Tips For Managing The In-House And Outside Counsel Relationship

By

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Introduction

• Corporate counsel owe duties to their clients to retain effective and cost-appropriate outside counsel.

• It is important to have a good working relationship between in-house and outside counsel to meet the client’s needs.

• This presentation is intended to give practical advice to improve the relationship between in-house and outside counsel so that the client has the best possible results.
Selecting Counsel

TO-DO LIST:
1. LAWYER
2. UP!
Selecting Counsel

- How should in-house counsel hire their outside counsel?
- There is no one right answer.
- What is the legal work that needs to be done?
- Highly complex or more routine?
- Does the assignment require expertise that justifies a higher rate/expense?
- So, in-house should determine what type of attorney is necessary.
Selecting Counsel

• In-house should then determine who the attorneys are with the necessary experience to efficiently handle the assignment.
• Attorneys are becoming more specialized—take advantage of that.
• Is industry knowledge necessary or helpful?
• In-house should utilize industry networking to assist in identifying qualified counsel.
Selecting Counsel

• “Relationships matter, and I will generally select an attorney (or firm) that I know and respect for his or her expertise and integrity. Ideally, outside counsel knows my client well enough that I do not have to reeducate the attorney on the nature of my company’s business and key business clients.”
Selecting Counsel

• Consider the following factors:
  • Ethics;
  • Reputation;
  • Expertise in the area of law ("Thought Leaders" in the area);
  • Track record;
  • Firm size, resources, and location;
  • Knowledge of forum and/or judge;
  • Rates;
  • Willingness to consider alternative billing arrangements;
  • Team;
  • Diversity; and
  • Responsiveness.
Selecting Counsel
Selecting Counsel

• If you are the outside counsel, be honest with yourself and the potential client on your expertise.
• If the client is better served with another attorney in your firm or a different firm, tell the in-house counsel.
• This will only serve to build your credibility, and the in-house counsel will likely work to use you in a matter in which you are experienced in the future.
• You are better off working on a matter in which you have experience and are more likely to get the second assignment.
Engagement Letters
Engagement Letters

• Engagement letters are very important to both in-house and outside counsel.
• These are the contracts that set the stage for all future work and disputes.
• The use of properly drafted engagement letters is not only a critical risk management tool, but also forms the foundation of client communication and trust.
• Need different engagement letters for different assignments.
Engagement Letters

• Things to include in letters:
  • Identify client (and who is not the client);
  • Rates/Fee Arrangement;
  • Retainer;
  • Who pays bills and retainer;
  • Billing and payment;
  • Scope of assignment (and limitations);
Engagement Letters

• Multi-party issues;
• Termination;
• Technology/hacking;
• Conflicts of interest and waivers;
• Business conflicts;
• Rules of ethics;
• No guarantee on results or cost; and
• Dispute resolution terms.
Fee Issues

"BE CAREFUL, HE JUST CHARGED ME $350 FOR HIS 'TWO-CENTS WORTH.'"
Fee Issues

• At the outset of all legal assignments there should be an agreement and understanding as to the fees and compensation.
• Written agreement required for contingency fee cases.
• Written agreement should be executed for all assignments.
• Market rates for the level of expertise required and/or the locality of the work.
Fee Issues

“It’s a coupon. File four frivolous lawsuits and get the fifth free!”
Fee Issues

• Consider different rates for different types of work even for the same counsel.
• Consider alternate billing arrangements such as lower rate/partial contingency.
• Insurance issues? Panel requirements or fee limitations?
• Warning: what a client is willing to pay counsel may not correlate to reasonable fees for the purposes of a recovery in a court of law.
Communication
Communication

• Constant, clear communication from both sides is essential.
• The first step is to set an understanding of what communication is expected, how often, and in what medium.
• What communication is expected?
• How often is outside counsel expected to communicate?
• How does in-house counsel prefer the communication (emails, phone calls, etc.)?
Communication

• Communicate expectations at the outset.
• Timing considerations?
• What is the budget and expense considerations?
• Formal written budget (update requirements)?
• Rate issues?
• Aggressiveness?
• Staffing?
• Experience requirements?
• Confidentiality/Privacy?
• Internal political issues?
Communication

- Communicate during the engagement.
- Is the assignment proceeding on schedule?
- Is the assignment on budget? If not, why not?
- Attorneys on team up to expectations?
- Any change in goals, strategy?
Communication

• Communicate after the assignment is over.
• Outcome consistent with goal?
• Work product issues?
• Budgeting, timing, staffing issues?
• Issues for next project for improvement?
Staffing Issues
Staffing Issues

- There should be an understanding early on and throughout a relationship regarding what attorneys the outside counsel should use on his or her team.
- Younger, less-expensive attorneys?
- Older, higher-rate attorneys?
- Expertise requirements?
- Personality issues?
- Diversity issues?
- What task will be handled by what attorney?
Know Your In-House Counsel
Know Your In-House Counsel

• Outside counsel needs to understand the nature of the in-house counsel’s job.
• What are his or her challenges each day, both short term and long term?
• What do they need to get their jobs done properly and meet corporate expectations?
• What can outside counsel do to make the in-house counsel’s job easier?
• Know his or her gender and name and spell it correctly.
Know Your Client
Know Your Client

- Outside counsel should know the client, its business, objectives, and culture.
- Take time to know anything that will support the rendition of effective legal services.
- An easy way to learn more is to search the internet and to review any public filings.
- Another way is to simply ask questions in the beginning of the relationship.
Litigation Issues
Litigation Issues

• Litigation can be especially stressful on the in-house and outside counsel relationship.
• There should be open communication about the following:
  • What’s the in-house counsel’s or client’s philosophy about trying or defending cases?
  • What is the big picture?
  • What does the in-house counsel need to report?
  • How involved does in-house counsel want to be in litigation decisions and course of the case?
Litigation Issues

• Outside counsel should be respectful of in-house counsel’s time.
• Forward drafts of motions/briefs/pleading with sufficient time for review.
• Be responsive, answer emails and voicemails.
• No surprises.
Bills

LAW 101

WELCOME TO THE FIRST DAY, FRESHMEN!

"Hello, Professor. When do we learn billing?"
Bills

• In-house counsel needs to communicate what entries you do not expect to pay for or see on a bill.
• Block billing, task codes, etc.?
• Outside Counsel should review all bills to ensure that inherently offensive items are not included: no inter-office conferences, multiple attorneys on same task, research that has not been pre-approved, attorneys that have not been pre-approved, tasks that are unexpected, etc.
• “Although the conversation about bills is probably one of the least fun for both in-house and outside counsel, it can also be productive because it reinforces our need to collaborate in defining a project, managing fees and costs, and providing the best advice to our client.”
Ideas for Better Management
Ideas for Better Management

- Create an approved counsel list for different legal issues
- Regularly review and add to and subtract from the list.
- Consider technology to assist the assimilation and distribution of communications to all relevant individuals.
Ideas for Better Management

• Create written outside counsel guidelines:
• Fee requirements (lowest rates, etc.);
• Billing: work that can be billed and what cannot;
• Cost estimates (preferred vendors)
• Budgeting requirements;
• Reporting requirements;
• Staffing;
• Confidentiality and media issues; and
• Actual and business conflict issues.
Tell The Truth!

YOU WANT THE TRUTH?
YOU CAN'T HANDLE THE TRUTH!!!
Tell The Truth!

- There are several different types of outside counsel.
- Debbie Downer—your case is terrible and maybe the outside counsel can salvage it for you.
- White Knight—your case is great and he or she will vindicate you.
- Honesty is important and also part of outside counsel’s fiduciary duty.
- Don’t accept anything less.
- However, there is some limitations on what outside counsel can forecast—do not ask for percentage of chance of success or failure.
Tell The Truth!

• Worst feeling for an outside counsel is never getting that next call and not knowing why.
• In-house counsel should tell their attorneys the bad news—what did they do wrong or could do better.
• This is true even if the in-house counsel does not intend to hire the outside counsel again.
• Call it a public service.
Conclusion
Conclusion

• The goals are to have relationships built on trust and that are built for the long term.
• Those types of relationships do not occur immediately and take effort by both parties.
• The suggestions in this presentation are meant to further those goals.