

# State CIO and Legal Counsel: JOINING FORCES FOR BETTER GOVERNMENT

NASCIO LEGAL ADVISORY COMMITTEE

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On a daily basis, a number of situations may arise where a state chief information officer (CIO) and legal counsel need to work together. Procurement and contract negotiations, privacy, cybersecurity, personnel actions and litigation including e-discovery are just some of the issues for which having a good working relationship is mutually beneficial. The NASCIO Legal Advisory Committee, with contributions from some veteran state CIOs and legal counsel, came up with the list below. This practical guide is intended for newbie and seasoned legal counsel and CIOs.

## Stay Abreast of Technology Developments

There are many points that one could argue are the most important, but we chose to highlight this first: given that technology changes so quickly and policy often follows slowly, counsel should attend Information Technology (IT) continuing legal education (CLE) sessions, read CIO publications and use any and all resources to stay abreast of what's happening in the marketplace. And, in general, try to keep up with what the CIO is working on, whether it is project governance, IT investments or infrastructure boards or some other venture. Note that the American Bar Association's amended comment 8 to Model Rule of Professional Responsibility 1.1 (Competence) now provides that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

## Lend a Hand

**Where can I help?** Counsel can make themselves most helpful by reaching out from day one to their new CIO, acclimating them to the legal issues surrounding their job, and asking where they can be helpful. As soon as an appointment is made, counsel can introduce themselves by email or letter and provide a brief overview

of significant legal issues and constraints a new CIO will encounter, especially if he or she hails from the private sector. Follow up with an in-person “meet and greet” as soon as possible. Even better, invite yourself for a tour of the IT facilities to see the faces of those whose names you will soon be seeing, to introduce yourself, and to get a familiarity with physical layout and equipment that will prove invaluable.

**Be a counselor.** Bring all of your client counseling skills to bear. Be available, be responsive, be a resource. Take every reasonable opportunity to build a trusting relationship with the CIO and staff. Invest some time with them and spend a good portion of that time listening. Let the CIO know that you are there to help them identify and manage risk. If it is appropriate for your particular role, help them discern, prioritize, and address policy issues where they impact risk or other legal concerns. Ask if the CIO wants your advice even as to non-legal issues where you think this would be useful, particularly on ethics questions, but beware that discussions on non-legal issues may not be privileged.

**Have an answer or make it clear that the issue remains unresolved.** It is not always clear how laws impacting government service, such as public records and records retention laws, impact use of new technologies. Good counseling includes laying out the legal issues, identifying “gray” areas of the law, and spelling out the CIO’s options. If issues remain undecided, you can help in articulating risk analysis.

**“We didn’t do this at my private firm”.** State CIOs whose previous career has been in the private sector can become mightily frustrated with the red tape surrounding many state government rules and processes, especially the state procurement processes. State CIOs all agree the process is inflexible, cumbersome and moves too slow. Counsel need to explain the legal requirements for and benefits of open, fair and transparent public procurement, listen to the new CIOs recommendations for streamlining procurement processes, and work with the state procurement officer to implement those that advance the cause of open, fair and transparent procurement while increasing efficiency. One or two “war stories” about CIOs who are now in prison for ignoring procurement laws might be appropriate as well.

**How does the CIO absorb information?** Everyone learns differently. Some state CIOs are happy to read and ask you questions about a 20 page legal memo on a problem that they are facing. Others absorb information best when it is presented to them at a meeting through a brief slide presentation. Counsel should get to know the “information style” of their CIO and communicate accordingly.

**Lawyers need to use their best legal skills to support their CIOs and CIOs need to change the way their state acquires, builds and uses information technology.** Lawyers are in the “here’s what the law says” business, but CIOs are often visionaries who have a plan for business transformation and changing the status quo to align with changes in technology and the IT business. Good lawyering requires counseling the CIO about the current state of the law, but also supporting the implementation of his or her vision by suggesting how legislation could be amended and working through the executive department legislative team to attempt to make such changes happen. In addition, lawyers need to take a hard look at “the way we’ve always done things” to make sure that their interpretation of law is not captive to agency culture; sometimes the “way we’ve always done things” in the government IT world is not rooted in law but in past agency practice. A fresh look at a legal issue can often help discover a novel legal way to help the CIO achieve his or her goals.

## Be in the Know

**What is my authority?** CIOs govern public sector entities whose power and authority is spelled out in law. Counsel for a new CIO should document the CIO’s legal authority when they first arrive, and update them as legislative changes to the CIOs authority are made over time. This seems simple enough, however the authority of the CIO is often questioned and debated, especially with respect to IT investments, project oversight and enterprise consolidation initiatives.

**Be Proactive and stay ahead of the curve.** Good lawyering means constantly identifying emerging issues before they become a problem for the CIO, researching the law and giving the CIO a heads up well before changes in law or technology create new legal problems. It is also very helpful to follow the technology press to identify emerging issues and learn how other government entities cope. Many resources are available, including those directed specifically at government technology. Bookmark useful sites, read the blogs, set up RSS feeds and check them regularly.

**Dig in to the technology related to the legal questions posed.** CIOs need more than a superficial review of legal matters related to the use of new technology, or new uses of existing technology. Make sure you have at least a basic understanding of the technology at the heart of the legal matters you handle, in particular if it is unfamiliar to you. You can only “issue spot” if you do so. Don’t expect technologists to issue spot for you; they will ask you to review legal terms related to analytic tools they want to use on an agency website, but it’s not their job to point out the privacy implications of the use of that technology; you have to take the time to understand what analytics tools do by reading the literature on the topic, including but not limited to the software publisher’s documentation and reviewing commentary from lawyers on the product, which may be available online.

**Ask the right questions.** Because the CIO’s perspective is not the same as the lawyer’s, it is important that the attorney carefully explore and fully understand the CIO’s purposes and concerns by carefully asking for clarification. All too often the CIO will come to his or her lawyer with mistaken preconceptions of the law or unclear proposals or concepts that a lawyer using legal training can help the CIO clarify.

## Get Connected

**Teach and Learn.** Today’s state, secretariat or agency CIOs are under tremendous pressure, from budget cuts, technology change, and intense public scrutiny of government’s use of technology. It’s hard for them to find the time to keep up with developments in the laws that affect technology. Counsel for CIOs should provide clear, concise, up to date training and written guidance in areas of law affecting the CIOs responsibilities. Interactive training sessions, where counsel can present legal issues and learn from CIOs about the nuts and bolts of how the law impacts the CIO’s daily responsibilities are the most valuable. Every IT legal group should try to publish articles that reach other public sector lawyers or CIOs.

**Stay connected with other counsel.** Sometimes a CIO may encounter legal problems outside the area of expertise of technology counsel. The CIO’s counsel should cultivate good relationships with counsel in other areas of state government, such as labor and employment law, so when a difficult issue arises in an area outside of the tech lawyers’ expertise they can make a quick referral or hunt down an answer in an area outside their expertise.

**Partner with Lawyers on the Business Side of the IT transaction.** Most IT transactions that you work on for agencies other than your state's central IT organization are business driven; you may be asked to work on projects related to diverse agency business topics such as environmental affairs, education, or public safety. Your CIO client will benefit from having you partner with the agency lawyers who are familiar with both the business and legal issues related to the IT project on which the contract is focused. To be a good lawyer for a CIO, you have to be a collaborator willing to work out issues with a team of equals: agency CIO, agency counsel, agency business and technologists. Good relations with your legal colleagues will also benefit you by encouraging them to consult with you on transactional issues - allowing you to head off potential problems before they occur.

## Stay Smart

**Hire lawyers with a technology background.** While some of the legal work related to counseling a CIO can be performed well by a lawyer with no technology background, it's tremendously useful to have technologist lawyers on your legal team. Hire lawyers with backgrounds as IT consultants, programmers, or software engineers; they will have at least a foundation for understanding most conversations about IT legal issues.

**Meet in the Middle.** As a gross generalization, CIOs speak techno-speak and focus on efficient and effective technology and serving the public and the current administration. Lawyers speak legalese and focus on adherence to law, development of policy, and provision of clear direction to state employees regarding use of technology. In order to work together effectively, CIOs and their counsel need to meet in the middle, always keeping the different roles, perspectives, and language of their separate differences in mind.

## In Conclusion

The best lawyers understand the true constraints but then immediately investigate ways to remain legal but help advise their clients when there are alternative means to skin the cat. They also learn about the tech person's field of expertise and specific objectives. Finally, they are proactive in educating techs about procurement laws - often not intuitive rules - and ethics laws - often very different than in the private sector and could get a newbie into serious trouble quickly.

The best CIOs proactively provide appropriate material for the lawyer to use (articles, standing agency contact memos, explanation of agency infrastructure, material from knowledgeable sources which detail how to review service level agreements (SLAs), data-sharing agreements and vendor contracts in the technology field) and will bring the legal person in EARLY and OFTEN so as to build the legal team into a source of counsel and advocacy versus the clean-up detail who can become frustrated or even suspicious of CIO when they only see the problems.

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