

LexisNexis® Emerging Issues Analysis

Mr. Steven A. Lauer Esq. on

If You Don't See Eye To Eye, Your Minds Will Never Meet...

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Lawyers understand the need to have a “meeting of the minds” in order to create an enforceable contract. Moreover, they also appreciate that a contract that establishes an ongoing relationship between two organizations, such as a partnership agreement, should contain standards by which to measure the continuing success of that relationship. For example, a real estate joint venture agreement probably would include items that define the parties’ relative shares of profit or loss, the mechanisms by which they expect to make decisions regarding the management and disposition of the assets and address other issues.

When in-house lawyers retain outside counsel on behalf of their companies for what they anticipate might be a long-term relationship, they often use a retention letter or agreement. Those documents typically do not address many aspects of the relationship that they may think they are initiating.¹ Besides the basis on which counsel’s fee might be calculated and a few other issues, however, those agreements leave for later discussion (if ever) how the client and its counsel expect to work together. Even “outside counsel guidelines” (or a similar set of rules or advisories) that law departments often provide to their outside firms typically do not address what we might refer to as “relationship” issues, focusing instead on many actions that implicate the substance of the arrangement and the fees and billings. While such guidelines might indicate the frequency and scope of reports that the law department expects of outside firms, how the outside and inside attorneys will work together on a day-to-day basis typically falls outside the ambit of those documents.

As one example, the Corporate Counsel Committee of the Section of Business Law of the American Bar Association issued a seven-volume publication that included a chapter on managing outside counsel that included a form of retention letter.² Even with the

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1. When retaining outside counsel for a one-time, episodic need, of course, concerns regarding an ongoing relationship and the possible implications of not addressing expectations as discussed herein likely would be of less significant.
 2. Chapter 7 of “The In-House Counsel’s Essential Toolkit” (American Bar Association 2007) is entitled “Training Outside Counsel” and includes a form retention letter, a form of request for proposals for legal service and other forms relevant to the relationship between a corporate client and its retained law firms.

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outside counsel guidelines to be included as an integral part of the retention letter, outside counsel would receive sparse guidance as to how to work with the in-house attorneys. Much of that would be defined as time and work progressed. Unfortunately, allowing important issues to go unaddressed on the assumption that they can and will be identified and resolved in the course of performing the work may allow those issues to remain unresolved until they reach such a level that they undermine the relationship. The expectations have relevance to all aspects of the relationship, even possible alternative fee arrangements.³

A failure to confirm that the client has reached agreement with outside counsel on the specific working relationship that they'll have risks considerable negative consequences for both client and counsel. Surveys have shown consistently a continuing level of dissatisfaction on the part of clients with the performance of their outside counsel.

Many surveys by various companies over the years showed consistently lower scores awarded by in-house attorneys to their outside counterparts for service provided to corporate clients. For example, in surveys in 1998, outside lawyers awarded themselves a B+/A- in response to the question as to whether they provided effective and creative preventive legal advice. The in-house lawyers for their clients awarded them an aggregate grade of C+. In consecutive surveys of in-house and outside lawyers in 1997, 1998 and 1999, in answer to a query as to whether the outside lawyers' charges were commensurate with the value of the service provided, outside lawyers felt that they deserved 4.3 in 1997 (5 was the highest score available), B+ in 1998 and 1.8 in 1999 (the highest score available was 1 and the lowest was 5). Their clients awarded them only 3.4 in 1997, C in 1998 and 2.6 in 1999. Clearly, the two sides held very different views of the outside lawyers' work.⁴

Last year a consulting firm in Belgium conducted in-depth interviews with over twenty general counsel of Belgium-based corporations. Among other things, that survey revealed that, for the interviewees, "the added value of a lawyer is directly related to his understanding of the business, objectives and functioning of the client's Legal Depart-

3. "Firms asked to submit proposals [in response to a request for proposals for legal service] are entitled to understand [the client's] expectations of them in that new relationship before they commit to any fee structure or other obligations." Lauer, "Creating a 'Partnering' Relationship Via RFPs," *In-House Practice & Management* (Altman Weil Pensa Oct. 1997), pp. 8, 9-10.

4. For a fuller discussion of the surveys from 1997 through 1999, see Lauer, "Maybe Humpty Dumpty Was a Lawyer," *Law Department Management Adviser* (Dec. 1, 2001), p. 5.

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ment, and long-term relationships tend (or at least promise) to enhance and deepen this understanding."⁵ The need for a common understanding remains a great concern for the in-house community.

Setting and Meeting Expectations. The success of a relationship – its longevity and the satisfaction of the parties to that relationship – depends on each party understanding the answers to two questions about that relationship: what does it need or want from the other party? What does that other party need or want from it? How can lawyers (both in-house and outside) remedy the above-described gap in their understandings?

As to the relationship between a client and its counsel, some aspects of the answers to the questions set forth above may seem clear enough. Outside counsel certainly expects to be paid by the client in accordance with the agreed-upon fee. The client naturally expects its outside counsel to achieve the goals that it (i.e., the client) has expressed.

Unfortunately, however, the complete answers to those questions – though so simply stated above – often include more complex, multi-faceted aspects. The failure of the parties to realize when their respective understandings and expectations include other, often-unstated terms, will often (if not always) lead to difficulties to the relationship or even a dysfunctional one.

At the outset of any engagement, the client and its counsel need to assure that they envision identical goals for that engagement. When their relationship is less mature (e.g., the first time that the client has retained the law firm or they are commencing a type of matter with which they are less familiar, such as a new substantive area of law), they may need to spend more time in this effort than if they have worked together repeatedly over an extended time. The client might need to explain what it means by "winning" a dispute, since a business person may have very divergent views of what that means than would a trial lawyer. They probably should address the relative division of responsibilities between them if the client has in-house counsel who will shoulder some part of the day-to-day effort. For example, some companies have established in-house discovery management centers to achieve cost control and consistency in their production of documents and information in multiple jurisdictions over time. Other companies still fol-

5. "General Counsel Survey 2009)," p. 27 (FrahanBlondé 2009). For more information about that survey, see http://www.frahanblonde.com/files/AHF_Article_Survey_2009.pdf.

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low the more traditional approach of allowing the outside law firms to take on that responsibility as part of their complete service to the client.

The important point is that clarity regarding expectations, in multiple contexts, is critical to a successful engagement. Rather than hoping that they will share goals and a common understanding of how they will work together, counsel and client should devote effort to assuring that is the case.

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About the Author. Steven A. Lauer is Corporate Counsel of Lumen Legal and Principal Value Consultant, Lumen Legal Consulting (www.lumenlegal.com). Mr. Lauer works with corporate law departments and law firms to assist them to better align and synchronize the cost and value of legal service delivered to corporations and other business entities. Steve served as Corporate Counsel for Global Compliance Services in Charlotte, North Carolina for over two years. Previously, he served for over two years as Director of Integrity Research for Integrity Interactive Corporation, in which capacity he conducted research, wrote white papers and otherwise worked with clients and potential clients of the company on issues related to corporate ethics and compliance programs. He also spent over two years as Executive Vice President, Deputy Editor and Deputy Publisher of The Metropolitan Corporate Counsel, a monthly journal for in-house attorneys. He received a B.A. from the State University of New York at Buffalo and a J.D. from Georgetown University Law Center.

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