

An Ongoing Saga . . .

The Still Imperfect Relationship between In-house and Outside Counsel

In-house counsel cannot spend money and outside counsel cannot live without it. The problem is as pervasive in its predominance as it is evasive in its elimination.

Despite a few encouraging signs, many businesses are still struggling financially, so outright avoidance or temporary delay of legal expenses is often the rule. The result for in-house counsel? More work is self-performed (often with a downsized staff) and huge pressure is brought by management to implement complex "Strategic Sourcing" or to immediately "reduce all legal costs, at all costs." In-house counsel are thus overwhelmed with work and underwhelmed with the typical lack of private practice value-add.

And for the law firms? Even as they face increased client demands, all are under tremendous stress to maintain revenue and profitability while facing increased competition from both within and without traditional legal practices. Some have "seconded" a couple of their former colleagues into clients' law departments. Some have crash-dived. Some have rived. Most have survived. A few have thrived. But they are under-loaded with work and overloaded with anxiety about it.

Here's a modest proposal.

By adhering to the following three suggested approaches, in-house counsel can achieve the "Cheaper, Faster AND Better" (all three!) legal representation it wants. Outside counsel can, in turn, obtain and retain its valued clients. I call this the "CFB Model."

How Outside Counsel Should Be Selected And Evaluated

Notice I said "should be." The reality is that outside counsel are still most often retained because they are inherited, long-standing advisors, colleagues, former classmates, friends, relatives, neighbors, referrals, good seminar presenters or rainmakers. Once the lawyer/firm begins work for the client, inertia (or resistance to change)

begins as well. Management does not want to pay to educate yet another law firm and in-house counsel does not want to pay for any mistake that might be made by a new, non-brand name firm.

Alternate fee arrangements (blended rates, bulk rates, capped rates, discounted rates, contingency billing, fixed fee billing, incentive billing, phased billing, value based billing, retainers, etc.), more robust law firm internet sites, online legal service and bidding sites are some of the innovations to connect businesses and lawyers. Most have attained only limited acceptance so far, let alone meaningful cost savings or increased client satisfaction.

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So how should outside counsel be selected? I believe that a business should consider the "Five C's": (1) competency; (2) capacity; (3) commitment; (4) communication; and (5) cost.

- **Competency:** The key word here is quality. Simply enough, the firm must be able to competently perform the work. The difficulty of the work should be the main driver. If it is a "bet the company" issue, a client needs the best firm it can afford. But for commodity type work, a client does not need a senior partner at an *American Lawyer 100* firm. Basically, a client should only pay for what it needs.
- **Capacity:** The key word here is quantity. The firm must be able to completely handle the volume. The amount and location of the work should be the main driver. The firm must have enough attorneys, locations and affiliations to handle all or most of a client's needs (locally, regionally or globally, as well as functionally and specifically).

Often, a company will have what I call a "backbone" firm that it relies on for its main support. If a client's current legal team lacks bench strength, the buyer will consider a complementary full-service or discrete service provider, which may be a practice group or boutique firm, for broader representation. That said, a client should generally limit the number of outside counsel it uses to a manageable number based on its own size, sophistication and needs in order to derive the full benefits of the Five C's. (For a terrific description of law firm convergence, "Strategic Partnering," and more, you should read <http://www.dupontlegalmodel.com/>.)

- **Commitment:** The key words here are dedication and collaboration. As I discuss below, clients expect you to know their people, know their business, know their industry and know their problems. Outside counsel are always convinced they know their clients, yet clients are rarely convinced that that is the case.

One way to gain that knowledge is "eat to learn" – or as viewed from the in-house perspective – "learn, then earn". Yes, it is non-billable client development time. No, it is not drinking beer and eating a hot dog at a ball game or hitting a golf or tennis ball. Once you have real institutional knowledge of your client, it should allow you, not only to react more quickly, but to be more proactive, more often. You will go from locating and putting out fires to reducing their frequency and magnitude, or even eliminating them altogether before they start.

- **Communication:** The key words here are speed and clarity. The lack of both gets more firms fired than anything else. You never want a call or message saying "I can't ever get hold of John...Where are we on this?" Do not try and impress the client with your knowledge of Latin phrases or sub-sub-sub-section references to regulations. In other words, do not talk like a lawyer.

Quite often, in-house counsel's greatest value-add is to translate the Company's business language into legal language for outside counsel and then to *reverse* the process. If there is no in-house counsel, make sure your clients understand by encouraging them to ask, "What do you mean by that?"

- **Cost:** The key words here are cost and value. Budgets are becoming the norm. Both sides should sit down before any major project to evaluate ways to reduce legal costs. Here, however, outside counsel should also emphasize any and all "value-added services" they can provide.

A strategic lawyer is not a mere technician. He or she is someone who, not only fully understands the client's business goals and does not focus solely on minimizing legal risk, but actually combines the two in

order to help the client achieve those goals in the best legal way. Your emphasis should be on the client getting more than just the typical law firm performance of a requested service at X hours times Y per hour. To your client, "value" means it believes that it got more business or legal benefit than what it paid for or expected.

It is interesting to note the contrasting views of in-house and outside counsel on the Five C's. Most law firms combine "competency" and "capacity" under the rubric of "Legal Service" and consider mitigating risk as the #1 client priority. They then combine "commitment" and "communication" as "Client Relationship," which is their #2 priority. Lowered client "cost" is often a distant third.

Conversely, most clients today view the key priorities as "cost, cost, cost" (much like real estate pundits repeat the "location" mantra). Client Relationship morphs into the "Faster" #2 component of the CFB Model, and Legal Service morphs into the "Better" #3 (brand name) component. So while law firms are touting their expertise and working hard to strengthen relationships, clients are focusing on costs and value added services.

Therein is the biggest and longest running disconnect between in-house and outside counsel.

How Outside Counsel Should Operate Toward Their Business Clients

Again, notice I say, "should." The following lists indicate a goal that, with cost and time constraints, are not necessarily realistic. Yet, for your most important clients, every effort should be put forth to achieve the following deliverables:

- **ALWAYS:** Know the key Company people (title/authority, personality, integrity, intelligence, experience, risk tolerance, expectations, etc.). Know the applicable Company business (core business, size, trends, growth strategies, "bet the Company" issues, channels of distribution, competitors, suppliers, customers, service providers, etc.). Do the expected outside review of the facts, issues, rules, analysis, conclusions, negotiations, etc. After that, provide legal advice that is strategic, "proactively reactive," first-class, timely, cost-effective and value adding.
- **Weekly:** Call or send very brief e-mail updates on significant developments regarding material projects. Call company contacts if there is any significant issue you need input on, such as: (a) a legal/business decision needs to be made; (b) inside business insight is needed; (c) an FYI should be shared (e.g., questionable management judgment); or (d) a "situation" exists with people, process or otherwise that is impeding your work.

- **Monthly:** Write brief one-paragraph status summaries of each significant billed matter to accompany your invoice. Use e-billing if requested.
- **Quarterly/Semi-Annually:** Research the latest news on the company and its industry and meet to discuss "lessons learned," business trends, emerging hot legal topics, etc.
- **Yearly:** Meet at the Company to review all of the above and to discuss cost-reduction/value added ideas and alternative fee arrangements.

How Outside Counsel Should Get to Know Their Business Clients Better

Once more, I'm saying, "should." No matter how hard you try, you will never know your clients as well as they want you to. You must nonetheless understand that you need to do as many as the following *on your own time*. They must understand that you have reached a level of knowledge about the Company that only full-time in-house counsel have any chance of equaling.

1. How well do you know the people?

- Do you know the CEO? President? COO? CFO? CLO/GC/Contracts administrator? CIO/VP IT? VP HR? VP EH&S? VP R&D/Engineering? VP Manufacturing/Supply Chain? Chairman of the Board of Directors? Anyone on the Board of Directors?
- When was the last time you met with or spoke to each of the above? Visited their office?
- How well can you rate each of them on the following: Overall personality? Integrity? Actual versus self-perceived industry and business IQ? Business/industry and company experience? Actual versus self-perceived authority and importance within the company? Actual versus self-perceived understanding weighing a business reward against legal risks? Risk tolerance? Communication expectations? Timing expectations? Budget expectations?

2. How well do you know the business?

- When was the last time you actually walked their manufacturing plant? Researched the company on their website or the internet? Researched the company's industry on an industry trade website or in an industry trade magazine?
- What is their core business? Manufacturer? Service provider? Industrial? Consumer? Governmental?
- What are their revenues and profits? Are the numbers trending up or down?
- What is their strategy for growth? Is it product-based? Service-based? What is the geographical strategy? How M&A-oriented is the strategy?
- What, if any, "bet the company" issues may they face?
- What are their major channels of distribution? Who are their major competitors? Major suppliers? Major customers? Other major service providers, such as other law firms, accountants, etc.?

Outside counsel's success in meeting a client's CFB Model can be more easily achieved by adhering to the three approaches described above. In-house counsel will save money and outside counsel will save clients.

Now that could be the real beginning of a beautiful friendship!

– Robert S. Burns

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