

**REPORT OF INVESTIGATION ON PAYMENTS FOR LEGAL SERVICES  
BY  
MT. DIABLO UNIFIED SCHOOL DISTRICT  
TO  
MILLER, BROWN & DANNIS**

This Firm was retained by the Governing Board of the Mt. Diablo Unified School District to conduct a review and provide recommendations in connection with invoices for legal services submitted to the Mt. Diablo Unified School District by the law firm of Miller, Brown & Dannis ("MBD"). All parties contacted cooperated fully in this review.

MBD has represented the Mt. Diablo Unified School District for a period in excess of 25 years.

When the current Superintendent, Dr. Gary McHenry began his employment as Superintendent of the Mt. Diablo Unified School District, the firm of MBD had a written contract with the District to provide legal services for the 1999-2000 school year, which had been executed by prior Superintendent Paul Allen on June 22, 1999, and duly approved by the Governing Board of the District. Thereafter, MBD would annually submit a contract for legal services to the District, but the agreements were placed in a file rather than being submitted to the Governing Board for approval. When these agreements were received by Superintendent McHenry, he would at times put the word "hold" on the agreement form. The Superintendent indicated that he made this notation as an instruction to his assistant to check with him as to what should be done with the document. When she did check with him thereafter, he would instruct his assistant to put the document into a particular file.

The Superintendent explained that he did not provide these contracts to the Board based on his prior experience in the Stockton Unified School District. It had been his understanding while employed at Stockton that its counsel, Cecilia Ruiz, had an automatic rollover legal services agreement with the Stockton Unified School District which unless cancelled by either party would renew without further action. It was his belief that this situation also existed with respect to the Mt. Diablo Unified School District and MBD.

Superintendent McHenry executed one of the agreements submitted by MBD on August 9, 2001, for the 2001-02 school year, but the agreement was never formally approved by the Governing Board. (MBD contends that a fee agreement was also signed by the Superintendent and return to MBD for the 2002-03 school year, but this could not be confirmed from MDUSD sources.) The Governing Board has approved a Legal Services Agreement with MBD for the 2007-08 school year, with such agreement being approved at the Governing Board meeting of October 9, 2007.

At all times from the period of the 2000-01 school year through 2007-08, the Governing Board was aware that the law firm of MBD was providing legal services to the District. The firm of MBD was the District's primary legal counsel, and assisted the District in connection with its negotiations with employee bargaining units, on matters relating to special education issues, and on a myriad of general education issues which arose on a regular basis. Members of the Governing Board did not receive written reports showing the hourly rate being billed by attorneys at MBD, nor the amount paid to MBD on a monthly or annual basis. Members of the Governing Board did receive vendor

warrant reports for approval as part of the Board's regular agenda. Such warrant reports do not identify individual vendors. Mr. Dick Nicoll indicated that these reports provide only the total number of warrants issued and a total dollar volume of warrants for that particular month and year to date. The report does not identify individual warrants by amount, and only if all warrants were requested would information pertaining to the amount paid for legal services be disclosed. Any member of the Governing Board had the right to obtain any and all information which would have been shown by such warrants upon making a request for such information. It is however unlikely that the warrant report would contain sufficient information so as to generate an inquiry into any specific vendor or warrant, or to put a Board member on notice that further inquiry was appropriate.

The Governing Board receives budget information at the time of the adoption of the budget, and preliminary budget information generally at least two weeks prior to budget adoption. The budget currently contains information by both object code and program code. The budget provided to the Board does not contain a specific program code or object code identifying the amount of legal services. Object code 5800 contains within it the amount paid for legal services, as well as a number of other professional services. Mr. Nicoll advised that if a request for detail were made by any Board member or member of the public with respect to object code 5800, further information would be available that specifically identifies the amount of legal services under object code 5850. It is also possible Mr. Nicoll noted to obtain legal services amounts in the budget by reviewing the detail provided for specific program codes.

Mr. Greg Rolen was appointed as the General Counsel for MDUSD in March of 2005. In connection with Mr. Rolen's appointment, the Board engaged in discussions with the administrative staff concerning the expected legal services savings that would be generated in connection with Mr. Rolen's retention. This discussion did not lead to a request for specific legal services contract information.

In September of 2005 the District began to implement a legal auditing system in an effort to control escalating legal fees. The District contracted with LexTech to assist the District in the processing of monthly invoices. The billing standards program was implemented by District administration, and was not an adopted Board policy. The firm of MBD indicated its objection to certain elements of the billing standards policy. Individual negotiations were entered into with representatives of MBD by Greg Rolen, Esq. on behalf of the District, resulting in certain modifications to prior billing practices of MBD, including reducing certain billing minimums which had theretofore been used by MBD. These modifications are reflected in correspondence sent to the District by MBD on June 30, 2006, June 19, 2007, and October 3, 2007.

While the specific billing changes as reflected in correspondence from MBD were agreed to by that firm, other differences remained in the billing standards program which the District sought to implement, and in the billing process utilized by MBD.

On June 28, 2007, the MBD firm wrote to Superintendent McHenry contending that substantial outstanding amounts were owed to MBD for services rendered which the District had failed to pay.

The Superintendent referred the matter to Greg Rolen, Esq. On July 17, 2007, Mr. Rolen received correspondence from MBD along with attached materials setting forth the basis for the claim being made by MBD. A number of oral agreements, some of which are reflected in the letters sent by MBD with their proposed legal services agreements, were reached after the billing standards program was implemented by the District. It is difficult to determine, however, which items MBD agreed on with the District, and which items remained in dispute. It is certain only that MBD agreed to reduce its minimum hourly rate for telephone calls to one-tenth of an hour, not to charge for travel time unless it was to be reimbursed as a reimbursable cost, and to identify the hourly rates of specific attorneys who would be working on District legal matters.

Mr. Rolen, a representative of LexTech and a representative of MBD thereafter met in an attempt to resolve the dispute. MBD contended that it was owed \$132,497.46 for services rendered to the District in 2005, 2006 and 2007, for which it had not been paid. Mr. Rolen on behalf of the District and representatives of MBD were unable to reach agreement on any amount to be paid to MBD for these disputed receivables. Thereafter, Superintendent McHenry indicated to Mr. Rolen that he would meet with a representative of MBD in an attempt to resolve the matter. Mr. Rolen provided a memorandum to the Superintendent dated September 14, 2007, expressing his views as to the basis for any resolution, and noting that MBD did not have at that time a valid written contract with the District and had not had one for the prior seven years. Mr. Rolen's memorandum expressed reservations as to whether any amount could be paid to MBD

within existing legal constraints and Board policy, but also offered paths to a potential resolution by obtaining Board ratification of prior contracts submitted by MBD.

The Superintendent decided to compromise the outstanding bill with MBD for the sum of \$109,655.53, representing unpaid invoices for 2006 and 2007. The Superintendent viewed it as being within his authority to settle this matter at that amount by way of analogy to other District policies and practices wherein if there are vendor disputes, a dispute resolution mechanism exists which contemplates an attempt by the responsible cabinet official to resolve the dispute, and if the dispute cannot be resolved, the issue then goes to the Superintendent, and ultimately to the Board for resolution.

Two Board members have indicated that they were unaware of the dispute between the District and MBD with respect to alleged unpaid invoices until after the Superintendent had acted to resolve the dispute with MBD.

The Board has not ratified any of the prior contracts submitted by MBD.

### **SUMMARY OF FEES BILLED**

MBD provided, in electronic form as requested, information pertaining to the billing statements submitted to the District for the period from July 1, 2000, through June 30, 2007. An analysis was done of that information, and a summary of that analysis accompanies this report.

The amount of billable hours and the amount billed for legal services varies slightly, but not materially, from the summary we were initially provided along with the Superintendent's letter of February 20, 2008. For example, in the memorandum we received from the District and which was also provided to the Governing Board in a

document entitled "Executive Summary in Response to Questions on Legal Fees" dated January 2008, it is stated that \$848,268 was paid by the District to MBD during the 2000-01 school year. The records obtained from MBD show a figure of \$854,455. The difference may be accounted for by when the receivable was created on MBD's records, and when the bill was actually paid by the District. In the school year 2002-03, the District's summary shows a total of \$967,171, paid to MBD, while the MBD summary of bills generated reflects the number of \$959,469. While such differences exist, we do not believe they are material differences.

An analysis was performed of the hourly rates billed by attorneys with MBD from and after the 2000-01 school year, and compared with the hourly rates last approved in a written agreement for the 1999-2000 school year. The results of that analysis are shown in the document entitled "Summary." The total difference over the period from July 1, 2000, through June 30, 2007, is \$56,011.

### **CONCLUSIONS AND REMAINING QUESTIONS**

A. Claims Against MBD Resulting from the Lack of an Approved Legal Services Contract.

While MBD did not have an agreement for legal services that had been approved by the Governing Board after the 1999-2000 school year until October 2007, the Governing Board was aware that MBD was providing legal services for the District, as were the executive officers of the District. There is case law authority for the proposition that a party who provides services to a public entity, including a school district, is not entitled to receive compensation for those services unless a written agreement to provide

compensation has been duly entered into and approved. All of these cases however arise in the context of an attempt to seek recovery from the public entity, which is not the context in which this matter arises. Instead, the District throughout this period of time regularly paid to MBD the fees it billed for legal services, until it began to question those fees in connection with the implementation of the LexTech system.

There is also case authority for the application of the doctrine of equitable estoppel to public entities. When evidence has shown that a public entity benefited from the receipt of goods or services, was aware of the receipt of such goods or services, and no evidence of any corruption, favoritism, unreasonable pricing or lack of quality performance, public entities have been held to be estopped from asserting that a contract was not properly approved in accordance with law.

During the course of this investigation MBD retained legal counsel, ReedSmith. Accompanying this report is a confidential settlement offer which has been provided by ReedSmith on behalf of MBD. ReedSmith was provided with a copy of the billing summary and analysis prior to submitting its proposal, and as you will note, makes no objection to its conclusions.

In weighing the offer provided by MBD, the Board should consider the cost, expense and inherent uncertainty of any legal proceeding. It can reasonably be anticipated that any attempt to obtain a refund of legal fees paid to MBD will be strongly opposed, likely result in the expenditure of at least one year's time in the court system, if there is no appeal, and legal fees and costs, exclusive of staff time, in the low six figures. It is unlikely that the prevailing party in such litigation would be able to recover the

attorneys fees incurred in pursuing the matter. The Governing Board, therefore, should be focused on what is the best net result for the District. If any ultimate verdict is appealed, it can be anticipated that an additional year will be consumed in the appeal, and perhaps an additional \$100,000, plus or minus, in legal fees.

B. Resolution of MBD Claim in October 2007.

As noted in the introduction, MBD had a claim for unpaid fees that arose in June 2007 in the total amount of \$132,497.46. The Superintendent ultimately compromised this claim in the amount of \$109,655.53.

There is a significant legal concern as to whether the Superintendent had the authority to enter into this compromise with MBD. The Superintendent has indicated that he believed he had such authority pursuant to existing District policy, custom and practice, allowing the resolution of disputes with vendors of the District in connection with a longstanding District dispute resolution mechanism. The perceived difficulty with this position is that the dispute resolution mechanism assumes an existing contract, and in this instance a Board approved contract did not exist.

The Superintendent, however, was of the belief both that the contract had automatically renewed based on his prior experience, and that it was within his discretion pursuant to District policy therefore to resolve the matter. While we believe the Superintendent was incorrect in this belief, there is no evidence to suggest that the Superintendent benefited personally from this resolution of the fee dispute nor is there evidence that the Superintendent was responsible for any malfeasance. The

Superintendent is not, therefore, personally liable for any amount paid by the District in resolution of this claim by MBD.

This matter should have come to the Board for resolution, and the issue here is a different one than the hourly rates charged by MBD and the hourly rates last approved by the Governing Board in 1999-2000.

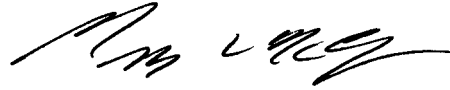
The particular dispute which gave rise to the October 2007 legal fee billing issue related to whether specific services should have been billed at all, a matter involving the LexTech standards in part. We have not been requested to perform the same analysis which has already been performed by LexTech in that regard, nor does it likely make sense for us to do so. As noted above, MBD had not agreed to all elements of the LexTech program, nor was that program an established Board policy during the period of time when this fee dispute arose.

The dispute here relates to the legitimacy of the items which were billed and whether they were properly billed by MBD to the District. This is the matter which the Superintendent originally negotiated a compromise on, but that compromise in our view required Board approval. If the Board is to re-open the issue, MBD could conceivably be found ultimately to be entitled to a larger amount than the Superintendent agreed to pay, or conversely a much lesser amount could also be found to be correctly owed to MBD, or perhaps nothing at all.

**CONCLUSION**

The Board should consider the settlement proposal provided by ReedSmith on behalf of MBD and any other actions the Board wishes to take on this matter.

Respectfully submitted:



Dated: May 12, 2008

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Gregory L. McCoy