



CITY OF LODI  
COUNCIL COMMUNICATION

**AGENDA TITLE:** Approve Fee Contract with Angelo, Kilday and Kilduff for Representation of the City of Lodi in Peter Rose et al. v. City of Lodi, et al.; United States District Court, Eastern District of California, Case No. CIV.S-05-02229.

**MEETING DATE:** February 7, 2006 Special City Council Meeting

**PREPARED BY** City Attorney

**RECOMMENDED ACTION:** Approve contract for outside counsel to represent the City of Lodi.

**BACKGROUND INFORMATION:** Ordinarily, the City Attorney's Office in Lodi defends all actions against the City with in-house staff; however, in this case, outside counsel is advisable because the case involves specialized areas of the law that should be handled by recognized experts in the field. Bruce Kilday is a highly recognized expert in Police Civil Rights cases who has regularly litigated such cases for members of CJPRMA.

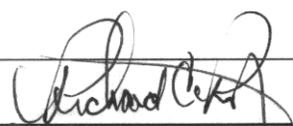
As you know, the City is insured through CJPRMA with a \$500,000 Self-Insured Retention (**SIR**). Since legal expenses are counted toward the SIR, they will not exceed \$500,000 to the City over the life of the action.

**FISCAL IMPACT:** Unknown at this time, but capped at \$500,000 out of liability reserve account.

**FUNDING AVAILABLE:** Liability reserve account

Ruby P . te, Finance Director

  
D. Stephen Schwabauer, City Attorney

APPROVED:   
for Blair King, City Manager



601 University Avenue Suite 150  
Sacramento, CA 95825  
Telephone No. (916) 564-6100  
Telecopier No. (916) 564-6263

Laurence L. Angelo  
Bruce A. Kilday  
Carolee G. Kilduff  
J. Scott Smith

---

Douglas R. Thorn  
Cori R. Samo  
Susan A. DeNardo

E-Mail: bkilday@akk-law.com

February 1, 2006

Mr. D. Stephen Schwabauer  
City Attorney  
City of Lodi  
P.O. Box 3006  
Lodi, CA 95241

Re: Pete Rose Matter

Dear Mr. Schwabauer:

Pursuant to our discussion on Monday, January 30<sup>th</sup>, I have revised the Retainer Agreement. Specifically, in section 2, I have added a paragraph which specifically states that we adopt the Billing Guidelines that **you** have prepared, with **one** modification. That modification is that we will bill half time for travel to and from the City of Lodi.

'Please let me know if this is acceptable to you and the City Council. I **look** forward to working with you.

Very truly yours,

ANGELO, KILDAY & KILDUFF

By: BRUCE A. KILDAY

BAK:jk  
Enc.  
I:\BAK\Rose\Schwabauer L02.doc



601 University Avenue Suite 150  
Sacramento, CA 95825  
Telephone No. (916) 564-6100  
Telecopier No. (916) 5646263

Laurence L. Angelo  
Bruce A. Kilday  
Carolee G. Kilduff  
J. Scott Smith

---

Douglas R. Thom  
Con R. Samo  
Susan A. DeNardo

E-Mail: bkilday@akk-law.com

February 1, 2006

Mr. D. Stephen Schwabauer  
City Attorney  
City of Lodi  
P.O. Box 3006  
Lodi, CA 95241

### **RETAINER AGREEMENT**

Re: Pete Rose Matters

Dear Mr. Schwabauer:

*Thank* you for retaining Angelo, Kilday & Kilduff (hereafter "Attorneys") to represent the City in connection with the Pete Rose matters. We appreciate the opportunity to serve **as** lawyers for the City of Lodi and its employees and look forward to working with **you**.

This letter sets forth our agreement concerning the legal services that we will provide and our fees for those services. Please read this letter agreement carefully before **signing** and returning it to **us**. If you do not understand any portion of this letter, or if **you** have any questions, please call me at your earliest convenience.

#### **1. Scope and Terms of Engagement**

We will provide the legal services reasonably required to represent and advise you in connection with this matter. We will take reasonable steps to keep you informed of the progress of the case and will respond in a reasonably prompt manner to your inquiries. Such matters might include the defense of a counter-claim, cross-complaint or separate action filed by any adverse party on any other matters. If such matters arise, **you** agree with **us** that a separate written agreement will need to be signed by both of us should you wish to retain us for such additional legal work.

You agree to be completely truthful with us, to cooperate, to keep us fully informed of developments, to abide by this Agreement, and **to** promptly pay our bills for services and costs

Mr. D. Stephen Schwabauer

**Re: Retainer Agreement**

Page 2

February 1, 2006

---

within thirty (30) days of the date of mailing each bill. **Your** cooperation includes keeping us informed of your whereabouts and agreeing to appear when necessary for settlement and other conferences.

Nothing in this Agreement and nothing in our statements may be construed as a promise or guarantee about the outcome of your matter. We make no promises or guarantees of any particular outcome in your matter and any comments made by us about the potential outcome of this matter are expressions of opinion only. If a particular outcome is not obtained, this does not relieve you of your obligations to pay in full for the services we render and the costs we incur on your behalf.

## **2. Compensation**

As compensation for our services, you agree to pay to us fees based on our regular hourly billing rates for the attorneys and personnel working on your matter. We will bill for our time in increments of 1/10<sup>th</sup> of an hour. All time expended is billed, including, for example, research and consultation time, time spent in telephone discussions, conferences and analyses of your matter, travel time and all time spent in court and depositions.

We accept and adopt the February 23, 2004 Billing Guidelines with one modification: Although we normally bill for all of our travel time, we will only bill one-half time for travel to and from the City of Lodi.

Bruce Kilday will be primarily responsible for advising and representing you, along with Senior Associate Douglas Thorn. Additionally, other attorneys and non-attorney personnel may also work on your matter. By this Agreement, you obtain the legal services of our law firm and not of a particular attorney. However, I will discuss the involvement of other attorneys and personnel with you in advance if you *so* request.

The hourly rate for Bruce Kilday and other partners is **\$165.00** per hour, and for Sr. Assoc. Douglas Thorn \$155.00 per hour. Other associates bill at \$140.00 per hour. The current rates for law clerks and paralegals are \$80.00 per hour. Hourly rates are subjects to periodic change. We will send you written notice of any rate increase affecting this matter at least **30** days prior to the date the increase is to take effect. If you choose not to accept the increased rates, you may promptly terminate our services as provided below.

While we will make a good faith effort to accurately estimate potential fees, you must understand that all fee estimates are based on limited factual information and upon assumptions and variables that may change during the course of our work. For these reasons, you understand that fee estimates are not precise and that actual fees can vary significantly from any estimate given. Consequently, our fees are not limited to the amount of any estimate.

### 3. Disbursements and Expenses

In addition to our hourly fees, certain costs may be incurred. It is our desire to serve you with the most efficient and effective support systems available. Therefore, in addition to our fees for legal services, we also charge separately for certain support services and expenses, including messenger, courier and other delivery costs; computerized legal research, support staff over-time (only if required and on a case by case basis), travel expenses, court filing fees, court reporter fees, outside copying/printing fees (for appellate matters), witness fees, expert and consultant charges, and miscellaneous expenses. Our hourly rate includes normal expenses for in-office document copying, fax transmissions and long distance telephone charges, and you will therefore not be billed separately for those.

Additionally, you understand that in order to assist us in the preparation or presentation of your case, it may become necessary to hire expert witnesses, consultants or investigators, which you authorize us, in our judgment, to employ. You agree to pay their fees and charges as they are incurred. We will advise you of any expert witnesses, consultant or investigators to be hired and their charges before engaging their services on your behalf.

### 4. Billing and Payment Responsibilities

We will send you a monthly statement for our time, describing the services performed and the amount of the fees and costs to be paid by you. If upon receipt of a statement, you have any questions about our charges, we ask that you promptly telephone or write to Carolee Kilduff or me so we can discuss the matter while it is fresh in our minds. We do not wish to have any misunderstandings between us concerning our fees and other charges, and at the same time, we want to resolve any questions promptly and before our next statement is issued. It is important that we resolve your concerns each month so that we may better serve you and so we can consider our work in reliance on your prompt payment.

However, a dispute could arise between us which cannot be resolved by discussion. We believe that such attorney-client disputes are more satisfactorily resolved through binding arbitration than by litigation in court. Consequently, if a dispute should arise between us which cannot be resolved by discussion, it will be subject to resolution through binding arbitration. Arbitration is a process by which the parties to a dispute agree to submit the matter to a retired judge or other arbitrator who has experience in the area and to abide by the arbitrator's decision, instead of litigating the matter in court. In arbitration, there is no right to a trial by jury and the arbitrator's legal and factual determinations are generally not subject to appellate review. Arbitration rules of evidence and procedure are often less formal and rigid than in a court trial. Arbitration usually results in a decision more quickly than proceedings in court, and the attorneys' fees and costs incurred by both sides are usually substantially less. As a practical matter, by agreeing to arbitration, all parties are waiving a jury trial. Therefore, any dispute based upon or arising out of our engagement, this letter agreement, the fees charged and /or the performance or failure to perform services shall be subject to binding arbitration to be held in

Mr. D. Stephen Schwabauer

Re: *Retainer Agreement*

Page 4

February 1, 2006

---

Sacramento, California in accordance with the rules of the American Arbitration Association. Judgment on the arbitrator's award shall be final and binding and may be entered in any competent court. By signing this letter of agreement, you agree to such binding arbitration to all disputes arising out of or relating to our engagement, our fee agreement, the fees charged and/or performance or failure to perform services, including but not limited to disputes regarding attorneys' fees and costs, claims of breach of duty, breach of contract professional negligence, fraud or any claim based upon a statute.

**You** may also have the right under the law to non-binding arbitration. If you request non-binding arbitration, it will take place before the binding arbitration which is provided for in this agreement. If you ask for non-binding arbitration and you or we are unhappy with the result, it will be followed by the binding arbitration. The binding arbitration provided for in this agreement replaces litigation in court before a judge or a jury, but it does not replace non-binding arbitration.

#### **5. Court Awarded Fees**

If an award of fees and/or costs to be paid by a third party is obtained on your behalf in this action, such award shall belong to the clients. **You** understand that the court's order awarding fees and/or costs will not affect your obligation to pay our attorneys' fees under this agreement. **You** also agree that, notwithstanding court awarded fees and costs in your case, you will remain responsible for payment in full of attorneys' fees and costs in accordance with this agreement. However, any payment of court awarded fees and/or costs by a third-party will be credited against the amount of fees and/or costs owed by you under this agreement.

#### **6. Court Awarded Sanctions**

Monetary sanctions awarded in your favor during this engagement shall be credited to you.

#### **7. Termination of Services**

**You** have the right to discharge Angelo, Kilday & Kilduff, or any of our attorneys, at any time by written notice. After receiving such notice and after receiving permission from the court in which we are representing you, if necessary, we will cease provided services under this Agreement. You agree to cooperate with us in facilitating the orderly transfer of your case to new counsel, including promptly signing a substitution of counsel form at our request. We may terminate our services at any time with your consent or for good cause. Good cause exists if (1) you fail to pay our statement within **30** days after mailing, or replenish a deposit as provided above within 20 days of our withdrawal of such funds as set forth above; (b) you fail to comply with the other terms of this agreement, including your duty to cooperate with us in protecting your interests; (c) you have misrepresented or failed to disclose material facts to us or refused to

Mr. D. Stephen Schwabauer  
Re: **Retainer Agreement**  
Page 5  
February 1, 2006

---

follow our advice on a material matter, or have otherwise made our representation of you reasonably difficult; or (d) any other circumstance exists that either **mandates or permits** termination of this agreement under the ethical rules of our profession. **Termination** of our services, whether by you or by **us**, will not relieve you of your obligation to pay **for** services rendered and for costs incurred prior to the cessation of our services.

**8. Client File**

If you do not request the return **of** your file, we will retain your file for a period **of six** years, after which time we may have your file destroyed. If you **decide** to have your file maintained beyond the six years after this engagement has concluded, **separate** arrangements with us must be made.

**9. Entire Agreement**

This letter contains our entire agreement concerning the legal services you have engaged us to provide and replaces any prior understandings or arrangements between us. Any modifications or additions to this agreement must be agreed to in writing **by** all parties. This agreement will take effect when you have returned the signed copy **together** with the **initial** deposit.

**If** the terms of this agreement are satisfactory, please sign this letter in the space provided below and return it to me by mail. I will sign it and provide you with a fully executed copy. Again, we thank you for allowing **us** the opportunity to work with you as your lawyers.

Very truly yours,

ANGELO, KILDAY & KILDUFF

By: \_\_\_\_\_  
BRUCE A. KILDAY

I have read and understand the above terms and have accepted and agreed to them on behalf of the City of Lodi.

\_\_\_\_\_  
D. STEPHEN SCHWABAUER  
City Attorney