

## **Make your selection of counsel more than a beauty contest**

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### **Introduction**

Many conferences and articles over the past five years have dealt with re-engineering the relationship between law departments and outside counsel. The successes are difficult to measure and almost always seem to be found in the other company's law department.

This chapter offers common-sense guidance and a sequence of issues to be addressed on how best to begin customizing the relationship between the law department and the law firms on which it relies.

### **Performance Is Key**

When a corporation commences a legal project for which the law department must supplement its own resources, it turns to outside counsel. The selection of outside counsel is one of the important responsibilities undertaken by the corporate counsel.

The law firm and specific lawyers selected can have a significant impact on the project, be it a case in litigation or a contemplated transaction. The outcome can be affected by the skill of the advocate, which can be the deciding factor in winning or losing a case or completing or abandoning a transaction. The careful selection of a firm can and likely will be apparent in the costs of the representation. Outside counsel must be able and willing to work with the corporate counsel to complete the assignment in line with the company's goals.

What are the implications of this for how law departments select outside counsel? It is clear that the selection process must be more rational and objective than it might have been in the past. The selection of counsel, moreover, should be supported by a more formal mechanism to evaluate the selection at a later date.

Although selections of counsel made under the former, less-objective approach may have been defensible, few corporate counsel completed the process in such a way as to allow subsequent analysis of the decisions. The greater sensitivity of clients to the selection of counsel for their work and their heightened skepticism mean that corporate counsel must be prepared to defend their choices. Since corporate management is more comfortable with results-based performance, a law department is likely to find a more accepting audience if its business case justifications follow a similar results-based pattern.

### **Matching Expertise**

How can the selection of counsel affect the outcome of a matter? One obvious factor is the correct match of substantive expertise with the type of assignment. All lawyers are, by definition, licensed to practice law and legally each one is able to handle any legal matter (subject to the ethical constraints, of course, and those relating to the distinction between solicitors and barristers). Even so, there will be aspects of a project or case that dictate the choice of a specialist rather than a generalist. It would be unwise to ask an environmental litigator to handle a complex probate matter, for example, or a trusts expert to represent a client's position vis-à-vis insurance coverage for environmental claims. Outside counsel must also have the necessary capability and support to meet the requirements of the assignment, be these for complicated legal research, computer litigation support, or familiarity with other technology that is necessary to successful completion of the matter.

The objective is to apply the best expertise to the task at hand. The first step is to take stock of the in-house legal resources. Answer several questions. What expertise is available in the department? How closely does that expertise match up with the anticipated legal work? Are there likely to be sufficient resources to handle the expected volume of that work? Are the in-house resources located in the appropriate parts of the country (or the world)?

With that basic information in hand, decide the extent of the company's need for outside legal talent. Will the company require any particular subject-matter expertise? Where is that need likely to occur? Is there need for local assistance, or is the firm's location less critical?

## **Scope of Legal Services**

Before starting the selection process, it is necessary to understand as well as possible what the company's needs are for legal services. While the need for legal services and the related cost of those services may not be perfectly congruous, one of the best sources of data about the company's past use of external legal services is the cost patterns from law firms over time. The more information that can be assembled about the company's history of its legal affairs, the easier it will be to plan for the future.

## **Cost of Legal Services**

Corporate management expects intensive management of legal service by the law department. At one time, executives allowed their inside lawyers considerable latitude to ensure that the legal work was completed successfully. They are less quiescent now. Corporate heads question strategy, especially with the advent of charge-back systems. They complain about the cost of legal services. They expect their inside counsel to provide them better and more frequent reports about the status of legal matters and the cost of legal services. In other words, they now evaluate law departments on how well they manage the legal services and how cost effective these services are managed.

The costs of legal services will also likely vary with the law firm selected. Most corporations still pay legal fees based on the amount of time devoted to the assignment, paying an hourly rate for each billing professional involved. The hourly rates charged by different law firms vary, as do the hourly rates charged for the time of different personnel within a firm. Therefore, the same amount of time billed by different lawyers will result in different legal fees. The composition of outside counsel teams will result in other differences that can affect the final bills. Different firms have different staffing approaches for the same type of matter. One firm will expect one or two specific lawyers to perform almost all of the professional work on a matter, while another firm might dedicate a larger team to the effort. Both of these approaches might be effective or efficient, albeit in different contexts. Travel costs can also vary, if the work requires more travel for the members of one firm than it does for those of another.

## **Getting Support**

To successfully implement changes to a process such as counsel selection and retention, the organization will need to secure commitment by all constituencies. It is not only in-house counsel that are affected by the choice of outside counsel. Business unit management likely has a significant amount of contact with both inside and outside counsel and can contribute greatly toward a successful change.

This is especially true when the changes result in the use of fewer outside firms than had been the case, a frequent outcome of companies' restructuring of their outside legal service. It is important to prepare both corporate counsel and business unit management for the changes in the rules of the game to appreciate what the new arrangements will be and why the company is making changes to established relationships.

Ultimately, the goal of general counsel is to identify the specific types and amounts of legal expertise necessary to achieve the business goals of the company. After determining how much of that expertise can be provided by members of the department, one can then retain outside counsel to complement in-house capabilities and complete the legal team.

It is essential to apply a consistent approach in the selection process with less dependency on the individual evaluations of particular lawyers in the department. Though the subjective, individualized evaluations by in-house counsel might be accurate, the process should be a formalized one. It should be one that can be explained to new members of the department, as well as to the business executives with whom counsel work closely in such a way that those executives are prepared to endorse necessary changes. The use of written criteria and a normalized process should also result in selections that are objectively and demonstrably fair and less subject to criticism.

## **Who Takes the Lead?**

Outside counsel should work hand-in-glove with the law department. The law department is, by definition, responsible to corporate management for designing and carrying out the company's legal strategy. Depending on the capabilities of the law department, its workload and other factors, the members of the department might be very involved in the daily details of how a matter is handled. Another law

department might take a less-involved approach to a similar matter, because of the different demands on its resources. A law firm working with the first law department would have a more limited role in a transaction or in litigating a case than a law firm working with the second department. Those differences likely will affect the size of the legal bill. It is important that the law firm fully understand the expectations of corporate counsel as well as their (that is, the firm's) role in the matter and the extent to which corporate counsel will be involved in the file.

Like all other corporate departments, law departments are expected to manage within their budgets. If the cost of legal services exceeds the amount forecasted, senior management expects justification for the variance. These cost pressures affect how law departments manage the work. Law departments are being held accountable for their management of legal services.

### **The Selection Methods**

The method by which outside counsel are selected will depend in part on the circumstances in which the selection is made. The primary methods are:

1. a request for proposal for legal services (RFP),
2. a request for qualifications (RFQ),
3. a "beauty contest,"
4. in-person presentations.

The last two are not necessarily mutually exclusive with the first two. For example, an RFP process might incorporate in-person presentations.

The strengths of the different selection methods should affect the choice. An RFP is the most rigorous of the four and calls for a greater degree of written description of the legal services as well as somewhat greater formality in the written submissions from the law firms. It certainly requires the most preparation by the law department and invariably takes a longer period of time to bring to completion than the other alternatives. It is characterized as somewhat more "bureaucratic" and rigorous than the other methods. An RFP requires considerable preparation and sustained attention by the law department. Law firms responding to an RFP have to provide more information than is typically the case on a file-by-file basis. The evaluation process can be time-consuming because the amount of information and the variety of proposals received. Nevertheless, an RFP can be a useful process to introduce significant change in the client/counsel relationship. Because it is a method not typically used to select law firms, it represents a considerable departure from the classic rules of engagement in the legal community.

Whether the company is searching for counsel on a matter-by-matter basis or to handle a group of assignments is also relevant to the selection process. For the former, the investment of time and resources associated with an RFP might not be justifiable, unless an assignment is very large or complex. On the other hand, if a company is looking for counsel to handle a large number of related or similar matters -- such as multiple transactions or repetitive litigation -- the benefits of an investment in an RFP might be realized over the course of the assignments.

An RFQ requires starts with a less-detailed statement of the company's legal needs. Essentially, the company asks law firms to state, in less-comprehensive fashion than in an RFP, their ability to provide the legal service required. However, because of the less-specific description of the needs of the company, this process is subject to more uncertainty. Responding firms try to learn enough about the company's needs to present an acceptable description of their capabilities. The RFQ approach likely leads to less discussion of non-hourly based fee arrangements because the firms have insufficient information on which to base their proposals.

A "beauty contest" is a selection based on less-complete presentations by the firms. This can be unsolicited or can be invited by the law department. It focuses primarily on the firms' described qualifications rather than a statement of the company's legal needs. It is possible to ask firms to state how they might address a hypothetical legal matter (for purposes of potential disqualification of some firms, it is preferable to state the issue in terms of a hypothetical situation). In that way, a company is able to generate a comparative sense of how well the firms might address its legal requirements and satisfy its "relationship" expectations.

This selection method is much less formal than an RFP. It's also quicker as a rule. If the type and amount of legal services is very well known, however, and the type of relationship that the client wishes is

no different than what already exists or what the law firms know well, that method might suffice. Like its namesake, however, a beauty contest for legal services can focus too much on appearances. Accordingly, it is important that, before starting the process, the law department carefully consider what types of firms might best provide the needed service.

In-person presentations are just that – meetings of members of the firms with representatives of the company. This selection technique enables the law department to probe the “chemistry” between in-house counsel and the law firm being considered. Such meetings are not particularly effective as a means of gauging a firm’s capabilities across a variety of disciplines, or of appreciating the depth of those resources. It is easy for the meeting to focus on less-substantive aspects of a relationship more than the business issues that must be addressed.

Clearly, then, each tool has different strengths and weaknesses. Accordingly, it is important to approach the choice with an eye to the post-selection environment and the matters for which counsel is needed. If time is available and resources are also available, a more rigorous process, such as the RFP, is likelier to yield a more accurate picture of what the firms’ capabilities and how they might meet the company’s needs. If time lines are tight, the required range of capabilities is not as great and/or the risk attendant to selecting less appropriate counsel is lower, then a process that is more rapid and less demanding – such as an RFQ – might suffice.

The selection method must be carefully chosen for another reason. The success of the undertaking will be decided by the interpersonal, and even the inter-organizational, dynamics of the relationship. Thus, it is important to use the selection process to improve the odds that the working relationship will be beneficial for all involved.

As companies continue to consolidate the number of firms they use on a routine basis, there will be a good number of excellent law firms available. Quality legal counsel are not difficult to identify. A combination of reputation, direct experience, referrals and other such indicators should make it possible to identify which firms should be invited to participate in an RFP, RFQ, or more restricted process to retain counsel. The challenge is to select from the best firms, the ones with which a law department can achieve the best value.

An important consideration is how much of the company’s work will be performed by the company’s in-house counsel. Each law department has distinct capabilities. Some have internal expertise on multiple substantive areas of law. Others have in-house litigation capability. Still others have lawyers located around the country. Are the in-house attorneys pro-active and extremely involved in all aspects of the company’s legal affairs, or are they limited to a more reserved role and allow outside counsel much more latitude in delivering legal services?

The selection process can commence with identifying law firms to participate. How can inside counsel do that? References from in-house counsel at other companies are excellent starting points. For example, the Canadian Corporate Counsel Association is a valuable resource for in-house lawyers, providing ready access to hundreds of knowledgeable potential sources of referrals. Even references from a company’s present outside counsel firms can be useful. Sources such as Martindale-Hubbell, Lexpert, and other directories offer some value, though the information can be only a starting point for a careful inquiry by in-house counsel.

### **Selection Criteria**

The next step is to identify the selection criteria. Because objectivity in the process is important and because corporate management increasingly demands accountability from the law department for the delivery of legal service and retention of appropriate counsel, it is important that the criteria be clear and well defined. Developing clear criteria is important because the process of doing this makes one think through the types of legal services needed and what characteristics of a law firm will be best suited to providing that service. It also should encourage greater consistency in reviewing the firms’ proposals. The more specific the selection criteria are, the easier it will be to manage the selection process.

It is important that selection be based on the merits of the proposals. Firms may have been initially retained in the past on the basis of personal relationships between individual partners and individual in-house counsel. Although the firms retained in this manner may have been very capable and may have provided excellent legal service, that method of selecting counsel serves neither the company nor the firm. A personal relationship can inhibit due consideration of the substantive needs of the company or stand in the way of a meaningful critique of the quality of the service provided. Moreover, such a selection method

prevents clear measurement of how well the company's legal needs are being met because there is no agreed-upon set of standards on which that service is to be measured. Finally, that method means the relationship between client and counsel can be subject to the vicissitudes of the interpersonal relationship.

If the company's request for proposals clearly describes the scope of legal services and other expectations of the company, the firms will be in a better position to describe how they are suited to provide the required legal services. If the firms devote resources and effort to submitting customized proposals, the company should recognize those efforts and the firms' requirements as well. The best way to do this is to ensure that the criteria described truly influence which firm(s) win(s) the competition.

The participation of the company's internal business units in the counsel-selection process must be factored in. Efficient legal services are often delivered directly to that ultimate client by outside counsel. Satisfaction of that internal client is the determinant for both inside and outside counsel about whether legal services satisfactorily addressed the company's needs. When considering the involvement of your clients in counsel selection, at least three issues are in play. How will their views be solicited? How will the results of the final selections be communicated? How will the client interact with outside counsel once the work is assigned?

Does a company select a law firm or a lawyer? Both approaches have merit and they are not mutually exclusive. Even when a particular assignment requires a specialty or expertise that is available from a few individual lawyers, assignments are few in number that only require the work of one lawyer. Rather, the individual lawyers commands a team that provides the service. Thus, the capabilities of the firm are always a relevant consideration in the selection process.

### **Third Parties**

Consider bringing other organizations into the system for delivering legal services to your internal clients. In some cases, this might mean a number of law firms. Certain types of litigation (such as when many claims across the country relate to a single product or type of injury for which common causality or source is at issue) might need one firm to serve as coordinating counsel. Although local representation is necessary in each case, there is also a strong rationale to adopt a consistent approach on behalf of the company.

In other situations, it might be preferable to incorporate organizations other than law firms into the legal services delivery system. The United States, for example, has witnessed the development of legal research companies. These firms are able to conduct legal research at a cost that might be a fraction of that which a law firm might charge. Other types of services that are increasingly evident in this approach are firms that provide temporary or contract lawyers and information-management companies. This "unbundling" of the various elements of service, which until recently had been provided by law firms as a "package" with the counseling service for which they are best suited, represents a recognition that few law firms are experts at cost-effective document management or certain other tasks that support the delivery of legal services.

It also represents a new approach by corporations to all providers of legal services. They are telling providers that they (the clients) expect law firms to function as project managers as well as lawyers. This project management function represents a sharing of project management responsibility for legal services. A very significant component of that responsibility is a budgetary one.

All organizations expect that their counsel will be more sensitive to the cost of the legal services than they have been historically. Whereas lawyers have often used a team approach within the context of a law firm, clients now demand that the team be defined more explicitly and that the members of the team be deployed much more efficiently to provide the best value (service, results and price). They often demand that the team span organizational boundaries.

### **Fees**

The nature of the preferred fee structure can be relevant to counsel selection. Legal costs have the attention of the management of most companies. Professional fees and associated costs typically account for at least one-half the total legal costs for a company (not including the outcomes of the legal matters, such as plaintiff awards, punitive damages, etc.). With fees accounting for the lion's share of those costs, many companies are actively seeking ways to manage fees.

Corporate counsel and law departments are exploring alternative fee arrangements for use by their companies' outside counsel. The term "alternative" usually means other than a fee based simply on the

amount of time that outside counsel devotes to an assignment. Several specific alternatives are typically mentioned. A blended rate is where single or tiered hourly rates are charged regardless of the identity of the specific professional involved. A firm might also be paid a fixed fee, which may be for a completed matter or for any other measurable tasks. A company might pay a law firm a flat fee for an agreed-upon volume of work. It might pay a contingency fee or a premium, often combined with another type of fee, based on outcomes.

The type of fee selected can strengthen or weaken the client/counsel relationship. The hourly rate is in some disrepute, because in-house counsel believe that it creates incentives for the law firm that are contrary to the client's interest in cost efficient legal services. The longer it takes counsel to complete an assignment, the more counsel is paid, even if the amount of time is disproportionate to the business importance of the work. Organizations that review legal fees in an effort to identify inefficient legal service have arisen. Disputes between clients and counsel have gained notoriety and brought further disrepute on the fee-related aspects of their relationships.

### **Performance and Evaluation**

Most companies are concerned about the costs of legal services, but they also want to preserve the quality of the legal services received. Some believe that cost and quality are mutually exclusive and that any effort to reduce fees will inevitably affect quality adversely. We don't believe that is true, but the best balance is the responsibility of the client.

The evaluation of law firms and law firms' proposals, if an RFP or a competitive RFQ is the selection method applied, can be very important to preserving the reliability of the selection process. When first contemplating counsel selection, identify those criteria that will positively differentiate those firms and their proposals from their competitors. Decide how to apply those criteria and then apply them consistently. Record your evaluations and use them later analyze how well they related to actual experience.

After the selection of counsel is complete, it is important that the company and the firm communicate often and well about the work and about the relationship. In fact, it's impossible to overstate the importance of communication to a successful relationship. Be frank in discussions about problems, irritants, successes, and concerns. Use the selection criteria and the periodic evaluations of the relationship to help frame the discussion.

### **Summary**

All law departments must do more with less. Whether selecting new counsel or reviewing existing relationships, care is required to maintain trust and best business practices in legal services. The right choice of technique and a studied approach are necessary to customize the new relationship with outside counsel.

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