

What Is the Most Important Task of In-House Counsel?*

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I. Introduction

What is the most important responsibility of in-house counsel? Many probably would say that litigation management is the most critical part of in-house counsel's mission. Others probably would suggest that the day-to-day counseling is the highest and best use of the time of inside attorneys. Still others likely would point to recent scandals and corporate missteps to support their view that compliance efforts promise the most value for the company.^{1/} Still others might identify the retention of appropriate outside counsel for those innumerable situations where in-house counsel has insufficient resources or time to handle a matter, particularly one that is in or about to enter litigation.

All of those responses are worthy of consideration for the title of "most important responsibility." I suggest, however, that there is another responsibility the significance of which is often overlooked but that can have very substantial impacts on the company's legal situation.

That responsibility is to identify potential outside counsel for the company. While the ultimate selection and retention of outside attorneys have obvious significance for the firm, it is important to realize that the final selection can be no better than the list of candidates considered. While we might call the retention decision the "selection" of outside counsel, the earlier stage of the process (the identification of candidates for selection) is the "search." It is imperative, then, that in-house attorneys consider whether the process by which they conduct that search now is satisfactory. Should they broaden their search for candidates in order to increase the chances that they will find the best outside attorney for the task at hand?

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In 1997, the Greater New York Chapter of the American Corporate Counsel Association issued a report that stated, “the suitability of a law firm for a particular engagement may have more to do with the ultimate success of that engagement than any other factor over which a corporation has control.”^{2/} The purpose of that report was “to assist corporations to develop and refine processes” for the evaluation of engagements of law firms and of candidates for those engagements.

For purposes of referring to the best attorney for the task at hand, I use the term “appropriate counsel.” In some circumstances, “appropriate counsel” might be the best attorney you can find, cost be damned. In other situations, on the other hand, appropriate counsel might mean the one who can achieve the best result feasible at the lowest cost. In other words, the selection of counsel should be based on a constellation of criteria that includes cost as well as pure quality of legal acumen. Or, to put it slightly differently, the selection process should begin with a search for outside counsel who possess the various qualities that are relevant to the assignment in question.

II. Current Methods of Identifying Outside Counsel

How do in-house attorneys conduct the search at present? Recent surveys provide some clues. In 2001, a survey was sent to all members of the American Corporate Counsel Association (ACCA) to study characteristics of the relationships between corporate law departments and outside law firms. Among other issues, the survey’s questions probed the methods by which the respondent law departments identified candidate law firms to serve their companies’ legal needs and how those departments retained law firms so identified. The methods to locate outside counsel that were

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most frequently listed by the respondents were as follows (in declining frequency of citation, with the percentage of respondents who indicated each method):^{3/}

- referral from outside counsel (77.19 percent);
- referral from other in-house counsel at the same company as the respondent (52.52 percent);
- referral from in-house counsel at other companies (52.25 percent);
- company-approved outside counsel list (51.72 percent);
- published directories (24.93 percent);
- legal professional organizations (20.16 percent);
- on-line directories (16.98 percent);
- accountants/investment bankers/advisers (15.38 percent);
- search of law firm Web sites (11.41 percent);
- trade organizations (9.55 percent);
- unsolicited marketing or other materials from law firms (5.31 percent);
- ACCA's Member-to-Member Service (4.77 percent); and
- other (19.63 percent).

A survey conducted by the General Counsel Roundtable in 2001 yielded similar results. Personal referrals formed the basis for selection 84 percent of the time, while requests for proposals for legal service (RFPs) were cited 41 percent of the time. Lawyer and law firm directories provided the information on which 22 percent of the selections were based. Referrals from agencies (17 percent) and law firm Web sites (3 percent) were much less frequently cited. The catchall category (other) captured 7 percent of the results.^{4/}

Another survey, conducted in 2000,^{5/} revealed that many of those same sources of information about prospective outside counsel were relied upon by res-

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pondents as follows:

- referrals/word of mouth (60 percent);
- newsletters/updates (19 percent);
- brochures (16 percent);
- call/visit (13 percent);
- seminars (12 percent);
- established relationships (11 percent);
- networking (11 percent);
- personal experience (5 percent);
- representative matters (5 percent);
- portals (4 percent); and
- articles (3 percent).

Historically, it seems that corporate law departments have used an *ad hoc* approach to identifying counsel. Many of the above methods of identifying counsel (such as “referrals/word of mouth” and “networking”) suggest as much. The search typically commences when the need arises, rather than the department identifying firms in advance at a more deliberate pace. (I speak here not of the practice of creating lists of “approved counsel,” but a search for counsel for a specific matter or type of matter.) That approach seems to result in a time frame that could be inadequate for a comprehensive search.

It may be that the search is only commenced at that time because the need for legal service cannot be readily anticipated. Generally, those methods seem not to be well-suited to canvas a large number of potential candidates in order to allow a more comprehensive evaluation of competitive choices. That traditional approach precludes much preparatory work by the in-house lawyers.

III. The Importance of Selection of Appropriate Out-

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Without conducting any research on appropriate firms or spending time developing specific search criteria, can a corporate law department assure itself or its internal clients that it has conducted a search for outside counsel that is likely to find the outside counsel best suited to handle the matter in question? How important is the identification and selection of outside counsel to a law department's achievement of its various goals, such as successful outcomes and cost control?

In early 2001, NCR Corporation's law department developed and implemented a pilot process to measure the performance, and guide the selection, of outside litigation counsel using Six Sigma tools.^{6/} At the conclusion of that pilot project in June 2002, NCR determined that, by instilling more rigor into the process by which NCR's in-house attorneys measure and select outside counsel, the company had lowered its outside legal fees for litigation by approximately 60 percent for all cases and 28 percent for routine cases (all but major intellectual property litigation), and reduced the number of open cases on its docket by about 3 percent. The NCR law department accomplished this while increasing its Six Sigma rating for the process from 1.8 in the baseline measure to 3.2, reflecting a marked reduction in the number of "defects" that NCR clients experienced in connection with litigation.^{7/} NCR's Six Sigma project demonstrates that effective measurement and selection of outside counsel is critical to achieving the cost saving and case management goals of a corporate law department.

As noted above, the Greater New York Chapter of ACCA earlier expressed the view that the selection of counsel "may have more to do with the ultimate suc-

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cess of that engagement than any other factor.”⁸/ That view is certainly supported by the empirical data produced in NCR’s project.

Of all the methods of selection listed above that are currently used, however, most share one common trait: they do not constitute a systematic, organized search for appropriate counsel. Generally speaking, they enable an in-house attorney to do little but sample the possible candidates for selection. For example, the most-cited source of the names of law firms, referrals by outside counsel or by other in-house attorneys at the same or another company, can provide a limited number of candidates if at all successful (unless the inquiring attorney has unusual stamina). A more systematic means of canvassing potential candidates would be necessary to assure that the ultimate selection is indeed from among qualified candidates and represents the best selection possible, within appropriate limitations, like cost and geographic constraints.

IV. A Modest Proposal

Given the importance of counsel selection, a more systematic method of identifying candidates for retention, and for ultimate selection, is needed. An *ad hoc*, unregimented approach, as has been used historically, will not suffice in these times of heightened scrutiny of the actions of all players in corporate America.

What should such a method include? What process is appropriate?

A. Identification and Selection

The law department should first develop its selection criteria. Those criteria likely will vary from law department to law department. As all in-house attorneys know and as the Greater New York Chapter of ACCA

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explained,^{9/} “it is crucial that the corporation employ a rational and objective process to define the needs of each engagement and then use an additional objective process to determine the type of lawyer who will do the best work on that matter [and] that a corporation should use a third objective process to identify the law firm which will be best suited to do the work.”

The criteria might vary, depending on the size, sophistication, and resources of the corporate law department. At a minimum, however, the search should be designed to ensure that the in-house lawyers canvas a sufficient number of law firms and that they are able to treat the group of candidates considered as a representative sample of those that meet the department's stated criteria.

The increasing globalization of business creates additional stresses for in-house attorneys when seeking appropriate outside counsel for an engagement. More and more often, they must find qualified outside counsel in jurisdictions with which they are totally unfamiliar. In fact, in some cases, the in-house attorney seeking outside legal help may even be unfamiliar with the legal system of the locale as well as the substantive law and the depth of legal resources available.

What does all that mean for in-house counsel? Simply that the traditional means of finding outside counsel, as described above and as documented in the cited surveys, will no longer suffice. A more robust method of identifying outside counsel who are qualified and able to handle the specific matter in question must be applied.

The Internet contains resources that might be useful in that regard, particularly when a company needs representation in a foreign locale. Many law firms have

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Web sites. There are also commercial Web sites that list lawyers.¹⁰ A more recent online service aggregates data from law firms' Web sites.¹¹ There are services that allow law departments to create and disseminate RFPs online.¹²

Technology can enable a law department to review a greater number of law firms much more readily than is possible with traditional methods. Firms can be located and analyzed over the Internet despite geographic separation. Also of value is that the technology can be used to more effectively contrast the candidates so identified. Data can be extracted from Web sites and entered into a database for easy comparison.

The analysis of competing law firms' qualifications should lead to a more reliable decision. That decision should also be more defensible due to its greater objectivity.

B. Evaluation

As important as is the selection of counsel for each matter, the proper evaluation of outside counsel after retention is an equally important responsibility of corporate law departments. Law departments will realize the benefits of ongoing evaluation, however, over the long term more than over the short term. Unless a corporate law department can measure how well outside counsel does, that department cannot be sure that the criteria by which it selected counsel were satisfied in the actual performance. The later decision (whether by default or otherwise) to retain that counsel for another assignment or to replace counsel, in that event, will be less supportable than it should be.

The method of evaluation should be consistent with

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the selection method. The same criteria should be applied, or else the selection and evaluation decisions may not correlate well enough.

Evaluation should be as objective as possible. It is distinctly unhelpful to the firm evaluated to simply say, "your performance was not good enough." Only with specific detail as to how the performance failed to measure up to expectations that the law department clearly expressed previously can a firm either improve enough to earn the evaluating department's continued trust or, if that is not possible, provide other clients a service that is improved by heeding the lessons of that negative evaluation.

What criteria should apply? The answer to this question likely will vary, at least somewhat, from law department to law department. In-house lawyers' expectations and tolerance levels for work quality vary. Law departments' need to rely on outside counsel varies as well. Some departments may be so resource-challenged that they need outside counsel who can function entirely independently and with minimal day-to-day supervision. Another department that has greater internal substantive resources may be more capable of augmenting any service provided by outside counsel in order to compensate for shortcomings in that regard. Those two law departments might apply different criteria in selecting and judging law firms.

In some situations, the cost of outside counsel is a more significant factor than it is in other engagements. In a "bet the company" case or one in which the company's chairman of the board is named personally, budgetary restrictions may be nonexistent. In many other matters, however, when all is said and done, the cost of representation is at least a factor, if not a dominant one, in determining how well the company was

served.

Whatever criteria apply, however, consistency in their application is important — consistency over time and consistency among members of the law department. Without such consistency, the law department and the law firms will find themselves without clear guidance as to how well the latter are fulfilling the needs of the former.

V. Conclusion

A law department's success will be in direct proportion to the quality of its outside legal service, if it relies to any degree on outside counsel. In order to maximize the likelihood that it will recognize when it has found and retained appropriate outside counsel, a law department should assure itself and its corporation's management that it uses a reliable, objective means of identifying, selecting, and evaluating law firms. By carefully developing its selection and evaluation criteria, not in the context of a time-sensitive search for counsel for a just-filed case, a law department more likely will achieve the consistency and defensibility of its counsel-selection decisions that it needs.

ENDNOTES

/1/ The enactment in late July 2002 of the Sarbanes-Oxley Act of 2002 by the federal government, which created requirements for certifications, by CEOs and chief financial officers of publicly traded corporations, of the accuracy of financial and other reports of those companies (as well as numerous other corporate governance reforms), certainly lends credence to the importance of that role.

/2/ "Report on Selection of Outside Counsel by Corporations," at 1. This report is available on the Web site of the American Corporate Counsel Association

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<www.acca.com>.

/3/ See "2001 ACCA Partnering with Outside Counsel Survey" (American Corporate Counsel Association & Serengeti, Inc.), at 118 (ACCA 2001 Survey).

/4/ See survey cited in Susan Chema, Senior Attorney, Corporate Litigation and Employment Law, NCR Corporation, "Applying Six Sigma to Outside Counsel Management: Instilling Rigor into Outside Counsel Selection," presented to Six Sigma Cohort Meeting, Malvern, PA (May 7, 2002). That survey seemed to mix together methods by which to select counsel (e.g., RFPs) with sources of information about outside lawyers on the basis of which information the selection decision can be made.

/5/ These results were from a survey conducted by FGI, Inc. and Greenfield/Belser Ltd. entitled "How General Counsels Buy and Will Buy Legal Services," as reported in Smith, "Inside/Outside: How Businesses Buy Legal Services" (NLP IP Co. 2001), at 54.

/6/ Six Sigma is a methodology for improving processes and eliminating defects, originally developed in a manufacturing context, resulting in both hard and soft savings. A number of corporate law departments have applied Six Sigma methods to various aspects of their management of legal services for their corporations. For a discussion of the applicability of Six Sigma to a law department and its processes, see the chapter entitled "Leaping into the Future" in "Leaps & Bounds: Moving Ahead with the DuPont Legal Model" at <www.dupontlegalmodel.com/files/leapsandbound.asp#>.

/7/ Chema, *supra*, note 4.

/8/ "Report on Selection of Outside Counsel by Corporations," *supra*, note 1.

/9/ See *supra*, note 2, at 4.

/10/ Both West (see <lp.findlaw.com/>) and LexisNexis (see <www.lexisnexis.com/martindale/default.asp>) include online directories of lawyers.

/11/ See, e.g., <lawperiscope.com>.

/12/ See, e.g., <firstlaw.co.uk>.