimbursement of costs incurred.

V. RECOMMENDATIONS

Given the lack of policies and procedures for outside counsel, King & Spalding has two primary recommendations for the CCSAO. King & Spalding first recommends that the CCSAO obtain court authorization for all outside counsel engagements, and provide the Litigation Subcommittee with prior notice of all such engagements as well as the invoices for them to review. The CCSAO may consider requesting legislative action by the Illinois General Assembly to formalize State's Attorneys' ability to obtain appointments of Special Assistant State Attorneys who would be directed, supervised, and managed by State's Attorneys.

Second, King & Spalding recommends that the CCSAO implement clear written policies and procedures to govern the selection, engagement and oversight of outside counsel. These policies and procedures should be comprehensive and should address (1) the appropriate cases and circumstances for referring a matter to outside counsel, (2) the methods for identifying qualified candidates to serve as outside counsel, (3) the procedure and criteria for selecting outside counsel from the pool of candidates, (4) oversight and management of cases handled by outside counsel, (5) budgeting and invoice management, and (6) proper documentation for the selection, oversight, and fee review for outside counsel. King & Spalding also recommends that the CCSAO make information regarding all appointments of outside counsel easily available to the public.

King & Spalding emphasizes the importance of written and consistently applied policies for the engagement of outside counsel – a matter of significant public interest when outside counsel stands in to represent Cook County or its officials. Attorneys performing work for the government must maintain the highest of ethical standards, and should be sensitive to concerns about appearances of impropriety. Additionally, the CCSAO should be clear that it is avoiding favoritism or the appearance of favoritism, to guard against erosion of public confidence in local government's integrity and fairness. Introducing transparency and competitive procedures should reduce the potential for and appearance of partiality and allow the CCSAO to obtain cost savings.

The specific recommendations set forth below are purposely phrased in broad terms for the CCSAO to consider in preparing its written policies. When implementing these recommendations, the CCSAO's guidelines should be prepared with an eye toward ensuring that CCSAO personnel, stakeholders (including the relevant County agencies and the Litigation Subcommittee), as well as the public have a clear understanding of the process, and the roles and responsibilities of different people within the process. Policies and procedures implemented by the CCSAO should be designed to stand the test of time, and provide for transparency and accountability within the process.

The recommendations King & Spalding sets forth below are based on (1) the review King & Spalding conducted as set forth above, (2) discussions with CCSAO

personnel regarding the strengths and weaknesses of the CCSAO's past practices for outside counsel, and (3) an in-depth review of the policies other public entities across the country have for outside counsel, ranging from state attorneys general to county and local government attorneys' offices. In looking to other jurisdictions, King & Spalding obtained publicly available materials regarding their practices and policies, which varied. Though the level of formality as well as oversight varied from jurisdiction to jurisdiction, there were common threads, discussed below, which support King & Spalding's recommendations.

Recommendation #1: Obtain Court Authorization for All Outside Counsel Engagements, with Involvement by the Litigation Subcommittee

King & Spalding first recommends that the CCSAO obtain court authorization for all outside counsel engagements, and provide the Litigation Subcommittee with prior notice of all such engagements as well as the invoices for them to review. This will allow for objective vetting by an independent court and ensure increased and complete involvement by the Litigation Subcommittee over outside counsel, as the Litigation Subcommittee has fiduciary responsibility for Cook County's litigation expenditures.

King & Spalding also suggests that the CCSAO consider requesting legislative action by the Illinois General Assembly to better formalize State's Attorneys' ability to obtain appointments of Special Assistant State's Attorneys who would be directed, supervised, and managed by State's Attorneys.

King & Spalding recognizes that Cook County's municipal ordinances typically cap attorney rates at \$185 per hour. However, that ordinance recognizes that attorneys' fees are to be reasonable, and allows for alternative rate arrangements that have been approved by a court or the Litigation Subcommittee.⁸ King & Spalding believes that the CCSAO's increased communication with the Litigation Subcommittee about outside counsel appointments and the CCSAO's own needs will allow appropriate billing rates to be paid for a particular matter. This may also help provide the Litigation Subcommittee with relevant information should larger-scale modifications to the billing rate schedule become appropriate. While it was beyond the scope of King & Spalding's engagement to determine whether the CCSAO may find qualified counsel at the \$185 per hour rate, King & Spalding notes that Cook County's municipal code provisions governing rates paid to outside counsel was last amended in or about 2013, and that the City of Chicago's Law Department has discretion to pay up to \$295 per hour to outside counsel.

⁸ As discussed earlier, King & Spalding observed that the CCSAO obtained court authorization for rates exceeding \$185 per hour for at least two appointments of outside counsel in 2017.

Recommendation #2: Have Panels, Not Individuals, Select Outside Counsel

King & Spalding recommends that the CCSAO have panels be responsible for selecting outside counsel for a particular matter, rather than placing that responsibility on a single person. King & Spalding observed that, on occasion, the CAB employed such a practice, and believes that this practice should be employed more broadly. King & Spalding observed that several other jurisdictions, including Delaware, Hawaii, and Virginia, generally rely on panels or committees to select outside counsel. For instance, the Delaware Attorney General relies on a committee of three to five people and, where possible, includes one person not employed by the state. Hawaii and Virginia, in contrast, use panels of at least three individuals, two of whom are attorneys and one of whom may be a client agency representative.

King & Spalding recommends that the CCSAO have three to five people on the panel. At least two of the panelists may be attorneys from the CCSAO; preferably one would be a member of the CCSAO executive team and one would be from the CCSAO Bureau where the matter arose. A representative from the relevant county agency or agencies involved in the matter should also be included. Each person on the panel should actively participate in (1) determining the need for outside counsel, (2) developing the methodology that will be used to solicit outside counsel, (3) interviewing and reviewing the qualifications of candidates, and (4) deciding whom to select as outside counsel. Each person should maintain written documentation indicating his or her views regarding outside counsel's qualifications, as well as his or her judgment on whom to select.

When a conflict of interest arises, King & Spalding recommends the active involvement of the Conflicts Unit on the selection panel. The Conflicts Unit, which has been created specifically to assist with cases where there is a conflict of interest, should be in a position to provide input on (1) its resources and availability to participate in the matter, and (2) whether a conflict of interest in fact exists.

In deciding who to include in the decision-making process, the CCSAO exposes itself, at a minimum, to the appearance of non-objectivity when the decision to send work to outside counsel is made, entirely or in part, by a person who was recently employed at that firm. The CCSAO should consider barring involvement by any person who has an actual or apparent conflict of interest, and perhaps even consider implementing a "revolving door" rule, where there is a time bar on a person's involvement in the decision to send work to a law firm where that person previously worked. At least one other public entity, Delaware's Attorney General, has a policy that prohibits participation in the selection process by any person who has a conflict of interest.

Recommendation #3: Provide Selection Panels with Clear Policies and Procedures to Govern the Process of Choosing Qualified Outside Counsel

King & Spalding recommends that the CCSAO implement clear policies and procedures to govern the process of choosing qualified outside counsel. Clearly written policies and procedures should help guide selection panels' choice of outside counsel, increase consistency over time, and allow for greater transparency and objectivity.

Recommendation #3A: Identify Cases or Circumstances Appropriate for Engagements of Outside Counsel

King & Spalding recommends that the CCSAO clearly identify cases or categories of cases that may be appropriate to refer to outside counsel. The decision to obtain outside counsel should not be made lightly by the CCSAO and county agencies, and instead should be truly reflective of a genuine need for assistance, whether the need arises because of a conflict of interest, a lack of expertise in a particular legal field, or lack of resources.

When deciding whether to send cases to outside counsel, it bears considering how that decision may later reflect on the CCSAO's ability to effectively prosecute and litigate on behalf of Cook County. For instance, increased reliance on outside counsel may appear to be a short-term way to address a lack of ASAs or to obtain increased expertise. Over the long run, the CCSAO should consider ways to work with Cook County administrators to increase ASA hiring and to develop expertise internally.

King & Spalding recommends that the CCSAO, in conjunction with the relevant County agency, identify and document the reason for engaging outside counsel in a particular case or category of cases. The documentation should articulate with specificity the expressed need for outside counsel, when the need arose, and why the CCSAO cannot address the matter. This documentation should be maintained in the CCSAO's case file, and be made available for review by the Litigation Subcommittee. The Cook County State's Attorney should be kept apprised of all such requests.

Recommendation #3B: Provide Selection Panels with Methods for Identifying Candidates

King & Spalding recommends that the CCSAO rely on clearly established methods to identify candidates to serve as outside counsel. To the extent possible, the methods should be standardized. Standardization provides a consistent process and criteria to evaluate prospective counsel. The CCSAO's methods should be available for review by the Litigation Subcommittee, and the CCSAO should consider making this information publicly available. This will provide stakeholders and prospective counsel with a greater understanding of the CCSAO's litigation philosophy, expectations for outside counsel, and its approach.

King & Spalding observed during its review that the CCSAO at times sought outside counsel's assistance in cases of a recurring or similar nature. King & Spalding recommends that the CCSAO conduct an internal review to identify categories of cases where outside counsel may become necessary in the future. The CCSAO should then publish formal requests for qualifications ("RFQs") to identify qualified candidates. Other jurisdictions, including the City of Chicago, Delaware, Florida, Pennsylvania, Ohio, and Virginia, employ RFQs to identify qualified counsel for broad categories of cases. King & Spalding identified the following categories of cases that may be appropriate for an RFQ, though the CCSAO may conclude that others should be included:

1. Civil rights litigation, particularly, cases brought under 42 U.S.C. § 1983;
2. Class action lawsuits;
3. Insurance coverage litigation;
4. Medical malpractice cases;
5. Real estate and transactional matters; and
6. Workers' compensation cases.

Employing RFQs should (1) allow selection panels to expedite their decision-making process when a particular need arises, (2) provide opportunities for outside counsel to exhibit their qualifications to the CCSAO, and (3) give selection panels better access to information about outside counsel's relative experience. RFQs may also provide the CCSAO and Litigation Subcommittee with relevant market information about outside counsel's expected rates of compensation.

King & Spalding recognizes there cannot be a one-size-fits-all approach appropriate for all potential circumstances. Instead, selection methodology may vary depending on the circumstances of a particular matter or type of case. When the selection panel decides that public solicitation is inappropriate, the panel should document that decision and specify the reason why public solicitation is inappropriate. King & Spalding identified the following circumstances that may warrant deviation from the public solicitation process, though the CCSAO may conclude that others should be included:

1. Whether the case presents exigent circumstances that require an immediate need for counsel;
2. Whether privacy interests or objectives would be jeopardized by a public process;

3. Whether outside counsel has been engaged on an identical or substantially similar matter;
4. Whether outside counsel is agreeing to provide services on a *pro bono* basis; and
5. Whether unique or unanticipated circumstances make public solicitation impracticable or adverse to the County's interests.

King & Spalding based this on its review of CCSAO's past practices, with guidance from other jurisdictions' publicly available practices, particularly Delaware and West Virginia.

Recommendation #3C: Establish Criteria for Selecting Outside Counsel from the Pool of Candidates

King & Spalding recommends that the CCSAO establish criteria for selection panels to choose a candidate best qualified to serve as outside counsel for a particular matter. King & Spalding based the following recommended criteria on its review of the CCSAO's past practices, as well as discussions with CCSAO personnel about best practices, which are generally consistent with the criteria King & Spalding found to be used by other jurisdictions, including Delaware, Hawaii, Virginia, and West Virginia:

1. The experience and reputation of outside counsel, particularly the attorneys who will be engaged to work on the matter, including the past experience and success outside counsel has had with similar matters;
2. The performance of outside counsel on past matters, including *pro bono* work, on behalf of Cook County;
3. Outside counsel's anticipated approach to the matter;
4. The cost of services, including costs relative to other candidates and relative to the experience and qualifications of the particular candidate;⁹
5. References and recommendations from former clients;¹⁰
6. Whether outside counsel meets Cook County's diversity objectives, including for veterans, minorities, people with disabilities, and women;
7. Whether potential or actual conflicts of interest exist; and

⁹ Because public funds are used for outside counsel, cost control and efficiency are important matters. One way to encourage outside counsel to provide qualified staff through the least costly billing category is for counsel to identify the lowest rate for legal services that counsel offers to any client, except not-for-profit and *pro bono* clients.

¹⁰ References should be able to provide insight into the type of matter previously handled, an assessment of counsel's expertise and handling of the matter, counsel's communication skills, and billing practices.

8. Other factors specific to the matter and/or its subject area.

During the review, King & Spalding observed that, in many instances, the CCSAO and agency representatives interviewed candidates prior to selecting outside counsel. King & Spalding agrees with this approach and believes that it should be implemented more broadly. While not every potential candidate must be interviewed, the selection panel should narrow the candidates to a manageable number for interviews. The goal for the selection panels during the interview should be to explore in greater detail the depth of outside counsel's expertise, their anticipated approach to the matter, and outside counsel's billing practices and rates.

Recommendation #4: Implement Clear Policies and Procedures to Manage Cases Assigned to Outside Counsel

King & Spalding recommends that the CCSAO implement clear policies to govern the management of cases assigned to outside counsel. These policies should address the oversight of cases handled by outside counsel, as well as budgeting and invoice management. While Cook County's municipal ordinance addresses some aspects of case management, budgeting, and invoices, additional policies and guidelines for all outside counsel engagements should be considered.

King & Spalding observed that the CCSAO did not oversee outside counsel's handling of cases involving conflicts of interest because the CCSAO recused itself entirely from the matter. In those cases, because of the conflict, the CCSAO has provided the Litigation Subcommittee with the outside counsel's invoices for the Subcommittee to review, and has not been involved in the Subcommittee's review of case progress. The CCSAO should consider involving the Conflicts Unit in the oversight of these cases or a set of these cases, understanding that there may be issues regarding appearance and capacity by involving the Conflicts Unit.

Notably, King & Spalding found that in 2017 the CCSAO began crafting its own guidelines for management of outside counsel. King & Spalding encourages the CCSAO to continue in that effort. Other jurisdictions, including Delaware, Houston, New Jersey, Palm Beach, Philadelphia, and Virginia, have in place litigation and case-management guidelines that govern, among other things, (1) billing procedures for items such as timekeepers, rates, and descriptions of work, (2) expense guidelines, (3) travel, and (4) audits and reviews.

Recommendation #4A: Implement Policies and Procedures for Oversight of Cases Assigned to Outside Counsel

Effective case management is a mechanism to ensure the public interest is protected and that litigation is cost-effective. The CCSAO should consider tasking an ASA to serve as a managing attorney for matters sent to outside counsel when

appropriate and practicable. That ASA would work with outside counsel to create detailed and comprehensive budgets, and would be responsible for periodically comparing outside counsel's actual costs against budgeted costs. To avoid the appearance of impropriety, the managing attorney should not be involved in selecting outside counsel. The managing attorney should monitor a case's progress and maintain a dialogue with outside counsel about budgeting.

The ASA serving as managing attorney would be in a position, through communication internally and with outside counsel, to limit the likelihood that litigation inconsistencies arise, which should ensure consistent litigation approaches by the CCSAO. Furthermore, the managing attorney should be involved in all significant aspects of the case on a consistent and regular basis, including by (1) reviewing pleadings and motions, (2) conferring on case analysis, (3) devising litigation strategy and approach, and (4) reviewing settlement offers and being actively involved in settlements. To effectively oversee the matter, the managing attorney should conduct periodic and regular conferences with outside counsel to address, among other things, upcoming issues and recent developments.

Recommendation #4B: Implement Policies and Procedures for Budgeting and Invoice Review

Clear policies and procedures for budgeting and invoice review are as important as the selection and oversight of outside counsel. The budget should be developed between the ASA serving as managing attorney and outside counsel at the outset of the representation, and should estimate the legal fees and expenses anticipated through judgment or completion of the representation. The budget should also sort fees and expenses by phase of the case.

With respect to the policy for invoice review, King & Spalding recommends that the CCSAO emphasize objectivity. The CCSAO should have an independent employee, either an ASA or a qualified staff member, be responsible for (1) verifying that invoices are consistent with the engagement letter, (2) confirming that the invoiced amount matches the detail of the costs submitted, and (3) reviewing charges for adequate supporting documentation. This independent employee should not have been involved in selecting outside counsel and should not be the managing attorney.

Once the independent employee completes the invoice review, the ASA assigned as managing attorney – who has first-hand knowledge of case specifics – should then conduct the final review of the invoice and approve all charges before the invoices are presented to the Litigation Subcommittee.

Recommendation #5: Implement Additional Measures When Contemplating Contingency Fee Arrangements with Outside Counsel

Contingency fee arrangements carry the risk that outside counsel's desire to maximize profits could conflict with Cook County's desire to enforce the law in a fair and reasonable manner.¹¹ Because of the increased potential for large fee awards, there is an even greater risk that the public may perceive the choice of outside counsel as lacking objectivity, and that counsel is motivated by profit, not the public interest.¹² King & Spalding found that many jurisdictions, particularly states across the country, have adopted laws to govern the hiring of outside counsel on a contingency fee basis in order to address these concerns. King & Spalding recommends that the CCSAO implement additional measures when contemplating contingency fee arrangements.

Before entering into a contingency fee arrangement, the selection panel should, in addition to the criteria discussed above, make the determination that chosen outside counsel will be cost effective and act in the public interest. Because of the importance of this issue, this determination should be presented to the Cook County State's Attorney for review, as well as the Litigation Subcommittee.

This practice is consistent with other jurisdictions' practices. For example, the Florida Department of Legal Affairs may not enter into a contingency fee contract with private counsel unless the Attorney General makes a written determination that the representation "is both cost-effective and in the public interest," Fla. Stat. Ann. § 16.0155(2) (2013), with specific findings made for each of the following factors: "(a) Whether there exist sufficient and appropriate legal and financial resources within the department to handle the matter[;] (b) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly[;] (c) The geographic area where the attorney services are to be provided[;] (d) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases." Other states – including Alabama, Arkansas, Iowa, Louisiana, Mississippi, Nevada, North Carolina, Ohio, Utah, West Virginia, and Wisconsin – have similar laws in place.¹³

¹¹ See, e.g., *People ex re. Clancy v. Superior Court*, 39 Cal. 3d 740, 749-50 (1985).

¹² See, e.g., *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, Eric Lipton, New York Times, Dec. 18, 2014, available at <https://nyti.ms/13FuqxY>.

¹³ See, e.g., Ala. Code § 41-16-72 (2013); Ark. Code Ann. § 25-16-714 (2015); Iowa Code §§ 23B.1 *et seq.* (2012); La. Stat. Ann. §§ 42:262 (2011), 49:258 (1992); Miss. Code Ann. §§ 7-5-5, 7-5-8, 7-5-21, 7-5-39 (2012); Nev. Rev. Stat. Ann. §§ 228.111 *et seq.* (2015); N.C. Gen. Stat. Ann. §§ 114-9.2 *et seq.* (2014); Ohio Rev. Code Ann. §§ 9.49 *et seq.* (2015); Utah Code Ann. § 63G-6a-106 (2016); W. Va. Code Ann. § 5-3-3a (2016); Wis. Stat. Ann. §§ 14.11, 20.9305 (2013).

In determining contingency fee arrangements, the CCSAO should consider whether it is appropriate to tier limits on fee recoveries – as it did in the opioid litigation – and should even consider an aggregate cap on fees. Florida, for instance, sets recovery percentages and an aggregate cap on fees. *Id.* § 16.0155(5). Additionally, fees should not be based on the imposition of fines or civil penalties, which is consistent with the contingency fee arrangements that the CCSAO has in place for the opioid and Uber cases. Other jurisdictions, including Mississippi, Nevada, North Carolina, West Virginia, and Wisconsin, have similar bars on recovery based on fines or civil penalties. Because contingency fee cases carry the potential to be highly lucrative for outside counsel, King & Spalding recommends that these arrangements be presented to the Litigation Subcommittee for review before they are entered into, unless impracticable due to exigent circumstances.

In terms of case management for contingency fee cases, the CCSAO should ensure that the ASA assigned to be managing attorney maintains full and complete control over the litigation. Anything less risks an inappropriate shift of power from the CCSAO to outside counsel.

Recommendation #6: Ensure Documentation of Outside Counsel Engagements, and Documentation of Selection, Oversight, and Invoice Review

During its review, King & Spalding did not find that the CCSAO had adequate recordkeeping practices to consistently and accurately track engagements and amounts paid to outside counsel during the prior two administrations. CAB personnel began implementing recordkeeping practices in approximately March 2017. King & Spalding agrees with this approach as an effort to improve reporting and tracking of outside counsel and their associated costs. This recordkeeping should be capable of organizing and sorting outside counsel by case name and docket number, type of case, fees paid to date, and fees paid year-to-date.

The CCSAO executive team should periodically review trends in the use of outside counsel and the associated costs, with an eye toward identifying areas where internal expertise may be developed, and in budget considerations, specifically, deciding whether additional funding is necessary to build capacity through additional ASA hires.

King & Spalding recommends that the CCSAO consistently employ documentation procedures for outside counsel. While discussed throughout these recommendations, it bears emphasis that documentation should start at the beginning of the selection process, with the specific reasons justifying the need to send matter(s) to outside counsel, and should continue through the selection process with documentation identifying the methodology employed, the candidates considered, and the reasons for selecting a particular candidate, as well as the rates to be paid. Such documentation should encourage a thoughtful determination before sending matters outside the

CCSAO, and could help the CCSAO determine ways to obtain the resources or expertise necessary if that is the justification.

Other jurisdictions, including Delaware, Florida, New York, Pennsylvania, Virginia, West Virginia, and Wisconsin, require similar documentation. Delaware, for example, requires written statements explaining the need for counsel, when the need arose, and why the government cannot support the legal need.

Recommendation #7: Make Information About Outside Counsel Engagements Publicly Available

The CCSAO has not made publicly available on its website or through any other platform its engagements of outside counsel. Only certain of that information traditionally has been available to the public through Litigation Subcommittee monthly sessions, meeting minutes, and agendas. King & Spalding recommends that the CCSAO make publicly available on its website or a similar platform information regarding outside counsel engagements. This will provide transparency and give the public important information about how Cook County funds are being allocated.

King & Spalding recommends that information to be made timely available to the public include (1) the date of the engagement, (2) the engagement letters and/or retainer agreements, (3) information regarding counsel's billing rates, and (4) fees paid yearly and to date. This information should be updated on at least a quarterly basis.

Florida, Georgia, Kentucky, and West Virginia, for example, make publicly available engagement letters. Georgia makes publicly available the fees paid to outside counsel on a quarterly basis; West Virginia posts payments of fees within 30 days of payment. The City of Chicago makes publicly available on its website a list of law firms with whom Chicago has active charges during the last year.

VI. CONCLUSION

King & Spalding has concluded that there are key areas of improvement for the CCSAO when seeking the assistance of outside counsel, from selection to engagement to case management. To assist the CCSAO with the areas of improvement identified in this memorandum, King & Spalding provided its recommendations for the CCSAO to consider. This report provides a full accounting of King & Spalding's work, findings, and recommendations.