



Office of the City Attorney

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To: Ordinance and License Committee
From: Brian Running
Re: Changing City Attorney from Elected to Appointed

This Memo and accompanying materials are in response to a referral by Councilor Beth Moltzan to change the position of City Attorney from elected to appointed.

Background

City Attorney is one of the municipal officials that are required by Wisconsin Statutes.¹ Every city must have one, although they need not be city employees. Generally, smaller municipalities use outside law firms as their City Attorneys, and larger cities' City Attorneys are in-house to provide full-time services.

The method of choosing city officials is also controlled by statute. All city officials except Mayor, Common Council, Fire Chief, and Chief of Police are chosen in one of the following ways²:

1. Appointment by the mayor.
2. Appointment by the mayor subject to confirmation by the council.
3. Appointment by the council.
4. Election by the voters.
5. Selection under any of the above methods, the selection to be made from an eligible list established under s. 66.0509. *[This is for cities with a civil-service system]*
6. Such other officers shall continue to be selected in the manner prevailing on April 15, 1939, provided one of the above plans was in force on that date. Such method shall be continued until changed in the manner provided by s. 66.0101.

It's not clear when the City Attorney first became an elected position, but we have to assume that it was when the City was first chartered in 1896. Since that was before April 15, 1939, changing the method of choosing has to be done in the manner provided by Wis. Stat. §66.0101, in other words, by a charter ordinance.

¹ Wis. Stat. §62.09(1)(a).

² Wis. Stat. §62.09(3)(b).

A charter ordinance has some procedural steps that an ordinary ordinance does not, because it either amends a city's original charter or it elects to opt out of a statutory scheme. This is how cities exercise their "home rule" powers. A charter ordinance is more like a constitutional amendment than an ordinary law.

A charter ordinance has to be passed by a 2/3 supermajority, and it doesn't take effect until 60 days after it's been passed and published. During that 60-day period, a petition containing the signatures of at least 7 percent of the votes cast for governor at the last general election can be filed, and if so, then the charter ordinance must go to a referendum. The charter ordinance then only becomes effective if a majority of the votes cast in the referendum are in favor of it.³ According to the Clerk's office, there were 30,775 votes cast for governor in the 2022 general election, so 2,155 signatures would be required on a petition.

Appointed versus Elected City Attorney

The vast majority of cities in Wisconsin have an appointed City Attorney. In fact, there are only 7 elected City Attorneys in Wisconsin: Milwaukee, Appleton, Waukesha, Stevens Point, Wisconsin Rapids, Kaukauna, and Lake Geneva. When I was first elected in 2014, I was told that there were 19 elected City Attorneys in Wisconsin, so if that's true, the trend to an appointed position is rapid.

There are advantages and disadvantages to a City Attorney being elected or appointed. The main advantage of an elected City Attorney is in having a great deal of independence. It's important to remember that the City Attorney's client is the corporate entity of the city, and not the Mayor, Common Council, or any other officials. The City Attorney is bound by the Supreme Court's Rules of Professional Conduct, which require that a professional duty is owed to the *client*. He or she has to act in the interest of the City, whose interests are generally established by the Common Council as its governing body, which may require doing things that are not popular with certain members of the Council, or the Mayor, etc.

In city government, the City Attorney acts as a third branch of government with the Council being the legislative and the Mayor and city staff being the executive, and can serve as a "check-and-balance" to the other two. To be an effective check-and-balance, the City Attorney has to be able to say "no" when it needs to be said, free from political influence.

The City Attorney also prosecutes municipal violations in Municipal Court, and the City Attorney has to be able to prosecute freely without any political influence being felt.

An elected City Attorney can't be fired except by a recall election, so there's no fear of reprisal for saying "no" or continuing a prosecution in spite of political influence. That independence is critical for the City Attorney to do his or her job well. On the other hand, an incompetent attorney can't be replaced until the next election.

Some of the advantages of an appointed City Attorney are:

³ Wis. Stat. §66.0101(2)-(5)

- A greater pool of candidates, since they are not required to be City residents
- Selection based on merit and qualifications, not by popularity in an election
- Avoiding the selection of an unqualified candidate
- The ability to remove an unqualified candidate without waiting for a term to expire

The consequences of voters electing an unqualified candidate can be very serious, as we recently witnessed in Milwaukee. The voters there replaced a long-time, experienced, and very good City Attorney with an unqualified person, and it threw the office into chaos, with many experienced assistants and staff leaving. That person was not reelected, and the new City Attorney is still working to undo the damage that was done. There's no guaranty that an appointed City Attorney will be the ideal person for the job, but at least the choice is not left to a possibly uninterested or uninformed electorate.

So, it is recommended that in making City Attorney an appointed position, that there be a balance struck between the advantages of the elected and appointed positions. That means ensuring that the appointed City Attorney retains appropriate independence and freedom from political influence.

Draft Ordinance

We recommend that a change to an appointed position be done with the creation of an ordinance specifically describing the position, and an amendment to Mun. Code §2.01 to show the position as appointed and describing the appointment method. Drafts are attached to this Memo, with the new ordinance tentatively numbered 2.016 so it slots in among the other ordinances regarding city officials. Alternatively, it could be numbered 2.15 to tack on to the end of the chapter. In addition to adding City Attorney as an appointed position, §2.01 is amended to add the Municipal Judge as an elected position (somehow that was omitted in previous versions), and to describe the appointing authority for each position.

The drafts have annotations in red, explaining the new provisions. If you have any questions, please let me know. As always, do not discuss this among yourselves outside of a formal meeting.

2.016 [2.15] City Attorney.

- (1) Selection and Appointment.** The City Attorney shall be appointed by the Common Council, to serve an indefinite term. At any time there is a vacancy in the office of City Attorney, a nominee for the office shall be selected by a selection committee, composed of the chairpersons of the standing committees of the Council and the Mayor, and over which the Mayor shall preside. The selection committee shall negotiate the basic terms of the nominee's employment, and the final terms shall contain such additional provisions as are determined by the Human Resources Department. The nominee and the proposed terms of employment shall be presented to the Council, which shall then confirm or reject the nominee and the proposed terms of the nominee's employment. Confirmation shall be by simple majority vote. If the Council does not confirm either the nominee or the proposed terms of employment, then the selection committee shall either begin searching for another nominee or attempt to re-negotiate the terms of employment to which the Council objects, and shall continue until a nominee and terms have been confirmed by the Council. The selection and appointment of the City Attorney shall be based solely on merit and qualifications for the position, including education, training, general fitness for office, and experience in municipal law.

This is modeled after the procedure for selecting a City Administrator in Mun. Code §2.015(2).

Note that current HR Policy B2 does not include City Attorney as a position to which the management recruitment process applies. The current director positions listed in B2 are non-statutory positions, and excludes statutory positions such as Clerk or Treasurer. City Attorney is a statutory position. If the Council wants the B2 policy to apply to City Attorney, then that policy will have to be amended. That can be done separately from the passage of this ordinance.

(2) Duties and Responsibilities.

- (a) General.** The City Attorney shall perform those duties listed in Wis. Stat. §62.09(12) and such other duties as the Common Council may prescribe from time to time. The City Attorney shall be responsible for the conduct of all City legal matters, and shall serve as legal advisor to the Council, the Mayor, City officials, and all City departments. It shall be the duty of the City Attorney to call to the attention of the Mayor and Common Council all matters of law affecting the City.
- (b) Municipal Court Prosecutions.** The City Attorney shall be in charge of the prosecution of all cases arising out of the violation of the provisions of the Municipal Code. The City Attorney shall have authority to enter into stipulations and settlements of such matters as he or she deems in the City's best interests.

This clarifies that the City Attorney has authority to settle municipal court cases without having to get separate approval from the Council for each and every case. That is the current practice, and this codifies that practice.

- (c) **Representation in Courts and Other Tribunals.** The City Attorney shall represent the City in matters in which the municipality is interested before any court or tribunal.

This clarifies that the City Attorney has authority to represent the City in all tribunals for example, Circuit Court, Court of Appeals, Supreme Court, Federal District Court, Bankruptcy Court, state agency administrative hearings, etc.), not just Municipal Court. This is implicit in §62.09, but this provision codifies it.

- (d) **Authority to Bind City in Certain Matters.** The City Attorney is authorized to execute on behalf of the City waivers and releases in settlement of claims and lawsuits, stipulations and settlement agreements, and other such procedural instruments, provided they do not create a financial obligation on the City.

Once again, this is to clarify that the City Attorney has authority to execute settlement documents without getting specific approval from the Council for each case, unless the settlement involves the City paying an amount of money. This also codifies current practice.

- (e) **Outside Counsel.** The City Attorney may engage outside counsel when he or she deems it appropriate, and may execute engagement letters on the City's behalf. No outside counsel may be engaged by the City, any City official, or any City department without the City Attorney's approval.

This provision serves a couple of purposes. First, it codifies the authority of the City Attorney to hire outside counsel when it is deemed appropriate, which is also current practice. Second, it requires that all outside counsel hires can only be done with the City Attorney's approval. That is required by §62.09(12), which says that the City Attorney "shall conduct all the law business in which the city is interested." No other official is authorized by law to conduct any law business, and this clarifies that.

- (f) **Revisor of Ordinances.** The City Attorney shall be the official revisor of the Municipal Code of Ordinances. No ordinance shall be enacted by the Common Council unless such ordinance is first referred to the City Attorney for a study respecting form and legality. The City Attorney is authorized to make editorial changes, correct scrivener's errors, correct grammar mistakes, renumber sections and subdivisions, and otherwise revise the Municipal Code when the changes are not substantive in nature and do not alter the Common Council's intent.

This is derived from Madison's City Attorney ordinance. §62.09(12) states that all ordinances shall be drafted by the City Attorney, so the responsibility for maintaining the Municipal Code should be with that drafter. This also allows the City Attorney to make corrections and edits in the Code as they are discovered, without having to go to the

Council for approval of every edit. It is common to find misspelled words and other such non-substantive errors in the Code.

- (g) **City Is the Sole Client.** The City Attorney's sole client shall be the corporate entity of the City of Waukesha, and the City Attorney's professional responsibilities shall be to the City. The City Attorney shall have no other clients and no other employment as a lawyer.

This is self-explanatory. The City Attorney, as an employee of the City, should devote 100% of his or her professional responsibility to the City, and no other entity.

- (3) **Removal from Office.** In order to preserve the independence of the office and avoid fear of reprisal for rendering opinions, the City Attorney shall be removed from office only for cause, and by a three-quarters vote of the entire membership of the Common Council. For purposes of this section, cause for removal shall mean inefficiency, neglect of duty, official misconduct, or malfeasance in office, including:

- (a) Unjustifiable refusal or failure to perform the duties shown in subsection (2).
- (b) Lack of physical or mental capacity to perform the duties shown in subsection (2).
- (c) Violation of any provisions of Municipal Code §2.10 or Wis. Stat. §19.59.
- (d) Discipline imposed by the Office of Lawyer Regulation.
- (e) Failure to maintain a license to practice law in Wisconsin.

This where the balance is struck between the advantages of an elected versus appointed City Attorney. It attempts to maintain independence while still allowing an incompetent individual to be removed in the best interest of the City. This is based on Wis. Stat. §17.12(3m), which controls removal and suspension of city officials. That section reads,

(3m) Common council authority. Notwithstanding subs. (1) and (2) and subject to sub. (4), a city may by ordinance provide that any appointed city officer may be removed only for inefficiency, neglect of duty, official misconduct, or malfeasance in office.

The draft ordinance lays out five specific examples of things that would constitute "inefficiency, neglect of duty, official misconduct, or malfeasance in office." They are all objective, performance-related matters, and not related to interpersonal conflicts, political differences, etc.

- (4) **Removal Procedure.** Removals from office pursuant to subsection (3) shall be done only upon the written complaint of a City official, and only after a due-process hearing before the Common Council at which the person sought to be removed may produce evidence and

be represented by counsel. Appeal of the Common Council's decision shall be by writ of certiorari to the Circuit Court.

This simply requires due process in the removal of the City Attorney.

- (5) **Assistants.** The City Attorney may appoint assistants, in accordance with Wis. Stat. §62.09(12)(f), who shall have the power to perform the duties of the office and for whose acts the City Attorney shall be responsible to the City. Assistants must be licensed to practice law in the State of Wisconsin. Assistants shall receive such compensation as the Common Council shall provide.

This is the current practice, and the draft will codify it as required by §62.09(12)(f).

2.01 City Officials.

(1) Elected Officials.

Official	How Elected	Term
Common Council Member	2nd, 3rd, 6th, 7th, 10th and 13th Districts, commencing in 1990 every 3rd year after; 1st, 4th, 5th, 8th, 9th, 11th, 12th, 14th, 15th Districts, commencing in 1989 and every 3rd year after	3 years
Mayor	1990 and every 4 years thereafter	4 years
Municipal Judge	1990 and every 4 years thereafter	4 years

(2) Appointed Officials.

Official	How Appointed	Term
Assessor	Mayor, subj. to conf. by Council	Indefinite
Cemetery Director	City Administrator, subj. to conf. by Council	Indefinite
Chief of Police	Board of Police and Fire Commissioners	Indefinite
City Administrator	Ad Hoc Committee, subj. to conf. by Council	Indefinite
City Attorney	Ad Hoc Committee, subj. to conf. by Council	Indefinite
Clerk	Mayor, subj. to conf. by Council	Indefinite
Director of Community Development	City Administrator, subj. to conf. by Council	Indefinite
Emergency Government Director	Shall be the City Administrator	Indefinite
Finance Director	City Administrator, subj. to conf. by Council	Indefinite
Fire Chief	Board of Police and Fire Commissioners	Indefinite
Housing Authority Executive Director	Housing Authority Commission	Indefinite
Director of Human Resources	City Administrator, subj. to conf. by Council	Indefinite

Information Technology Director	City Administrator, subj. to conf. by Council	Indefinite
Library Executive Director	Library Board	Indefinite
Director of Parks, Recreation and Forestry	City Administrator, subj. to conf. by Council	Indefinite
Director of Public Works	City Administrator, subj. to conf. by Council	Indefinite
Transit Manager	Dir. of Public Works, subj. to conf. by Council	Indefinite
Treasurer	Mayor, subj. to conf. by Council	Indefinite
Water Utility Manager	Water Utility Commission	Indefinite
Weed Commissioner	Mayor	One year

(3) Annual Evaluations. Each of the appointed officials listed in subsection (2), above, shall have their performance evaluated annually by the City Administrator and their evaluations may be shared with the City Council in closed session at its option.

History

Subs. (1) amended by ordinances 38-92, 61-01, and 6-10

Subs. (1) amended by Charter Ordinances 47-87, 48-87, and 53-87

Subs. (2) amended by ordinances 4-06, 6-10, and 23-14

Subs. (2) Assessor amended by Charter Ordinance 26-09

Subs. (3) created by ordinance 23-14

Amended by Ord. 2024-14 Separates offices of Clerk and Treasurer on 6/4/2024