405 - Good Cop/Bad Cop? Improving Outside Relationships

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Faculty Biographies

Steven Lauer

Steven A. Lauer is corporate counsel for Global Compliance Services in Charlotte, North Carolina.

Previously, he served as director of integrity research for Integrity Interactive Corporation. He also consulted with corporate law departments and law firms on issues relative to how in-house and outside counsel work together. He worked as an in-house attorney in law departments as the sole in-house attorney for an organization. Mr. Lauer also has served as executive vice president, deputy editor, and deputy publisher of The Metropolitan Corporate Counsel, a monthly journal for in-house attorneys. Prior to becoming an in-house attorney, he was in private practice. Mr. Lauer was an assistant general counsel for The Prudential Insurance Company of America. He was project director for the Prudential law departmentï¿_s outside counsel utilization task force. Mr. Lauer was the in-house environmental attorney in the Prudential law departmentï¿_s real estate section. He was responsible for management of all litigation for those real estate units. Mr. Lauer represented Prudential in industry groups. In his consulting practice, Mr. Lauer conducted benchmarking research for clients, designed evaluation processes for counsel selection, researched and designed a case-evaluation methodology, and created a manual for outside counsel, among other projects. He has worked with law firms to better understand the changing expectations of corporate clients.

He has authored numerous articles on compliance, the relations between in-house and outside attorneys, the selection of counsel by corporate clients, the evaluation of legal service, litigation management, and other topics relevant to corporate compliance programs and corporate legal service.

He received a B.A. from the State University of New York at Buffalo and a J.D. from Georgetown University Law Center.

Patrick McGlone

Patrick McGlone is associate general counsel at ULLICO Inc., a privately-owned holding company with several insurance and investment services subsidiaries in Washington, DC. Mr. McGlone's principal responsibility is the management of all litigation and ADR matters. He also advises ULLICO on employment, commercial and insurance issues.

Before joining ULLICO, Mr. McGlone served as in-house litigation counsel at Mobil Corporation and US Office Products. He began his career as a litigation associate in the Washington, D.C., office of Hunton & Williams, and was a litigator at the Federal Deposit Insurance Corporation before moving in-house.

Mr. McGlone has been an active in several bar associations. He has participated in the Corporate Scholars program of ACC's Washington Metro Area Chapter. He is a member of the council of the ABA's Section of Individual Rights and Responsibilities and is a former co-chair of the section's committee on sexual orientation and gender identity. Mr. McGlone is member of the D.C. bar's publications committee. He previously served as co-chair of Gay & Lesbian Attorneys of Washington and as co-chair of the GAYLAW Education Fund, a 501(c)(3) foundation. He received the Chairman's Award from Us Helping Us/People Into Living, Inc., and a DC-area HIV/AIDS outreach organization that focuses on the African-American community.

Mr. McGlone is a graduate of The George Washington University Law School (J.D., with High Honors) and was a member of the editorial board of The George Washington University Law Review. He received his B.A. summa cum laude from Fordham College.

Alison Nelson

Alison R. Nelson is managing counsel of Ford Motor Company's consumer litigation and product claims group. She is also Ford's chief counsel on all consumer affair issues. In addition, she handles some Commercial Litigation matters, including antitrust and contract disputes.

Prior to assuming this position Ms. Nelson worked in the product litigation practice group at Ford Motor Company and was team leader of the general product group. She also previously worked in Ford's environmental matters practice group. Her duties at Ford also include serving as chair of the outside minority counsel and the charitable contributions committees. Ms. Nelson is also a member of the office of general counsel's diversity committee.

Ms. Nelson has extensive bar association experience. She is a member of the ABA board of governors. She is also past president of the Wolverine Bar Association (National Bar Association Affiliate). She has served on various ABA, National Bar Association and the State Bar of Michigan committees. Within the ABA she has chaired the ABA's Commission on Homelessness, served in the House of Delegates. Ms. Nelson is an active member of the Word of Faith International Christian Center. She also participates in many other community activities and has served as assistant general counsel for the Michigan State Council of the NAACP. Ms. Nelson has also received several awards for her commitment to diversity.

Ms. Nelson graduated with honors from Michigan State University College of Law with a J.D. and Michigan State University with a B.A.

Michael Parham

Michael Parham holds the position of associate general counsel at RealNetworks, Inc. in Seattle, Washington. He is responsible for the negotiation of technology licensing agreements including software licensing, development and consulting services. He also provides advice and counsel to RealNetworks on human resource matters as well as community and governmental affairs.

Before joining RealNetworks, Mr. Parham was an attorney with IBM. Prior to his departure, he served as the regional counsel, responsible for managing IBM's Midwest region

legal department in Chicago. He began his legal career with chapman and cutler in Chicago where he practiced in the area of corporate finance.

Mr. Parham is a member of the ACC, the ABA and the Loren Miller Bar Association. He is on the Seattle public library board of trustees and serves as vice president of the pike place market foundation board.

Mr. Parham received a B.A. from Michigan State University and is a graduate of the University of Michigan Law School.

The care and feeding of outside counsel

By Steven A. Lauer © 2002 *

When a company has a law department, that department is responsible for the company's legal affairs. Due to staffing and other limitations, however, it's unusual that the members of a law department are able to handle all the legal work directly. Rather, outside counsel typically is engaged to handle at least some of that legal work. Surveys repeatedly demonstrate that spending on outside counsel typically is at least 50% of the total legal budget. This is true for litigation-specific matters as well.

Even when outside counsel represent a company, however, the law department is responsible for those legal matters. The law department must manage the legal work that is performed by the outside law firms. It cannot afford to simply turn that work over to them and ignore how, and how well, it is accomplished.

The management of outside counsel is a multi-disciplinary role. It spans selection, retention, management and evaluation of law firms. Each of those spheres of action relates to the others. They should be viewed as parts of a whole. For example, actions taken in respect of selection will affect the means by which counsel can be managed on a day-to-day basis. How a law department daily manages outside counsel can be important in determining how it should evaluate them.

Selection of Outside Counsel

Historically, companies have selected outside law firms by a variety of methods. Personal relationships between individual in-house attorneys (particularly the general counsel or chief legal officer) and individual outside attorneys have played important roles in that selection process. The presence of outside lawyers on corporate boards of directors has often been an important, if not decisive, factor.

Those decisions were made at a time when law departments were accorded considerable autonomy in managing companies' legal affairs. The departments did not routinely face scrutiny as to how they selected, retained and paid outside counsel.

That benign neglect is no longer the case. Legal budgets are subject to corporate cost cutting initiatives. Corporate executives are no longer quiescent in respect of how legal work is handled. They want to know who represents the company. They expect information about the many other decisions that in-house lawyers once made without fear of second-guessing. Senior management analyzes even strategic and tactical decisions made with respect to litigation. The atmosphere today is far different than it was in prior decades for in-house lawyers.

Another change in the relationships between corporate clients and law firms has been in respect of the number of law firms a company might use, compared to what had been the case. Years ago, many companies relied on only one or a small number of law firms for all, or virtually all, of their legal work.

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* Steven Lauer is a consultant in Maplewood, New Jersey. He spent thirteen and one-half years as an in-house counsel in four organizations, including one of the largest law departments in the country. He was responsible for litigation management for several business units and associated issues, including counsel selection and management. He was project director for the effort of the Law Department of The Prudential Insurance Company of America to use requests for proposals in its counsel selection process. As a result of that effort, approximately 60% of the company's outside legal service was awarded to 80 law firms. He now consults with law departments on issues related to counsel selection, counsel management, litigation management and other issues. His phone is (973) 763-6340 and he can be reached by e-mail at steven.a.lauer@comcast.net. He is presently Senior Partner, PLI/Corpedia Managed Compliance eLearning Services and can be reached at (212) 824-5994 or by e-mail at slauer@corpedia.com. This article previously appeared at *Law Department Management Adviser* (March 1, 1999), p. 2, and *Corporate Counsel's Guide to Litigation Management* (April 2002 supplement).

Legal issues have become more complex since that time. Specialized and more-complicated practices have developed. The geographic scope of business operations has grown tremendously, subjecting companies to suit in far-flung jurisdictions in which they may not have counsel already available. Those and other changes led companies to utilize many law firms over the course of a year. The selection of law firms became more frequent and more challenging than it had been. More recently, however, a shift has occurred. Companies are paring the number of firms they rely on for day-to-day work, including litigation.

Accordingly, in many law departments the selection of outside counsel is now conducted differently than it once was. With a view to establishing credibility for the process and anticipating accountability for the selection decisions, more and more law departments are applying business tools to this process that they formerly did not consider utilizing. While personal relationships are still important criteria by which law firms come to the attention of and are retained by in-house attorneys, more formal methods of selecting counsel are more common than they once were. "Beauty contests," requests for qualifications (RFQs) and requests for proposals to provide legal service (RFPs) have become more common in recent years. The Greater New York Chapter of ACCA issued a report in 1997 in which it canvassed issues related to various selection methods.

What are those methods by which to select counsel? How do they differ? How do you choose among them?

A beauty contest focuses on the described qualifications of the target law firms. The potential client company solicits interest from firms while some information about the type or types of work it needs handled. The process is not very structured and it can be completed in a fairly short time. It relies more than the RFQ or the RFP on face-to-face meetings with candidate firms.

An RFQ asks law firms to state their qualifications to perform the legal work that is described in fairly nonspecific terms. This process is also not too lengthy or involved. The submissions by law firms likely will vary significantly, however, as they try to anticipate the company's need. The selection among the firms represented likely will be a more-reasoned one than is often possible after a beauty contest, but it might still leave certain issues unaddressed. Exhibit 1 is an example of a hypothetical RFQ. Obviously, the specific questions and information requests will vary for each situation.

An RFP is the most rigorous selection method of the four identified. It should include a more complete description of the company's need for legal services. For example, it might describe the type of litigation for which the company needs counsel. It should estimate the amount of work expected to be assigned. Accordingly, it requires the most preparation by the law department and a longer time for completion. Finally, it typically requires the most complete submissions by the firms invited to "bid" for the work. One of the strengths of an RFP, however, is that it can serve as the vehicle to introduce changes in the nature of the relationship between a company's law department and the company's outside counsel. In other words, it is (or can be) more than a device to retain counsel for one case or transaction. Exhibit 2 is an example of a simple, hypothetical RFP for a category of litigation cases. (An RFP can be much more extensive than Exhibit 2 and the terms of an RFP should be very specific to the needs of the client and the context of the work.)

The selection of a method of retaining counsel should be made on the basis of several factors. What sort of data does the company possess regarding its prospective legal needs? Are there any time constraints that might impact the selection process? What resources does the law department have to prepare the RFP and process the related paperwork?

The data should be as complete as possible. The goal is to provide to the law firms invited to submit proposals enough information to enable those firms to make proposals that are as complete and contain as few assumptions and provisos as possible. If the law firms that receive the RFP are unable to anticipate what will be required of them if they are awarded the work, they won't be able to submit proposals that are reliable. The types of data that one would like to have include historical use of outside counsel for the types of work involved (*e.g.*, amounts spent on similar legal fees in the past), numbers of cases of the types involved for several prior years, some indication of the complexity of those past cases

and how the future cases might compare, the geographic distribution of those past cases and any other identifiable traits of that past work that might be true as to future similar work. Naturally, the description of prospective needs can't be a guaranty.

As to resources, it's important to understand that an RFP demands considerable attention from the law department's personnel. While some of that can be alleviated by retaining a consultant with experience in preparing RFPs, the success of the RFP process (in fact, the success of any of the selection methods described) depends on willingness on the part of the department to help shape and participate in the process. After all, the in-house attorneys will have to live with the results.

An RFP can take considerable time. The more extensive the RFP is (in terms of scope, number of law firms invited to respond, etc.), the longer it will take. Even a simple RFP can consume several months if done properly. Preparing the RFP itself will, in all likelihood, take weeks. The law firms will require some time to prepare responsive proposals. Evaluation of the various proposals and selection from among them can also be time-consuming, particularly if the department engages in any negotiation with one or more of the law firms (to improve firms' proposals, to clarify some of the terms or to remove some of the conditions, for example).

Implementation of the method selected should be completed as expeditiously as feasible. Once the process starts, there is considerable uncertainty and anxiety among the in-house and the outside counsel as to who will be working for the company in the future. This period of uncertainty can be debilitating and it can adversely impact ongoing work. The process should also be undertaken with as much respect for those involved as possible, also due to the uncertainty created and the need for sincere implementation of the results.

Is the use of an RFQ or an RFP available only to a larger law department? Not necessarily. The use of either of those tools is more dependent on the type and amount of legal work that can be anticipated and awarded through such a process. A smaller department, with fewer internal resources than a larger law department, might use an outside consultant to do more of the drafting and other tasks involved in such an endeavor, though even in that case the in-house lawyers should remain in control of the process. The benefits of restructuring the outside legal service through such an effort can be achieved regardless of the size of the department.

The retention of counsel

A company that is involved in litigation usually is involved as a defendant. Thus, it becomes actively involved only when it receives a complaint. The significance of that is the need to respond within a fairly short time frame with an answer or some other pleading. If some of that period is spent locating counsel, precious time can be lost. That can handicap a company in its defense, to some degree.

It's far better to know in advance what firm you will go to for that defense. If that firm is also familiar with the company, its products, and its litigation preferences, the entry into litigation as a defendant can be much smoother than it otherwise would be.

If there is enough litigation of a particular type, and it is dispersed geographically, there is great benefit from selecting counsel in various locales prior to facing suit in those places. Much of the time that might otherwise be spent identifying appropriate counsel, retaining them and bringing them up to speed can be eliminated or devoted to more productive tasks, such as planning your strategy for the case.

Depending on the volume of litigation you anticipate, you might retain a firm for a single case or, if there is likely to be sufficient work, for a class or classes of cases. This can be done by means of an oral understanding, a retention letter or a retention agreement. I list those in the order of complexity, starting with the simplest – the oral agreement – through the most involved – the retention agreement.

What are the benefits and shortcomings of each? The oral understanding is obviously the quickest to effect due to the simplicity. It probably should be used only in situations where the company and the

firm are already familiar with each other and have a good working relationship. It is difficult to address in a conversation all the issues that one should in retaining a law firm (compensation, working approach, conflicts of interest, and a myriad of other issues). Moreover, there may be nuances to any or all of those issues that one cannot anticipate and problems may later arise. It's easier to address such issues later if there is a reservoir of goodwill between the parties that results from prior history. The absence of a written understanding invites problems due to inconsistent recollections of the terms of the discussion, also. If time is extremely short, however, a verbal retention may be necessary, in which case it should be followed as soon as feasible by a written understanding.

A retention letter is a short, unilateral document by the client (usually) to the firm detailing the terms of the relationship. It often does not address some important issues. It might be accompanied by billing guidelines or some other auxiliary document from the company setting out its understanding or expectations as to certain issues. If a retention letter is used, the firm should evidence its agreement to the terms by countersigning the letter in some fashion. There are compilations of forms of retention letters available from the American Corporate Counsel Association and other sources.

A retention agreement is the most involved means of retaining a firm. It typically includes discussion of more areas of concern than is the case for either the retention letter or the oral agreement. The retention agreement might be legalistic in tone or not. My advice is to keep it more informal in style due to the nature of the relationship between client and counsel. It's not a situation where you expect or want to have to try to enforce terms specifically. In fact, the freedom that clients have under ethical rules to select and deselect counsel, as well as other protections they enjoy, may be sufficient protection for a client that becomes dissatisfied with its counsel.

A primary purpose of the agreement is to describe the expectations of client and counsel vis-à-vis their relationship. It need not contain excruciating detail as to how the relationship will work, but it should provide the basic parameters by which they plan to work together to achieve the client's goals. Don't forget that this document should be entitled to status as a privileged communication, so treat it accordingly (appropriate legend, limited distribution, etc.).

The selection of a means of retaining a firm can also depend, in part, on the fee arrangement between the client company and the firm. If the firm is to be paid on an hourly rate, for example, you might wish to spell out in great detail some of the "thou shalt"s and the "thou shalt not"s on billing issues. The submission of invoices in your preferred format (*e.g.*, task-based billing) might be of greater import in that situation. Perhaps the firm and the client have agreed on an alternative fee arrangement (whereby the fee for the firm is calculated on the basis of something other than just the amount of time devoted to the work by the professionals of the firm, multiplied by one or more hourly rates). In that situation, the client may not have any interest in seeing invoices that detail the time and expenses borne by the firm on its behalf. The important point is that the nature of the fee arrangement can impact various elements of the counsel-management system.

Retention of counsel for transactional work can be effected by means of the same mechanisms. The time considerations might be less urgent than those in the litigation context, but many of the other considerations apply.

Day-to-day management of counsel

The heart of the client/counsel relationship (for a corporate client, particularly one with a law department) consists of the day-to-day management of outside counsel. As much as you might try to anticipate issues that can arise, litigation being what it is, that is almost impossible. The pressure on law departments to control costs and achieve desired results means that members of a law department should be proactive in managing those legal affairs.

There are two basic styles of management to consider. You can be unilateral and bureaucratic. By this, I mean that the client lays down the law and sets all the rules for the engagement, sometimes in extreme detail. Billing guidelines may be only the tip of that iceberg. There is little discussion of the terms by which the client expects (no, demands) the firm to serve it.

The alternative is a more consultative and collaborative style. The client's expectations are still paramount, but either party can raise issues. The client and counsel discuss those issues and jointly decide the best means of achieving the client's goals and how the client's expectations will be met.

I advocate the consultative approach. I don't suggest that the client cede its prerogatives as client. I think it's important to recognize, however, that as a client you want a firm that will try to anticipate your needs (legal and, in some respects, extralegal). If everything must conform to the terms set out by the client without discussion and something arises that doesn't neatly fit into any of the specific guidelines set out, there is a risk that time will be lost as the firm seeks direction. If the appropriate individual in the client organization is not available at that time, the delay can be costly. Moreover, adopting a unilateral approach and issuing bureaucratic edicts sets a tone for the relationship that is more adversarial than recommended.

The consultative approach suggests more of a partnering relationship. The unilateral approach implies that the relationship is one of "us" and "them." The latter type of relationship depends not only on complete and accurate anticipation by the client of all that might later arise, but also on close scrutiny of the actions of the firm to make sure that it has in fact satisfied the dictates laid out at the beginning. In other words, it's akin to the "command and control" style of organizational management.

The collaborative approach relies on establishing common goals and expectations. Those goals are those of the client, of course, but the means of reaching them and the details of those goals are reached through discussion between the client and the firm. Good ideas can originate with either. Meetings for that purpose can be a very effective mechanism to establish the specifics of those goals and means.

The importance of communication

The importance to counsel management of good communication cannot be overstated. I'm not speaking simply of the messages sent between in-house and outside counsel about the status of cases and recent developments. Rather, the entire range of information that must be passed back and forth, and how that information flow pertains to the relationship between and among the attorneys is critical.

A monthly periodical for the legal profession has conducted annual surveys for ten years regarding the opinions of corporate general counsel about how law firms service their companies and how outside lawyers think that they service those clients. There has been a consistent gap in the two groups' views on those issues. On some issues, that gap has even widened from year to year.

In the 1998 survey law firms awarded themselves a grade of B+/A- in response to the question of whether they provide effective and creative preventive legal advice. The surveyed general counsel awarded only a C+ on that point. In 1997, general counsel had rated the firms as deserving a score of 3.3 (on a scale of 1 to 5, with 5 being the highest score), while law firms felt that they deserved a 4.2. In 1999, law firms earned only a 2.1 score from the general counsel (in the 1999 survey, the scale was 1 to 5 again, but 1 was the highest grade available and 5 was the lowest), while firms awarded themselves a 1.8.

As to whether firms share risk with their clients, general counsel felt in 1997 that the firms deserved a 2.6 while the firms felt that they deserved a 3.4. In 1998, the respective scores were C- from the general counsel and C+ from the firms. In 1999, general counsel awarded only a 2.9 (the highest score available was 1 and the lowest was 5), while firms felt entitled to a 2.2.

In respect of whether firms' charges are commensurate with the value of the services provided, general counsel graded firms at 3.4 in 1997 (5 was the highest score available), a C in 1998 and a 2.6 (1 was the highest available score) in 1999. The firms awarded themselves 4.3 in 1997, a B+ in 1998 and 1.8 in 1999.

On most service criteria rated in those surveys, self-grading by the firms resulted in grades that have been consistently higher than the grades that they earn from their clients. Clearly, there has been a considerable difference of opinion between law firms and the chief legal officers of their clients as to how well the firms serve those clients.

The 1999 survey demonstrates a more puzzling dichotomy between the views of inside counsel and the views of the outside lawyers with whom they work. The surveyed general counsel were asked to select a descriptor for the working relationship between their law departments and the outside law firms in various substantive practice areas. The outside lawyers were asked to make a parallel selection. The available labels were "In-house only", "Outsource", "Case management", "Co-counsel" and "Temps".

"In-house only" was defined as "[I]n-house counsel performs all work internally and only uses outside counsel for overflow or when unique specialty is required." "Outsource" described a situation in which "[o]utside counsel is responsible for entire practice or block of work with little in-house management." "Case management" would apply where "[o]utside counsel performs the work; in-house counsel manages" that work. "Co-counsel" was to be selected if "[I]n-house counsel and outside counsel share substantive work responsibilities." "Temps" was to signify that "[u]se on-site contract lawyers and paralegals from a service."

There are two striking features about the data in the surveys. (The results of the surveys illuminate other issues as well, but for purposes of this discussion, I will focus on only two.) First, they reveal starkly that outside and inside lawyers do not agree even on how they work together! There may very well be disagreement on specific details as to how attorneys will work together: the allocation of responsibility for individual tasks and assignments might be confused on account of inadequate specificity at the start. To differ so dramatically on whether work is completed by only one of the parties, with little supervision, or by both of the parties sharing responsibility equally, however, leads to a natural question. Do inside and outside attorneys attempt to coordinate their actions in respect of their common clients at all? Are the clients as well served as they deserve to be?

A second conclusion that leaps of the pages of the two surveys is that the two groups are remarkably consistent over time in their views on the question. They simply disagree between themselves tremendously. That such disparity of perception should persist seems to prove that communication between in-house and outside counsel, to the extent it exists, does not include discussion of what appears to be a basic and seminal issue – how in-house and outside counsel for one client will work together!

Communications problems have been particularly significant in the insurance industry, it seems. An article several years ago highlighted the dissatisfaction of many law firms with the status of their relationships with the insurance companies. The thrust of the story was to the effect that a number of lawyers who have long represented insurers (including some prominent members of that group) have decided to represent plaintiffs against their former client industry. In the course of the article, the president of an organization of over 20,000 defense attorneys was quoted as saying "[t]here's been a dramatic drop in constructive dialogue between defense counsel and the insurance industry." (See Brennan, "Driven to Defection," The National Law Journal (May 18, 1998), pp. A1, A27.)

Communication failures have obvious implications for the day-to-day responsibilities that you must shoulder in managing litigation. Simply put, you can't afford to misunderstand the expectations of outside counsel or for them to fail to grasp your concerns. As much as possible, you need to assure that everyone is "singing from the same hymnbook." This even includes the representative of the business unit that is involved in the matter.

How can you do that? There are several tools you might consider. First, design into your counsel-management procedures periodic tasks that require communication. By requiring periodic communication to satisfy your own procedures, you'll reinforce its importance. For example, if you require that counsel evaluate the relative risk of each dispute, don't allow the mere submission of a memorandum to satisfy that need. Engage in a discussion of the details of that analysis and the implications of each factor considered for the company's litigation posture. If you require that counsel prepare budgets for your cases, and

updates are called for (either because you require periodic updates or because events have overtaken the old estimate of costs), have a discussion of those questions.

Think about the benefit of having discussions with outside counsel that are not about specific cases but, rather about the ways in which you work together, or what your expectations of them are in the relationship. Ask them for suggestions as to ways to improve your management of the litigation. While they might offer such ideas on their own and without prompting, that might not be so. Their representation of other clients allows them to see the relative strengths of different clients' differing management approaches. Take advantage of that.

Meet with groups of law firms (at least, firms that handle similar work for you) periodically. Look for common approaches that they might adopt for your work. Challenge them to work together as a team. The benefits of doing so can be significant for your company and for them. Ask them to suggest ways to improve how the legal service is delivered to the business clients.

Evaluation of firms

Legal service is amorphous. It consists of words and concepts and the only tangible output is paper. Quality legal service is even more amorphous. While everyone wants high quality legal service, there is not ready agreement on what comprises it. I liken it to Justice Potter Stewart's famous statement about pornography: "I can't define it, but I know it when I see it."

The problem with that approach to legal service is that it's difficult to know the degree to which individuals' definitions of quality service vary. Even within a single law department, individual attorneys have divergent expectations of outside counsel and therefore their opinions of the same firm (and even of the same individual lawyer) can and likely do vary.

It's time that the legal profession attempted to define more specifically what it means when it refers to "quality" legal service. While the concept may be elusive, it's important in so many ways that clarity is important. If some commonality can be achieved throughout the profession, it should assist both in-house and outside counsel. Inside attorneys will be more certain of the comparative meanings of the recommendations they receive from each other (even within a single law department).

Outside counsel will have an easier task in marketing their services if they and the in-house attorneys to whom they direct their efforts are speaking the same language. It seems that every brochure that I've seen from a law firm includes the claim that the firm is the best. Can we believe that they're all correct? Can we know what standard they might have in mind?

Even within a law department, there's much to gain by developing a common understanding regarding the factors that equate with a high quality legal service. The department will be able to achieve consistency in its use of counsel because the standards will be clarified. The selection of counsel should be more reliable in terms of assuring that high quality is appropriately valued. The selections made will be far easier to defend when the quality can be more readily demonstrated. Finally, the department will be better positioned to provide to its outside firms better, ongoing feedback as to whether and how they satisfy its demands for quality service.

In short, a well designed means of evaluating outside counsel, consistently and diligently applied, supports the selection and management paradigms described above. It will also strengthen the relationship between inside and outside counsel because it should lead to periodic communication about a topic of high interest to both (and less stressful than invoices!). This in turn will conduce toward common understanding on these issues.

Conclusion

Management of outside counsel is one of the most important functions of a law department. It runs the gamut of the terms of the relationship between inside and outside counsel. The choice of a

selection method is important. The design of a fee structure is part of management. The degree to which in-house counsel are involved in the day-to-day tactical decisions necessary in litigation and transactions is the heart of counsel management. The means by which a law department evaluates its outside law firms and communicates the results of those evaluations is another important facet of counsel management. All those aspects of the management approach should be consistent and mutually supportive. Properly designed, however, they can be valuable elements of an effective and efficient legal-services delivery system.

Exhibit 1

ABC Corporation Law Department
Request for Qualifications

Name of law firm: _____
Address: _____
_____
_____

Contact partner: _____

Phone and fax: _____

E-mail address: _____

ABC Corporation is seeking qualified law firms to represent it in certain litigation. That litigation involves the company's do-it-yourself kits for automotive brake repairs. The ABC Corporation Law Department plans to select lawyers around the country for this work by means of a broad review of firms including firms that have not represented it previously. To enable it to identify firms to interview, the Law Department has identified the following as the minimum criteria for consideration in this process:

1. Evidence of a firm's demonstrated competence in product liability litigation in respect of products marketed to do-it-yourselfers. At least one member of your firm must have at least five years of success representing clients in this field of law and that individual must be available to represent ABC Corporation in these matters.
2. Support staff and technological capabilities that would be necessary to handle this representation.
3. At least four references from clients for whom the firm has handled such matters.

This inquiry will be followed by interviews of firms selected on the basis of these submissions. In addition, the Law Department may very well request additional information in subsequent stages of this process. If your firm is interested in being considered for this work and is prepared to participate in the submissions (which may be extensive) and discussions deemed necessary by the ABC Corporation Law Department, please provide information (the minimum you feel necessary) responsive to the following questions:

1. Who would be on the legal team that would represent ABC Corporation in this litigation? Please identify each proposed member of the team and his or her qualifications. What is his or her experience in this type of litigation? Who would be the team leader?
2. Is your firm willing to share information and practices with other firms that represent ABC Corporation in this litigation? What practices of the firm would be consistent with a high degree of teamwork with both ABC Corporation's in-house legal staff and the members of other firms around the country representing ABC Corporation in the same or similar matters?
3. What experience does the firm have with task-based billing and litigation budgeting?
4. Can the firm commit to make available at least 2,500 hours of total professional staff time over the course of a year? Which professionals would be the primary billing professionals (they need not be all the same individuals identified in response to question 1)?
5. Would the firm be willing to enter an alternative fee arrangement with ABC Corporation for this work? If so, what sort of arrangement would you propose?

If your firm is interested in being considered, please sign this form in the space below and provide the above information in hard copy (not by fax, please) to the attention of the Deputy General Counsel by January 31, 1999.

_____ _____
Signature Date

Exhibit 2

ABC Corporation
Request for Proposal to Provide Legal Service

ABC Corporation is a defendant in a series of cases involving its do-it-yourself kits for automotive brake repairs. The plaintiffs typically allege that the kits are defectively designed and inappropriate for their intended application. ABC Corporation is interested in retaining a law firm to function as national coordinating counsel for this litigation. An attachment to this request for proposal details the number and jurisdictions of such cases.

The ABC Corporation Law Department envisions that the national coordinating counsel will be responsible for the following tasks: (1) maintaining a computerized database of all cases related to the do-it-yourself kits; (2) preparing the initial drafts of all responses to discovery demands to the extent those demands relate to the kits or to ABC Corporation's manufacturing or distribution processes in respect of the kits; (3) coordinating the depositions of ABC Corporation representatives and experts in the various local jurisdictions, even when the defense of ABC Corporation or its representatives or experts is primarily handled by local counsel in such jurisdiction; (4) asserting affirmative defenses to the suits and recommending litigation strategy; and (5) serving as co-counsel in most litigation involving the kits. Local counsel will be responsible for pleadings and motions (other than those specifically assigned to the national coordinating counsel), local investigations, routine court appearances, depositions of case-specific fact witnesses, medical witnesses and experts other than those retained to analyze the claims specific to the kits.

If you are interested in serving as ABC Corporation's national coordinating counsel, please submit to the Law Department by January 1, 1999, a proposal which addresses at least the following issues:

a. The total number of partners, associates, and legal assistants in the firm (with their geographic locations indicated) who are involved in litigation such as that described above. Please indicate which among them would be involved in representing ABC Corporation if the firm is selected as national coordinating counsel.
b. Specific experience of the firm and of the individuals identified in response to paragraph a in litigation such as that described above. In which cases has the firm served as coordinating counsel? What is the firm's success rate in such matters? Please provide the names and contact information for at least four clients for whom the firm has served in such role.
c. The firm's record in such litigation, including at least the number of cases won on summary judgment, the number won after bench or jury trial, the number lost, the number won on appeal and the number settled.
d. The firm's experience in developing and utilizing computerized databases for product liability litigation, including databases covering prior claims, consistent discovery responses, experts, witnesses, etc. How were the firm's clients able to access the data in such databases?
e. The names and experience of the individuals in the firm who would create and oversee the use of such databases for ABC Corporation's litigation.
f. The billing rates for the individuals identified in response to paragraph a.
g. The firm's experience in respect of alternative or non-traditional billing methods for such litigation and whether the firm proposes such alternative methods for this representation and, if so, what that proposal is.

The primary goals of this request are to identify firms that are willing to work with ABC Corporation so as to assure effective representation in these matters and to explore the terms on which they propose to represent ABC Corporation in that regard. ABC Corporation is interested in entertaining fee arrangements that align the interests of counsel and client more closely and that provide incentives for counsel that are likely to enhance the representation in that regard. An additional goal is to achieve cost savings through such methods.

We look forward to reviewing your submission.

The "Art" that is part of "Partnering"

By Jack L. Foltz and Steven A. Lauer *

For the past few years, "partnering" has been the subject of much commentary in the trade press in respect of relations between in-house and outside counsel. There have been some efforts to define that term. Those efforts generally have focused on specific examples of relationships (usually, each article dealt with one particular relationship) that the authors called "partnering" without a critical analysis of how widespread were the attributes of the specific exemplar. Similarly, few attempted to discern whether there are core attributes of a "partnering" relationship – attributes that can assist the observer in deciding if a specific client/counsel relationship represents true partnering.

As time has passed, several of the relationships that have been so labeled have matured. With the benefit of hindsight and the opportunity to review some of the literature and to analyze the issue with the assistance of comments by experienced participants in those situations, perhaps we can identify the commonalities that seem to identify the true partnering relationship. With those common characteristics in hand, inside and outside counsel will be able to identify their relationships as "partnering" or not as "partnering" more accurately. The appropriateness of that label will depend less on the vagaries of personal opinion and more on objective standards.

Before undertaking that analysis, it's important to remember that the most important element of the responsibility of the lawyers is the needs of the client. Those needs must be paramount. The term used to describe the relationship, and the type of relationship that exists between a law department and the law firms that serve that client, is of subsidiary importance. In fact, a relationship that elevates the needs of the client to the pre-eminent place that they must occupy is a good attorney/client relationship whether you can call it "partnering" or something else. In sum, the client's needs must override the concerns of both the law department and the law firm. The attorneys must have a strategic understanding of the client's goals if the relationship is to work properly.

So, what are the identifiable attributes of a "partnering" relationship?

The most elementary characteristics seem to be respect, trust and communication. Those three seem to exist in all the relationships that are commonly understood as representing a partnership between inside and outside counsel. There are other specific traits that those relationships exhibit, but those traits often are concrete manifestations of those three, or more-specific examples of how those three traits play out in the unique web of exchanges that each combination of client and outside counsel represents.

It is entirely possible for a corporate general counsel and a member of a law firm to have a good interpersonal relationship. Each may respect and trust the other and they may communicate frequently. That relationship, in turn, may lead to relations between the department and the firm that exhibit the characteristics of a partnering relationship. In certain contexts, such as one in which the law department is small (say fewer than five attorneys, for example) and the outside firm represents the company in many different situations (litigation and transactional work that cuts across substantive areas), that may suffice. The interpersonal relationship between the general counsel and her outside counterpart will set the tone for their organizations' relationship effectively.

In that regard, each of the most effective partnering relationships between departments and firms seem to have at its core a very good relationship between the general counsel (or another senior member of the department) and a senior partner. It may not be possible to have a good partnering relationship without that foundation. Whether you can institutionalize such a relationship is difficult to know, since the trust aspect is particularly dependent on interpersonal experience. It develops over time.

If a law department has several hundred lawyers and the company works with dozens or hundreds of law firms over the course of a year, something more lasting or organizational may be necessary. If those characteristics don't permeate both of the organizations (the law department and the law firm) in that

situation, that relationship will survive only so long as those individuals are in their respective positions; the relationship between the organizations will simply be a reflection of their personal relationship. That might not suffice if the relationship between the organizations is to survive the departure of either individual. Is that possible? The answer is difficult to predict.

The precise characteristics of the relationship, whether it constitutes "partnering" or not, must reflect the needs of the specific situation. The size of the law department can impact how structured the relationship with the outside law firms ought to be. Another factor that can impact that issue is the nature of the legal work that they must handle for the client. What is possible for repetitive, relatively uncomplicated litigation may be very different from what is needed to appropriately handle very complex, one-of-a-kind litigation.

What are some of the traits, besides respect, trust and communication, which are often found in partnering relationships? The inside and outside lawyers constitute a team that contains both generalists and specialists needed by the legal needs of the company. The team should be seamless in that the respective strengths of each member of the team are calibrated to supplement and complement those of the rest. In the aggregate, the team members will possess all the talents needed to fully serve the client's needs. The division of responsibility among the members of the team is based on strategic strengths or core competencies. The outside attorneys must possess an understanding of the particular needs of the in-house attorneys. Outside counsel share inside counsel's sensitivity to the cost of legal service.

The expectations of the various members of the team must be clear and clearly expressed early in the relationship. Communications among the team must reflect honest, frank dialogue, with each participant listening as well as contributing to the exchanges. Inside counsel and outside counsel must have a great deal of empathy for the position of the other and for the other's needs in the relationship. For example, a company's general counsel will "call the shots" as to what legal positions are taken on behalf of the company and how those positions are advanced. Those decisions should be animated, however, by an appreciation for the needs of the outside attorneys, to the extent those needs are relevant and important. In that way, the inside and outside attorneys will achieve a greater degree of interdependence.

Very often, a partnering relationship includes a fee arrangement that is based on something other than an hourly rate or hourly rates. Whether such an arrangement (often called an "alternative fee arrangement") leads to a partnering relationship or can succeed only if implemented within the context of an existing, effective partnering relationship is not clear. Whatever the form of the fee arrangement by which the law firm is paid, it should reflect a strategic understanding of the client's goals.

The relationship must be managed. That management must be firm. Each party is willing and ready to evaluate the relationship on a continuous basis to assure that it is working as planned.

What are the specific terms of these various attributes? How can they be implemented or achieved?

The team (inside and outside) that delivers the legal service to the common client is very deliberately formed. The relative strengths of the two organizations are taken into account and their contributions to achievement of the goals of the relationship are carefully plotted. Whether done through formal requests for proposals for legal service (as done by Prudential, Stanford University, Sunoco and other corporate law departments) or less formally, the law department analyzes the client's needs and determines how those can be best satisfied. Often, lawyers with specific, narrow specialties are included in the team along with generalists, since corporate clients often have varying needs over time and the particular needs at any point may change unexpectedly.

Outside attorneys must recognize the importance, for most if not all law departments, of issues other than the quality of the legal service (as outside attorneys tend to define quality). Without gainsaying the importance of quality, few in-house lawyers have the luxury of using that as the sole touchstone for measuring the success of an assignment. Cost effectiveness is, increasingly, a standard by which their efforts are judged and it has become part of the measure of the quality of the service expected of them. (In this sense, in-house lawyers define quality a bit differently than do outside lawyers. The latter often seem to consider it a quality apart from cost effectiveness.) They must, in turn, apply that standard to the work of their outside compatriots. Thus, sensitivity to cost issues is an ever-more-important criterion by which outside counsel are selected and judged.

Communication must be frequent and honest. Each party must set out for the other its expectations for the relationship. The law department must enable the law firm to know what the client (the internal business units of the company, as understood by the internal law staff) needs in the way of legal service and how it expects that service to be delivered. The relative importance to the client of various qualities of the legal service must be communicated. For example, does the client want the law firm to pursue every legal issue that it can identify in a project regardless of the cost of doing so? Is cost a significant criterion by which the lawyers' (inside as well as outside) performance will be judged? Law firms often seem to think that quality of their service is independent of the cost of that service; for inside counsel, quality and cost are irrevocably intertwined. Indeed, cost is an element of quality.

DuPont, in its widely publicized convergence program, meets annually with representatives of all the law firms in its team (which it refers to as its preferred law firms or PLFs) in a plenary session. There are other, more focused meetings (some with just one or a few firms if the subject is very specific to one or a small number of cases), as well. Prudential's in-house real estate lawyers formed a team of law firms to represent the company's real estate units in environmental litigation. Those law firms then met annually with the in-house real estate attorneys and the inside and outside environmental engineers and consultants who also work for those business units. Other law departments have established less formal mechanisms for getting the inside and outside counsel together on a regular or sporadic schedule. When the General Counsel of Stanford University created a legal team from members of three law firms and some in-house attorneys, the law firms' representatives were assigned office space in university buildings in order that they and the in-house attorneys would meet on a daily basis as a way of fostering communication.

Flexibility is important. Attorneys within the department and within the firm must be willing to adapt to unanticipated circumstances. Moreover, they must also be willing to re-examine the relationship periodically and to ask if it continues to be the best that it can be. Fresh approaches to the company's legal needs must be welcome always.

How else does the flexibility of the inside and outside attorneys change in this new environment? Each must be willing to allow the other to have input into decisions that formerly were his or her sole province. For example, inside counsel will have a say in how the legal work is staffed by a law firm and whether some tasks are performed by individuals or organizations not employed by the law firm (*i.e.*, those tasks are "outsourced"). Suppose an arrangement between a law department and a law firm places on the latter full responsibility for completing an assignment (including the cost by imposing a cap on the latter's fee). If local counsel must be involved, to what degree should the inside attorney be concerned with the selection of local counsel if the primary outside firm is responsible for completion of the project as to quality, cost and all other measurable factors? Perhaps the inside attorney should have a voice in that decision but leave most of the discretion to the outside attorney.

Arrangements by which outside counsel's fees are not measured solely by the amount of time devoted to them are popular today (though more so in discussion than in practice, according to surveys). An interesting question is whether such an arrangement is the basis for a good relationship or whether a good relationship must precede an effective, successful arrangement that eschews the hourly rate. Though there may be exceptions, it seems that the success of such an arrangement often depends on the existence of a good, honest relationship between the law firm and the client. This is so because a fee arrangement must often be adjusted to reflect events that were not (and couldn't have been) anticipated when the arrangement was designed. A fee arrangement that reflects the client's strategic needs should provide a greater foundation for a good relationship, however, whether it is based on hourly rates or not. Establishing an arrangement that addresses the client's needs and the needs of the firm requires that the parties discuss those needs carefully. That discussion is an important element of the communication that underlies an effective relationship.

All the well known (and the lesser-known) examples of partnering relationships seem to include a recognition of the need to have an identified attorney within the law department and one within the law firm responsible for maintaining the relationship. That responsibility is independent of the substantive responsibilities for completing the work. (In fact, a partner who is not involved regularly in the client's work often fills that role at the firm.) In other words, a good relationship requires attention on its own.

The relationship must be managed. If the client and the firm expect that a relationship will flower without periodic attention, they will be disappointed. A representative of one department that is well known for the partnering arrangements that it has created with its outside firms has stated that, "[I]n short, it takes lots of TLC to keep a relationship strong." Whether that TLC must be continuous or can be episodic may vary with the specific needs of the situation and of the relationship.

It is important that the outside counsel be well attuned to the particular needs of the law department in question. For example, at Sunoco, the law department decided to outsource the intellectual property legal section. In seeking outside firms for the role that had been played up to that point by inside lawyers, the department needed to address at least four significant issues:

- The loss of the people who had been part of that section of the department
- Economic pressure from the business clients to do the outsourcing correctly and to achieve real savings
- The impact of the outsourcing on the morale of the rest of the law department staff; and
- Determining how to best manage the intellectual property function after the transaction was in place

One of the criteria by which the department evaluated the candidate law firms was a relatively subjective one: how well did the firm understand those issues and the significance of those issues to the Sunoco legal department?

The department had to make some tough decisions as to the degree of core competency that would be needed in-house after the outsourcing in order to properly manage the resulting team of lawyers. After all, without some internal understanding of the technical minutiae of patent and trademark work, the law department would be unable to provide the management or monitoring function that the company expected of its internal lawyers.

If law firms are to become parts of the team that the word "partnering" suggests, there is another important consequence of that role of which they should be aware. Inside counsel are subject to increasing expectations to demonstrate that they add value to the operation of a company. While in-house lawyers have always felt, with significant justification, that they fill a strategic and important role in achieving the business goals of the enterprises that they serve, the expectations now demand better evidence or proof of that fact. No longer will a company's senior managers accept on faith that having lawyers involved in their business is necessary. They demand that the law department provide them data to support the position that having a law department is a cost-effective means of advancing the business interests of the company.

Law firms should help shoulder this burden. After all, the spending for outside legal talent typically consumes over half the aggregate budget for legal services of a company. The inside and outside lawyers have a common interest in making that case. The total legal team, inside and outside, must have the reputation of being a value-adding component of the corporate structure. Whether through metrics or some other means, they must present to corporate management the data necessary to support that view.

A recent article described an innovative effort to institutionalize and enhance the interrelationship between a corporate law department and a law firm. The department and firm have determined that they will jointly conduct the recruiting by which the firm locates lawyers to work on that client's matters. By doing so, the firm and client should assure that lawyers so hired by the firm would be more responsive to and in synch with the attitudes of the client department.

Firms that engage in "secondment" or externships with client law departments evidence a similar goal. In such an arrangement, a lawyer from the firm works at the law department for a set period of time, such as a year or six months. The head of a department at a major law firm that has entered into such

arrangements with clients described it as "an important element in creating a tighter relationship between the client and the firm." In some cases, a member of a law department has worked in one of the company's law firms for a period.

The Sunoco law department has established with one firm an arrangement that should improve the law firm's understanding of the company and provide the law firm an advantage in its recruiting efforts. The firm's summer associates can spend a portion of their term with the firm working in the company's law department under the supervision of one of the department's attorneys. The remainder of the summer associate's time is spent at the firm. The firm pays the summer associate's salary, even while working within the law department. The opportunity to observe and experience the work undertaken in the law department of a major industrial company is unusual for summer associates and that opportunity distinguishes that law firm's program from those of its competitors.

If respect, trust and communication are the most basic attributes of a partnering relationship, how can you achieve that state? Trust and respect are hard to mandate; they must grow of their own accord to a large degree. Communication, on the other hand, can be nurtured directly. The types of regular meetings held by some law departments (such as Prudential and DuPont) with their outside counsel are very conducive to establishment of the interpersonal and institutional relationships that comprise a partnering relationship between a law department and a law firm. Less formal meetings can be valuable in that regard as well.

One type of meeting that seemed to help establish such a relationship was an "orientation" meeting organized by the Prudential Law Department. Meetings were held with representatives of some law firms that had significant amounts of work for the company (over 20 such meetings took place). Each firm's representatives visited the company's headquarters for at least one full day to meet with representatives of the sections of the Law Department with which those firms would work under assignments that had been awarded pursuant to a series of requests for proposals. The discussions over the course of the meeting focused on how the inside and outside lawyers would work together under those awards. Issues relative to the use of technology, billing and budgeting and other specific areas were addressed. By the end of each meeting, the firm's representatives had a much clearer idea of what the in-house attorneys expected of their firm. During the meeting, the firm's representatives had the opportunity to ask questions and offer constructive criticism (an opportunity of which a few availed themselves). The dialogues were healthy. As a result, the form of the partnering between the department and the firm was much crisper for all who were involved.

Unfortunately, some data suggest that very few law departments and firms expend enough effort to understand each other's expectations. For example, the most recent (of ten annual versions) survey conducted on behalf of Corporate Legal Times (see "Law Departments Are from Mars, Law Firms Are from Venus" in the July 1999 issue) reveals that there is considerable discrepancy in how law departments and law firms describe the form of their collaboration.

General counsel of companies were asked to assess their companies' outside counsel on a large number of criteria. In addition, they were asked to select among five choices the type of matter management style their law departments follow in respect of seventeen substantive fields of law. Law firm partners were asked to describe (using those same choices of style) how the law departments with which their firms dealt manage the work in those areas.

Of the management styles identified in the survey, two (those labeled "case management" and "co-counsel") seem to involve some sort of active participation in the matter by both inside and outside lawyers, albeit participation at different levels of intensity. The outside law firms and the corporate general counsel consistently expressed very different views of how frequently law departments and law firms work together in ways that are so identified.

For example, when handling acquisitions and divestitures, the general counsel described either "case management" or "co-counseling" as the management style 65% of the time. Law firm partners used those terms to describe the management style of their firms' clients for such matters only 12.5% of the

time. For capital markets work, general counsel used those descriptors 52.5% of the time, while law firm partners used them only 9% of the time. Intellectual property work was handled in that fashion 62.4% of the time according to general counsel but only 16.5% of the time according to law firm partners. Litigation is handled through "case management" or "co-counseling" 67.7% of the time (in-house respondents) or 26.9% of the time (outside respondents). For international work, the respective percentages were 55.6 and 17.1.

Clearly, there's little unanimity between the groups as to whether law departments share the substantive responsibilities of the work with outside lawyers. If the lawyers (inside and outside) cannot agree on how they work together, it's hard to believe that they can hold a common view of much else.

That same survey provides other data that indicate the need for better communication between the groups. General counsel consistently grade outside lawyers on a variety of criteria lower than the outside firms grade themselves on the same criteria. Many of the criteria are relevant to a discussion of partnering.

For example, on communication, general counsel assign to law firms a score of 2.1 (with 1 – "excellent" - being the highest score and 5 – "poor" - the lowest) in response to the question "keeps all parties informed of progress on a timely basis." As to whether firms "provide sufficient information required for informed decision making" by the clients, general counsel awarded 1.8.

In response to those same questions, on the other hand, law firms awarded themselves 1.5 and 1.5. Clearly, law firms think that they do a better job of communicating with their clients than the clients think.

As to whether law firms "understand the importance/balance of cost and quality" (which is a frequent issue in discussions of partnering arrangements), general counsel graded firms with 2.3. For being "cost conscious and sticking to budgets," they awarded the firms only a 2.5. Law firms graded themselves with 1.5 and 1.7, respectively.

The grades given the firms by general counsel in areas related to cost and billing are among the lowest of any. The grades given by the general counsel are also uniformly lower than the grades that the firms give themselves on the same factors. Since cost and value are also central tenets of the push toward partnering (and for in-house counsel, those qualities are subsumed in a definition of "quality legal service"), these results do not augur well for an effective partnering arrangement, as a rule.

Communication, which is the most critical step that law departments and law firms can affirmatively take to enhance the nature of the way that they work together, must be improved for partnering (or any team approach, for that matter) to work. The relationships between corporate law departments and their outside law firms would be greatly enhanced were they communicating with each other more effectively.

• Jack L. Foltz recently retired as Vice President and General Counsel of Sunoco, Inc., one of the largest independent U. S. petroleum refiner-marketers. He joined Sunoco in 1980, following a 19-year career with Shell Oil Company, where he held various responsibilities in Shell's legal patent and licensing organizations. He was named to his current post at Sunoco in 1992.

While attending law school at George Washington University, from which he received an LLB in 1961, Mr. Foltz served as a Patent Examiner at the United States Patent Office. In addition, he received a Master of Laws degree in Trade Regulation in 1971 from New York University Law School. Mr. Foltz's 1957 undergraduate degree is a Bachelor of Science from Rose-Hulman Institute of Technology where he majored in Chemical Engineering.

Mr. Foltz has been admitted to practice law in Virginia, California, New York, Texas and Pennsylvania as well as various federal courts. He is the immediate past Chairman of the Board of the American Corporate Counsel Association, and is a member of the American Bar and the Philadelphia Bar Associations.

Steven A. Lauer is a consultant on issues related to the management of legal service by corporate law departments and the relationships between in-house and outside counsel. He is also Executive Vice President, Deputy Editor and Deputy Publisher of *The Metropolitan Corporate* Counsel, a monthly journal for in-house lawyers.

Mr. Lauer began his consulting practice in 1997, after thirteen and one-half years as an in-house attorney. For six years prior to becoming an in-house attorney, he was in private practice.

From April 1989 until May 1997, Mr. Lauer was an Assistant General Counsel for The Prudential Insurance Company of America. From March 1996 until May 1997, he was Project Director for the Prudential Law Department's Outside Counsel Utilization Task Force. In that capacity, he designed and managed the preparation and distribution of 109 distinct work packages (RFPs) by which Prudential restructured its purchase of legal services and the evaluation of hundreds of proposals submitted by over 130 firms to handle those packages of work.

Mr. Lauer was the in-house environmental attorney in the Law Department's Real Estate Section for almost seven years. In that capacity, he managed all environmental litigation for the company's commercial real estate investment units. For several years, he was responsible for management of all litigation for those real estate units.

In his consulting practice, Mr. Lauer has conducted benchmarking research for clients, designed evaluation processes for counsel selection and created a manual for outside counsel, among other projects. He has consulted on alternative fee arrangements, task-based billing and client expectations. He has worked with law firms to better understand the changing expectations of corporate clients.

He has authored numerous articles on the relations between in-house and outside attorneys, the selection of counsel by corporate clients, the evaluation of legal service, litigation management and other topics relevant to corporate legal service. He has spoken at numerous conferences in respect of those topics. He has organized such conferences and seminars, as well.

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Alternative Fee Arrangements for Corporate Clients

By Steven A. Lauer © 1999 [*]

Corporate clients are imposing many restrictions and changes on the law firms that serve them. In many cases, they are reducing dramatically the number of firms to which they will assign the day-to-day legal work they require. They are embracing tools and concepts such as task-based billing, partnering and budgeting for legal matters. The relationship between a law firm and its corporate clients is or may soon be very different than it has been.

The clients are also exploring the use of alternative fee arrangements, a term that generally means any method of calculating a legal fee other than by simply multiplying the number of hours expended by the per-hour rate of the attorney. The hourly rate is younger than the baby boomers who are often the individuals questioning its validity. Why is the hourly rate in disrepute?

The answer is that the hourly rate is perceived as creating incentives for outside counsel that are not consistent with the interests of their clients. A fee based on the length of time that it takes counsel to complete an assignment is perceived as rewarding inefficiency. The attorney who takes twice as long to complete a task as another stands to be paid twice as much as a second, more-efficient attorney unless the resulting calculation is adjusted to reflect relative efficiency. Such an adjustment would be difficult at best and certainly subjective in nature.

The hourly rate has led to developments such as the industry known as "fee auditors." While such persons are often retained to review fees to be imposed on one party to a lawsuit as part of the victory by that party's opponent (in "fee shifting" cases), they are also retained by the clients of the law firms whose bills they analyze. They have become popular with insurance companies. In many cases, they second-guess the amount of time billed by the firms for projects and cases. They often monitor adherence by counsel to billing guidelines that the corporate clients have promulgated.

Not surprisingly, the firms whose bills are scrutinized have not always accepted the activities of the fee auditors too gladly. Relationships between firms and their clients have been affected adversely by the conclusions of the audits in some cases. See Brennan, "Driven to Defection," National Law Journal (May 18, 1998), pp. A1, A27. Such audits have even spawned litigation between firms, their clients and the auditing firms.

Whether the soured relationship resulted from the use by the client of a fee auditor or whether the souring of the relationship predated the client's retention of the auditor is perhaps an unnecessary inquiry. Either way one answers that question, however, there is "bad blood" between many clients and the firms that serve them. There probably are relationships that have already reached such a point even though the law firms involved may not be aware of it.

Firms should proactively address the malaise (or worse) that afflicts many relationships with clients. To pretend that clients are copacetic because they have not complained invites disaster in the form of lost clients or fee disputes.

What can they do? They can, and should, address the perceived (and actual) disincentives that the hourly rate creates. They should propose alternative fee structures to their clients.

In saying this, of course, I recognize that the prescription is much simpler than its implementation. As I said above, the term alternative fee is an elastic one. It is defined by what it is not, rather than by what it is. In proposing alternative fees, law firms must be sensitive to their clients' needs and desires, because the design of an alternative fee will vary from client to client and from situation to situation.

What are those needs and desires? While I obviously can't speak for all clients in all contexts, there are some concerns that I believe are common to most if not all corporate clients. It is important that firms also understand the pressures that bear on in-house counsel in the present climate, since those pressures will affect the perspective of the inside lawyers in addressing the question of alternative fees.

The primary goals of corporate clients, in terms of the fees that they pay their outside counsel, are lowering their expenses, budgetary certainty, value and an alignment of interests. What do these mean? How do they relate to alternative fee arrangements?

The increasing focus of corporate America on costs means that law departments of corporations must "do more with less" (to borrow an oft-heard phrase). The total costs of corporate legal service must be reviewed and, as far as possible, reduced or at least controlled.

The second goal – budgetary certainty – means that a law department, like all other corporate departments, must submit a budget for its part of the enterprise operation. While this has long been true, the environment of the 90s means that budget overruns will not be countenanced without good justification. Accordingly, the more a law department can plan its future costs, **and be confident that the actual outlays will not exceed the budgeted amounts**, the more secure that law department, and the client, will be.

The third goal is value. Legal costs have been uncontrolled for years (from the perspective of corporate executives, at least). Often, that cost has borne little relation to the resulting work product. A limited assignment might have cost more than what appeared to the business client as the more important portion of the assignment. (An example might be an opinion letter for a transaction, with the opinion letter costing more than the efforts of counsel to draft the necessary documents.)

The fourth goal is an alignment of interests. I have heard corporate counsel often express, in different contexts, a desire that outside counsel demonstrate that the interests of client and firm are truly aligned (not simply that counsel express that view, but also effect the sentiment). For example, outside counsel knowingly forgoing a short-term economic benefit (such as some billings) to assist the client in achieving a particular goal would be a dramatic display of the type of alignment of interests desired.

How can these goals animate the approach to alternative fees? In general terms, they can assist counsel (inside and outside) to design a fee structure that fits the vagaries of a client's situation. A firm that plans to suggest an alternative fee should be aware of the ways in which each type of fee might address the clients needs as well as the ways in which it might not. Some fees can have impacts that make them less then desirable from the client's position also. Let's look at a few examples.

A reduced hourly rate might appear to satisfy the first goal (reduced expense). Very often, that is the first type of alternative fee that comes to mind, and on first blush it seems like a quick fix. The overall cost of the legal service is still unconstrained, however. A reduced hourly rate merely increases the need to manage the work in order to keep the amount of time taken to complete the task from unintentionally expanding and eliminating the hourly saving. Because the fee structure still creates no incentives for the firm to control the amount of time devoted to the assignment, the task of managing the time falls on the shoulders of the in-house attorneys. If inside counsel is unable to manage the work so closely (due to insufficient staff to monitor progress in such detail, for example), then the client's goal of reduced cost may not be met. If the client increases staff in order to assure such oversight, the savings may also be reduced.

A fixed fee for a legal service provides greater certainty in budget terms. Obviously, when a law firm proposes a fixed fee, it does so with certain assumptions in mind, such as the amount and types of legal expertise that would be needed to properly complete the assignment. So long as the law firm is correct as to those assumptions, the firm and the client both will be satisfied. The accuracy of assumptions about the amount and types of legal work that will be necessary to complete an assignment is far from

[*] Mr. Lauer is a consultant on the efficient delivery of legal services to corporate clients. He has over 13 years' experience as an in-house attorney in several organizations. Previously, he spent six years in private practice. He is based in Maplewood, New Jersey.

assured, however. Accordingly, the firm and the client may both be unwilling to take the risk that the fee agreed to at the beginning will turn out after completion to have been appropriate for both of them.

From the client's perspective, however, a flat or fixed fee has a quality that makes it very attractive. The fee places on the shoulders of the law firm the burden of assuring that the amount and types of work actually devoted to the task are commensurate with the value (at least, the value as reflected in the size of the agreed-to fee). Since the firm has greater control of those variables than does the client, in the client's mind, that burden should be on the outside firm.

A contingent fee places the greatest risk on the outside firm. Effectively, that type of arrangement requires that the firm literally "put its money where its mouth is" because the firm receives no fee unless its work is successful. The client has no risk other than the costs associated with the assignment (*e.g.*, court filing fees and other out-of-pocket costs). For a firm, however, a contingent fee has another adverse effect – it has a very negative impact on the firm's cash flow because the firm's expenses (rent, salaries, etc.) continue even while the fee (assuming success) is yet unrealized. Accordingly, a client must be cognizant of that effect, since it should not want to have counsel living hand-to-mouth during the pendency of the matter. In some jurisdictions, there are even ethical considerations that can make the contingent fee unavailable in some contexts.

A firm and client might agree that all time devoted by the firm's personnel might be charged at the same hourly rate regardless of the seniority or expertise of each billing professional. Sometimes a different rate is quoted for partners than for associates than for legal assistants. This is a "blended" hourly rate. This seems to have the benefit (for the client) of reducing the need to oversee who within the firm is completing which part of an assignment. The blended rate creates incentives for the firm to delegate tasks to lower-level personnel (less-senior rather than more-senior associates, for example). Since many clients have expressed the view that the hourly rate creates incentives to move work up the seniority ladder within a firm (since more-senior professionals bill at higher rates, leading to greater cash flow), this arrangement seems to satisfy a client need. Care must guide the negotiation, however, because those incentives can have greater-than-desired effects. The delegation might be too far and too often, to the detriment of the quality of the work. Again, a greater management burden is one result, an often-unanticipated one.

A firm and a client might agree that the fee would be determined after the assignment is completed and that it would be calculated on the basis of the value that the legal work added to the entire project (such as a transaction). This arrangement clearly and most directly addresses the client's desire that the cost of the legal work be commensurate with the purpose of that work. The client and firm need to discuss in advance (and agree) who will determine that fee value and by what standards. Will it be an entirely subjective determination by the client? Will it be set by comparison to fees of counsel in other, comparable deals? If they haven't agreed on such issues ahead of time, the firm and client may very well find themselves at loggerheads after one or the other sets the fee. At that point, the only resolution may be fee arbitration or another less-than-desirable means of resolving a difference of opinion on such a critical issue.

A form of fixed fee is a retainer for an anticipated volume or type of work. The client gets budget certainty. The firm gets some benefits as well. It will expect a greater volume of work than it otherwise would have received. It will benefit from a more-predictable cash flow (if the retainer arrangement calls for payment by the client of a set amount on a preset basis). The greater volume of work (particularly if that work consists of similar matters over time) will enable it to introduce some efficiencies into its work on behalf of that client.

In a retainer for work volume, the firm takes on some risk. The volume of work may exceed by an unexpectedly great amount the anticipated volume, causing the firm to be paid a less-profitable fee (as measured on a per-matter basis) than planned. The client takes the countervailing risk, however, that the amount of work will be less than anticipated, so that it pays the firm a fee that is more remunerative (similarly measured) than either had expected.

There are other types of fee arrangements possible. The variety is limited only by the collective imagination and risk tolerances of the client and firm. Each has its unique benefits and risks for each of the client and firm. Each can have different impacts on the incentives of the firm and the client.

They must anticipate those potential effects when they discuss the potential fee. Moreover, there are other issues that they must address in advance, as well. For example, if they agree to a fee that is paid after the work is done (such as a contingent fee), and the client comes to believe that it must change counsel and discharge the firm that agreed to that fee, what if anything is due the first firm? What obligation would the first firm have to cooperate with replacement counsel?

The discussion of and agreement on a fee based on something other than the number of hours of work that the assignment entails are not easy subjects to address and resolve in advance. A properly structured fee arrangement can add value to the relationship between the firm and the client by aligning their interests more directly. If poorly negotiated and designed, however, it can introduce complexities into an already-complex situation.

Regardless of the results of such discussions, however, it is important that the client and the firm agree on the terms by which the latter will be paid by the former for its role in the client's work. Even if the parties discuss the issues and agree to a fee that is based on hourly rates, then, the discussions will have a beneficial effect on their situation. This is so because the discussion of issues related to the fee will require that they also address many other issues relevant to the work. They will need to attempt to define the extent that the legal work impacts on the client's business. They will address staffing issues relative to completion of the legal work. They will need to resolve things such as timing, coordination and other items that impact on the amount and type of legal work needed by the client.

In short, the discussions about the fee are important enough. So much so that they should be held regardless of their outcome. By doing so, the firm and its client will better plan the specifics of their relationship. And perhaps that is the most beneficial effect of discussing alternative fees, not whether such fees are in fact entered into.

What we have here is a failure to communicate!

By Steven A. Lauer © 1998

The state of the relationship between corporate America and the law firms that represent it shows some disturbing symptoms. There is evidence that, in many cases, there is significant lack of trust between the two. This can have very negative consequences for both.

What causes the disaffection? What can be done to correct it?

First, it's helpful to understand some of the trends in corporate law departments in the 90s. First and, for purposes of this discussion foremost, there is considerable pressure on in-house lawyers to contain legal costs. In some cases, there is even pressure to reduce in absolute terms the amount spent for outside legal service. For example, corporate executives expect in-house counsel to adhere to budgets for their departments. The inside attorneys, in turn, are looking to outside counsel to prepare budgets for specific legal matters. In addition, law departments are exploring the possible use of alternative fee structures in order to eliminate the hourly rate from their law firm relationships, since the hourly rate is widely perceived as creating disincentives to efficiency. As to cost, law departments are also expressing a desire that outside firms share the risk in their assignments.

Those trends within law departments are affecting the relationships between those departments and their outside law firm "partners." In part, the steps that law departments are taking to respond to those expectations on the part of their internal clients are the causative events for the deterioration of the relationship between corporate clients and law firms. The same steps cannot remedy all the causes, however.

There are other causes, as well, however, that are probably due to the nature of lawyers and law firms. Lawyers are trained to work alone rather than as members of mutually dependent teams. This approach manifests itself in the tendency on the part of lawyers to commence research anew as issues arise rather than seek from others prior work product that might be recycled. This approach also leads to law firms following approaches that they have previously applied for other clients even when a new client might have a different approach in mind. This "loner" approach might have been accepted at one time, but the concerns and pressures of the current decade undermine the basis on which that might have been true and what was once okay is no longer.

How are law departments meeting the expectations of their internal clients? They are trying to apply to legal service some of the tools that business executives have wielded for years. Many companies determined that they should use fewer law firms than they had previously, simply to be able to manage the work more closely. One insurance company recently reduced the number of firms to which it assigns work from approximately 4,000 to about 2,000.

Law departments are taking other steps, as well. For example, more companies are issuing requests for proposals for legal service (RFPs) than ever before. Companies have used the services of legal auditors to monitor the fees and expenses charged them by outside law firms. Billing guidelines have become almost commonplace.

These actions reflect the clients' dissatisfaction with the legal service they receive and the amounts that they pay for it. Most indicative is the anecdotal evidence that clients are more willing to sue their outside counsel over fees and other issues that arise in the course of their relationships.

Even with that background, however, a more pervasive problem may be the evidence that suggests that corporate clients and the law firms that serve them do not communicate well. In a recent survey of law departments and law firms, there was considerable disparity as to how law departments, as a group, and law firms, as a group, rated the efforts of law firms on behalf of the clients. For example, law firms awarded themselves a grad of B+ in response to the question of whether they provide effective and creative preventive legal advice. Their clients, on the other hand, awarded them a C+. As to whether they share the risk with their clients, law firms felt that they deserved a B+, while the clients were willing to assign a grade of only C-. As to whether the firms' charges are commensurate with the value of the service that they provide, the firms felt entitled to B+ while they clients thought that they deserved only a C+. Firms believe that they are willing to share risk through alternative fee arrangements (they gave themselves a B-), but clients are much less sanguine on that score (they awarded only a C-).

In the insurance industry, a recent article highlighted the dissatisfaction of many law firms with the status of their relationships with the insurance companies. The thrust of the story was to the effect that a number of lawyers who have long represented insurers (including some prominent members of that group) have decided to represent plaintiffs against their former client industry. In the course of the article, the president of an organization of over 20,000 defense attorneys was quoted as saying "[t]here's been a dramatic drop in constructive dialogue between defense counsel and the insurance industry." [*]

That symptom is not limited to the insurance industry and its lawyers, however. The survey cited above, which was conducted in 1997, highlights quite a few examples of miscommunication between clients and their counsel additional to the few itemized.

Some law departments still issue unilateral directives to law firms on topics such as billing instructions (the "thou shalt nots and thou mayests" that became popular several years ago). More and more, however, law departments and law firms profess to seek "partnering" relationships. Whatever that term might mean in each context (and the precise qualities it might exhibit in each relationship), it certainly should include significant elements of communication. Moreover, the communication must be mutual and it should include subjects that are often unaddressed when companies retain law firms with perfunctory retention letters or representation agreements, which typically address the substance of the assignments.

Clients and law firms should be seeking ways of sharing information easily and frequently. They must foster the type of mutually interdependent relationships that they claim to seek.

How can they do this? The problem is that when corporations usually retain firms, they are well into a case or about to embark on a project. The work itself commands the attention of both. They dive right into completing the task with minimal attention to the ways in which they will work together and whether the ways in which they worked together in the past are adequate at present.

Accordingly, they should devote time and effort to explore the relationship that they will have. There is a myriad of details of that relationship that can advance a good, collaborative alliance or, if the specifics of their cooperation are not well planned, hinder such a beneficial partnership.

They should hold meetings specifically to discuss the specific ways they can work together most effectively. The substance of the work that the firm does (or will do) for the client will be relevant (the ways of working together in litigation can be quite different from the ways of working together in completing a business transaction, for example) to their discussion. But the primary focus of the meeting should be how they will share the workload efficiently.

The agenda for the meeting should cover the concerns and ideas of the firm and the client. A dialogue is the most effective means of achieving the partnering type of relationship that they both seek.

One law firm and one client can hold such a meeting. Whether the firm or the client is the motivating party, such a meeting can engender a very strong sense of teamwork and shared expectations. From the perspective of a firm, it can solidify a good client relationship by building off the pre-existing sense of shared goals. If the client is a new one, the meeting can help the two parties to identify the most productive way that they can work together and, in that way, help create the "partnering" relationship that is the goal for both.

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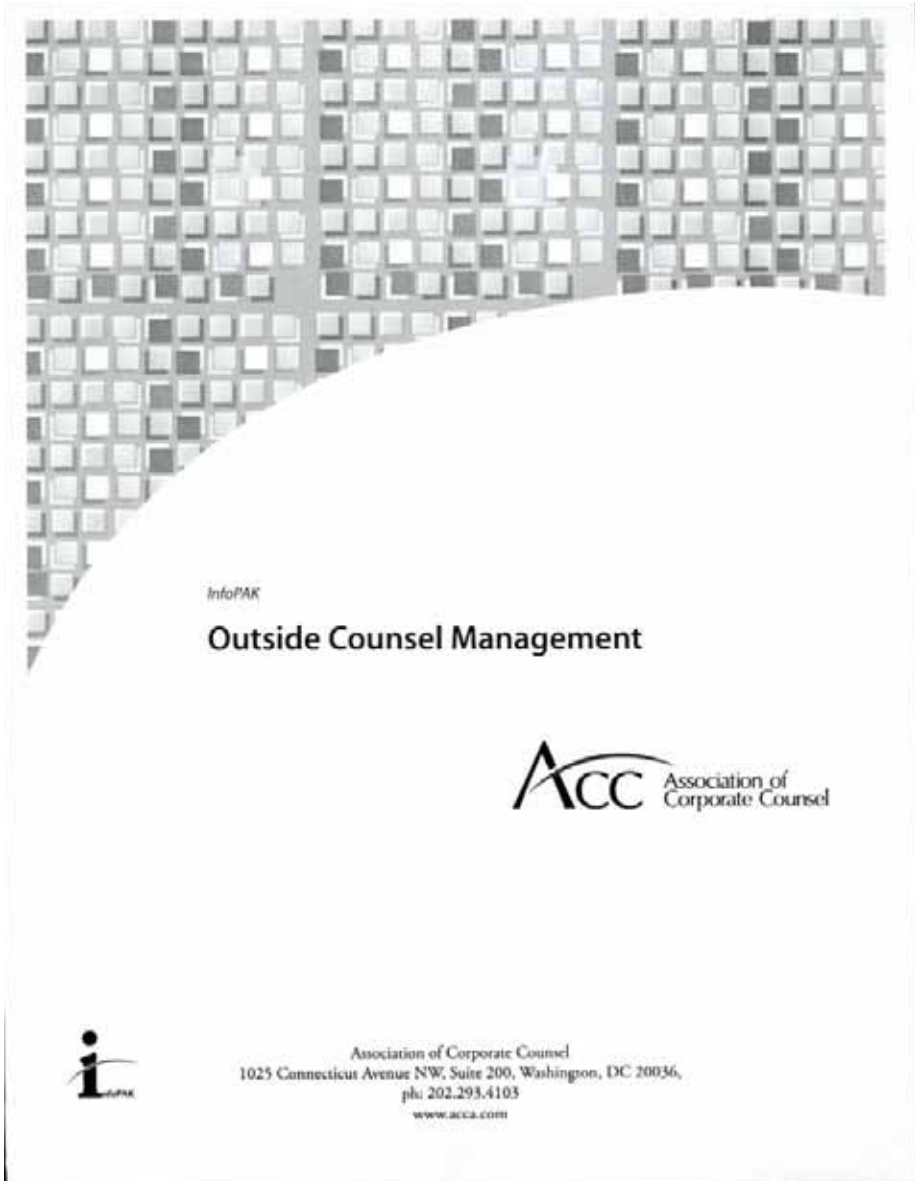
[*] See Brennan, "Driven to Defection," The National Law Journal, (May 18, 1998), p. A1, A27.



InfoPAK

Outside Counsel Management

ACC Association of Corporate Counsel

Association of Corporate Counsel
1025 Connecticut Avenue NW, Suite 200, Washington, DC 20036,
ph: 202.293.4103
www.acca.com

J. Performance Evaluation Letter[10]

PERFORMANCE EVALUATION WITH OUTSIDE COUNSEL

FIRM _____ DATE: _____

Coordinating or Lead Partner:

Number of Matters Currently Being Handled:

Number of Firm Attorneys Handling Matters:

PERFORMANCE CRITERIA	This Eval.	Last Eval.
1. LEGAL KNOWLEDGE/SKILL/EFFORT/RESULTS (Overall)		
a. Results	_____	_____
b. Legal knowledge/expertise	_____	_____
c. Quality of service/advice/counsel	_____	_____
d. Professionalism	_____	_____
2. MATTER/CASE MANAGEMENT & ADMINISTRATION (Overall)		
a. Efficient staffing of cases	_____	_____
b. Cost consciousness & control; working within budget	_____	_____
c. Cooperation with other legal services providers	_____	_____
d. Organization & planning	_____	_____
e. Timeliness of work product	_____	_____
3. USE OF SYSTEMS, PROCESS & TECHNOLOGY (Overall)		
a. Timely & detailed case plans and budgets	_____	_____
b. Timely & detailed invoices	_____	_____
c. Use of e-mail for communication	_____	_____
d. Sensitivity to cost issues - expenditures, experts, travel, lodging, service providers	_____	_____
4. COMPLIANCE WITH SET GOALS & PROCEDURES (Overall)		
a. Timely delivery of documents	_____	_____
b. Timely delivery of legal research studies & memoranda	_____	_____
c. Securing approval when appropriate or required	_____	_____
d. Prompt notice of significant changes or events	_____	_____
5. TEAMWORK (Overall)		
a. With other outside counsel	_____	_____
b. With client's in- house counsel	_____	_____
c. With other legal service providers	_____	_____
d. With outside counsel	_____	_____

For more ACC InfoPAKs, please visit www.acca.com/article/infopak

6. COST CONSCIOUSNESS AND CONTROL (Overall)
a. Understanding client position re legal expenses _____ _____
b. Willingness to consider/use alternative billing arrangements, rate discounts & freezes _____ _____
c. Performance re budgets & plans _____ _____

7. CLIENT/ COUNSEL SATISFACTION (Overall)
a. Sensitivity to wants/needs _____ _____
b. Anticipation of wants/needs _____ _____
c. Willing cooperation _____ _____
d. Sensitivity to personnel issues _____ _____
e. Resolution of conflict situations _____ _____
f. Understanding culture & style _____ _____
OVERALL EVALUATION _____ _____

COMMENTS/OBSERVATIONS:

_____
_____
_____
_____
_____

2007 ULLICO Inc. Outside Counsel Performance Evaluation

Law Department Personnel Survey Form

Survey for Law Firm Name
Matters:

Question 1 of 16
Quality of firm's analysis and counseling
(Reliability, trustworthiness, credibility and maturity of the firm's advice)

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 2 of 16
Quality of firm's communications
(Clarity, persuasiveness and polish of the firm's oral and written advice)

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 3 of 16
Consistency of quality in firm's lawyers and staff

consistently excellent personnel	many excellent; some to be avoided	few are excellent	not observed
○	○	○	○

Question 4 of 16
Responsiveness; timeliness and completeness of advice

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 5 of 16
Timeliness in preparing drafts for in-house review

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 6 of 16
Cooperative and productive in working with Law Department attorneys and

Survey Page 2 of 3

staff

consistently superior | above average | average | below average | consistently unsatisfactory | not observed

Question 7 of 16

Value added in relation to billing rates and invoicing

excellent value | above average | average | below average | unsatisfactory | not observed

Question 8 of 16

Compliance with billing and budgeting guidelines

consistently comply | usually comply | often non-compliant | rarely/never comply | not observed

Question 9 of 16

Sensitivity to ULLICO's business objectives

consistently superior | above average | average | below average | consistently unsatisfactory | not observed

Question 10 of 16

Sensitivity to ULLICO's unique mission and stakeholders

consistently superior | above average | average | below average | consistently unsatisfactory | not observed

Question 11 of 16

Knowledge of ULLICO products, services, personnel

very knowledgeable | somewhat knowledgeable | not knowledgeable

Question 12 of 16

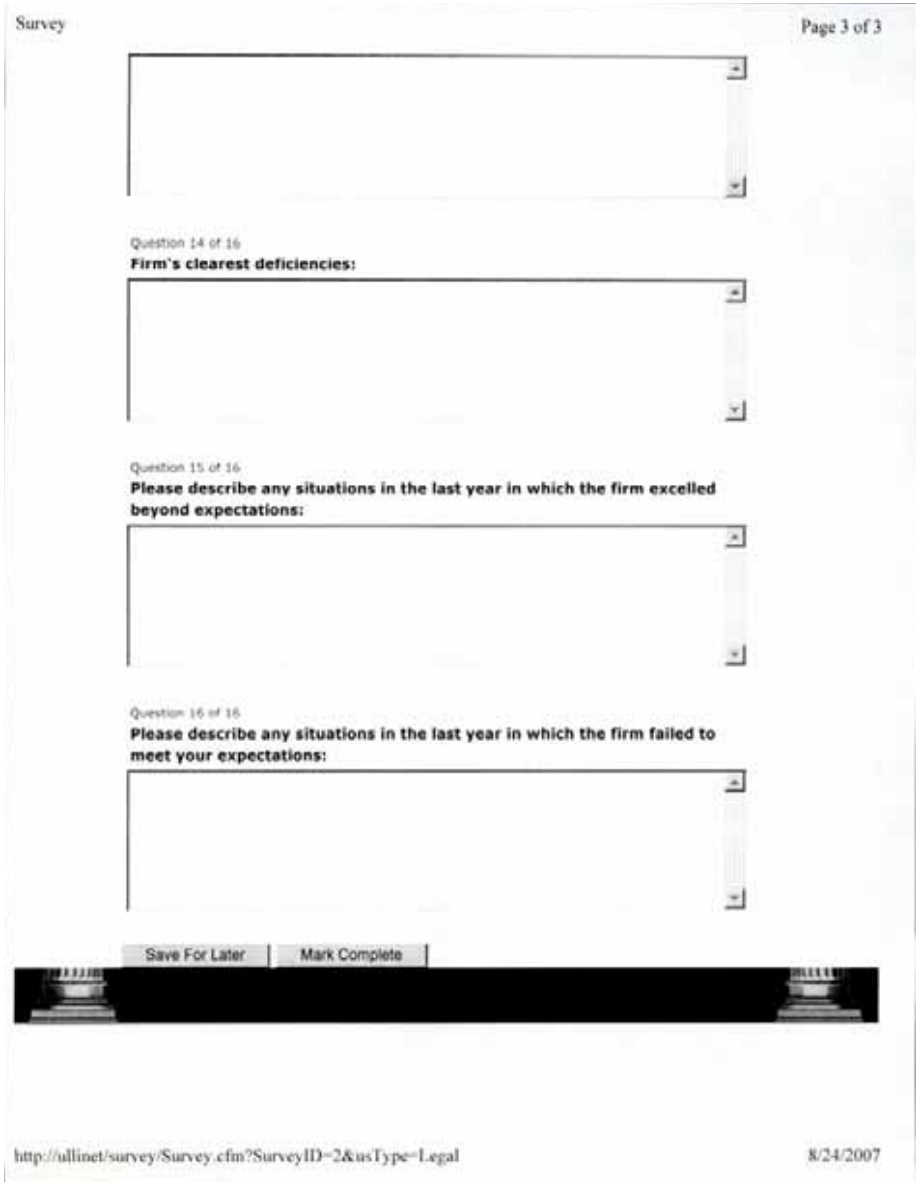
Your overall confidence in this firm

high confidence | average confidence | lack confidence | no opinion

Question 13 of 16

Firm's best qualities:

http://ullinet/survey/Survey.cfm?SurveyID=2&usType=Legal 8/24/2007



Survey Page 3 of 3

Question 14 of 16

Firm's clearest deficiencies:

Question 15 of 16

Please describe any situations in the last year in which the firm excelled beyond expectations:

Question 16 of 16

Please describe any situations in the last year in which the firm failed to meet your expectations:

Save For Later | Mark Complete

http://ullinet/survey/Survey.cfm?SurveyID=2&usType=Legal 8/24/2007

2007 ULLICO Inc. Outside Counsel Performance Evaluation

Business Executive Survey Form

Survey for Law Firm Name
Matters:

Question 1 of 12
Quality of firm's analysis and counseling
(Reliability, trustworthiness, credibility and maturity of the firm's advice)

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 2 of 12
Quality of firm's communications
(Clarity, persuasiveness and polish of the firm's oral and written advice)

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 3 of 12
Responsiveness; timeliness and completeness of advice

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 4 of 12
Value added in relation to billing rates and invoicing

excellent value	above average	average	below average	unsatisfactory	not observed
○	○	○	○	○	○

Question 5 of 12
Sensitivity to ULLICO's business objectives

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 6 of 12
Sensitivity to ULLICO's unique mission and stakeholders

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 7 of 12
Professionalism and client relations skills
(Anticipates client needs; sensitive to client authority; handles disagreements appropriately; neat and polished in presentation)

consistently superior	above average	average	below average	consistently unsatisfactory	not observed
○	○	○	○	○	○

Question 8 of 12
Your overall confidence in this firm

high confidence	average confidence	lack confidence	no opinion
○	○	○	○

Question 9 of 12
Firm's best qualities:

Question 10 of 12
Firm's clearest deficiencies:

Question 11 of 12
Please describe any situations in the last year in which the firm excelled

beyond expectations:

Question 12 of 12

Please describe any situations in the last year in which the firm failed to meet your expectations:

Save For Later | Mark Complete

McGlone, Patrick

From: McGlone, Patrick
Sent: Friday, August 24, 2007 3:35 PM
To: McGlone, Patrick
Subject: 2007 Outside Counsel Performance Evaluation Program

The Law Department is launching its first-ever performance evaluation of ULLICO's principal outside law firms. Formally assessing our outside law firms' performance will help ensure that we are obtaining cost-effective and high-quality services.

We have selected for evaluation eight law firms that provided substantial services to ULLICO during the past year. The Law Department's personnel and members of ULLICO's senior management who have worked with these firms are being surveyed about the firms' performance.

Please click on the link below, which will take you to a brief electronic survey tailored especially for your input. You will see a separate survey page for each firm with which you have worked. Each survey page will identify for you the law firm and the significant matters it has handled. In addition to asking you to rate several of the firm's qualities, the survey page also contains spaces for you to provide narrative comments about particular activities or attorneys. We may contact you with follow-up questions as we complete the survey process.

The Law Department will tabulate the survey results, review other law firm performance indicators, meet with each law firm to discuss our evaluation, and explore how we can improve our relationship.

The survey can be accessed at the following link: http://ullinet/survey

Please complete your survey by Friday, September 7th. Call me on extension 6967 with any questions. Thank you for your participation in this important evaluation process.

Patrick McGlone
Associate General Counsel
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8/24/2007

HANDSOn

Benchmarking the Performance of Outside Counsel

The Project

As in-house counsel we've all had this file—the one where you just can't properly manage outside counsel's time. You feel the meter running as the case progresses, and the mere thought of receiving the account is frightening. When the account does come in, you delay looking at it. Why cause problems for yourself before you have to?

Unfortunately, we in-house counsel can't afford to ignore these problem matters. With class action law suits, hefty hourly rates for outside counsel, and budget cuts within our own companies, it is vital that all in-house counsel know which outside law firms work most effectively and which ones provide the best value. To determine this, we need to be able to measure the performance of outside counsel. And in turn, that means we need to know what aspects of outside counsel performance are important, so we'll know what to measure.

In this *HandsOn*, we provide a roadmap for how to assess the performance of your outside counsel. We also offer some tips on how you can apply this information to both cut your outside legal bills and improve the quality of services you receive.

Tackling the Project

What are other in-house counsel doing?

In the summer of 2005, Bottomline Technologies conducted an electronic survey of the in-house counsel/outside counsel relationship of Fortune 1000 companies and AM Best 200 insurers. Of the 200 companies that responded, the results are:

- Performance measurement is being used by 78%.
- Benchmarking is being used by 54%.
- Benchmarking is a relatively new practice for the survey participants who are using it, who reported that they have been using it for:
  - 5 plus years: 24%
  - 2 to 4 years: 52%
  - Less than 1 year: 24%
- Survey participants rated their current law firm measurement process as:
  - rudimentary: 37%
  - pretty good: 37%
  - robust: 18%
  - exceptional: 5%

According to Tom Gaillard, vice president and general manager at Bottomline Technologies, these results indicate that the rising interest in benchmarking over the course of the last few years has coincided with the maturation of IT solutions designed to automate process workflow and collect a broad spectrum of data.

Why are so many in-house counsel using performance management and benchmarking? According to the survey respondents, these techniques have enabled them to obtain better service at a lower cost using fewer outside law firms. Indeed, many in-house counsel have found that by using fewer law firms, they can get the same amount of work completed with less effort on their own part. It's no wonder that there's a growing trend for companies to reduce the number of their outside law firms.

Supply List

In this HandsOn, we will provide helpful tips on:

- measuring outside counsel's performance;
- taking charge of the inside counsel/outside counsel relationship;
- strengthening your control over how outside counsel handles your work;
- improving the quality of outside counsel's work; and
- reducing the cost of outside counsel.

Blueprint

Know the Terminology

Benchmarking. Performance management. Legal-spend management. These are relatively new concepts in the inside counsel/outside counsel relationship.

Performance measurement is an assessment of whether outside counsel are effectively serving the company. Such an assessment does not have to be perfect to be valuable. But the assessment should make like-to-like comparisons; remember that what you need from your litigation counsel can be quite different from what you need from your corporate counsel.

Benchmarking is measuring an outside counsel's services according to specified standards, so that you can compare services across law firms and improve the services you receive from the benchmarked firm. Benchmarking is more rigorous than performance measurement. If you're at a rudimentary level in terms of your assessment process, you may want to implement the process gradually, starting with some performance assessment processes and adding benchmarking over time. For those who can afford it, there are consultants who would be pleased to put your benchmarking in place quickly, for the appropriate fee.

Legal-spend management is aligning (1) the legal services you need with the services you're getting and (2) the price you should pay for those services with the price that you're actually paying.

Setting your goals

As with any project you undertake, you need to determine your goals. What do you want to achieve through performance management and benchmarking?

Here are some broad, general goals you may wish to consider:

- Cut costs.
- Appease others within the company who are not in the legal group and who complain about the cost of outside counsel legal fees.
- Respond to requests from a business unit to improve legal services.
- Increase the quality of service within the existing group of law firms. In other words, perhaps you really enjoy working with a particular firm and hope that, with a bit of objective criticism, they can step it up a notch.
- Award new work to the highest-performing law firms.
- Cut out the low-performing law firms.
- Reduce the number of law firms so that these relationships can be more easily managed.
- Better align the inside counsel/outside counsel teams, so that you can get the right combination of inside and outside attorneys to handle specific projects. You want to know which combinations of people don't work well.
- Improve the way that your company's business units obtain services from outside counsel. Basically, you want to advise the business units on how they can help get better, faster, cleaner processes and results when dealing with law firms.
- Take better control of the inside counsel/outside counsel relationship. In essence, you want to establish your own more stringent rules for the law firms and lay down the consequences if they breach these rules ("I won't pay your bill if . . .").
- Tie law firm compensation to the firm's performance on designated matters or types of files.
- Improve services as part of a corporate drive toward best practices within the entire company.

Once you've determined your broad goals, your next step is to refine each of these into more specific and measurable goals. For instance, one of your aims may be to improve litigation services. In that case, what concrete things would you be attempting to achieve? For example, you might be trying to:

- have everyone thinking in terms of early resolution;
- get to mediation and arbitration quickly;
- shorten the duration of cases;
- be kept informed by outside counsel;
- keep outside counsel costs aligned with the company's exposure; or
- have effective litigation management guidelines.

You should also consider who within the company is driving the performance assessment initiative. Is your legal group merely responding to complaints by others within the company, or does your group genuinely back the initiative? You'll get a better result if your group truly believes in the project and implements performance management as part of its mandate to provide superior legal services to the company.

What do you want to measure?

Once you have your goals in place, the next step is to create appropriate means for determining how well (or poorly) these goals are being met. Some of what you want to measure is objective: How well does the law firm do what it is assigned to do? Other aspects of the relationship with outside counsel are more subjective and have a strong personal component. Be sure that your measurement processes include an appropriate balance of subjective and objective measures—or you could find yourself working with someone that you really don't like.

Objective measures

Here are some objective measures that might help you in reviewing completed legal services.

- *Outcomes.* Look at the matter in the context of other issues, such as the total cost of outside legal fees, the value to the company of the result obtained, and the consequences for the company if the lawsuit had reached a different result.
- *Compliance with your guidelines.* Is outside counsel following your instructions?
- *Hourly rates.* Can you receive a discount off the regular hourly rates? What types of matters can be billed on a project basis, as opposed to an hourly-rate basis?
- *Charging correct rates.* See who is working on the matter. Ensure that the outside lawyers you've selected are the ones actually doing the work and that work isn't being passed down to other lawyers without your prior approval.
- *Case duration.* What are the potential defense costs compared to the liability of the company? Is outside counsel providing advice consistent with these two factors, or is outside counsel working the file?

Subjective measures

The following measures are somewhat more subjective. They are either hard to quantify, or the importance of the measures may vary, depending on the tastes and demands of each inside counsel and its client. Nevertheless, many in-house counsel believe these are key issues to consider in

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any relationship with outside counsel:

- *Quality of personal service provided by outside counsel.* How responsive, trustworthy, reliable, and credible are the counsel?
- *Outside counsel's efficiency.*
- *Value of outside counsel's services.*
- *Internal client satisfaction with outside counsel.*
- *Outside counsel's reputation in the legal community.*
- *Diversity of outside counsel's employees.* Does this diversity satisfy you and your client?
- *Outside counsel's technological infrastructure.* Many in-house counsel demand electronic billing, use of the firm's word-processing services, and other desired value-adds.

Although these seven factors are hard to quantify, you can still use them to compare different law firms. For example, you might begin by rating these seven factors in terms of what is most important to you, on a scale of one to seven. Then rate each outside law firm on how they measure up. The results will give you a like-to-like comparison among firms.

Making the measurements

Benchmarking and performance management can seem like daunting new tasks to add to your already overlong to-do list. But take heart; it's a matter of finding the right place to start.

Informal surveys. For those who are just beginning, start with something simple, such as anecdotal staff surveys: Just ask general questions of your staff and others. The questions can be very broad, such as "Who do you like to work with and who not?" Then drill down into the answers received. For instance, "Why don't you like working with Lawyer A in Law Firm X?" What you may find from these anecdotal surveys is that no one likes working with any lawyers in Law Firm X and that the only reason that staff have kept quiet is because Lawyer B in Law Firm X is a good friend of a company VP outside of the legal group. The legal world has changed, and this inefficient business connection should no longer be simply accepted by you or any other GC. The legal group can and should get rid of Law Firm X.

Formal surveys. A somewhat more rigorous approach would be to perform a formal staff survey. Such a survey could examine, among other matters, the same issues examined in anecdotal surveys.

Billing. An electronic billing review can provide a wealth of information relating to outside counsel's staffing and billing. The review of bills can easily spot changes in lawyer file staffing, duplicate entries, unapproved hourly rates, and unauthorized expenses. It is also a useful way to track costs in order to determine whether a specific matter should be settled. (For more information, see the article, *"Electronic Billing Enters the Mainstream: How to Ensure a Successful Launch for Your Law Department,"* also in this issue.)

Audits. Audits involve a review of matters, both closed and active. The reviewer has a series of items to look for and record. This type of review lends itself to spotting trends and patterns.

Benchmarking. Benchmarking involves comparing your company's outside legal costs with the costs of legal services for a typical company in your client's particular industry. The latter, benchmark costs, are available through published studies, trade journals, conferences, and consultants.

Methods for improving performance

Once you've collected and analyzed your data, your next step is to use this data to improve the performance of outside counsel. We've listed some practices below that can help you implement new ideas and processes so that they become routine. If you decided to adopt some or all of these practices, it is vital for you to formalize them, document them, and distribute the documents to all appropriate company personnel. You should make the practices you adopt routine within your company's legal group, corporate group, and whoever else is involved within the company.

Create a formal panel. One common method for improving performance is to establish a formal panel of selected, preapproved outside counsel. In order to be included on this panel, each of the law firms must satisfy your selection criteria. Each of these selected firms should have a single designated lawyer through whom all work is to be funneled and who has formally accepted the role of managing your files throughout the firm.

Identify common goals. After you have selected your law firms, you need to work with outside counsel to identify some common goals. A typical goal is for the law firm to develop a solid understanding of the company's business. Another common goal is for the law firm to understand how the company wants to approach certain types of matters. In almost all instances, one of the goals will be to create and maintain a collaborative, long-term relationship.

Use retainer letters. When dealing with outside counsel (as with so many other business issues), setting and managing expectations is frequently critical to ensuring a successful relationship and a good result. For the relationship to work, expectations must be clearly communicated, understood, and agreed on both sides. One of the most effective ways to establish the expectations for outside counsel's representation and billing is through the retainer letter. A meaner, leaner retainer letter can be of great assistance in establishing the new norm and resolving billing disputes. It can help inside counsel determine, throughout the course of a matter, when emails, telephone calls, conference calls, and face-to-face meetings are needed to manage expectations.

Have a formal intake procedure. Another useful method for managing outside counsel is to establish a formal intake procedure for each new matter. This subjects the matter to a standard review and approval process, but the process may vary according to the nature of the matter and the anticipated fees. For

Ask the Experts

Q: Can you give any guidance on performance-based compensation? I'd like outside counsel to share not only the victories, but the losses too.

A: Performance-based compensation works in some, but not all situations. This type of compensation scheme can work only if:

- Performance criteria are relevant to the services being performed.
- Inside counsel can set specific service expectations.
- Performance criteria include both subjective and objective criteria.
- Performance criteria are fair.
- Outside counsel has some flexibility and is able to take risks.
- Both inside counsel and outside counsel can opt out of the arrangement based on a predetermined mechanism.

Q: Do you have any other suggestions for getting more value for each dollar paid to outside legal counsel?

A: Here are some tips.

- Try to reuse information from previous cases. Some of the larger law firms have strong knowledge management processes in place, which are accessible to outside counsel.
- Implement knowledge management processes within the company. Share best practices.
- On some files, have in-do counsel administer files with outside counsel.
- Compare law firms with offices across the country on a segment-by-segment basis.
- Leverage technology to better study and understand outside counsel's billings.
- Determine the ratios of your various legal costs. For instance, determine the ratio of motion costs to total costs, or discovery costs to total costs.
- Look for trends in these ratios and changes in trends. Try to figure out the reasons for these trends and how you might change the numbers to your advantage.
- Encourage outside counsel to be flexible and try new things.

Blueprint

Meaner, Leaner Retainer Letters

To get better results from your outside counsel, consider including these items in your short, to-the-point retainer letter:

- Bills from outside counsel must be provided on a regular, timely basis. This basis can be monthly, bimonthly, or whatever you prefer.
- All bills from outside counsel are to go to a specified billing address. They are to be sent "nowhere but here, and to no one but me."
- There shall be no general matters or billings.
- Outside counsel will accept no work directly from someone in a business unit. All work must come from your legal group.
- Only preapproved lawyers can work on a matter. If a lawyer leaves the firm, the firm must absorb the time incurred in bringing a replacement lawyer up to speed on the file. This time is nonbillable.
- Specify how and when outside counsel should communicate with you concerning progress on a matter (perhaps a combination of monthly, quarterly, and annually). Tell outside counsel what information they need to provide. Make sure that communications must be comprehensive. Outside counsel must understand that you want absolutely no surprises.
- After initial communications on a new matter, outside counsel will deliver, within a specified number of days, a written plan and budget for the matter.
- Certain outside counsel expenses, which are specified on a list, are not billable. They are considered part of the firm's overhead.
- Outside counsel's fees and work must align with the value of the matter to the company and the exposure the matter creates for the company.

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For More Information

You might find the following resources helpful when researching law department benchmarks:

- Altman Weil, Inc., Law Department Management Benchmarks Survey, 2005 Edition (Altman Weil, Inc. 2005).
- Virginia Grant, "Three Not So Simple Rules for Law Departments Serious About Controlling Costs," Altman Weil, Inc. (June 1, 2004), www.altmanweil.com/dir_docs/resource/3a352cc0-1128-4c72-9876-9979eac3ca2_document.pdf.
- Rees W. Morrison, Law Department Benchmarks: Myths, Metrics and Management (Hildebrandt International 2001).

Useful websites include:

- www.altmanweil.com
- www.bottomline.com
- www.calatystlegal.com
- www.hildebrandt.com
- resources.martindale.com

instance, if a new matter is expected to have fees that exceed a certain amount (say, $5,000), work should not begin until the law firm has submitted a budget that has been accepted in writing by the general counsel. For less costly matters, the process can involve an intake conference call, where the information is presented and the law firm provides an initial assessment.

Watch the budget. While a matter is ongoing, you should regularly compare actual activity and billings against the matter's plan and budget. This should be done on an informal basis every 30 days. After this review, you should modify the plan and budget, as needed.

Have a formal review process. You may also want to put in place a formal review process for every matter, with such reviews occurring every 90 days. Such reviews of the work and billings of outside counsel allow you to update the plan and budget for the matter—and also provide other important benefits.

- The formal review helps you to assess outside counsel's work. (By the way, make sure you engage outside counsel in the review of their performance. That way, both of you will get a better understanding of what the other side wants and expects.)
- The formal review provides an opportunity to reconsider a particular matter and develop further strategies. When confronted with questions such as "How can we be only this far along when we've spent so much money?" a law firm may become more creative and more open to new suggestions for resolving a particular matter.

Debrief after completion. After a matter is resolved, you may want to have a post-completion debriefing from outside counsel. Work with outside counsel to assess how well counsel performed in this matter. Compare the original plan and budget with the actual, final one. If there were any significant discrepancies, why did they occur? Such information can be used to provide more accurate plans and budgets in the future.

Performance-based compensation

Performance-based compensation is becoming more common, particularly in litigation matters. It is a value-based approach to compensating outside counsel that ties a law firm's compensation directly to the benefit the company derives from the service.

In order to implement this type of compensation, in-house counsel and the law firm need to agree, at the beginning of an engagement, on the criteria that will be used to assess performance. At least three criteria should be agreed to, and at least two of these should be objective measures.

Blueprint

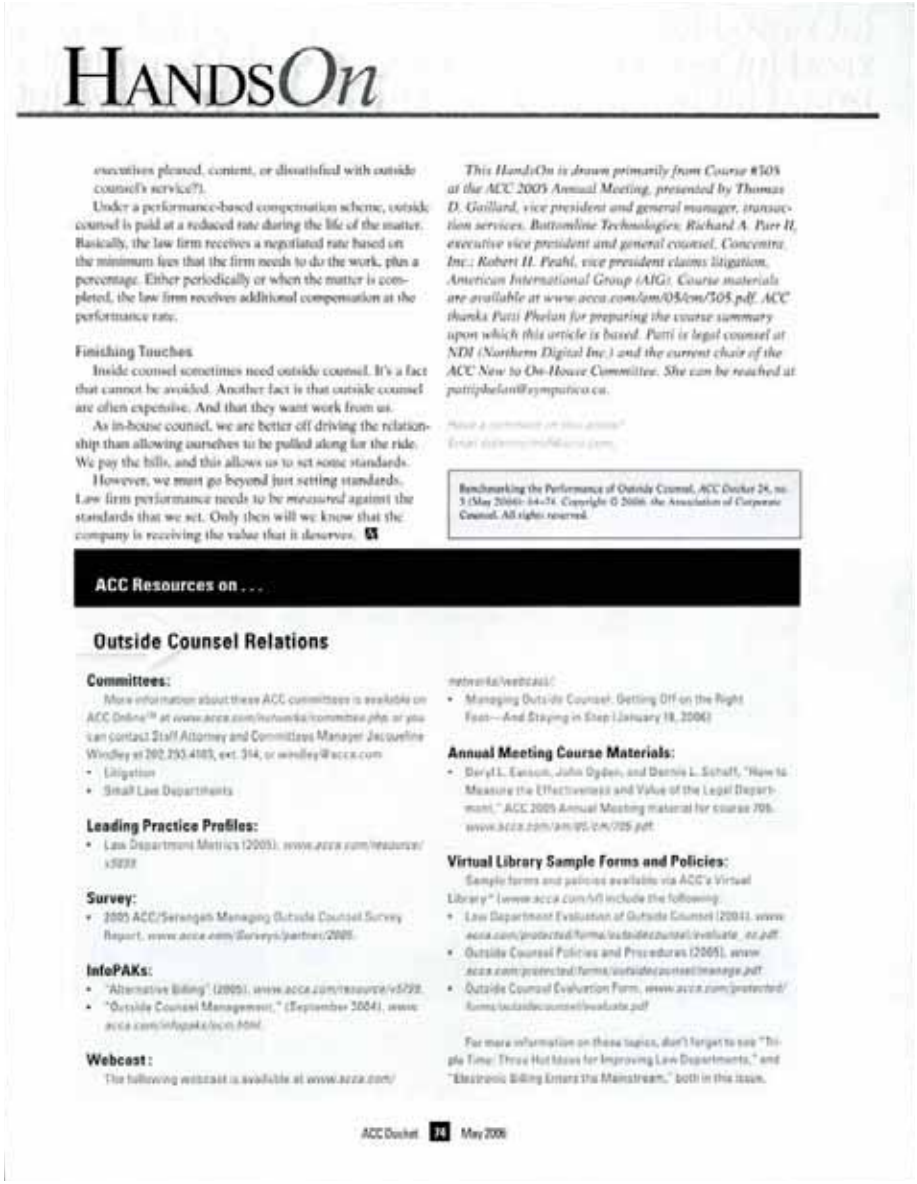
Litigation Management

Do not treat any litigation as routine.

Treat each case as a series of purchasing decisions, and establish in advance what you are prepared to pay for the various steps in the litigation process. For instance, specify that there are to be no more than X number of motions prior to trial and no more than Y number of depositions.

Among the criteria you may wish to consider are:

- the duration of the matter;
- the outcome of the matter;
- outside counsel's compliance with in-house counsel's guidelines;
- the extent and quality of communication between outside counsel and your company;
- the total cost, including not only the fees paid to the law firm, but all other costs, such as the expenses of experts;
- outside counsel's strategic performance; and
- your client's satisfaction (are your company's senior



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executives pleased, content, or dissatisfied with outside counsel's service?).

Under a performance-based compensation scheme, outside counsel is paid at a reduced rate during the life of the matter. Basically, the law firm receives a negotiated rate based on the minimum fees that the firm needs to do the work, plus a percentage. Either periodically or when the matter is completed, the law firm receives additional compensation at the performance rate.

Finishing Touches

Inside counsel sometimes need outside counsel. It's a fact that cannot be avoided. Another fact is that outside counsel are often expensive. And that they want work from us.

As in-house counsel, we are better off driving the relationship than allowing ourselves to be pulled along for the ride. We pay the bills, and this allows us to set some standards.

However, we must go beyond just setting standards. Law firm performance needs to be *measured* against the standards that we set. Only then will we know that the company is receiving the value that it deserves.

This HandsOn is drawn primarily from Course #505 at the ACC 2005 Annual Meeting, presented by Thomas D. Gaillard, vice president and general manager, transaction services, Bottomline Technologies; Richard A. Parr II, executive vice president and general counsel, Concentra, Inc.; Robert H. Feahl, vice president claims litigation, American International Group (AIG). Course materials are available at www.acca.com/am/05/cm/505.pdf. ACC thanks Patti Phelan for preparing the course summary upon which this article is based. Patti is legal counsel at NDI (Northern Digital Inc.) and the current chair of the ACC New to On-House Committee. She can be reached at pattiphelan@sympatico.ca.

ACC Resources on . . .

Outside Counsel Relations

Committees:

More information about these ACC committees is available on ACC Online™ at www.acca.com/networks/committee.php, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com.

- Litigation
- Small Law Departments

Leading Practice Profiles:

- Law Department Metrics (2005). www.acca.com/resource/v5933

Survey:

- 2005 ACC/Serengeti Managing Outside Counsel Survey Report. www.acca.com/Surveys/partner/2005.

InfoPAKs:

- "Alternative Billing" (2005). www.acca.com/resource/v5798.
- "Outside Counsel Management," (September 2004). www.acca.com/infopaks/ocm.html.

Webcast:

The following webcast is available at www.acca.com/networks/webcast/:

- Managing Outside Counsel: Getting Off on the Right Foot—And Staying in Step (January 18, 2006)

Annual Meeting Course Materials:

- Beryl L. Eanson, John Ogden, and Dennis L. Schaft, "How to Measure the Effectiveness and Value of the Legal Department," ACC 2005 Annual Meeting material for course 705. www.acca.com/am/05/cm/705.pdf.

Virtual Library Sample Forms and Policies:

Sample forms and policies available via ACC's Virtual Library™ (www.acca.com/vl) include the following:

- Law Department Evaluation of Outside Counsel (2004). www.acca.com/protected/forms/outsidecounsel/evaluate_oc.pdf.
- Outside Counsel Policies and Procedures (2005). www.acca.com/protected/forms/outsidecounsel/manage.pdf.
- Outside Counsel Evaluation Form. www.acca.com/protected/forms/outsidecounsel/evaluate.pdf.

For more information on these topics, don't forget to see "Triple Time: Three Hot Issues for Improving Law Departments," and "Electronic Billing Enters the Mainstream," both in this issue.

Tips for Improving Relationships with Outside Counsel*

1. Treat your outside counsel like your partner and not hired help.
2. Clearly communicate expectations.
3. Immediately discuss performance concerns.
4. Be quick to provide praise and positive feedback.
5. Cascade positive results obtained internally and externally.
6. Provide outside counsel with incentives to make your work a priority.
7. Don't micro-manage outside counsel.
8. Timely provide outside counsel with documents or information needed to represent your company's interest.

*This tips are applicable to ongoing relationships with an outside counsel.

Submitted by: Alison R. Nelson – Ford Motor Company
August 17, 2007

Case Management Cost Savings Suggestions

1. Develop budgets for outside counsel's time and expenses in every matter, including those covered by retainer agreements.

2. Establish billing and payment guidelines. Clearly define expenses that are reimbursable versus non-reimbursable.

3. Travel guidelines should closely mirror your corporate policy

4. Identify approved team and rates

5. Conduct monthly conference calls with outside counsel to review performance against budget, performance against retainer agreement and the plan for the rest-of-year performance to targets.

6. Limit representation to one lawyer at most hearings and court conferences, except pre-trial conferences. Prior approval required for different staffing.

7. Utilize telephonic/webcam meetings, depositions preps and depositons whenever feasible.

8. Depositions should be videotaped only when a witness's testimony is expected to be critical and the witness is likely to be unavailable for trial.

9. Create preferred accounts with court reporting and copying services to minimize cost.

10. Electronically distribute documents, correspondences and photos whenever appropriate. Limit use of express mail.

11. Immediately discuss any discrepancies.

Submitted by: Alison R. Nelson
ACC 2007 – Chicago, Illinois