Morgan Lewis

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Officers of the National Rifle Association

FROM: Alexander Reid

DATE: March 21, 2019

SUBJECT: Authority of management to engage outside legal counsel on behalf of the Association

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You have requested advice regarding the authority of the Executive Vice President and other salaried officers ("Management") to engage legal counsel on behalf of the National Rifle Association particularly as it relates to the Association's engagement of Brewer Attorneys & Counselors ("Brewer").

By way of summary, this memorandum concludes that Management has the authority to engage counsel to provide legal services as well as to institute, defend, conduct or settle litigation. At the same time, Management must comply with the Association's procurement policy which requires the signature of the President and either the First or Second Vice President ("Board Officers") as written acknowledgment of contracts in excess of $100,000.

With regard to the existing Brewer engagement, Management had the authority to enter the contract, but it failed to obtain the written acknowledgment of any Board Officers. This failure to comply with the purchasing policy could have resulted in an ultra vires or unauthorized act by Management; however, the board of directors subsequently ratified the engagement of Brewer by knowingly acquiescing to it. The payments the Association has made to the Brewer firm and the services the Brewer firm have provided to the Association to date are therefore authorized, absent a finding that the legal services were not in fact performed or legal services were performed that exceeded the scope of the engagement.

If Management believes that it is in the best interests of the Association to expand the scope of the Brewer engagement, Management should either obtain (1) the prior written approval of the Board Officers or (2) an authorizing resolution of the board of directors or Executive Committee. Management may also terminate the Brewer engagement.

In the event that the Board Officers believe it is in the best interests of the Association to terminate the existing engagement with the Brewer firm, they should obtain an authorizing resolution of the board of directors or the Executive Committee withdrawing Management's authority to engage the Brewer firm. The Board Officers may also refuse consent to a request by Management to expand the scope of the engagement, as they have indicated in their recent letter to Management.

As a practical matter, when Management and Board Officers have a substantial disagreement regarding the direction, scope, and course of legal representation, it is incumbent upon the board to decide what is in the best interests of the Association in a proceeding that is free of any conflicts of interest. We therefore recommend that the board or the Executive Committee consider the issue at its first opportunity.

PRIVILEGED AND CONFIDENTIAL

I. Background

The Association retained Brewer Attorneys & Counselors by engagement letter signed by Secretary / General Counsel John Frazer on March 7, 2018. The scope of the engagement letter is for legal services "in connection with litigation and strategic needs arising from the termination, or potential termination, of key corporate relationships by contract counterparties in response to political pressure." More specifically, the Brewer firm agreed to:

1. Research, develop, and prosecute potential litigation on behalf of the NRA against one or more counterparties who have so-terminated their relationships, as well as provide advice to the NRA regarding the preservation of other, material corporate relationships; and

2. Assist in advising and representing the NRA with respect to the New York Department of Financial Services' investigation of the NRA's affinity insurance programs, and with respect to related investigations of NRA activities that may occur in New York or elsewhere.

The contract is for time and materials, and authorizes hourly rates of up to $1,400 as may be adjusted periodically.

On June 28, 2018, the Association authorized fees and expenses of "[a]pprox. $1.25 million/month (based on hourly billing)" to the Brewer firm which "has agreed to notify the NRA promptly when monthly billing is expected to exceed $1.25 million." The business case analysis prepared by Secretary / General Counsel John Frazer noted that the Brewer firm "was retained on the advice of outside counsel Steve Hart, who has worked with Mr. Brewer on projects for several other clients." The business case analysis further notes that "[i]n addition to its experience in litigating very high-stakes cases, this New York-based firm has unique contacts that position it extremely well to represent the NRA in the state."

For contracts of $100,000 or more in a given 12-month period, the Association's procurement policy requires approval of the appropriate division director, Executive Vice President, and the Treasurer. In addition, the procurement policy provides that "[t]he signature of the President and one of the Vice Presidents is also required as written acknowledgment of the contract/commitment."

The contract and monthly fee estimate were approved by Executive Vice President Wayne LaPierre and Treasurer Wilson Phillips, with legal review by Secretary / General Counsel John Frazer. All three officers signed the contract review. The Association's Board Officers at the time the engagement letter was executed were President Pete Brownell, First Vice President Richard Childress, and Second Vice President Carolyn Meadows. In May, 2018, President Brownell resigned, and Oliver North was elected President. We understand that none of the Board Officers, past or present, have signed a written acknowledgment of the engagement with the Brewer firm.

We understand that the Association is current through January, 2019 on its payment of the retainer amount to the Brewer firm; however, it has not received a full accounting of all the time charges booked for legal services the Brewer firm has provided to the Association to date. Such an accounting may be useful for purposes determining whether the Brewer firm has adhered to the scope of work set forth in the engagement letter.

On February 26, 2019, President Oliver North wrote a letter on behalf of himself and the other Board Officers to Executive Vice President Wayne LaPierre indicating that the board officers insisting that "no invoices payable to Brewer Attorneys & Counselors be paid for services rendered after 28 February 2019" and requesting a "thoughtful conversation with you and your compliance advisor[s]" prior to continuing the engagement with the Brewer firm.

PRIVILEGED AND CONFIDENTIAL

On March 6, 2019, the Special Committee on Operations moved that "the committee recommend to the Executive Vice President that a retainer agreement between the NRA and Brewer, Attorneys and Counselors, be negotiated and executed pursuant to the NRA board's policies and procedures."

On March 8, 2019, the Audit Committee resolved that "all representation of the NRA by Brewer must be pursuant to a contract that complies with the internal controls and policies established by the NRA."

II. Law and Analysis

Under New York law, all powers of the Association are vested in its board of directors, and the board, in turn, delegates general managerial authority to the Association's Executive Vice President through the bylaws. See N-PCL §§ 701, 713; Bylaws Article V Section (c) (Executive Vice President "shall direct all the affairs of the Association in accordance with the programs and policies established by the Board of Directors.").

Committees of the board of directors, including the Executive Committee which is chaired by the President, have the authority of the full board. See N-PCL § 712; Bylaws Article VI.

As a practical matter, this means that any managerial authority the board of directors delegates to the Executive Vice President can be modified or terminated by duly enacted resolution of the full board of directors or the Executive Committee.

The Executive Vice President ordinarily has the power to engage legal counsel to the extent that it is in the best interests of the Association. This power is within the scope of the Executive Vice President's managerial authority which includes the power to bind the Association by contract and encompasses the authority to engage counsel to provide legal services as well as to institute, defend, conduct or settle litigation. Extraordinary acts and acts that are not clearly in the interest of the Association are beyond the general managerial authority and must be authorized by resolution of the board or the Executive Committee of the board.

The authority of the Association's officers to conduct litigation is strengthened where the board is informed about the litigation and knowingly acquiesces to it, as such acquiescence implies ratification of the decision. For example, implied board ratification can cure technical defects in the approval procedure. See, e.g., *Pixley v. Western Pac. R.R.*, 33 Cal. 183 (1867) (board ratified oral contract through acquiescence despite requirement in bylaws for all contracts to be in writing).

As a practical matter, this means that the Association cannot seek to void contracts duly entered into by the Executive Vice President or other officers with managerial authority when the contract has been performed in good faith and the Association has had the benefit of it. See *Wormser v. Metropolitan St. Ry. Co.,* 184 N.Y. 83, 76 N.E. 1036 (NY 1906).

A contract may be voided as an unauthorized or ultra vires act if it was entered into or performed in bad faith. For example, contracts that violate the Association's procurement policy, adopted January 7, 2006, may be ultra vires acts. The procurement policy provides that the Association's directors and officers shall adhere to the Association's Statement of Corporate Ethics and shall, among other requirements, make every effort to negotiate equitable and mutually agreeable contracts, give equal consideration to competitive suppliers/vendors, and "[w]ork on behalf of the interests of the Association solely and avoid situations that may result in personal benefit or gain." The policy further stipulates that anyone who suspects violations of the code must report his or her concerns to their supervisor, the Office of the Treasurer, the Audit Committee Chairman or the General Counsel. "Matters of concern include pressure exerted by manufacturers, customers, Association staff, or others to utilize funds in an unauthorized manner or to take or enable other actions inconsistent with authorized Association procedures and policies." With respect to approval authority, the policy provides that

PRIVILEGED AND CONFIDENTIAL

All contracts requiring payments equal to or greater than $100,000 in any twelve month period, must have written approval of:
a. the appropriate Division Director and
b. the Executive Vice President and
c. the Treasurer.
The signature of the President and one of the Vice Presidents is also required as written acknowledgment of the contract/commitment.

In addition, special rules regarding professional conduct apply to legal engagements. Attorneys practicing in New York are required, among other professional obligations, to conduct themselves ethically in accordance with the New York Rules of Professional Conduct; treat clients with courtesy and consideration; handle legal matters competently and diligently, in accordance with the highest standards of the profession; render independent professional judgment and undivided loyalty uncompromised by conflicts of interest; and charge reasonable fees and expenses and to explain how the fees and expenses will be computed and the manner and frequency of billing. See New York Courts, Statement of Client's Rights, 22 NYCRR § 1210.1. Clients are entitled to request and receive a written itemized bill at reasonable intervals and to refuse to enter into any arrangement for fees and expenses that the client finds unsatisfactory.

III. Opinion

In our opinion, the retention of the Brewer firm was within the apparent authority of Management because the Executive Vice President and Secretary / General Counsel regularly retain counsel and direct litigation on behalf of the Association. It is not unusual or extraordinary to do so in this case. In addition, the litigation with Lockton Affinity and the Department of Financial Services and potential litigation with the New York Attorney General involves material risk to the Association's assets, key business relationships, and ability to do business in the state of New York and elsewhere. Moreover, the Executive Committee of the board and other key committees have been kept informed about the litigation and the retention of the Brewer firm, including through presentations by Bill Brewer and his associates, and have until recently been generally supportive of the litigation.

The failure to obtain signed written acknowledgment of the engagement by one of the Board Officers is a technical violation of the Association's procurement policy that could have resulted in an ultra vires act by Management were it not for the fact that the board of directors has been regularly informed about the engagement with Brewer and subsequently ratified the engagement through tacit approval.

We are unaware of any evidence of bad faith or unfair dealing on the part of the officers who authorized the engagement with the Brewer firm or of any unethical behavior or bad faith on the part of the Brewer firm in the performance of the legal services to the Association. We have not, however, engaged in any independent analysis and are relying solely on the Association's representations regarding the conduct of the parties involved. The Brewer firm's billing rates and monthly retainer, while high, are not unheard of in the context of high-stakes corporate litigation.

It is, therefore, unlikely in our judgment that the Association would prevail in an effort to refuse payment to the Brewer firm for past services rendered on the theory that the engagement was not authorized. The Association is entitled to review the services, including any unpaid time charges booked, incurred on its behalf by the Brewer firm to determine whether they are accurate and within the scope of the engagement. It may well be in the Association's interest to obtain a full accounting of the Brewer firm's time charges to date.

The board has the power by resolution to terminate the engagement, revise its scope, and/or redirect the litigation efforts. Such a resolution would take precedence over any implied managerial authority of the officers to conduct litigation, whether with the Brewer firm or another provider of legal services, and Management would be obliged to follow any such resolution.

PRIVILEGED AND CONFIDENTIAL

In light of the letter from the Board Officers to Management withdrawing consent to the engagement with the Brewer firm and the recommendation of the Special Committee on Operations and the request of the Audit Committee and the Board Officers that Management obtain consent of the Board Officers prior to expanding the scope of the engagement with the Brewer firm, Management may not expand the scope of the engagement without violating the procurement policy.

In the event that Management believes that it is in the best interests of the Association to expand the scope of the Brewer engagement, Management should obtain either (1) the prior written approval of the Board Officers or (2) an authorizing resolution of the board of directors acting as a whole or through its Executive Committee.

ALR

c: Matt Elkin
Martha Stolley