



CITY OF WOODINVILLE, WA
REPORT TO THE CITY COUNCIL
 17301 133rd Avenue NE, Woodinville, WA 98072
 WWW.CI.WOODINVILLE.WA.US

To: Honorable City Council **Date:** 12/13/2011
From: Richard A. Leahy, City Manager *RL*
By: Alexandra Sheeks, Assistant to the City Manager *AS*
Subject: Approval of Agreement for Legal Services with Ogden Murphy Wallace

FINANCIAL ACTION SUMMARY		
Expenditure Required	Amount Budgeted/Approved	Additional Amount Required
\$345,500	\$345,500	\$0

ISSUE: Shall the City Council approve the Agreement for Legal Services with Ogden Murphy Wallace PLLC Attorneys at Law?

RECOMMENDATION: To approve the Agreement for Legal Services, substantially in the form presented.

POLICY DECISION: Pursuant to RCW 35A.13.090, "the council shall make provision for obtaining legal counsel for the city, either by appointment of a city attorney on a full time or part time basis, or by any reasonable contractual arrangement for such professional services."

BACKGROUND: Ogden Murphy Wallace has provided City Attorney legal services to the City since incorporation in 1993. The contract has been renewed and/or extended several times since. The current contract expires on December 31, 2011.

ANALYSIS: The proposed Agreement provides for the same level of service as the previous agreements. The proposed Agreement does not set an expiration date, but continues in effect until terminated. This Agreement may be cancelled at anytime, for any reason, with written notice. The proposed Agreement provides for a 3% increase in the hourly rate from the previous agreement. Hourly rate adjustments may be requested annually by the Attorneys, subject to approval of the City Council.

RECOMMEND ACTION:
I MOVE TO APPROVE THE AGREEMENT FOR LEGAL SERVICES WITH ODGEN MURPHY WALLACE PLLC, SUBSTANTIALLY IN THE FORM PRESENTED, AND AUTHORIZE THE CITY MANAGER TO TAKE OTHER ACTIONS NECESSARY TO IMPLEMENT THE DIRECTION OF THE CITY COUNCIL REGARDING THIS MATTER.

Attachments:

A: Agreement with Ogden, Murphy, Wallace, PLLC Attorneys at Law

AGREEMENT FOR SERVICES
BETWEEN THE CITY OF WOODINVILLE AND OGDEN MURPHY
WALLACE, P.L.L.C., ATTORNEYS AT LAW

THIS AGREEMENT is made this ___ day of _____, 2011, by and between the City of Woodinville (hereinafter referred to as "City"), and Ogden Murphy Wallace, P.L.L.C., Attorneys at Law (hereinafter referred to as "Attorneys"), doing business at 2100 Westlake Center Tower, 1601 Fifth Avenue, Seattle, WA 98101-1686 .

WHEREAS, Attorneys are in the business of providing certain professional services specified herein; and

WHEREAS, the City desires to contract with Attorneys for the provision of legal services, and Attorneys agree to contract with the City for same; and

NOW, THEREFORE, in consideration of the mutual promises set forth herein, it is agreed by and between the parties as follows:

TERMS

1. Description of Work. Attorneys shall perform work as described in Exhibit A, "Scope of Work," which is attached hereto and incorporated herein by this reference, according to the existing standard of care for such services. Attorneys shall not perform any additional services without the expressed permission of the City.
2. Payment.
 - A. The City shall pay Attorneys at the hourly rate set forth in Exhibit A, for the services described in this Agreement.
 - B. Billings should be submitted on a monthly basis and will be paid within thirty (30) days of submittal. Time will be billed to one-tenth of an hour, itemized as to department, project, work done, and time. The City will not be charged separately for normal secretarial or clerical work, the expense for which has been calculated into the attorney's hourly rate. Reimbursement will be made by the City for expenditures for court costs and fees, copying, postage, and computer-aided legal research, when made on behalf of the City, and for travel or long distance telephone calls when required on City business. The Attorneys will retain all original billings and cooperate with bill audits.
 - C. If the City objects to all or any portion of any invoice, it shall so notify Attorneys of the same within five (5) working days from the date of receipt and shall pay that portion of the invoice not in dispute. The parties shall immediately make every effort to settle the disputed portion.

3. Relationship of Parties. The parties intend that an independent contractor - client relationship will be created by this Agreement. As Attorneys are customarily engaged in an independently established trade which encompasses the specific service provided to the City hereunder, no agent, employee, representative or subcontractor of Attorneys shall be or shall be deemed to be the employee, agent, representative or subcontractor of the City. None of the benefits provided by the City to its employees, including, but not limited to, compensation, insurance and unemployment insurance, are available from the City to the Attorneys or its employees, agents, representatives or subcontractors. Attorneys will be solely and entirely responsible for their acts and for the acts of Attorneys' agents, employees, representatives and subcontractors during the performance of this Agreement. The City may, during the term of this Agreement, engage other independent contractors to perform the same or similar work that Attorneys perform hereunder.
4. Term of Agreement. This Agreement shall continue in effect until terminated.
5. Termination.
 - A. Termination By Agreement. The parties may terminate this Agreement by mutual agreement at any time.
 - B. Termination By Option. Each party to this Agreement shall have the option to terminate this Agreement at any time. Termination shall be effective as set forth in the written notice to the other party.
 - D. Rights upon Termination. In the event of termination, the City shall only be responsible to pay for all services satisfactorily performed by Attorneys to the effective date of termination, as described in the final invoice approved by the City. The City Manager shall make the final determination about what services have been satisfactorily performed.
7. Discrimination. In the hiring of employees for the performance of work under this Agreement or any subcontract hereunder, Attorneys, its subcontractors or any person acting on behalf of Attorneys shall not, by reason of race, religion, color, sex, national origin or the presence of any sensory, mental, or physical handicap, discriminate against any person who is qualified and available to perform the work to which the employment relates.
8. Indemnification. The Attorneys agree to hold harmless, indemnify and defend the City, its officers, officials, agents, employees and representatives from and against any and all claims, costs, judgments, losses, liability or suits including attorney's fees or awards for damage to property and/or for injuries, sickness or death of persons, including claims by Attorneys' own employees to which Attorneys might otherwise be immune under Title 51 RCW, arising out of or in connection with any willful misconduct or negligent act, error, or omission of the Attorneys, their officers, agents, sub-contractors Providers or employees, in connection with the services required by this Agreement, provided,

however that the Attorneys' obligations to indemnify, defend and hold harmless shall not extend to injuries, sickness, death or damage caused by or resulting from the sole willful misconduct or negligence of the City, its officers, agents or employees.

It is specifically and expressly understood that the indemnification provided herein constitutes Attorneys' waiver of immunity under Title 51 RCW, solely for purposes of this indemnification. This waiver has been mutually negotiated by the parties.

The City's inspection or acceptance of any of the Attorneys' work, when completed, shall not be grounds to avoid any of these covenants of indemnification.

This clause shall survive the termination or expiration of the Agreement and shall continue to be in effect for any claims or causes of action arising hereunder.

9. Insurance. The Service Provider shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Service Provider, their agents, representatives, employees or subcontractors.
 - A. Minimum Scope of Insurance. Service Provider shall obtain insurance of the types described below:
 1. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.
 2. Commercial General Liability insurance shall be written on ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract. The City shall be named as an insured under the Service Provider's Commercial General Liability insurance policy with respect to the work performed for the City using ISO additional insured endorsement CG 20 10 10 01 and CG 20 37 10 01 or substitute endorsements providing equivalent coverage.
 3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.
 4. Professional Liability insurance appropriate to the Service Provider's profession.
 - B. Minimum Amounts of Insurance. Service Provider shall maintain the following insurance limits:

1. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.
 2. Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence and \$2,000,000 general aggregate.
 3. Professional Liability insurance shall be written with limits no less than \$1,000,000 per claim and \$1,000,000 policy aggregate limit.
- C. Other Insurance Provisions. The insurance policies are to contain, or be endorsed to contain, the following provisions for Automobile Liability and Commercial General Liability insurance:
1. The Service Provider's insurance coverage shall be primary insurance as respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Service Provider's insurance and shall not contribute with it.
 2. The Service Provider's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.
- D. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.
- E. Verification of Coverage. Service Provider shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Service Provider before commencement of the work.
10. Entire Agreement. The written provisions and terms of this Agreement, together with all Exhibits attached hereto, shall supersede all prior verbal statements of any officer or other representative of the City, and such statements shall not be effective or be construed as entering into or forming a part of, or altering in any manner whatsoever, this Agreement.
 11. City's Right of Supervision, Limitation of Work Performed by Attorneys. Even though Attorneys work as an independent contractor in the performance of his duties under this Agreement, the work must meet the approval of the City and be subject to the City's general right of inspection and supervision to secure the satisfactory completion thereof. In the performance of work under this Agreement, Attorneys shall comply with all federal, state and municipal laws, ordinances, rules and regulations that are applicable to Attorneys' business, equipment, and personnel engaged in operations covered by this Agreement or accruing out of the performance of such operations.

12. Work Performed at Attorneys' Risk. Attorneys shall be responsible for the safety of its employees, agents and subcontractors in the performance of the work hereunder and shall take all protections reasonably necessary for that purpose. All work shall be done at Attorneys' own risk, and Attorneys shall be responsible for any loss of or damage to materials, tools, or other articles used or held for use in connection with the work.
13. Modification. No waiver, alteration or modification of any of the provisions of this Agreement shall be binding unless in writing and signed by a duly authorized representative of the City and Attorneys.
14. Assignment. Any assignment of this Agreement by Attorneys without the written consent of the City shall be void.
15. Written Notice. All communications regarding this Agreement shall be sent to the parties at the addresses listed below, unless notified to the contrary. Any written notice hereunder shall become effective as of the date of mailing by registered or certified mail, and shall be deemed sufficiently given if sent to the addressee at the address stated in this Agreement or such other address as may be hereafter specified in writing.
16. Non-Waiver of Breach. The failure of the City to insist upon strict performance of any of the covenants and agreements contained herein, or to exercise any option herein conferred in one or more instances shall not be construed to be a waiver or relinquishment of said covenants, agreements or options, and the same shall be and remain in full force and effect.
17. Resolution of Disputes, Governing Law. Should any dispute, misunderstanding or conflict arise as to the terms and conditions contained in this Agreement, the matter shall be referred to the City Manager, whose decision shall be final. In the event of any litigation arising out of this Agreement, the prevailing party shall be reimbursed for its reasonable attorney fees from the other party. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year above written.

CITY OF WOODINVILLE

By: _____

Richard A. Leahy

City Manager

CONTRACTOR

By: _____

Title: _____

Taxpayer ID # _____

ATTEST/AUTHENTICATED:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
Office of the City Attorney

CITY CONTACT:

City of Woodinville
17301 133rd Ave NE
Woodinville, WA 98072
Ph (425) 489-2700
Fax (425) 489-2705

CONTRACTOR CONTACT:

Ph: _____
Fax: _____

Exhibit A

SERVICES BY ATTORNEYS

Attorneys shall perform legal services as attorneys for the City for all legal matters as assigned or referred by the City to Attorneys. This Agreement shall commence effective January 1, 2012, and shall continue until terminated pursuant to Paragraph 5. Greg Rubstello of Attorneys shall be the responsible attorney. With the permission of the City Manager, other attorneys of the law firm may from time to time also perform legal services under this Agreement. Portions of this contract may be subcontracted with the express written consent of the City Manager. The City Council will be notified of any such requests.

- I. General City Attorney services to be performed include, but are not limited to, the following:
 - A. Attendance at all regular and special meetings of the City Council, as requested by the City Manager or the Council's presiding officer;
 - B. Consultation with staff or officials of the City, as requested by the City Manager; and routine preparation and legal research required in connection with these duties, and in preparation of ordinances and resolutions;
 - C. Provide for a regular staff day as requested and meet with city staff as needed to handle all non-emergency issues, assignments and meetings.
 - D. Routine preparation and legal research required in connection with any of the above subparagraphs, and in preparation of routine ordinances and resolutions.
- II. Special services defined to include:
 - A. All litigation wherein the City, one of its boards, or one of its officials is a party. In this connection tort and/or negligence cases will normally be handled by counsel retained by Washington Cities Insurance Authority unless active participation by this office is specifically requested, either by WCIA or by the City. Unless such active participation is so requested, this office will limit its participation in such cases to one of consultation and coordination between the City and the WCIA retained attorneys.
 - B. It is understood that, in some instances, due to conflicts of interest or other reasons of an ethical nature, the attorney may request and recommend the retention of special counsel to represent the City. In such instance the cost of such counsel shall be borne by the City at the attorney's hourly rate for special services as provided herein.
 - C. Drafting and review of all contracts or agreements to which the City is a party, including negotiations. Acquisition of easements, rights-of-way, or other property and real property interests, including condemnation proceedings.

- D. Legal services to be rendered in connection with local improvement districts, bond issues and other matters where a special counsel has been or normally is retained. Such legal services, when requested to be performed by this office, will not substitute for but may supplement the services rendered by bond counsel.
- E. Drafting of special ordinances and resolutions. An ordinance or resolution is determined to be special because of the existence of any one of the following factors:
 - 1. Unusual length or complexity of ordinance or resolution;
 - 2. Ordinance or resolution relating to a complex or perplexing legal problem or area where the state of the law is in flux or rapid development; or,
 - 3. Ordinance or resolution which is the product or culmination of a situation or procedure requiring the expenditure of a substantial amount of time or effort in excess of that normally required for the preparation or drafting of ordinances or resolutions.
- F. Any other services requested to be performed and not falling within the definition of general services.

III. Hourly Rates for Services.

- A. "General Services": Effective January 1, 2011, all of the general services performed under this Agreement shall be compensated at the rate of \$178.00 per hour for the first 275 hours of general services work in each calendar year. After 275 hours, the hourly rates for special projects will apply.
- B. "Special Project" Rates: Effective January 1, 2011, all litigation in administrative or judicial proceedings, arbitrations or mediations and other work that is of a special complexity or amount of work, as agreed by the parties, shall be billed at the following hourly rates: Members: \$235; Associates: \$181; Paralegals: \$106; and Law Clerks/ Interns: \$112.27.
- C. Hourly rate adjustments may be requested annually by the Attorneys, subject to approval of the City Council.

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From: Pat Mason [pmason@mrsc.org]
Sent: Thursday, December 01, 2011 9:55 AM
To: Richard Leahy
Subject: Question

Richard -

You raised a question in response to a situation that has occurred in Woodinville after the last election. Apparently the cousin of the city attorney was elected to serve on the city council. The question is whether this situation creates a conflict of interest that affects the ability of the city attorney to provide legal advice to the city and serve as official legal counsel.

In my opinion, the election of the cousin of the city attorney to the city council does not generally affect the ability of the city attorney to serve as legal advisor to the city or to the city council specifically. It is potentially possible that a specific situation could arise involving the city councilmember who is a relative of the city attorney that would make it preferable that the city attorney excuse himself from advising the city on a particular situation but it is not certain that this type of situation will ever occur and it can be easily dealt with if it does.

The primary regulations that relate to conflicts of interests for city officers are contained in Ch. 42.23 RCW, "Code of Ethics for Municipal Officers – Contract Interests." These statutes primarily deal with possible contract interests between a city officer and his employing city and outline when these contracts may cause a legal conflict of interest. However, in the situation you describe, there does not appear to be any contract interest that would create a legal difficulty with these statutory provisions. There is a contract between the city and law firm of the city attorney and councilmembers do vote to approve that contract. However, the councilmember in question does not have any legal or financial interest in the earnings of his cousin and so this does not raise an issue in terms of the application of Ch. 42.23 RCW. It would appear to me that this councilmember could legally participate and vote on this contract. Of course, the councilmember could voluntarily decide not to participate and vote on this contract from the standpoint of public relations or perception if that becomes an issues, but that decision would not be based on a legal requirement in state law.

The other possible source of a conflict would be a provision in the Rules of Professional Conduct (RPC) that apply to attorneys. However, there is no general rule in RPC's that would present a conflict for the city attorney in this situation. The client for the city attorney when representing a city is not the individual officers of the city but the entity as a whole - the city attorney does not represent any of the city officials in their individual capacity. The fact that his cousin serves on the city council should not ordinarily present a conflict of interest for the city attorney in his role as legal advisor for the city as a whole.

I indicated that conceivably a fact pattern could arise that might at least arguably present a potential conflict for the city attorney. For example, if charges of misconduct against the councilmember who is a relative were made and the city attorney were required to provide a legal analysis of the risks to the city of different courses of action, it arguably would be advisable for the city attorney to excuse himself on that issue and have another attorney handle that particular matter. It is likely that this kind of situation will never develop, and if it does, it can be fairly easily dealt with.

I should also mention that my opinion is based on the provisions in state law and the state ethics codes that apply to attorneys. I do recommend that you review any local ethics codes that may have been adopted by the city of Woodinville itself to be certain there are no local provisions that may apply to this situation.

12/09/2011

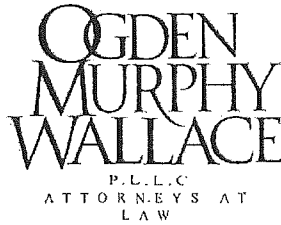
In summary, in my opinion the fact that the cousin of the city attorney was elected to the city council does not mean that the city attorney cannot continue to serve the city as legal counsel in the future and does not generally present a legal conflict of interest.

Pat Mason
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MEMORANDUM

DATE: November 29, 2011

TO: Woodinville Council Members and City Manager

FROM: Greg A. Rubstello

RE: Question of Conflict of Interest Due to Election of Les Rubstello

With the election of my cousin Les Rubstello to the City Council I want to address the question of whether or not any conflict of interest exists or has the potential to exist with my service as City Attorney. Les is the son of my father's brother. For the reasons explained below, I am confident that no actual conflict is created by my cousin's election to the Council and no greater potential for conflict exists with his service as a Council Member and my service as City Attorney, then exists between myself and any other Council Member.

As an attorney licensed to practice law in Washington State, I have an ethical duty not to represent a current client if a conflict of interest exists between current clients. Rules of Professional Conduct (RPC), Rule 1.7. I do not currently and have never had an attorney - client relationship with Les, his father (my uncle) nor any other member of my uncle's side of the family tree. Although the entity of the City of Woodinville is technically my client, all Council Members are representatives of the client, and I would apply the same ethical standard as I would to multiple clients. In other words, I could not ethically represent the City if there was a significant risk that my representation of the City would be materially limited by a personal interest in one Council Member over another. I trust that after Les is seated on the Council, you all will find that I provide Les with no greater or lesser level of consideration, availability, or deference than I do to all other members of the Council. I make a concerted effort to treat all members of the Council with the same level of respect and availability, in my service to the City.

In addition to the above rule, RPC, Rule 1.8 prohibits a lawyer from entering into a business transaction with a client. Since I have no business or financial relationships with Les, there is no such relationship to sever, and none will be created.

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Lastly, RPC, Rule 1.11 prohibits a government attorney from serving as a public officer in any matter covered by the conflict of interest rules of the government agency. The City's nepotism policy prohibits employment of a public official's or employee's spouse, registered domestic partner, child, parent, brother and sister, mother and father-in-law, son and daughter-in law, aunt and uncle, grandparents, grandchildren, or step-relatives or domestic partner-relatives in one of these relations. A public official's cousin is not included within the coverage of the nepotism policy. Although we share the same last name, albeit an uncommon one, we have no economic or household ties, and a distance in family relationship that eliminates any potential of family pressures for me to work with or treat Les any differently than any other member of the Council.

The City's Ethics Code also prohibits a public official from influencing the selection of or the conduct of business with a corporation, person or firm having business with the City if he or she personally or through household relatives has financial interest in or with the corporation, person or firm. I am not currently nor have I ever lived in the same household as Les. Moreover, neither Les nor any of his household relatives has any financial interest in Ogden Murphy Wallace, P.L.L.C, or myself or immediate family.

These are my thoughts on the question and I wanted to share them with you. I did see the question asked in a letter to the Woodinville Patch a few weeks ago, so I wanted to address it with you, were Les elected.

I and Ogden Murphy Wallace, P.L.L.C. look forward to continued service to the City in 2012 and in the years to come.

GAR: