

SPECIAL COUNSEL FOR FIREARMS LITIGATION

DATE RFQ ISSUED: September 7, 2022

QUESTION & ANSWER CUT-OFF DATE: September 28, 2022

RFQ RESPONSES DUE: October 5, 2022

**RFQ ADDENDUM NUMBER ONE
QUESTIONS & ANSWERS
Issued: September 30, 2022**

Q1: Every time I try to check for an issued addenda, I get a NO RESULTS FOUND error. Does this suggest that there is no addenda posted? Not yet, anyway?

A1: Correct, this is the first addendum containing questions posed as of September 28, 2022, and answers to those questions.

Q2: Can you please clarify who legal support is, for 7.2.3 of the Diversity Questionnaire? Does this include librarians, etc., or just paralegals?

A2: For purposes of 7.2.3, “legal support staff” includes any non-attorney support personnel whose duties are necessarily related to the practice of law and/or for which specialized training related to the law is required. This includes, for example, law librarians as well as law clerks, paralegals, and patent agents. “Other support staff” includes personnel with more general duties related to the administrative functioning of the firm, e.g., administrative managers, administrative assistants, human resources personnel, accounting staff, receptionists, clerical staff, file management personnel, and mailroom staff.

Q3: Is the survey only asking for Firm Leadership from NJ? Not the Firm as a whole.

A3: The questions on page 6 of the Outside Counsel Diversity Questionnaire relating to demographics of “Firm Leadership” are seeking only the number of New Jersey-based attorneys in leadership positions in the enumerated categories.

Q4: Regarding the 2022 Outside Counsel Diversity Questionnaire included with the above-referenced RFQ, the instructions state that “Except as otherwise noted, please provide information limited to your law firm’s New Jersey Based Attorneys, current as of **January 1, 2022.**” However, in the accompanying Demographic Information charts, it asks for numbers of attorneys who held the stated positions “as of January 1, 2020” and “during the 1-year period ending January 1, 2020.” Can you please clarify whether we should provide 2022 or 2020 headcount numbers in these charts?

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A4: The Outside Counsel Diversity Questionnaire seeks demographic data as of January 1, 2022 and during the 1-year period ending January 1, 2022. References to 2020 are the result of a clerical error and should be replaced with 2022.

Q5: If selected for the program, may a firm limit its scope to defensive matters instead of affirmative matters, or vice versa?

A5: Because the RFQ seeks firms for both potential affirmative and potential defensive litigation, a firm may in its proposal limit the type of matters it will accept. If a firm does so, it should clearly so state that in its proposal. In addition to any firm's self-limitation, firms will still be required to clear conflicts prior to any retention. See Outside Counsel Guidelines and the [May 15, 2019 - Conflicts Letter \(nj.gov\)](#) for further information pertaining to how the State conducts the conflicts of interest analysis for outside counsel.

Q6: Where can I see all the questions asked and answered?

A6: All questions received during the question and answer period, as of September 28, 2022, are included here with responses.

Q7: Section 7.2.6. requests that firms provide a representative listing of the firm's major private and public sector clients. Rule 1.6(a) provides that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...." How should/can we respond accordingly in light of these Rule 1.6 concerns?

A7: Submissions should contain publicly available information and/or information for which the firm has obtained appropriate client consent.

Q8: Who is considered the "client" special counsel is representing?

A8: The client represented by Special Counsel will depend on the particular matter for which Special Counsel is ultimately retained. Special Counsel may ultimately be retained to represent the Attorney General, the Statewide Affirmative Firearms Enforcement ("SAFE") Office within the Department of Law and Public Safety, and/or other State officials, entities, or agencies.

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Q9: May Firms combine their talents and submit a joint application in response to this RFQ?

A9: Yes, but if a firm also wishes to be considered on its own it should make that clear. In this instance, firms may be selected for inclusion on the list of designated Special Counsel jointly, separately, or both.

Q10: Is it possible to enter into a retention *only when* a firm takes on a specific matter, rather than at the time the firm is selected and agrees to be Special Counsel? We are not sure if this is something your office will consider, but it would make the conflicts process much easier if the RFQ was designed to select eligible and qualified firms as potential counsel for specific litigations, with the retention starting when a firm, in fact, took on a litigation, rather than if the firm is obligated to assess conflicts throughout the term of the Special Counsel, even when the firm is not engaged in a specific matter. Is this a possibility?

A10: Retention occurs only when, subsequent to a firm's selection for inclusion on the list of designated Special Counsel, a firm is selected to handle a specific matter. Inclusion of a firm on the list of designated Special Counsel will not bind or otherwise obligate the State of New Jersey to retain the listed firm for legal services or guarantee any other form of retention. Nor does inclusion of a firm on the list of designated Special Counsel bind or otherwise obligate the firm to accept any specific matter.

Q11: RFQ Section 3.1 says "[t]he firm(s) selected . . . will, upon retention, be required to handle all aspects of providing representation to the Attorney General, SAFE and/or other State officials, entities, or agencies related to firearms litigation." For purposes of the RFQ and the conflicts requirements, does the firm need to state that it does not have conflicts when it submits the RFQ, or are conflicts assessed on a case by case basis when the firm is retained for a specific case?

A11: For purposes of the RFQ, please identify any known conflicts with representation of the Attorney General or SAFE consistent with the Outside Counsel Guidelines and the [May 15, 2019 - Conflicts Letter \(nj.gov\)](#). Identification of these known conflicts will not necessarily disqualify a firm from inclusion on the list of designated Special Counsel. Conflict determinations will be made on a case-by-case basis if a firm is selected to handle a particular matter.

Q12: If the firm is required to assess conflicts at the time it submits the RFQ, is the client, for purposes of the RFQ, specifically the Statewide Affirmative Firearms Enforcement Office, or more generally the Department of Law and Public Safety, Division of Law and/or the NJAG Civil Division?

A12: Clients for matters that are the subject of the RFQ may include the Attorney General, SAFE, and/or other State officials, entities, or agencies. The client or clients may vary based on

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the particular matter, and so conflict determinations will be made on a case-by-case basis in the event a firm is selected to handle a particular matter. At this stage, a firm should identify any known conflicts with representation of the Attorney General or SAFE consistent with the Outside Counsel Guidelines and the [May 15, 2019 - Conflicts Letter \(nj.gov\)](#).

Q13: If the firm is selected as a Special Counsel, does the Office of Attorney General assume that an attorney client relationship commences at that point, or does the attorney client relationship begin if/when the firm takes on a specific case and an engagement letter is entered into? In other words, does “upon retention” mean upon a firm’s successful response to the RFQ or does it mean upon State’s request to handle a specific matter and, at what point would the firm have an attorney-client relationship requiring waiver for adverse matters?

A13: This RFQ governs selection of qualified firms for inclusion on a list of designated Special Counsel pursuant to N.J.S.A. 52:17A-13 and Executive Order 157 (2008 Corzine). Retention occurs only when, subsequent to a firm’s selection for inclusion on the list of designated Special Counsel, a firm is selected to handle a specific matter. Inclusion of a firm on the list of designated Special Counsel will not bind or otherwise obligate the State of New Jersey to retain the listed firm for legal services or guarantee any other form of retention. Nor does inclusion of a firm on the list of designated Special Counsel bind or otherwise obligate the firm to accept any specific matter. Retention of Special Counsel will occur in accordance with Part II of the Outside Counsel Guidelines. Conflict determinations will be made on a case-by-case basis in the event a firm is selected to handle a specific matter. An attorney-client relationship is formed upon entry of a retention agreement. The question of whether the attorney-client privilege applies to any particular communication will be determined based on the Rules of Professional Conduct and applicable law. However, please note that all documents and information submitted in response to this RFQ generally shall be made available to the public as required by applicable law.

Q14: If a firm is selected as a Special Counsel, does that firm have any obligation to take on a specific number of matters throughout the course of the term?

A14: No, there is no obligation on Special Counsel to take on a specific number of matters. Similarly, there is no obligation of the Attorney General’s office to retain all firms on the Special Counsel List developed pursuant to this RFQ.

Q15: RFQ Section 5.1 says that “if your firm is designated as Special Counsel, you have a continuing obligation during the term of the designation to disclose to the Attorney General any actual or potential conflicts.” Similar to the questions above, who is the client for purposes of determining actual or potential conflicts on an ongoing basis? Is the client the Statewide Affirmative Firearms Enforcement Office, the Department of Law and Public Safety, Division of Law and/or the NJAG Civil Division generally?

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A15: Retention occurs only when, subsequent to a firm’s selection for inclusion on the list of designated Special Counsel, a firm is selected to handle a specific matter. Clients for matters that are the subject of the RFQ may include the Attorney General, SAFE, and/or other State officials, entities, or agencies. The client or clients may vary based on the particular matter, and so conflict determinations will be made on a case-by-case basis in the event a firm is selected to handle a particular matter consistent with the Outside Counsel Guidelines and the [May 15, 2019 - Conflicts Letter \(nj.gov\)](#).

Q16: RFQ Section 5.0 states that the Special Counsel is subject to the Outside Counsel Guidelines, including “any updates that may be made during the term of the designation.” Is it possible to add a clause to allow Special Counsel to review any changes to the Outside Counsel Guidelines before agreeing to the changes? It is difficult to agree to possible future changes without knowing what those might be.

A16: The State will provide written notification to outside counsel thirty (30) days prior to the effective date of any substantive changes to its Outside Counsel Guidelines.

Q17: Under your Outside Counsel Guidelines, it states: “Outside counsel must be sensitive both to direct conflicts of interest that representation of the State and other clients poses, and to the less direct, but nevertheless serious, conflicts that may arise from the same firm’s advocacy, on behalf of other clients, of positions conflicting with important State interests. Prior to your engagement, your firm should carefully review whether any conflicts of either type exist and, if so, bring those conflicts to the attention of the Designated Attorney. The Division expects to be promptly informed of and consulted with respect to all potential conflicts. Although issue conflicts may not necessarily result in a disqualification of your firm, the Division does expect to be consulted before your firm accepts an engagement that will require the firm to advocate a position that may be adverse to a State legal interest or otherwise prejudicial to the interests of the State. The Division in its sole discretion shall, after consultation with you, determine whether an impermissible State agency conflict exists, or whether other circumstances exist that would undermine the public’s confidence if your representation continued.”

In this context, are indirect positional conflicts limited to actions brought under the New Jersey statute P.L.2022, c.56? As a large law firm representing many different clients, we are adverse to certain New Jersey governmental agencies and departments on a number of current matters that do not involve NJ P.L. 2022, c.56, and will likely be adverse to the State of New Jersey on future matters that do not involve that statute as well. Any requirement that we promptly notify the NJ AG’s Office of ANY positions that may pose an indirect conflict with the State, even if that position does not involve N.J. P.L. 2022, c. 56 at all, would be a serious problem for any large law firm, given client confidences. Can you please clarify the scope of this requirement to notify the Division of potential conflicts?

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A17: The nature of what might constitute a positional conflict will vary based on the particular representation, which laws are at issue, and which agency clients are involved. Representations handled by the Special Counsel are not limited to actions brought under P.L.2022, c.56, but may also include affirmative or defensive litigation as specified in Section 3.1 of the RFQ. In assessing its obligation to promptly inform and consult with the State regarding potential conflicts, the firm must do so consistent with its professional obligations to all its clients and should also be guided by Outside Counsel Guidelines and the [May 15, 2019 - Conflicts Letter \(nj.gov\)](#).

Q18: Is it possible to change the “potential conflicts” language to “ethical conflicts under the Rules of Professional Responsibility?” It is difficult to define all *potential* conflicts for purposes of compliance.

A18: Retention occurs only when, subsequent to a firm’s selection for inclusion on the list of designated Special Counsel, a firm is selected to handle a specific matter. The client or clients may vary based on the particular matter, and so conflict determinations will be made on a case-by-case basis in the event a firm is selected for possible retention to handle a particular matter. At that time, a firm should disclose any known actual or potential conflicts of interest, including direct conflicts of interest and positional conflicts of interest, in accordance with the Outside Counsel Guidelines. While a firm is not expected to speculate as to potential conflicts of interest that are not known based on current information, the Outside Counsel Guidelines do require a firm to bring any conflicts that do become known based on new information promptly to our attention.

Q19: Are the State personnel with whom the firm would interact on matter dedicated only to the types of matters the firm would handle or do they also work on varied other matters? The press release announcing the creation of SAFE says “SAFE’s work will be distinct from but supplement the Department’s ongoing – and successful – efforts to use the state’s Consumer Fraud Act (CFA) to stop out-of-state gun dealers from selling illegal firearm products into New Jersey over the internet.” Is it possible, for example, that State attorneys on our firm’s firearms matter might also work on the State’s suit against generic drug manufacturers that alleges violations of the same CFA?

A19: Division of Law attorneys assigned to matters that may be the subject of this RFQ will also work on other matters. Internal staffing decisions have been and will continue to be made on a case-by-case basis.

Q20: Approximately how many firms does the Attorney General anticipate selecting to serve as Special Counsel?

A20: The State will designate as many firms as it deems qualified to serve as Special Counsel.

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Q21: The Outside Counsel Guidelines state that “outside counsel has the responsibility to ensure that there are no conflicts between any vendor and the State.” We are not in a position to ensure conflicts of third-party vendors and would like guidance on whether this is a requirement before being selected as Special Counsel.

A21: At this stage, a firm should identify any known conflicts with its representation of the Attorney General or SAFE consistent with the Outside Counsel Guidelines and the [May 15, 2019 - Conflicts Letter \(nj.gov\)](#). Conflicts will be determined on a case-by-case basis in the event a firm is selected to handle a particular matter, and at that point a firm should identify any known of third-party vendors it has determined to use. The firm has an ongoing duty, in accordance with the Outside Counsel Guidelines, to report any conflicts that become known due to the retention of a third-party vendor.

Q22: It is unclear how long the term for a Special Counsel will last and whether the termination of the term is at the sole discretion of the New Jersey AG’s Office. Is it possible to include language that allows either party to conclude the term provided that it can be accomplished in accordance with the rules of professional responsibility and applicable law?

A22: A Special Counsel designation does not have a fixed term as, consistent with N.J.S.A. 52:17A-13, it needs to remain in place for so long as a firm is representing the State or a State official or employee, department, board, body, commissioner or instrumentality of the State, under any specific retentions made consistent with the designation.

If, once designated, Special Counsel no longer wishes to accept any new retentions consistent with its special designation, it may so advise the Director of the Division of Law.

Individual retentions may be terminated in accordance with the terms of the retention agreement and the Rules of Professional Conduct.