



105 Building/Maintaining Relationships with Outside Counsel

Catherine Fox

Senior Vice President & General Counsel
Alcatel Alenia Space

Robert L. Scott

Vice President & General Counsel
Starwood Hotels and Resorts Worldwide, Inc.

Our controller and accounts payable team just asked me how I verify and approve outside counsel bills for payment. I assured them that I scrutinize these invoices for compliance with our outside counsel retention policies by going through the following checklist.

Reviewing Outside Counsel Bills

BY KARIN B. SINNIGER

Is the work billed to the right legal entity?

We often retain firms to represent more than one BP affiliate. Obviously it would be unfair for Subsidiary A to pay Subsidiary B's legal expenses. This is particularly true where the subsidiaries have different ultimate parent companies. A law firm might provide services to numerous joint venture companies BP operates on behalf of different shareholders with differing equity stakes. We don't want to be accused of trying to avoid our fair share of costs by asking a law firm to do work for an entity in which we have a 50 percent equity interest and to charge this work to an entity where we are only a 50 percent shareholder.

Did the right lawyers bill the time?

To better control costs, we agree which lawyers may work on our matters at the outset of any engagement. Our engagement letter makes it clear that we won't pay for work unless a BP lawyer has approved the name and hourly rate of the individual doing the work.

Is the bill's description of time and work reasonable?

If I'm pressed for time and ask outside

counsel to draft a simple agreement that would have taken me five hours to draft, and I am billed for two days of a lawyer's time, you can bet I'm going to question this charge. It's worth being sensitive to cultural differences when making this assessment. US firms, for example, encourage their lawyers to be more aggressive about billing than the typical UK or European firm, where billing time for thinking about a matter while commuting or in the shower is taboo. BP does occasionally ask law firms with very aggressive billing practices to cap the number of hours their lawyers can bill on our matters per day. (Tip: When comparing bids for work from competing international firms, factor this into the equation. The US firm may have lower billing rates than a UK firm, but you may still be better off retaining the competing

US firms encourage their lawyers to be more aggressive about billing than the typical UK or European firm.

UK firm, which may charge less hours for the same work due to a less aggressive billing culture.)

Is there potential billing abuse?

We make it clear upfront that outside counsel should not bill us for "general matters," "miscellaneous advice," or similar descriptions that don't identify the actual subject of the legal advice. This not only makes checking the bill easier, it also reduces the scope for bill padding. I also check whether we were charged for lots of internal conferences for the firm's lawyers to get each other up to speed on our matters, since these are often instances of double-billing. Finally, I check whether the law firm charged us a mark-up for paralegals, word processing, telephone charges, photocopies, conference facilities, and so forth. We generally disallow such mark-ups unless they are the norm in a particular jurisdiction.

Did travel costs conform to our travel policy?

If a law firm charged BP for a business-class ticket when under our travel policy (which we provide when we sign the engagement letter) it was only entitled to fly economy class, we will reject this charge. In addition, lawyers may bill us only for the time they actually worked on our matters while traveling, rather than for the time it took them to get from door to door.

Is the basic bean counting in order?

Lastly, I check that the number of hours billed multiplied by the agreed rate is correctly computed; that the correct exchange rate was used; and that the application of withholding taxes or VAT is proper under local law. ☞

Have a comment on this article?
Email editorinchief@acca.com

KARIN B. SINNIGER was born and raised in Asia but is of European origin. She holds law degrees from both US and UK universities and has done deals on virtually every continent. She is a senior legal advisor for BP's Azerbaijan Business Unit based in Baku, Azerbaijan and can be reached at sinnigkb@bp.com. The views expressed in this column are her own and not necessarily those of the BP Group.



Outside Counsel Management

ACC AMERICA
Association of Corporate Counsel
1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
Tel 202.293.4103
Fax 202.293.4701
www.acca.com
*The in-house bar association*SM

Outside Counsel Management

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Provided by the Association of Corporate Counsel
1025 Connecticut Avenue, Suite 200
Washington, D.C. 20036
Tel 202.293.4103
Fax 202.293.4107

The following materials are intended to provide in-house counsel with information focused on Outside Counsel Management.¹ This information should not be construed as legal advice or legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated. This is not intended as a definitive statement on the subject but a tool, providing practical information for the reader. Please help us improve this InfoPAKSM by contributing your own sample clauses, forms, policies or other relevant information concerning Outside Counsel Management. We hope that you find this material useful. Thank you for contacting the Association of Corporate Counsel.

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¹ The information contained in this InfoPAKSM was compiled by Ingrid Hutto, Esq. (in 2002), updated in 2003 by Neven Stipanovic, Esq., and in 2004 by Brian Eagle, Esq., at the direction of the Association of Corporate Counsel.

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I. Assessing the Need - Is Outside Counsel Necessary?

A. Factors to Consider

Despite the continued down-turn in the economy, corporations' legal spending continues to increase in both amount and as a percentage of corporate revenue.² Outside counsel was one recipient of this increased spending. Median spending on outside legal counsel increased from \$1.09 million in 2001 to \$1.20 million in 2002.³ But as corporate legal spending increases, outside firms responsiveness to corporate needs has not kept pace with corporate needs. A general resistance to explore alternative fee arrangements, poor quality work product/results, excessive fees, and a lack of responsiveness all were contributing factors in the termination of a legal relationship between in house counsel and their law firms.⁴

Thus, before a company takes steps to hire outside legal counsel, they must first consider whether the cost associated with such a relationship will be rewarded with appropriate results. A company's general counsel must consider multiple factors in the analysis of whether a law firm is appropriate for their particular company. These factors include:

- "The decision to retain outside counsel, as opposed to handling the matter within-house staff, is driven by three main factors: geography, the need for specialized expertise, and a lack of inside resources."⁵
- "Geography refers to the need to obtain local counsel when the location of the legal matter is at some distance from the corporate law department and is most often an important factor with respect to litigation."⁶
- "The need for outside counsel provision of specialized legal expertise is an obvious situation for most in-house counsel. But the attempt to mesh specialized outside counsel with available in-house counsel knowledge can be a management challenge. This is especially so when an outside firm is providing only part of the legal advice for a transaction or when several outside firms are providing advice concerning the transaction. In such instances, the expertise of in-house counsel in identifying legal issues and coordinating their resolution is particularly necessary."⁷
- "Finally, in-house counsel sometimes require outside counsel, if due to the press of time and other matters, staff resources are simply unavailable even where geography and specialized knowledge are not an issue."⁸

² 2003 ACCA / Serengeti Managing Outside Counsel Survey: Assessing Key elements of the In-house Counsel / Outside Counsel Relationship, p.12.

³ *Id.*, at 15.

⁴ 45.6% of in-house counsel terminated their relationship with at least one of their law firms in 2002. See 2003 ACCA / Serengeti Managing Outside Counsel Survey: Assessing Key elements of the In-house Counsel / Outside Counsel Relationship, p.23.

⁵ Richard E. Mulroy, *Issues of Outside Counsel Management*, ACCA Docket, May/June 1995.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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B. Key questions to ask when considering outside counsel

- How much internal work is to be outsourced?
- What is the cost of providing legal services internally and is that cost competitive with outside firms?
- What benefits does the law department bring to the organization by handling the work? Are there particular services or areas of law that would be better handled by outside counsel?
- Does the law department have or want to develop the necessary skill sets to effectively handle specific areas of work?⁹

II. Selection Process

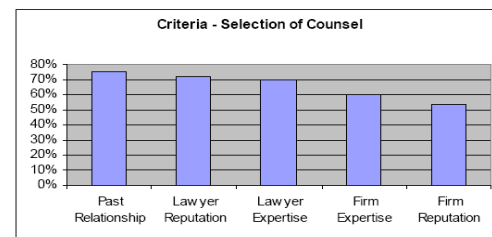
A. Locating Outside Counsel

Companies are most reliant on referrals from trusted sources as the most common ways of locating new outside counsel. In-house counsel are more likely to rely on a personal referral than to utilize a directory (published or online) or general search of law firms' websites. Broken out by percentage, the methods preferred by in-house counsel to locate new outside counsel are:

- 81.5% - Referral from other outside counsel
- 52.2% - Referral from in-house counsel at other companies
- 47.4% - Referral from other in-house counsel at the company
- 40.4% - Company-approved outside counsel list
- 26.3% - From other employees at their company
- 17.4% - Online directories
- 14.4% - Published directories
- 10.0% - Search of law firm websites¹⁰

B. Selection Criteria

Once the decision has been made to utilize outside counsel, the company and in-house legal department must analyze the information available to them in formulating a set of criteria with which they can evaluate prospective law firms. Choosing a firm is not as simple as picking a name from the Yellow Pages. Instead companies are relying on past relationships, a firm or lawyer's reputation as well as their expertise in deciding which law firm to hire.



Companies should also ask for and check out references. One would not hire a new employee without references, so the same rule should apply when selecting outside counsel. Do not assume

⁹ Excerpted from *The Outsourcing Decision: Make v. Buy*; PriceWaterhouseCoopers, Law Department Consulting, www.pwcglobal.com/extweb/manissue.nsf/DocID/8B95B6DA8C8107A185256B26007233BD. See also, Robert L. Haig, Successful Partnering Between Inside And Outside Counsel § 3:21 *Time sheets or a reasonable facsimile thereof* (2000) (detailed method of measuring the cost-effectiveness of in-house v. outside counsel); and § 3:26 *The study is done; now it's time to decide* (2000) (list of principal factors of the make or buy decision matrix).

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¹⁰ 2003 ACCA / Serengeti Managing Outside Counsel Survey: Assessing Key elements of the In-house Counsel / Outside Counsel Relationship, p.20 – 21.

¹¹ *Id.*

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that any firm is right for the client or of the highest quality just because the firm features a big-name lawyer or is an “institution” in the legal community. Instead:

- Talk to the law firm’s other clients.
- Meet with the leaders of the team who will be doing your work.
- Take your time making a decision (even if it means just sleeping on it), and don’t feel pressured to hire people just because they take the time to “pitch” their services to you.
- Explore the firm’s sensitivity to and comfort with the negotiation and settlement process; insure that they are willing to consider your interests and not just the bottom line on their bill. Then choose to hire good lawyers who you’ve met and interviewed; don’t just hire a faceless law firm on the strength of its reputation.¹²

The skill set which will best suit any particular company will of course vary depending on the nature of work (litigation vs. contract development; dispute resolution vs. research) and the particular issues confronting the company itself. General attributes though can be considered as a baseline for evaluating any prospective lawyer or firm. Law department managers should look for the following attributes in outside counsel:

- **Strong Technical Legal Skills.** Outside counsel should have strong technical legal skills. The ability of outside counsel to develop and offer deep technical expertise is one of their differentiating features.
- **Results Orientation.** Outside counsel should be focused on the outcome to the corporation, rather than the dollar-value of the work. Best-in-class law departments will ensure that arrangements with outside counsel are “win-win” to ensure the right focus of outside counsel (i.e., billing arrangement promotes the desired result).
- **Innovative Value-Added Services.** Outside counsel are often relied upon as experts in specific areas, where in-house counsel often lack the opportunity to develop the applicable knowledge. Outside counsel should be able to provide innovative value-added service that the in-house team is unable to provide, such as industry knowledge gained from working with other clients. Additionally, law firms should be pro-active by offering training programs. Although outside attorneys are not employees of the organization, they make integral contributions to preventative law efforts. For a law firm that is paid on an alternative fee arrangement, such as a retention agreement, preventative law is really in everyone’s best interest. Outside counsel is able to provide a broad perspective that reflects lessons learned and identifying trends and particular areas where the business units need educating.
- **Solid Project Management.** Outside counsel should be able to prioritize work and manage workflow to get the job done efficiently. Most importantly, inside and outside counsel should be jointly responsible for establishing clear, ongoing mechanisms for the organization to communicate expectations and the firm to articulate needs.
- **Flexibility.** Changes in direction or strategy should be responded to quickly by outside counsel and not be treated as “bumps” in the project that warrant another conversation about scope (and cost).

¹² Excerpted from “A Client’s Guide to Engaging Outside Legal Counsel,” ACCA Docket, Summer 1993 www.acca.com/protected/pubs/docket/Summer93/susan.html

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- **Predictable Pricing.** Many law department managers find that predictable pricing is a more important factor in managing the legal budget than cost. Clearly cost is an important factor, but accurate planning and consistent communication is essential to effective management.
- **Use of Technology.** Technology is an integral part of providing cost effective legal services. Outside counsel should be willing to embrace technology which has become an accepted method of communication and integration of outside counsel with inside lawyers.¹³ For more information on the use of technology, see Chapter 7 of this InfoPAK.

| Criteria Checklist¹⁴ |
|---|
| ○ Highest quality |
| ○ Lowest cost |
| ○ Fastest response |
| ○ Ease to work with |
| ○ Efficiency |
| ○ Accessibility |
| ○ Amount and flexibility of resources within the firm |
| ○ Areas of expertise |
| ○ Value added services |
| ○ Location |
| ○ Name and reputation |
| ○ Flexibility in billing/payment |

C. Beauty Contests¹⁵

The “beauty contest” – a catchy phrase for an interview – has recently become a fashionable way to select counsel. In the beauty contest approach, instead of asking a single, leading candidate to make a presentation, several firms are interviewed and their presentations are compared. By forcing firms to compete against each other, the company can maximize the services they receive while minimizing the legal costs.

- A number of interviews should be undertaken only if all of the firms to be interviewed have a significant chance of being selected.

¹³ See PriceWaterhouseCoopers, supra note 3

¹⁴ Carl B. Horton and Peter M. Marchel, *Selecting and Managing Your Outside Counsel Resources*, ACCA’s 1999 Annual Meeting. www.acca.com/education99/cm99/pdf/808.pdf

¹⁵ Excerpted from Robert L. Haig, *Successful Partnering Between Inside And Outside Counsel* § 4:23 *Interviews or “Beauty Contests”* (2000)

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- It is often useful to submit to the law firm a description of the issue and material about the corporation so that during the interview process the attorney and the inside counsel can discuss the issues and strategy.
- In the beauty contest format where several firms are being interviewed, it is not unusual for the company to request specific information about the law firm above and beyond the general marketing material that one often sees law firms distribute.
- The corporation can request references, lists of similar matters handled and their outcome, a budget, staffing proposals, and a description of any technology which would make the delivery of legal services more cost-effective.
- During the interview, the corporation can ask about billing rates, explore alternative billing arrangements, and discuss staffing issues.
- Issues to explore in the interview:
 1. The firm's experience:
 - How many engagements of this type has the lawyer and law firm handled and with what outcomes?
 - How recent were those experiences?
 - For which clients were the services performed, and who can be contacted at each client for references?
 - If the proposed engagement involves litigation, how many cases has the lead lawyer tried to verdict in the past five years? What types of matters? With what results? When?
 2. The matter at issue:
 - What is the lead attorney's initial evaluation of the case?
 - What strategy would the firm propose to follow if it were selected to handle the matter?
 - How would the law firm staff the matter?
 3. Overall operation and management of the firm:
 - Describe how the firm goes about assigning lawyers to new matters.
 - What has the law firm done in the last five years to become more cost-effective?
 - What technology does the firm use and how does the firm use the technology to achieve efficiencies?
 - What has been the turnover rate of associates and partners at each of your U.S. offices in the last three years? How do you explain these numbers?
 - Describe the kinds of lawyers you like to recruit to the firm. What qualities do you look for in a candidate – both entry level and lateral?
 - What has the firm done to promote internal diversity?
 - What are the firm's pro bono policies?
 - Give us an idea about the nature and extent of your training program (formal and informal) for associates.
 - Does the firm have an hourly billing requirement? If so, what is it?
 - How does the firm set salaries and billing rates? What factors drive the firm to increase rates?

- On what basis are partners compensated? Does the compensation system encourage partners to “run the meter” in order to increase their own compensation?
- Does the firm have a mandatory or other retirement program? If so, please describe it.

D. Requests for Proposals¹⁶

- A more formal way of selecting counsel is to prepare something similar to the request for a proposal (“RFP”) often used in governmental procurement processes.
- RFPs are frequently used when the corporation is going to select the lowest possible bidder for an engagement that is susceptible to being done for a flat or fixed fee.
- An RFP may be justified where there is a need to obtain a substantial amount of detailed information about various aspects of the legal services sought to be purchased.
- The RFP should be comprehensive and specifically describe the nature and extent of the assignment. In preparing such a document, the corporation should be straightforward and set forth what it seeks and any limitations that may exist.
- The corporation should request the responding firms to submit information, consistent with the company's requirements, concerning terms of retention, billing arrangements, and identification of the proposed staffing of the matter.
- Also, in such proposals, the law firm is often required to agree, as a condition of employment, to all of the corporate policies and procedures of the client.
- The RFP should not only solicit the information that will be necessary to select a candidate but also should be forthright in describing the factors that will determine the successful candidate, including for example:
 - If the company has concluded that it will employ a certain billing arrangement for the engagement, it should limit the RFP to that method and not ask for alternative billing arrangements.
 - If the company's goal is to promote vendor diversity, the RFP should state that the racial and gender diversity of the firm will be considered.
 - If the company is seeking to retain national coordinating counsel for national multi-plaintiff litigation and intends to hire only a firm that has such experience, then the RFP should require specific information about the firm's experience in such litigation.
 - If the company is seeking to outsource certain intellectual property work and intends to consider the firm's approaches to such a relationship, then the RFP should specifically solicit proposals concerning such approaches.
- If the request for proposal is not sufficiently detailed, the responses will not only be hard for outside counsel to prepare, but the responses will be so varied that it will be difficult for the corporation to use the responses in comparatively selecting counsel.

¹⁶ *Id.* at § 4:24

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III. Engaging / Retaining Outside Counsel

A. Engagement Letter

Upon choosing a law firm to represent the company, in-house counsel should thereafter create the working agreement that will govern the firm-company relationship. This "contract" puts on paper the essential elements that define the responsibilities and obligations of the two (or more) parties. This "engagement letter" will also describes the scope of work for outside counsel and should include:¹⁷

- Roles of inside and outside attorneys
- Scope of work
- Conflict waiver
- Process of engagement for new work
- Responsible attorney / lead attorney
- Persons qualified to handle matters
- Objectives and measurements
- Communication mechanism
- File retention
- Type of compensation / fee arrangement
- Billing

The engagement letter can also define the methods that will be used to resolve any future disputes, limit the nature of work the firm will perform and address potential issues of conflict. The letter thus should address the following points:

- Case evaluation and disclaimer of results
- Dispute resolution clause
- Confidentiality waiver / press release provision
- Termination

B. Billing Guidelines

In engaging a law firm to represent a company, in-house counsel will of course be concerned with the fee structure. Billing guidelines should be in place before either party begins operating under the engagement letter. Choosing a billing method should be done at the earliest stage of the RFP as possible. Firms soliciting your company's business should clearly state their fee expectations. It is for the in-house counsel though to modify and negotiate that fee based on what the company is prepared to pay and what product/work is expected from the firm. In the end, the billing agreement should include:

- Fee arrangements
- Required level of billing detail

¹⁷ See Horton, et al., *supra* note 8

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- Requirement for timely submission of bills
- Details of allowable expenses

Once the billing guidelines have been set up, it's imperative that in-house counsel maintain control over the fee arrangement and costs the firm attempts to charge.¹⁸

Ten Ways to Slash Spending on Outside Counsel¹⁹

- Designate one person in your department to handle bills and pursue savings.
- Set a strict and uniform billing policy for outside counsel.
- Forbid rate increases and changes in assigned teams without prior approval.
- Require outside counsel to prepare budgets for all specific matters and cases
- Cut the overall number of firms you retain.
- Develop a cadre of preferred providers by region or practice area.
- Investigate reverse-auction Web sites.
- Explore electronic billing services
- Make lawyers' natural competitiveness work for you; grade outside counsel regularly
- Share the grades with all of the firms you retain.

C. Conflict Waiver²⁰

Studies have shown that in recent years, as companies have become subject to greater scrutiny by government agencies, shareholders and other groups, there has been an increased need to avoid conflicts of interest. In general, in-house counsel require more substantive conflict checks of potential outside counsel than what is required by the local professional responsibility ethics rules. In-house counsel are now checking for past representation of an adverse party (71.1%), current representation of business competitors not adverse in specific matters (50.0%), as well as positions taken in past cases that may conflict with a current corporate issue (19.6%).²¹

Although examination of potential conflicts have increased in depth and scope, in-house counsel remain flexible in granting conflict waivers. In fact, in-house counsel granted 97.1% of all conflict

¹⁸ Dan DiLuccio, *Chief Legal Officers Continue Raising the Bar for Law Firm Performance*, AltmanWeil (July 2001), available at www.altmanweil.com/about/articles/pdf/chieflegalofficer.pdf

¹⁹ Catherine Aman, *Cracking the Whip*, Law.com (Feb. 27, 2003), available at www.altmanweil.com/about/articles/pdf/chieflegalofficer.pdf

²⁰ Haig, *supra* note 9 at § 9:13 *Conflict check and current conflict waivers*, (2000)

²¹ 2003 ACCA / Serengeti Managing Outside Counsel Survey at 21.

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waiver requests in 2002 as compared with 87% in 2000.²² The steps available to counsel in seeking such a waiver include:

- The engagement letter can serve as written documentation which identifies the client, its affiliates and predecessors, for purposes of conflicts checks. A written list of those entities gives the client an opportunity to verify that the list is comprehensive and accurate, while allowing the lawyer to fulfill her duty to avoid conflicts of interests.
- If there is a current conflict, the engagement letter can also serve as a vehicle for disclosing the conflict and for obtaining the client's informed consent. It can also detail the manner in which the outside counsel will seek to minimize the effects of the conflict, such as putting a "Chinese wall" in place.
- To be effective, a conflict waiver provision should identify the adverse party, the nature of the conflict, and the consequences of waiving the conflict.

It is important to note though that, in addition to waiving current conflicts of interests, engagement letters can serve to waive future conflicts that may arise.²³ However, in-house counsel often avoid granting these blanket waivers.²⁴

²² *Id.* at 22

²³ Haig, *supra* note 9 at § 9:14 Prospective conflict waivers, (2000) (detailed analysis of prospective waivers).

²⁴ 2003 ACCA / Serengeti Managing Outside Counsel Survey at 23.

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IV. Managing Outside Counsel

A. Creating Win-Win In-house/Outside Counsel Relationships²⁵

Effective management of outside counsel means constant evaluation and reevaluation of the law firms' performance. Regular reviews of bills/work product are the most common and efficient means of informally conducting a cost-benefit analysis. A more task specific method is to perform an end of matter (case, filing, etc.) assessment or a periodic assessment of the firm's work.²⁶

Besides conducting reviews (whether formally or informally), in-house counsel can monitor hired firms and look for these traits that help ensure an effective partnership between company and outside firm.

Traits of an Ideal Outside Counsel

- Has recognized expertise and experience in his field.
- Clearly translates/applies legal advice into the context of what it means for the client's business and delivers it in a way that helps the client meet legitimate business needs.
- Anticipates client needs.
- Proactively solves problems.
- Is a creative, strategic thinker and effective communicator.
- Is timely, available, responsive and result-oriented.
- Identifies what adds value to the client, delivers that value and demonstrates that he/she has done so.
- Delivers more than the client expects – consistently. A recent survey of in-house counsel at U.S. Fortune 1000 companies showed that for the satisfied client, client service drove satisfaction far more than any other factor. At 53%, superior client service was by far the dominant factor, more than twice as much as any other, with legal skills at only 21%.

Traits of an Ideal In-house Counsel

- Summarizes for outside counsel reasons he/she was selected over other attorneys. This will help outside counsel understand in-house counsel expectations. Reminds outside counsel about the company budget and his/her ideas for minimizing cost.
- Expands on personal management styles and explains exactly how he/she wants to participate in the dispute resolution process.
- Explicitly records corporate goals and objectives at the outset of transactions. Distills key factors that add value to the company and actively encourages other in-house counsel and managers to discuss these factors with outside counsel.
- Invites outside counsel as observers to selected internal meetings, particularly those relating to corporate strategy.
- Includes outside counsel on distribution lists of corporate and industry publications.

²⁵ Excerpted from Ronald F. Pol, *Get More Value from Outside Counsel: Show Them the Flipside*, ACCA Docket, April 2003. www.acca.com/protected/pubs/docket/am03/flipside1.php

²⁶ While 84.4% of companies utilize the informal review, 40.4% conduct end of project reviews and 30.0% conduct occasional evaluations. See 2003 ACCA / Serengeti Managing Outside Counsel Survey at 28.

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- Invites outside counsel to identify three ways to help achieve your corporate objectives and three ways to add more value aside from simply doing the work.
- Invites outside counsel to identify three ways and circumstances in which they might charge other than hourly billing to more accurately reflect value to you.

Traits of a Win-Win In-House/Outside Counsel Relationship

- Prepare engagement agreements together. Negotiating the terms of the engagement helps develop better working relations, allowing outside counsel to better understand the client's needs, thus making it easier to deliver effective value. Establish upfront that the in-house counsel will manage the matter for the company and be a key member of the legal team.
- Develop a case strategy, including staffing levels and projected costs. Work collaboratively as a team with clearly delineated division of work.
- Centralize all communication through in-house counsel. This ensures appropriate briefing on the matter's status and progress and protects privileged information.
- Hold regular reporting and review meetings. Such meetings build communication and facilitate "no surprises" management of legal issues. They help keep track of budget and objectives. They also facilitate forward planning.
- Practice risk-reward sharing. In setting out respective expectations, deliverables, obligations, and commitments, you're necessarily dealing with how to share risk and reward. Align the outside counsel's interests with the company's. Reward effective and efficient representation, i.e. with repeat business.
- Employ value billing methods to improve service quality. Factors to consider for value billing: problem solving skills, availability, timeliness of advice, legal/commercial judgment, project management, outcome. Reward outside counsel not simply on hours worked but according to criteria that reflect value to the client. Use alternative fee arrangements such as: flat annual fees; variations on contingency fees; lesser hourly rates with a bonus for early conclusion.

B. Effective Management of Outside Counsel Litigation²⁷

Use the following checklist to manage your outside counsel in litigation:

- When you identify a dispute, determine the time frame for resolving it and your company's ultimate goal(s) in order to decide whether and when to hire outside counsel.
- If you are not experienced in negotiating, litigation, and the subject matter of the dispute, contact outside counsel immediately.
- Before meeting with prospective outside counsel, assess your company's budget and internal dispute resolution resources and your personal management style.
- To find potentially appropriate attorneys, get recommendations from within your company and from contacts in the relevant legal and business communities.
- When meeting with a prospective outside firm, present your budget and ideas for minimizing litigation costs and ask that the firm present an efficient litigation plan.

²⁷ Checklist for Effective Management of Outside Counsel in Litigation, ACCA Docket, April 2003, available at www.acca.com/protected/pubs/docket/am03/primer_check.php

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- When selecting outside counsel, consider possible conflicts, trial experience, substantive expertise, knowledge of the courts, compatibility with attorney(s) who will actually be handling your case, feedback from references, and the firm's litigation plan.
- Hold an initial meeting with the attorney that you select, agree on a protocol for your working relationship, and memorialize that protocol in a retention letter.
- Make a preliminary factual investigation within your company to educate yourself and give outside counsel a running start.
- If you are an experienced litigator, consider playing a role in shaping discovery and motion practice to reduce costs, but do not deprive outside counsel of experience with witnesses, the adversary, and the court.
- Always act as the gatekeeper of corporate information in communications with outside counsel.
- Consider participating in settlement negotiations at the various stages of litigation if you are experienced in negotiation and know the case as well as outside counsel does.
- Select a role at trial that will accommodate your desired level of participation and time availability.
- Address any problem with the in-house/outside counsel relationship immediately.
- Develop a collegial relationship with outside counsel that will benefit your company in this dispute and in any future disputes.

C. Reducing Dependence on Outside Counsel

One of the most effective ways for in-house counsel to control outside legal spending and to weed out under-performing firms is to utilize the strategy of convergence. Convergence is the method by which companies reduce the number of outside law firms with which a company does regular business and this is utilized by 26.4% of in-house departments.²⁸ Although this number represents a decline from previous years (where in 2001, 27% of law departments used this method), it remains an effective tool for a company to reduce its dependence on outside counsel. The benefits of convergence are:²⁹

- outside counsel become more aware of business needs,
- better legal advice/work product,
- lower outside counsel fees,
- less time spent on managing outside counsel.

In 2002, almost 50% of all in-house counsel terminated their relationship with outside counsel.³⁰ The three most common reasons for terminating this relationship are:

- lack of responsiveness to counsel requests
- poor quality work product or results
- fees and costs that were excessive

²⁸ 2003 ACCA / Serengeti Managing Outside Counsel Survey at 24.

²⁹ Id.

³⁰ Id.

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Inefficiencies of attorney/law firm and fee and billing issues are also significant reasons for terminating outside counsel.

One of the better known examples of the benefits of effective management of outside counsel is found in the precedent set by E.I. DuPont Legal Department. The DuPont Legal Model brought discipline to legal spending by imposing early case assessment, eliminating over 300 firms from its outside counsel rolls, and implementing a battery of cost-control measures. It is estimated that these efforts saved the company more of \$50 million since 1993.³¹

The next chapter outlines the convergence process, guiding corporate law departments with a step-by-step method for reducing the number of outside law firms which they manage and rely upon.

³¹ Catherine Aman, *Cracking the Whip*, Law.com (Feb. 27, 2003), available at www.altmanweil.com/about/articles/pdf/chieflawofficer.pdf. See also Thomas L. Sager and Scott L. Winkelman "Six Sigma: Positioning for Competitive Advantage" ACCA Docket, 2001, available at: www.acca.com/protected/pubs/docket/jf01/six.html and Thomas L. Sager and Gerard G. Boccuti, "Achieving the Common Goal: DuPont's Performance Metrics," ACCA Docket (September/October 1997) available at: <http://www.acca.com/protected/pubs/docket/so97/duPont.html>.

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V. Convergence: Creating Outside Counsel Networks

A. First Things First

A number of law departments have reduced costs by conducting a convergence project. Convergence is the method by which companies reduce the number of outside law firms with which it does regular business. The resulting benefits are that the company (i) establishes a network of preferred legal providers, (ii) lowers outside counsel fees, and (iii) increases quality of work and responsiveness by law firms. Further, the decrease in the number of outside counsel will reduce the overlap and duplication of effort common to companies that use numerous outside firms.

The process of convergence involves the following:

1. Choosing the nominees
2. Requesting proposals
3. Evaluating the responses
4. Selecting the final list

B. Choosing The Nominees

The initial step in determining the list of nominees is to assign a core team to the task. Then, in deciding which outside firms to focus on, the team can use the firms' historical performance for the company, including quality of work product, cost, responsiveness, etc., as a guide in thinning the list of firms down to a small pool of prospective full service providers. The core team should also assess the earlier work done by each firm as this will lead to the realization that many of the firms previously used either did not produce a worthy product or provided work which was replicated by others. Thereafter, group the remaining law firms not only by practice areas, but also by the likelihood of meeting the department's cost/legal budget objectives, as well as charting potential overlap -- where multiple law firms have been used for the same area of law. Spreadsheets, case management technology and summary reports can simplify this process of comparing and narrowing the nominee list.

A common strategy included in many convergence projects has been the adoption of a regional approach. The search team divides the country into 4 or 5 regions, (for example, west, south central, north central, southeast, or northeast and so on) then determines in which region are most matters assigned. As one general counsel said, "We try to limit our use of firms with multiple offices because we can get into conflicts. We target 50 to 100 lawyer firms located in just one region."

In developing a network of preferred providers, corporate legal departments should analyze their overall needs, including:

- o Required areas of specialization
- o Geographic locations
- o Rates/costs
- o Technology

In addition, corporate counsel should also consider intangibles such as:

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- past relationships
- willingness of a firm to form a true partnership with your company
- ease in dealing with the firm's personnel

For most in-house legal groups, somewhere in the range of 10 to 15 percent of its historical list of law firms will make it through the first cut onto the nominee list. Most, if not all, of these Preferred Provider candidates will be pre-existing firms. See the Sample Forms and Policies at the end of the InfoPAK for an example.

C. Requesting Proposals

To help each prospective law firm make its case to be selected for inclusion in the primary network, prepare to send out Request for Proposal (RFP) to each firm. Legal departments should draft the RFP thoughtfully, focusing on two important elements:

- **Content.** Include enough information to allow the firms to provide conscientious bids such as the firm's practice area and region, and the company's legal expenses for the previous year. Encourage the firms to provide information about internal policies concerning diversity issues, pro bono work, technology; ask respondents to describe how they would support certain law department goals and so on. The firms should be allowed to bid for as many regions and practice areas as they want to.
- **Packaging.** Put together and distribute the RFP in a way that conveys seriousness. One company sent out its RFP in a formal portfolio, including a video about the company, a CD ROM with the RFP to be filled out, and a cover letter. As a result, over 95% of the targeted outside firms sent back responses; unheard of when compared to typical solicitations.

At the end of the convergence process, the law department will have eliminated firms with which it had a long relationship. Some of the large firms will be horrified when they don't get a second chance to provide a more competitive bid. Therefore, to avoid any surprises, it must be clearly conveyed that the firms should submit their best offer up front. The purpose of convergence is not to pressure large firms with the lowest bid and ask them to beat it. Instead the firms need to make a bid they can live with on the first shot.

The Sample Forms and Policies at the end of the InfoPAK provide examples of questionnaire forms to send to law firm network candidates.

D. Evaluating The Responses

Prospective preferred provider firms should have ample time, about six to eight weeks, to respond. During the waiting period, the law department should assemble a team that will evaluate and score the responses. It is worth considering whether this team should be the same (or similar) to the one you used to draft this list of firms. While the knowledge gained from the previous "weeding out" process may provide greater insight into the bids submitted, it may also result in individuals coming into the process with a bias. One solution would be to route the incoming RFP responses to an in-house lawyer without prior experience with that firm to reduce the potential for bias.

Once all the RFP responses have been scored, enter the responses into spread sheets, with firm, region, area of law, partner average rates, associate average rates, etc. A master spread sheet is a tool

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selection teams find very helpful in order to see that Firm A, Region 1, bankruptcy has an average partner rate of X, firm 2 is Y, etc. As a result, the evaluation team can see which firms in each region have the lowest rates by area of law. This may reveal the need to repeat the RFP process and solicit bids from alternative, specialty firms.

After all responses have been scored and consolidated, the evaluating team and senior legal staff should discuss the overall rankings for each firm and reach a consensus.

At one company, after evaluating all of the RFPs, the team realized that the overall the hourly rates were still very high. Because a majority of the RFPs were from large firms, and on the theory that these large firms have a lot of overhead cost, the evaluation team sought bids from medium and smaller firms that specialized in areas such as standard litigation (collections, simple tort), labor and employment law and real estate. The bids from the smaller, specialty firms were on average \$50 to \$100 an hour less than the hourly rates of the larger firms. Further, given that the practice areas of the smaller firms accounted for the 33 to 50 percent of the company's of billable volume, the reduction in cost was significant.

In the end, a preferred provider law firm network might have the following mix³²

- 25% Tier 1 law firms (also called "regional" firms)
- 75% specialty firms

E. Selecting The Final List

The convergence process can last for four to five months. Once the process is completed, each of the selected firms should be given a detailed engagement agreement. One law department required each law firm to provide invoices that detailed both the standard billing rate and the preferred provider billing rate. This approach made it easier for in-house counsel to measure whether they were achieving the projected savings and determine if the primary firms were billing for more hours to compensate for the lower hourly rate.

Typically, initial law firm network engagements last for one year, with the understanding that there would be an evaluation at the end of the one year period and that the engagement would be renewed only if both parties were in agreement. Some law departments negotiate renewals for two year periods in order to lock in rates.

Caution: It is important to remind all preferred providers that there is no a guarantee that all work will go to them and that the company reserve the right to go outside the network on, especially with high risk cases.

F. Maintenance

Once all the work of selecting a primary law firm network is finished, there is still more to do. Depending on the area of law, maintaining adherence to the network can be very challenging. In banking, for example, a company may have in-house staff still wanting to go back to the old law firms they know even though they are outside the network. The pull of relying upon a known entity is often one which is hard to break. But, a general counsel's direct reports can enforce it, if the

³² This is of course only a suggested Preferred Provide make up. In no way do the authors or ACC believe this is the correct balance for all companies.

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counsel is willing to be diligent in monitoring whether the staff is relying upon the Preferred Providers. To help general counsel ensure staff compliance, case management technology can be used to provide the staff with an online menu from which to choose vetted outside counsel. Even more, some general counsel pay their staff performance bonuses for adherence to the primary law firm network.

Conversely, to motivate preferred providers, let them know they have an opportunity to come in and market themselves to your people. Also encourage the preferred providers to network with each other. When notifying law firms that they've been selected to be a preferred provider, list all firms so they can get a sense of the network they are part of. Some corporate legal departments also try and hold an annual meeting of the preferred providers to share the vision for the next year. No matter how your preferred law firm network is tailored, the opportunity to lower the cost of outside counsel while measurably increasing each law firm's performance are at the heart of all convergence programs.

G. Tools

Law departments can use a variety of techniques and tools to help benchmark their historical costs – showing expenses by geographical region, area of legal specialization, title/level of billing person, and law firm. In-house groups using software like case management and e-Billing systems can use search features and standard reports to cull historical summaries. To make it easier to structure and analyze their cost information, many in-house departments use spreadsheets like those shown in sub-section M of "IX. Sample Forms and Policies."

In addition, spreadsheets can also be used to capture a projected picture of the future, illustrating the budget and billing rate reductions that an in-house group wants to achieve via convergence – selecting preferred providers for an outside counsel network. To illustrate the approach taken by one corporate law department, the following four spreadsheets have been included:

Historical – Where are we?

- Hourly Rate Benchmarking Analysis
 - *Overview of Specialization, Avg.* Summarizes the mean hourly billing rate for each type of billing person (partners, associates, of counsel, paralegals, and administrators) you use for each area of specialization – from bankruptcy to litigation to tax matters.
 - *Overview of Job Class, Avg.* Summarizes the hourly billing rates for each type of billing person you use; includes high-low range, sample size, and mean billing rate.
 - *Avg. by Job Class* Lists the entire billing rate sample for each type of billing person and shows the calculation of the mean hourly billing rates.
 - *Avg. by Specialization* Lists the entire billing rate sample for each area of specialization and shows the calculation of the mean hourly billing rates.
- Legal Fee Analysis (by Region, by Law Areas)
 - Summarizes the total cost of legal fees, by region, for each area of specialization – from bankruptcy to litigation to tax matters.

Future – Where do we want to go?

- RFP Proposed Rates

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- Lists the hourly billing rate received for each type of billing person, proposed by each law firm invited to respond to your RFP. The list can be used to set the mean billing rate that finalists will be asked to accept.
- Firms by Region – for use in RFP
 - Shows the projected total cost of legal fees, by region, using the RFP proposed billing rates that finalists will be asked to accept.

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VI. Establishing a Relationship with International Outside Counsel³⁹

In these times of rapid movement toward a global economy, in-house counsel must be prepared for transactions and dealings worldwide. To effectively represent your client's global interest, in-house counsel must be able to navigate foreign legal systems and know and appreciate the culture and society in which he/she is doing business. Selection of competent international outside counsel in the relevant jurisdiction thus becomes a critical step to successful global transactions. The following subsections outline the key issues an in-house counsel should consider before engaging and/or retaining the services of an international outside counsel.

A. In-house Due Diligence

Before retaining international outside counsel, in-house counsel should do the following

- Sketch out the parameters of your international matter.
- Identify what services you need:
 - Researching local laws,
 - Drafting,
 - Negotiating,
 - Handling litigation,
 - Meeting with local government officials/contacts,
 - Industry experience.
- Identify the type of international counsel that you need:
 - Foreign office of international law firm
 - Organized legal referral networks, i.e. Interlaw
 - Local law firm - do you need a barrister, solicitor, or notary?
 - Foreign Legal Consultant – expatriate lawyer based in U.S. or abroad
- Create a budget or estimate of costs.
- Outline your goals and expectations and review them with your client to confirm you know your client's objectives.
- Educate yourself about outside counsel's country – the history, culture, customs, and especially, its legal system:
 - What type of judicial system is it?
 - Is the judicial system generally perceived to be impartial?
 - Must disputes be resolved in the country?
 - Is there a political method for resolving disputes?
 - Are alternative methods of dispute resolution permitted?
 - How long does it take to resolve disputes?

³⁹ Excerpted in part from Elliot R. Lewis, "Selecting and Working with Foreign Counsel", The International Lawyer's Deskbook, American Bar Association (1998), www.acca.com/education99/cm99/506b.html

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- Can foreign judicial decisions be enforced in the country?
- Can decisions from the country be enforced outside the country?
- Are there separate tribunals, depending upon the subject matter of the case?
- Are there different legal systems within the country or its political subdivisions?
- What are the rules of privacy, attorney-client and attorney work product privilege?

B. Selecting International Outside Counsel

- Solicit recommendations from:
 - Other corporate counsel, business professionals, i.e. accountants, bankers
 - ACC resources such as *Member to Member*SM, the International Legal Affairs Committee, www.internationalcounsel.org, ACC chapters
 - Contacts within your company's domestic law firms
 - International counsel with whom your company has an existing relationship
 - Martindale-Hubbell International Law Directory
 - The U.S. Embassy in the relevant country
 - The relevant country's embassy in your home country – contact the commercial attaché
 - Specialty bars
- Interview potential counsel - preferably in person.

One ACC member recommends: "meet them and look them in the eye before hiring them. I have found this to be pretty universally a wise step in the process..." If you cannot interview in person, meet and greet virtually – via videoconference, telephone, email fax

- Things to inquire about during the interview:

ACC members suggest: Check for "integrity", "reputation in the local community", "reputation among other ACCA members", "expertise by specialty", "resources", "fees relative to the competition", "make sure the outside counsel has native English speaker" ability. "One overriding criterion for selecting outside counsel – will that lawyer understand well enough what I do and do not know as a skilled lawyer of my country to be able to tell me what I do not have the wit to ask – key is whether the lawyer can tell me what questions to ask." "What one needs is a lawyer who can issue-spot from the point of view of the in-house lawyer/client".

- What is the counsel's education, training, expertise, experience?
- Has counsel been educated or worked in the U.S.?

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- What languages is counsel fluent in?
 - Does counsel have substantive expertise and experience in your industry?
 - Does counsel have sufficient support staff capabilities and office equipment/technological resources for efficient handling of the matter?
 - Has counsel worked with other U.S. clients?
 - Will counsel provide references and allow you to contact them?
 - Does counsel have local contacts that might be important to your case?
 - Is counsel flexible and committed to providing quality service?
 - What is the counsel's work style?
 - Is counsel available after-hours and on holidays?
 - What are the billing practices – fees, billing detail
 - Is counsel aware of U.S Anti-boycott Regulations, the Foreign Corrupt Practices Act (FCPA) and OECD counterparts? Other pertinent statutes
 - Are there any conflicts of interest? And if so, can they be resolved?
- Test abilities – give homework, i.e. asks potential counsel to send a short fax concerning some of the details of the interview to test ability to communicate timely in writing.
 - Send an engagement letter which covers the guidelines establishing the policies and procedures that will govern the relationship with international counsel:
 - Billing: request that all billing be provided in English, that the billing and payment be in U.S. currency, and that the billing provide the name of your foreign counsel's bank, account number, and routing number so that payment can be wired. Also, request that foreign counsel send you a sample bill to ensure that the method and billing format is acceptable. Clarify all expenses, billing cycles, billing format and other billing matters. Be sure the items and services you will AND will not pay for are clearly and definitively expressed. Discuss the possibility of alternative billing arrangements.
 - Local laws: request foreign counsel to identify local laws, practices, etc., which differ from your local laws and pertain to the matter. Make sure you fully understand relevant differences between U.S. and local law and procedure. Be clear on local standards of conflict and clarify all issues well in advance.
 - Deadlines: Establish time frames and calendar reminders to meet deadlines. Be specific about whose time zone and date you are talking about when the parties are in different geographic locations. Make clear
 - How delivery is to be made – in person, courier, fax, voice mail.
 - Communications: What is the preferred method of communication - in person, videoconference, telephone, email, fax, courier, and letters? Be sure to exchange all relevant phone/fax numbers and have alternate numbers available. Request a list of local holidays and inquire about standard local office hours. Inquire about flexibility in setting standard hours for your matter.
 - Action Plan: should be implemented with regard to time efficiency, research, costs, resources, potential exposure to liability and business interruptions, deadlines. Specify chain-of-command regarding document handling,

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information flow, legal bills and contact with key individuals in the company. Allocate work. Institute a standard of conduct in compliance with FCPA.

C. Things In-House Counsel Should Do for International Counsel

In seeking to maintain a meaningful and effective relationship with international counsel, a company's legal department (or liaison with the international counsel) should:

- Keep international counsel apprised of changes in U.S. laws that may affect your company's foreign operations.
- Keep international counsel apprised of changes in the company.
- Verify that invoices are accurate and paid on time.
- Supply international counsel with appropriate materials, reports and brochures.
- Educate international counsel on all aspects of the client's business.
- Supply international counsel with your company's corporate code of conduct and mission statement.
- Invite counsel to visit and tour the company.
- Have an annual relationship review in which expectations, performance, fees, expenses, and timetables are discussed.

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VII. Role of Case Management System (CMS) Technology

A. Getting Organized

In-house counsel have long used technology to file and retrieve information and to quickly produce quality reports. Today, the need has gone beyond using technology to produce glossy reports; technology is now used to manage the complexity of a company's internal law department. In-house counsel need more than an efficient storage place and search engine; they need a solution that can understand the information. Such technology would:

- Point out factors that have the greatest impact on costs (Primary Economic Denominators);
- Identify matters that are using up their budgets too quickly (Budget Burn Analysis); and
- Ensure outside counsel law firms are selected based on standardized criteria rather than gut feel (Standardization of Decision-Making).

This ideal solution would alert the general counsel to trends and cost-saving strategies while helping to reinforce the use of preferred law firm providers.

B. Finding The Primary Economic Denominator

Economic denominators are those factors that affect costs. Table 1 lists some of the common economic denominators important to legal departments. Analyzing costs by various economic denominators can lead to important insights into, and subsequently control of, the law department spending habits.

| Economic Denominator | Costs by This Denominator |
|----------------------|---------------------------|
| Law firm | Cost by Billing Entity |
| Matter type | Cost by Matter Type |
| Product line | Cost by Product |
| Division | Cost by Business Unit |

Table 1: Common Economic Denominators

Technology such as case management systems (CMS's), can assist a law department in understanding its outside counsel spending habits. It can quickly turn invoice information into legal cost reports that details spending by predetermined, economic denominators, such as "Legal Spending by Outside Counsel Firm" as shown in Figure 1:

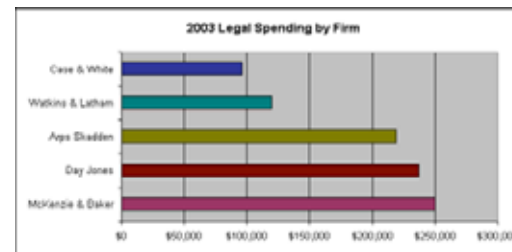


Figure 1: A Legal Cost Report

This report provides a comparison of the amount spent with each outside counsel firm during the previous year. The CMS can also be useful in pinpointing the economic denominators that most influence the department's spending. For example, with a typical legal cost report, the general counsel or law department manager would be able to click on one of the bars (as shown in the graph in Figure 1) and would be presented with outside counsel cost information defined by any number of additional denominators, such as matter type, area of law, or individual outside counsel billing information.

C. The Budget Burn Analysis

Budget burn is the rate at which a matter consumes its budget. An ideal rate is less than 1, meaning that at any given point there is at least enough money left in the budget to finance the remainder of the case. Matters that burn through their budgets too quickly are problems, even if they have not yet consumed half the total budget.

A chart that only compares actual versus budgeted cost, as shown in Figure 2 below is limited in its usefulness.

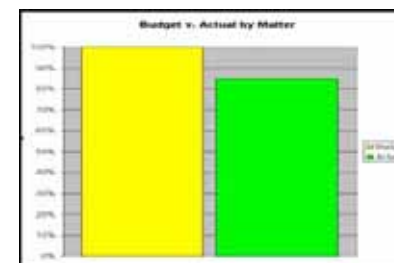


Figure 2: A typical actual v. budget chart

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This chart simply tells us that the matter described has consumed 85% of its budget, but gives no indication as to whether the matter is consuming its budget too quickly. For instance, this matter may be a week away from a favorable settlement, in which case 85% would mean the matter would come in under budget. On the other hand, this matter might be three months into the discovery process, and outside counsel projects another year before the trial even begins.

In reality, the general counsel does not have time to regularly compare actuals against budget for each and every active matter. A system is needed to alert the general counsel when a case is headed for economic trouble *before* it is too late.

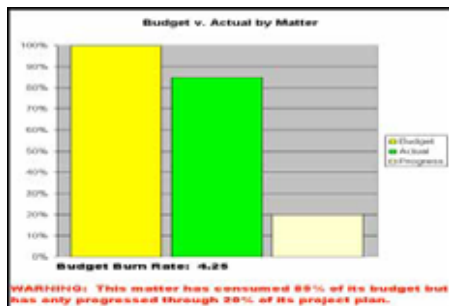


Figure 3: An example of a budget burn analysis

A “budget burn” analysis compares the budget consumption against the lifetime of the matter. Ideally this ratio should be 1:1, so that if the matter is 20% complete for example, the budget should be less than 20% used (more sophisticated systems weigh different phases of the matter based on their relative costliness). The matter described in Figure 3 above has consumed 85% of its budget, yet is only 20% through its lifetime. In this example, the CMS would recognize this and would automatically alert the general counsel via e-mail or inclusion in a daily budget summary report run for the general counsel.

D. Standardization of Decision-Making

An example of standardization is the use of a network of preferred providers, where in-house counsel is required to decide on which outside counsel to use based on a list of approved firms. Standardization not only cuts costs; it reduces risk. The challenge with creating standards is ensuring that they are properly communicated and followed.

One way to address this challenge would be to require in-house counsel to follow a very detailed process of elimination:

1. Look at all cases that are legally or strategically similar to the case in question.
2. Select all firms whose success in the cases has exceeded some threshold level.
3. Identify the outside counsel attorneys who have demonstrated the best performance on this type of matter.

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4. Choose the attorney that works for the lowest-cost firm. This would result in the best attorney with the least expensive firm with an acceptable probability of success.

This is a “best practice” for choosing outside counsel; however few attorneys have the time to perform this analysis. Fortunately technology makes it possible to quickly reach an objective decision based on standardized criteria and proven track record.

Using the historical information in the database, the CMS technology can develop a “performance profile” for each approved attorney that practices the required area of law in the relevant jurisdiction. This profile might include an analysis of the cases that the firm handled during this time period, and the relative success of each (based on the legal outcome and the damages paid, as compared with the initial expectations of the primary in-house attorney).

| All Approved HR, Labor, & Employment Attorneys Practicing in Rhode Island | | | | | | | |
|---|------------------|------------------|-----------------------------|------------------------------|------------------------------|--------------------------|----------------------------------|
| Attorney | Firm | Practicing since | Average damages per HR case | Average recovery per HR case | Ratio of favorable judgments | Average cost per HR case | Average rating by in-house staff |
| Bradley, Roger | Apps Skadden | 1999 | \$97,742 | \$8,376 | 0.21 | \$11,229 | 0.87 |
| Coan, Adlene | Apps Skadden | 1996 | \$16,167 | \$0 | 1.24 | \$1,902 | 4.96 |
| Morri, David | Apps Skadden | 1992 | \$79,161 | \$2,312 | 0.26 | \$9,212 | 1.91 |
| Pope, Madeline | Apps Skadden | 1979 | \$11,292 | \$8,716 | 1.77 | \$1,326 | 7.08 |
| Wang, Theodore | Apps Skadden | 1990 | \$120,687 | \$0 | 0.17 | \$16,187 | 0.66 |
| Edwards, Steven | Case & White | 2001 | \$32,975 | \$4,199 | 0.61 | \$3,879 | 2.43 |
| Garrison, Deborah | Case & White | 1999 | \$95,124 | \$0 | 0.23 | \$10,122 | 0.93 |
| Newman, Richard | Case & White | 1995 | \$14,976 | \$3,468 | 0.27 | \$6,760 | 1.88 |
| Obenshager, Eileen | Case & White | 1992 | \$62,998 | \$0 | 0.32 | \$7,408 | 1.27 |
| Thompson, Nicholas | Case & White | 1995 | \$97,932 | \$3,650 | 0.23 | \$10,345 | 0.91 |
| Fahey, Nancy | Day Jones | 1993 | \$73,226 | \$0 | 0.27 | \$8,616 | 1.09 |
| Judson, Pamela | Day Jones | 1996 | \$99,234 | \$9,263 | 0.02 | \$136,739 | 0.89 |
| Lewis, Peter | Day Jones | 1992 | \$766,434 | \$0 | 0.03 | \$90,061 | 0.10 |
| Stevenson, Sylvester | Day Jones | 1996 | \$967,261 | \$0 | 0.02 | \$136,147 | 0.08 |
| Lyles, Roberts | McIntyre & Baker | 1983 | \$225,163 | \$2,417 | 0.09 | \$26,490 | 0.26 |
| Neuman, Charles | McIntyre & Baker | 1997 | \$972,261 | \$0 | 0.02 | \$114,296 | 0.09 |
| Walshing, Christina | McIntyre & Baker | 1979 | \$17,361 | \$0 | 1.16 | \$2,042 | 4.61 |
| Albiston, Peter | Watkins & Latham | 1991 | \$66,243 | \$5,136 | 0.23 | \$10,146 | 0.83 |
| Harold, Sarah | Watkins & Latham | 1994 | \$90,221 | \$9,621 | 0.26 | \$11,587 | 0.81 |
| Peterson, Samuel | Watkins & Latham | 1976 | \$219,146 | \$0 | 0.66 | \$2,779 | 3.39 |
| Simpson, Janine | Watkins & Latham | 1984 | \$82,739 | \$9,861 | 0.24 | \$9,734 | 0.87 |
| Watkins, Edward | Watkins & Latham | 1998 | \$23,956 | \$0 | 0.83 | \$2,818 | 3.34 |

Figure 4: The performance profile table

As shown in Figure 4, a performance profile makes it immediately evident which attorney/firm does the best (and least expensive) job at handling a particular type of work. The CMS, by providing this table to the attorney, actually makes a recommendation as to the best firm to use, based upon the standardized selection criteria established by the general counsel during the implementation. The attorney selects the firm, and with a click the CMS dashes out the standard engagement letter. This approach has two key benefits. First, it is more efficient than the manual method. Second, it standardizes the criteria upon which outside counsel are selected.

The performance profile will be different for every law department, because each law department will weigh the factors that indicate success differently. Some of the criteria that might serve as indicators of performance are:

- o Average amount paid in damages for similar matters
- o Maximum amount paid in damages for similar matters
- o Average amount recovered for similar matters

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- o Minimum amount recovered for similar matters
- o Average cost to handle similar work
- o Maximum cost to handle similar work
- o Average rating given the firm by in-house staff upon completion of similar work
- o Total number of similar cases handled
- o Number of years practicing required area of law
- o Average percent variation from projected timeframes for similar work

E. The Unique Needs of the Law Department

It is important to note that each legal department is unique. Therefore, CMS technology cannot be deployed as an out-of-the-box solution. It must be tailored to meet the unique analytical needs of each general counsel. This means that implementation is critical to the success of the system. Every law department will have:

- o different threshold budget burn rates
- o diverse ways of assessing the performance profile of outside firms
- o peculiar needs or concerns that must be implemented into the CMS

For this reason, a successful implementation is even more important than the brand of software selected, and the most important part of the implementation is the initial analysis.

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Additional Resources

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Marc R. Jeske, "Controlling Legal Costs: The Three C's Theory of Action," ACCA Docket September 2002 <http://www.acca.com/protected/pubs/docket/so02/costs1.php>

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Donald P. Bogard, "International Law: Foreign Corrupt Practices Act," ACCA Docket, November/December 1997 <http://www.acca.com/protected/pubs/docket/nd97/foreign.html>

"The Criteria In-house Counsel Use to Hire and Fire Outside Counsel," ACCA Docket (September/October 1997) www.acca.com/protected/pubs/docket/so97/counsel.html

Richard E. Mulroy, "Issues of Outside Counsel Management," ACCA Docket, May / June 1995 www.acca.com/protected/pubs/docket/mj95/issuesof.html

A Client's Guide to Engaging Outside Legal Counsel, ACCA Docket, Summer 1993. <http://www.acca.com/protected/pubs/docket/Summer93/susan.html>

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M. Boyle, et al., "21st Century Approaches to the In-house/Outside Counsel Relationship" ACCA Annual Meeting (2000) www.acca.com/education2000/am/cm00/308.pdf

Carl B. Horton and Peter M. Marchel, "Selecting and Managing Your Outside Counsel Resources," ACCA 1999 Annual Meeting

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Ellior R. Lewis, "Selecting and Working with Foreign Counsel", The International Lawyer's Deskbook, American Bar Association (1998), www.acca.com/education99/cm99/506b.html

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ACC's Census of U.S. In-house Counsel, www.acca.com/Surveys/census01/

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2003 ACCA / Serengeti Managing Outside Counsel Survey: Assessing Key elements of the In-house Counsel / Outside Counsel Relationship.

Other ACC Resources

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 Amy I. Strickel, *The Cold War, Miscommunication, Failed Expectations And Complacency Continue to Define GC-Law Firm Relationship*, Corporate Legal Times, July 2003.

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Internet Resources

www.AltmanWeil.com

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IX. Sample Forms and Policies

A. Proposal For Joining The Dupont Primary Law Firm Network³⁴

Date: _____

A. Your Firm And Our Proposal

1. **Description of Your Firm.** We would like to have some background information on your firm such as size, ratio of partners/associates, policy regarding legal assistants, places you recruit, policies regarding associates, how the firm is managed, what you aspire to as firm, strategic plans, overall approach to the practice of law.
2. **The Territory.** Describe the areas within _____ that your firm can service and the range of services you feel you can provide effectively and cost efficiently. If you have branch offices, tell us if you can provide a full range of services from those branches. Our goal is to have as few firms as possible to represent us in ---- _____.
3. **Scope of the Work.** Our intention is to retain a firm to represent us with certain exceptions in all DuPont legal matters in _____. We plan to put all of our work in the primary firm, subject to exceptions such as:
 - a) Cases currently with other firms which we decide should be grandfathered;
 - b) Cases in which there is a conflict of interest which we elect not to waive;
 - c) Nationwide series of cases which have already been assigned to national/regional counsel;
 - d) Matters placed with other firms in a joint defense effort;
 - e) Cases involving affiliated companies such as Conoco and Consolidation Coal;
 - f) Cases involving intellectual property rights;
 - g) Financial and securities matters.
4. **Volume of Anticipated Work.** The total billings in thousands of dollars on DuPont matters in the defined Territory for the period 1995-1997 are as follows:

| | 1995 (\$M) | 1996 (\$M) | 1997 (\$M) |
|------------------|------------|------------|------------|
| Admin/Regulatory | | | |
| Collection | | | |
| Contracts | | | |
| Criminal | | | |
| Employ/Labor | | | |
| Environment | | | |
| Intel.Property | | | |
| Miscellaneous | | | |
| Property Damage | | | |

³⁴ This form letter might be used as part of the convergence process detailed in Chapter VII.

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Personal Injury

5. **Staffing/Conflicts.** Considering the scope and volume of work proposed, describe the staffing you would propose, and how you would handle overload situations. How would you handle a conflicts situation? Do you know of any conflicts?

6. **Diversity.** Diversity is a core value of the DuPont Company and constitutes one of the cornerstones of our convergence program. We want to know about your programs with respect to hiring and promoting minorities and women. We encourage firms to hire minority and female professionals and to assign them to significant projects, including DuPont work. Please provide statistics and information regarding your efforts and results. Describe how you could assist us in getting certain business to minority firms.

B. Our Needs And Your Expertise

1. We are interested in your expertise in litigation and general areas of legal practice.
2. Describe your resources and expertise in the above areas.

C. The Partnering Relationship

This proposal reflects a significant initiative by DuPont Legal that over time will reduce substantially our outside legal costs through a partnering relationship with selected firms. This is not a one-sided proposal that merely seeks to reduce hourly billing rates. Instead, by establishing long-term relationships with a small number of cooperative firms who learn DuPont's businesses and the way in which we do business, we will be able to implement systems which will allow us to staff and handle matters in the most cost efficient manner possible. We actively solicit your ideas on how to develop such systems and best utilize each other's resources so as to achieve greater productivity and cost reduction consistent with quality results. To this end, we suggest:

1. **Relationship Managers.** James Shomper, Manager of Law Firm Partnering, will work with counterparts from your firm to manage our relationship. We have found that it is most productive to split the responsibilities for managing the relationship at our primary law firms as follows:

Engagement Partner

- | | |
|---|--|
| ○ enlists firm's Senior Management support | ○ addresses internal compensation to reinforce best in class |
| ○ has influence in the firm | ○ provides strategic thinking |
| ○ negotiates fee structures | ○ allocates resources |
| ○ leverages the relationship | ○ *promotes technology investment |
| ○ serves as foremost external advocate | ○ conducts annual reviews |
| ○ seizes marketing opportunities for the firm | ○ focuses on women/minorities serving DuPont |

Account Manager

- | | |
|--|--------------------------------------|
| ○ handles day-to-day program-related tasks and | ○ initiates collaboration with other |
|--|--------------------------------------|

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challenges

- educates others
- applies technology
- serves as primary network communications interface
- participates in annual review
- engages in most network activities

PLFs and service providers

- writes for external publications
- assists Engagement Partner with advocacy of program within the and elsewhere
- supports supplier usage

2. **Technology.** We expect our primary firms to have, or agree to acquire in due course, specified electronic technology compatible with DuPont's, including the specific areas below.

- a) Use Lotus Notes to communicate via e-mail with DuPont and its primary law firms and suppliers.
- b) Exchange documents for review and revision, etc. using Lotus Notes e-mail.
- c) Actively participate in the KnowledgeBase (see attachment 1 'KnowledgeBase Participation Requirements').
- d) Submit and pay bills electronically using task-based billing codes.
- e) Install the BillWiz software for processing invoices.
- f) Sign DuPont's Corporate Electronic Security Information (ELIS) agreement.
- g) Agree to meet the hardware and software requirements (see attachment 3 'Hardware and Software Requirements').
- h) Have full time Internet access for your firm.
- i) Provide Information Technology staff to work with DuPont on network configuration changes and modifications (see attachment 4 'Circuit, Router, TCP/IP Address and DuPont Server Change Procedures & Timelines').

3. **Case Management.** We have jointly developed with our primary law firms standardized procedures for handling all DuPont cases. The emphasis is on *Early Case Assessment* within 120 days of case filing which takes into account the potential liability, your knowledge of the plaintiff's counsel and local jurisdiction, business input for the overall strategic approach to the case, and the business implications of the suit. By this process, in-house and outside counsel then mutually agree on the course of action which results in the earliest disposition of the case consistent with the business objectives. *Strategic Budgeting* will be utilized, but primarily as an input to case management as opposed to an absolute cost control device

4. **Periodic Performance Reviews.** We will do periodic reviews which will include a candid discussion on staffing, quality of services, efficiency in disposing of cases, cost-effectiveness, and areas in need of improvement. These reviews will also include an open and candid assessment of DuPont's support of the primary law firm. We expect to have an annual formal review, but we also believe this should be a continuous process in which the firm and DuPont freely express areas of concern and develop opportunities to increase cost-efficiency and effectiveness on an on-going basis.

5. **Annual Meetings.** We expect all of our primary law firms to attend an annual meeting of DuPont primary law firms and primary suppliers. These typically are two-day meetings and are attended by the firm's engagement partner and account manager.

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F. Fees And Billings

1. DuPont is interested in results, not effort. Our long-range goal is to move away from hourly billing where feasible. We believe hourly billing is a disincentive to efficient service, and we welcome opportunities to structure fee agreements that provide for incentives and that reward results rather than time devoted to a matter. We solicit your input on alternative billing arrangements that allow you to deploy your resources in the most cost-efficient manner.
2. For the near term, in consideration for our placing our business with you, we solicit your proposals regarding reduced hourly rates, volume discounts, or other alternative fee arrangements.

B. Request for Qualifications Letter³⁵

Joe Attorney
A, B & C, Ltd.
Three First National Plaza
70 West Madison Street
Chicago, Illinois 60602

Re: Request for Qualifications

Dear Mr. Attorney:

From time to time, the American Bar Association ("ABA") requires the services of outside counsel to represent it in intellectual property litigation. In preparation of the assignment of one such matter, we wish to pre-qualify one or more attorneys with expertise in this area.

This letter is a Request for Qualifications (RFQ). We will use the responses to this RFQ to evaluate attorneys on both objective and subjective bases and then intend to develop a short list of attorneys to participate in oral discussions with our General Counsel and senior members of the Law Department. Your strict adherence to the ground rules included in this RFQ will be appreciated and will be an important evaluation criterion.

1. *Publicity.* There is to be no publicity about this RFQ or the underlying evaluation process. Moreover, if you practice with a firm, no one should be informed of this RFQ or the evaluation process except those with a "need to know" basis so that you may respond to it. Finally, even people in your firm with a need to know basis should be cautioned to strictly abide by the requirements of this paragraph of the RFQ.

2. *ABA Contacts.* For further information regarding this RFQ your primary contact at the ABA is Michael R. Booden, Senior Associate General Counsel, 312/988-XXXX. In Mr. Booden's absence, you should call Darryl L. DePriest, General Counsel, 312/988-XXXX.

3. *No Obligation.* This letter is a request for information only. The ABA reserves the right to engage outside counsel or not to engage counsel on any basis that it sees fit. Attorneys and firms engaged may be terminated for any or no reason in the absolute discretion of the ABA. Attorneys and/or firms receiving or responding to this RFQ shall bear all costs of responding and the ABA shall be under no obligation, financial or otherwise, to them.

³⁵ Excerpted from: "Selecting Outside Counsel: Ask the right questions, get the Right Results," originally presented at ACCA's 2001 Annual Meeting, available at www.acca.com/protected/forms/outsidecounsel/RFQ.pdf

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4. *Responses Due.* You are requested to submit your written responses to this RFQ no later than 5 PM on XXXX, 2001 by facsimile, mail or e-mail (boodenm@staff.abanet.org).

C. Retention Letter

DuPont Legal
James D. Shomper
Manager, Law Firm Partnering
1007 Market Street, D-7047-2
Wilmington, DE 19898
(302) 774-6403
(302) 774-1398 (FAX)

Date:

Dear _____:

It is indeed a pleasure to send you this letter which sets forth the arrangements under which we will retain your firm as a primary provider of legal services to DuPont in the State of _____.

We at DuPont Legal are very pleased about having your firm join our network of primary law firms and suppliers. It has been an interesting and challenging journey for us these past six years, and with your selection as a PLF we believe we have further strengthened and solidified our network.

As you know from our prior discussions, DuPont's program is founded on three basic goals:

1. Forming long-term *strategic partnerships* with a select group of innovative and exceptional law firms and suppliers who can collaborate and team with other PLFs to further DuPont's goals and interests.
2. Maximizing the use of *technology* to increase efficiency and to produce the most cost-effective services possible.
3. Focusing on *work processes* to increase efficiency and reduce our costs.

From these fundamental goals, critical components of the DuPont Legal Model have evolved including a serious commitment to diversity, early case assessment, strategic budgeting, alternative fee arrangements, and metrics. We believe strongly that the corporate legal industry has changed significantly in recent years and continues to change. We have been on the forefront of that transformation, and together with our PLF and primary supplier network we intend to stay on the "cutting edge". We hope your law firm proves to be a major contributor to that joint effort.

DuPont desires to handle our legal matters in the most cost-effective manner possible, consistent with excellence of service and optimal results. To obtain that objective we have agreed to establish a partnering relationship with your firm whereby we jointly develop systems to allow DuPont to achieve its cost reduction and productivity goals while securing for your firm a profitable relationship with DuPont. We desire that the relationship be flexible and mutually beneficial and that we jointly develop case management systems, which will team DuPont staff counsel with attorneys in your firm. The system that we envision will apply a disciplined, creative and business-like approach to the early, cost-effective resolution of DuPont's matters.

The elements of our partnering relationship are as follows:

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Territory

Legal services subject to this engagement letter shall be rendered in _____.

Staffing

Staffing requirements will be based on consultation with DuPont attorneys. Actual requirements will be decided on a case-by-case basis.

Scope Of Services

It is DuPont's intention to retain your firm to represent DuPont in all types of matters. Potential exclusions include: _____.

Fees And Disbursements

Fees and reimbursable disbursements shall be as set forth in the attached Schedule. DuPont's Billing Guidelines from Primary Law Firms are also attached to this letter. We encourage and are open to discussing any proposals you may have for alternative fee arrangements on any specific cases or matters as they come in. Feel free to propose any ideas to the DuPont attorneys assigned to your cases.

The Partnering Relationship

The critical elements of the partnering relationship we seek to establish with your firm involve: a) enhanced communication among DuPont business management, staff counsel and outside counsel; and b) a focused dedication to a case management planning system which is designed to achieve desired client objectives at the lowest possible cost. In furtherance of those objectives we desire to establish a partnering relationship as follows:

- *Relationship Managers.* DuPont's Manager for Law Firm Partnering will be _____. She will have overall responsibility for managing the relationship between your firm and DuPont. You have indicated that you will be the engagement partner for your firm in its dealings with DuPont. Our manager of law firm partnering will be responsible for interacting with you to carry out the provisions of this engagement letter and to work with you to develop new and creative ways to enrich our relationship to our mutual benefit.
- *Computer Technology.* DuPont Legal Information Systems will work with you to identify computer technology, which would make your firm compatible with DuPont Legal's technology. If you do not currently possess that technology, you will acquire it in due course. Computer compatibility is essential to allow us to achieve the following objectives: a) consistent, cost-effective communications; b) share information electronically; c) submit and pay bills electronically; d) develop data bases for legal fees and costs and for other relevant case data; and 3) litigation budget control.
- *Periodic Reviews.* A key element of the partnering relationship is a clear communication of objectives and expectations. Accordingly, we propose that the manager of law firm partnering meet with you periodically to review all aspects of our relationship and to explore additional opportunities to increase productivity and to further reduce costs.

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- *Benchmark Surveys.* Each year we expect our PLFs and primary suppliers to complete a benchmark survey that helps us assess the success of the overall program and to identify areas in need of improvement. A copy of last year's survey is attached to give you a sense of the types of inquiries we ask our PLFs to answer each year. This helps us evaluate our programs progress and success and helps us make adjustments as needed.
- *Network Referrals.* We actively encourage the members of the PLF network to refer business to each other from their non-DuPont clients. One of the real benefits to the PLFs from participating in the DuPont Legal Model, among others, is the referral business that has developed within the network. We ask that you track any referrals you receive from others in the network and those that you make to others in the network.
- *Annual Meetings.* We expect you to attend Annual PLF Meetings and occasional interim meetings. They are essential to our program and provide our PLFs with excellent networking opportunities.

Diversity Policy

We have explained to you our policy of promoting full and equal participation in the profession by minorities and women. In this regard, DuPont encourages the firms with which it is establishing a partnering relationship to hire minority and female professionals and to assign them to handle DuPont work. In addition, we encourage our partnering firms to associate with minority run firms, as well as organizations that provide legal support services. You have indicated that you understand the significance of this policy to DuPont and that your firm is equally committed to this policy and will adhere to it in performing services under this engagement letter.

We have set forth in this engagement letter the principal elements of the partnering relationship, which will be effective as of _____. We view this relationship as a creative and dynamic process to allow both of us to achieve our desired objectives and we would welcome your continued efforts to work with us to improve the process. Although this letter is not intended as a legally binding agreement, we expect it to govern our relationship until modified by either party upon reasonable notice.

Very truly yours,
James D. Shomper
DuPont Legal
Manager of Law Firm Partnering

D. Engagement Letter

Dear _____,

This letter will confirm our firm's representation of [client] in [matter]. We understand that our assignment is limited to [detailed description of scope of representation and specific tasks that will be performed and any tasks that are excluded, e.g., appeals, investigation into insurance coverage, compliance with SEC or IRS requirements]. We look forward to working with you on this matter.

We will be representing [client] in this engagement. We have not been retained by any of [client]'s affiliates, officers, directors, employees, shareholders, partners, subsidiaries, or parent companies,

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including [any specific individuals or entities]. If we are asked to represent any of these individuals or entities, that representation must be entered into separately and explicitly through a letter such as this. If any uncertainty about our role in this matter arises, we would appreciate your bringing it to our attention so that we can clarify our relationship with that party.

I will be the Partner in charge of this matter, but I may recruit assistance from other lawyers and legal assistants as necessary to provide efficient and cost-effective services. As we discussed, _____ and _____ will also be working on this matter under my direction. We have also agreed that local counsel should be retained for assistance in this matter. [Client] will be responsible for retaining and paying local counsel. We recommend that you enter into a separate agreement with regard to that engagement.

You have expressed your desire that [in-house counsel] be responsible for [describe tasks]. As you like, our firm will rely on you to perform these responsibilities conscientiously and, of course, in accordance with the applicable rules of professional conduct. If we feel that those responsibilities are not being fulfilled to our satisfaction, we reserve the right to withdraw from representation. Our firm takes ethical obligations very seriously and we trust that you will aid us in fulfilling those duties.

[Our fees will be determined by the time devoted by each lawyer and legal assistant involved and the hourly billing rates assigned to each such person. My current hourly rate is \$_____. Our firm's hourly rates range from \$_____ for a junior associate to \$_____ for a senior partner and from \$_____ to \$_____ for legal assistants. We periodically revise our rates and we reserve the right to do so from time to time during the course of our representation of [client]. As we have agreed, however, our fees will not exceed \$_____ for this matter.]

[Our fees will be determined on a contingency basis. [Client] agrees to pay:

_____ percent (___%) of the total money amount or current value in money recovered or paid to [client] arising from or related to the matter described above if the matter is settled by negotiation and does not go to a hearing on the merits.

_____ percent (___%) of the total money amount or current value in money recovered or paid to [client] arising from or related to the matter described above if the matter goes to a hearing on the merits.

_____ percent (___%) of the total money amount or value in money paid to [client] if the matter is taken on appeal or if the matter must be retried in whole or in part.]

[We have received your check for \$_____, which will serve as a retainer. We will deposit that money into our client trust account, which our firm maintains in accordance with the applicable rules of professional conduct. We will apply that money against our fees and costs in this matter to satisfy our monthly billing statements, copies of which will be sent to you for your files. Any money left at the close of our engagement will be returned to you, without interest. If the retainer reaches a balance of zero, we will advise you and you will pay all further billing statements on receipt.]

Our firm will incur costs associated with your representation. These costs may include charges for such items as long distance phone, delivery, copies, facsimile, travel, filing fees, court reporters, translators, and experts. In some cases, the charges for these costs may differ from the actual, fully-absorbed, out-of-pocket costs incurred by our firm for these items. You have agreed to reimburse us for these costs, which will appear on our billing statements. You have also authorized us to retain any consultants or experts that we feel are necessary to advance your interests in this matter. In the

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event that the charges from these (or other) outside vendors exceed \$_____, we may submit those bills directly to you for payment.

Our billing statements will be sent to you monthly and are payable on receipt. If after ____ days we have not received payment, we reserve the right to suspend performance until all outstanding fees and costs are paid, consistent with applicable rules of ethics.

As we have discussed, the fees and costs that will accrue in our representation of you are unpredictable as is the outcome of this matter. We may from time to time give you our opinions on estimated costs, the likelihood of success, and the strategy we will pursue. These statements are our opinions and are based on the information available at the time; you should not take these statements to be guarantees or promises.

We have agreed that our firm will not disclose any of [client's] confidences or secrets except to the extent necessary to further [client's] interests. All media statements and requests for information will be forwarded to you for disposition.

[Our firm represents many other clients, and as we have discussed, some of those clients may have interests adverse to yours. Specifically [disclose all current and prospective conflicts, including name of client and nature of conflict]. As we have discussed, you have expressed your desire for our firm to represent you despite these actual and potential conflicts. You have agreed that you will not seek to disqualify our firm on the basis of these conflicts and consent to our representation of those interests that may or do conflict with yours. [We have agreed that we will not assign the same people to staff your matter as matters of clients whose interests may be adverse to yours.]

You may terminate our representation at any time with reasonable notice. Terminating our relationship will not discharge your obligation to pay fees and costs incurred before termination and those incurred thereafter in the transition of the matter. [In the event that you terminate our representation, we will return to you all of your papers and property upon receipt of payment for all outstanding fees and costs.] We will retain our own files associated with this matter, which include drafts, notes, internal memoranda, legal and factual research, administrative records, time and expense reports, accounting records, and personnel materials. [Our firm has a file retention policy. At the conclusion of this matter, we will retain your files in accordance with the policy in place at that time. If you would like documents returned to you, please so notify us.]

We may withdraw from representing you if you breach this agreement in any way, including by failing to pay our fees and costs, or with reasonable notice to you, or as the applicable rules of professional conduct require or permit.

In the event that a dispute arises regarding any aspect of the relationship between [client] and our firm, we agree that that dispute will be subject to the laws of _____ (without regard to the choice of law principles thereof) and will be venued in _____. Our firm and [client] also agree to consent to the jurisdiction of _____ in any such dispute.

Finally, we understand that [client] will cooperate fully with our firm in this matter.

If this letter correctly reflects our mutual understandings, please sign and date this letter and return it in the envelope provided. We appreciate the opportunity to provide these services to [client] and are pleased to be able to continue the relationship between [name of firm] and [client]

Very truly yours,

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[firm lawyer]

The foregoing correctly reflects [client's] understanding and the Firm has [client's] consent to take action in accordance with this letter.

[client representative]

[date]

E. Outside Counsel Engagement Letter

[Date]

Lead Outside Counsel Name

Law Firm Name

Address

Re: [Matter Name]

Dear _____:

This letter will confirm that [XYZ Company] has asked you to represent us in the above matter. In connection with your representation we have asked you to [describe scope of the engagement].

With this letter I am sending a copy of our Outside Counsel Policy. Except as set forth in this letter, or specifically agreed to by me, the Policy will govern your representation of [XYZ Company] in this matter and all subsequent matters in which you are retained. We have agreed that you will be the lead outside counsel on this matter and will be responsible for ensuring adherence to the Policy. I [or name of appropriate inside counsel] will be lead inside counsel on this matter. We believe that providing you with a clear statement of the principles which apply to your representation of [XYZ Company] will assist us both in providing effective, high quality legal representation responsive to the needs of the company. I urge you to raise any questions you may have about the Outside Counsel Policy with me or [other lead inside counsel] at the outset.

We have agreed that you will be compensated for your work on this matter [insert fee arrangement]. [If fixed-fee billing and budgeting applies, we have agreed that you will prepare [a] task-based budget[s] (monthly, quarterly, for all the work necessary to complete this assignment, for each phase of this matter) for my approval.] We have agreed that you will submit your bills [monthly, quarterly, or at the completion of this matter].

We have agreed that the attorneys and staff who will work on this matter are:

Name

Name

Billing rate

Billing rate

I look forward to working with you on this matter. Please confirm that you have received and agree to abide by the Policy by returning a signed copy of this letter to me at your earliest convenience.

Very truly yours,

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XYZ Company Attorney

We have received XYZ Company's Outside Counsel Policy and agree to be governed by that document's terms in our representation of [XYZ Company] and its affiliates.

Law Firm Name

By _____

Lead Outside Counsel

F. Outside Counsel Policy-Billing Requirements and Disbursement/Expenses Summary

I. General Requirements

- A. **Engagement Letter (III.A)** Required for all matters where fees likely to exceed \$Xx,000.
- B. **Lead Inside Counsel (III.B)** Responsible for all substantive decisions; outside counsel to keep informed; provide all documents to inside counsel for review.
- C. **Retention of Local Counsel, Consultants, Vendors (III.D)** Pre-approval required for all retentions; - outside counsel policy terms apply.

II. Billing Requirements

- A. **Billing Rates (VII.C)** In effect for entire matter unless written approval 60 days in advance.
- B. **Staffing/Billable Time (VII.E)**
 - 1. No more than 2 attorneys at meetings, negotiations unless pre-approved.
 - 2. No firm paralegals unless pre-approval (III.B)
 - 3. More than 12 hours per day by one member outside counsel staff closely reviewed
 - 4. Internal conferences more than 10% total monthly billings closely reviewed
 - 5. No billing for travel time, clerical work (filing, date stamping, indexing, making arrangements)

III. Budgeting/Billing Requirements

- A. **Task Based Budgeting and Billing (VII.D)** Required for all matters where fees will be greater than \$XX,000
- B. **Billing Timing/ Contents (VII.F)**
 - 1. Bills to be rendered monthly within 30 days after end of month.
 - 2. Detail of fees by lawyer, paralegal, number of hours by task, description
 - 3. Expenses/disbursements detail and charges by category

IV. Expenses/Disbursements

- A. **Non-Reimbursable Overhead (VIII.A)**
 - 1. Computer, e-mail, word processing charges
 - 2. Conference room charges, rent

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3. Supplies
 4. Library use, staff
 5. Clerks
 6. Proofreaders charges
 7. Meals (except during business travel)
 8. Taxis and limousines to and from firm office (even at night)
 9. Support salaries, overtime
 10. Local telephone calls
 11. Fax charges
- B. XYZ Preferred Disbursement Vendors (VIII.B) XYZ legal staffing, court reporting, duplication, scanning/coding vendors must be used; XYZ will not pay any firm mark-up/administrative charges.
- C. Travel (VIII.C)
1. Airfare. Coach only fare in U.S., within Europe, Asia, Latin America; business airfare maybe reimbursed U.S. to/from Europe, Asia, Latin America with pre-approval.
 2. Rental cars Mid-size cars only, no limousines, hired cars unless pre-approved.
- D. Meals/Accommodations (VIII.D)
1. Hotels: Use reasonable judgment
 2. No personal/incidental expenses reimbursed.
- E. Telephone/Facsimile/Photocopying (VIII.E)
1. Photocopying: \$0.10 per page or firm's actual annualized per page if lower.
 2. Telephone/ facsimile: No local call charges, toll charges only for outgoing transmissions, no charges for incoming faxes.
 3. Messenger services: Only actual charges.
- F. Computerized Research (VIII.F) Actual charges only without firm mark-up, admin charges; use XYZ password when provided.
1. Secretarial time, Word processing (VIII.G) No charges for secretarial, word processing charges, including overtime.

G. Policies and Billing Requirements for Outside Counsel

NPR Policies and Billing Requirements for Outside Counsel

1. To minimize misunderstandings, outside counsel should share these policies and billing requirements among all firm personnel working on NPR matters.
2. Outside counsel is engaged for NPR by its Office of the General Counsel, and an OGC attorney will manage the engagement. Others at NPR do not normally have authority to expand or contract the scope of the engagement or otherwise to manage the rendering of legal services to NPR. If someone other than an OGC lawyer requests a change in the scope of services to be rendered, before beginning any change in the scope of work you must inform the OGC attorney managing the work of the request and obtain his/her approval of the change.
3. All billing statements for legal services shall be supported with details of the work performed. The details to be included are:

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- A. A narrative description of the work performed for each specific task by the attorney or paraprofessional performing it. Daily "block" billing descriptions will not be sufficient. The description should state clearly the nature of the task performed and allow us to see why it was necessary.
 - B. The name or initials of the person undertaking the task.
 - C. The time spent on the task described, in at least tenths of hours (every six minutes).
 - D. A summary by each attorney or paraprofessional providing services during that month (or other billing period), showing (a) the total time spent by that person, (b) the billing rate for that person, and (c) total charges for that person
4. Where more than one attorney or paraprofessional is involved in the same work project – such as writing a brief or attending a meeting or deposition – the details in the billing statement should make clear why the other person or persons' presence was necessary.
5. NPR cannot afford to finance training of lawyers or paraprofessionals working on our matters. Persons participating in the matter must in all instances be rendering valuable services based on existing expertise commensurate with their billing rate.
6. NPR when it hires outside counsel expects to be engaging lawyers who are already highly skilled specialists in the subject matter for which legal services are sought. It should thus be rare for legal research by outside counsel to be needed. Before undertaking legal research, therefore, approval should be obtained from NPR. In cases where it is impractical to obtain approval, NPR should be informed as soon after the fact as possible.
7. Discussions or conferences between or among attorneys should be minimized and should only be undertaken when that is the most efficient means possible to convey or obtain information. Billing descriptions for such conferences should indicate why a conference was needed. An entry "Conference with ABC re status" is not a sufficient explanation.
8. Billing shall be undertaken monthly, unless the total amount due is less than \$500. The billing statement should be sent no later than twenty days from the end of the billing period. This is necessary for our budget and matter management.
9. Each disbursement shall be billed at actual out-of-pocket cost. No mark-ups or administrative fees may be added.
10. Computerized legal research should not be undertaken without NPR's prior approval. NPR has a special arrangement with Lexis/Nexis that may well be available to outside counsel working on NPR matters.
11. The costs for meals for personnel while working, or for transportation between the office and their home, shall not be charged to NPR.
12. Billing for photocopies should not exceed eight cents per copy (unless you can show us that your actual cost exceeds that). Moreover, the number of copies should appear on the billing statement.
13. NPR may not be billed for receipt or delivery of facsimile transmissions (other than any actual long distance telephone toll associated with the transmission), or for computer or word processing printing charges.
14. NPR will not pay for either secretarial (including word processing) or inside messenger services, or any overtime, unless there is prior written approval.

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15. Paraprofessional time billed should not include tasks that are more appropriate for clerical or secretarial personnel, such as stamping or numbering documents, indexing or tagging exhibits, organizing files or reproducing documents.

16. No single disbursement in excess of \$500 may be incurred without our prior approval.

17. NPR may find it necessary to impose other billing requirements and policies during the engagement as appropriate to manage the matter properly. Prior notice will be given and the matter discussed with counsel if this is deemed necessary.

NPR encourages outside counsel to put to us promptly any questions about either the above requirements or our billing expectations. We believe that the best way to avoid misunderstandings over billing is good communications. We are committed to paying quickly those billing statements that conform to these requirements.

H. Conflict Waiver Letter

[Date]
[Name of Lawyer Requesting Waiver]
[Outside Law Firm Name]
[Address]

Re: [name of case or transaction for which waiver is requested]

Dear [outside lawyer]:

This letter is in response to your request for a waiver of a [potential or actual] conflict of interest in connection with [law firm]'s representation of [other client's name] in the above referenced matter. We have no objection to such representation subject to the following conditions:

1. [Other client name] agrees not to object to [law firm]'s continued ability to represent XYZ COMPANY or its affiliates on existing and future matters; [and]
2. [Law firm]'s representation of [other client] will not involve the assertion against XYZ COMPANY or any of its affiliates of a claim of fraud, misrepresentation, or other dishonest conduct .[; and]
3. [Law firm] is representing [other client] for the sole purpose of [describe limited engagement to which XYZ COMPANY is consenting]and it is understood that XYZ COMPANY reserves the right to claim a potential or actual conflict of interest and take appropriate action regarding any other matters including broader representation of [other client] with reference to this matter. [; and]
4. [(Law firm) personnel providing services to (other client) in connection with this matter will not be among those concurrently providing services to XYZ COMPANY or a XYZ COMPANY affiliate; and]
5. [(Other client) has been informed of the conditions set forth in this letter and has agreed to these conditions.]

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[Please sign this letter and have it signed by a representative of [other client] and return it to me if it is acceptable to you.]

Very truly yours,

XYZ COMPANY Attorney
Received and agreed to:

[Attorney at law firm]

[Other client representative]

I. Sedgwick Outside Counsel Guidelines

Control And Handling Of Litigation

The cost of litigation has risen dramatically in recent years. Sedgwick, like so many corporations, has added litigation experts to oversee and manage litigation, and has been compelled to seek improved ways to plan and budget its cases. You will be working with me or my staff to develop strategy, assess our exposure and evaluate settlement potential. Your firm will be responsible to the Sedgwick Legal Department. All decisions regarding litigation strategy, discovery, settlement and trial are to be made at the direction of or with the prior approval of the Sedgwick Legal Department. Although you will often have direct contact with Sedgwick personnel regarding the facts underlying a particular file, various Sedgwick personnel may provide input regarding litigation strategy; final decisions on all litigation matters must come from or have the prior approval of the Legal Department.

Our methods of planning and controlling these costs are the defense plan and the case budget. These help us project not only our legal fees, but other costs of litigation as well, such as the time executives and other employees may have to devote to case management. Accordingly, we will need to work with you to develop an overall litigation plan which is both result-oriented with respect to a particular case and cost effective.

Defense Plan And Case Budget

Following the assignment of a new case, your firm, in consultation with us, should develop a defense plan and budget for this litigation. We require the defense plan and case budget within forty-five (45) days of your being assigned the case. The defense plan should provide the following:

- o Brief factual summary noting key issues or areas of inquiry;
- o An assessment of exposure, i.e., whether coverage exists or is absent and dollar value range of potential damages;
- o Anticipated future activity;
- o Resolution strategy.

The budget should include anticipated disbursements as well as time estimates and fees for local counsel and experts. The case budget should be your best estimate based upon your experience. We

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do not want you to deliberately estimate high so that you can "look good" by coming in lower than your estimate. Nor do we want low estimates, accompanied by "cost overruns". Obviously we want you to strive for consistency between estimates and actual billings.

We understand that litigation has elements of unpredictability, and we do not expect clairvoyance. However, when the unpredicted events occur we want you to think about the impact on the case budget and make appropriate revisions. Thereafter, for active litigation matters, monthly reports should be made noting significant developments, revisions of the initial assessment, changes in strategy and budgets, etc. For non-litigation or inactive litigation matters, such reports could be on a quarterly basis. Sound judgment should be used in the time spent on a defense plan and case budget. If it is apparent that the case should be settled early or could be dismissed on motion without discovery, please discuss the recommendations with the supervising in-house attorney before embarking on these analyses.

Sedgwick expects to resolve cases as expeditiously and economically as possible without jeopardizing its position on legal issues of significance and important policies, practices and principal. Accordingly, immediate and continuing efforts should be made to identify cases for early disposition as well as cases that could be handled more effectively through mediation, arbitration or other means of alternative dispute resolution. Critical to this identification process are the early communications with opposing counsel to establish a precise nature of plans against Sedgwick and early internal investigation and development of facts. Whenever appropriate, dispositive motions should be used early in the litigation to efficiently eliminate meritless claims.

Consultation with and approval by the supervising in-house counsel is required before making any substantive motion, conducting discovery whether in the form of interrogatory, document demands, requests to admit, depositions, or filing any claim, counter-claim or cross-claim. All draft memoranda of law pleadings and other work products shall be forwarded to the supervising in-house counsel early enough to enable consideration, comment and approval.

All settlement proposals and requests for settlement authority must be submitted to in-house counsel. No settlement discussions may be entered into without the approval of Sedgwick Counsel.

Contact With Sedgwick Personnel

Generally, the Legal Department will exclusively communicate on behalf of Sedgwick with outside counsel. We recognize the time constraints of discovery deadlines or trial preparation may make it impractical at times to channel all communication through the in-house attorneys. When it is necessary for outside counsel to work directly with Sedgwick technical personnel who are consulting on a case, it is essential for outside counsel to keep in mind the need of the in-house attorneys to be advised promptly what has been discussed. Accordingly, it is the responsibility of outside counsel to advise the in-house attorneys as soon as possible the nature of any direct communications with Sedgwick personnel. Copies of all correspondence and documents sent to Sedgwick personnel must also be sent to the in-house supervising attorney. We also expect our phone calls to be returned promptly.

Please carefully and thoughtfully review discovery requests prior to sending them to the in-house supervising attorney and the Sedgwick colleague who will be drafting responses, and identify those items to which you will object and those which will require an answer. You should also advise on protective orders or stipulations for trade secrets or other confidential information. These discovery requests should be forwarded with sufficient time to prepare responses. No document should be

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produced without a thorough review by an attorney familiar with the case or without consideration being given to a protective order or stipulation where appropriate.

In order to speed up discovery matters, outside counsel should send additional copies of the following types of data directly to the in-house attorney and to the Sedgwick technical colleagues who are assisting in the discovery:

- a. Significant deposition transcripts;
- b. Requests to Sedgwick for answers to interrogatories and requests to admit;
- c. Answers of other parties of interrogatories (with the interrogatories if they are not restated in the answers).

Please do not prepare deposition summaries as a matter of routine without first discussing the matter with the responsible in-house attorney. Where you and the in-house attorney concur that you should prepare a deposition summary, it should be concise, setting forth only the relevant testimony, your impressions of the witness, and how the deposition of that witness affects our liability posture and our strategy in the case.

Conflicts

Outside counsel shall undertake a thorough search of conflicts of interest immediately after being contacted to represent Sedgwick in any matter. Any actual or potential conflict must be discussed with in-house counsel at the time of the engagement or as soon as the conflict becomes known. Sedgwick is comprised of all the entities appearing on the enclosed organizational list. It is essential that you recognize the scope of Sedgwick's domestic organization when investigating potential conflicts of interest. Prior to your representation in the matter, please advise us if your firm is presently representing or if your firm has ever represented a client in any matter in opposition to any of the Sedgwick entities appearing on the attached list. In the event a current conflict exists, we request that you notify us immediately. Should you later become aware of potential conflicts that may arise please provide us with all necessary information as soon as possible so that a timely decision regarding the retention of counsel can be made. Notice and waivers of conflicts must be acknowledged in writing.

Staffing

We have selected you to represent us because of your expertise and because we have confidence in your ability and judgment. Consequently, you should be personally in charge of any matter you are handling for us from beginning to end including the billing.

If you contemplate anyone else assisting you in this matter, including a paralegal, please consult with us in advance as to the experience of the persons you anticipate assisting you, your anticipated involvement and the billing rate(s) of the people involved. We also ask that you counsel with us if a change in staffing is contemplated. If the change becomes necessary because of the firm's needs, Sedgwick will not be billed in start-up costs of educating the new person in the case. Also, Sedgwick will not pay the billing rate for more than one attorney when two or more firm attorneys meet to discuss Sedgwick's case. We trust that you will attempt to minimize legal expenses by relying on a junior attorney or legal assistant for less demanding tasks, rather than yourself, where their skill and ability would result in more effective economical efforts. However, we know that duplication and inefficiency can sometimes be avoided by a few hours of your direct effort.

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Legal And Technical Research

We expect to be billed only for that legal research deemed necessary to defend Sedgwick's interests. With the exception of legal and other research for an initial report and evaluation of liability and exposure in a new matter, any such legal research and the need for any written memoranda or opinions based thereon must be authorized in advance by the supervising in-house attorney. We require that a copy of any significant legal memoranda or opinions be provided to the supervising in-house attorney. Sedgwick will not pay for and expects not to be billed for legal research to educate attorneys in basic fields of expertise on the basis of which the firm is chosen.

Billing/Check Request

We require detailed monthly bills. The bills should include:

- o the name or initials of the attorney handling the matter;
- o the date of service and time allocated to the service,
- o a full description of the service rendered and the billing rate of the attorney and of attorneys in addition to those in which we have agreed, it would be helpful if the explanations were included along with the billing.

Disbursements for extensive computerized research services, extensive copying, computerization of documents and the like will not be reimbursed unless approved by us in advance. Disbursements should not include charges for routine secretarial work or processing or office supplies. Disbursements for overtime should be charged only if required for client effort and not because of other firm or personal priorities or interest (e.g., charges for an attorney working nights or weekends necessitated by another client or bar activities during the business day should not be chargeable to us).

We will reimburse you for necessary photocopying and other expenses at your cost. We do not authorize and will not generally reimburse for first class air transportation, luxury hotel accommodations, and lavish meals. All out of town travel must be approved in advance. Sedgwick will compensate for time spent in transit. However, if work is done for another client in transit we will not reimburse for transit time. If travel time is devoted to working for one or more clients in addition to Sedgwick, we should be billed only for the proportionate time period. Time away from home or the office which is not in transit or spent performing legal services will not be compensated. Sedgwick will reimburse only for coach class travel unless unusual circumstances justify otherwise. We do not reimburse for normal secretarial services such as time spent in filing, file indexing, typing, clerk filings, and the like unless we are informed in advance as to the reason. Disbursements should be charged only if required for client effort and not because of other firm or personal priorities or interest. Major disbursements must be agreed to in advance (e.g., expert's fees, extensive microfilming, computer use, document retrieval, etc.). Please do not bill us for support staff overtime unless we have agreed in advance.

We will reimburse you for necessary photocopying and other expenses at your cost. We do not expect to be charged for courier service or other expedited mail delivery where the urgency was created by last minute preparation not caused by Sedgwick. Invoices should be addressed to the attention of Peter Marchel, Assistant General Counsel and Professional Liability Risk Management and Litigation Director. We trust that you will find the above acceptable. Should you have any questions please contact Peter Marchel at (901) 684-3894.

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Name & Title

J. Performance Evaluation Letter³⁶

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 | _____ | _____ |

³⁶ The following material has been excerpted from the ACCA and West Group publication, Successful Partnering Between Inside and Outside Counsel § 5:47 Form: Performance evaluation with outside counsel www.acca.com/protected/forms/outsidecounsel/haig/5_47.html

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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 _____

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:

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K. Engagement Checklist³⁷

CHECKLIST - ENGAGEMENT LETTERS

Every firm, and every practice group within each firm, will have its own preferred style and text for its form engagement letters. Our purpose is to present the basic checklist of items that should be covered in all such forms. If a firm decides to structure its intake process as described in this work, it should review each version of the engagement letter form so that the review process, can proceed without separate consideration of every form letter by the oversight partner or committee. Because clients have differing needs and levels of sophistication, this checklist includes both required and optional items. Required items, listed in **bold face and large type**, should at least be considered for inclusion in every engagement letter; in *bold face italic type* are additional *optional* items which may also be included.

The Checklist is presented in two forms, first as a simple list, and, second, with detailed commentary.

THE CHECKLIST

1. Parties
2. Scope of Engagement
3. *Nature of Services – Course of Representation (optional)*
4. Lawyers and Others Providing Services
5. Communicating with the Responsible Lawyer
6. *Methods of Communication - Preserving Confidences (optional)*
7. Client's Obligations
8. (i) Fee Arrangement; (ii) Disbursement Arrangement
9. Billing Arrangement
10. Dispute Resolution
11. Right of Withdrawal
12. *Additional Requirements of State Law or Court Rules (optional)*
13. Agreement (Countersignature) of Client

ANNOTATED CHECKLIST – ENGAGEMENT LETTERS

1. Parties

- o The letter should specifically identify all parties or entities represented in the matter — and all parties specifically *not* represented — by proper legal name.
- o If the client is a corporation or organization, make clear that you will represent the interests of the entity, **not** the president, the board of directors, or the trustees. If the engagement involves services provided to individuals, state whether you will represent,

³⁷ The following material is excerpted from: Gary E. Munneke and Anthony E. Davis, *THE ESSENTIAL FORMBOOK: Comprehensive Management Tools for Lawyers*, Copyright 2000 American Bar Association. Reprinted with Permission. Copies of THE ESSENTIAL FORMBOOK are available by calling 312.988.5522. This material was presented at ACCA's 2001 ANNUAL MEETING ADDING VALUE

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for example, the husband, as opposed to the husband and wife. *If appropriate, include advice to those not being represented to seek and obtain separate counsel.*

Comment: Careful specification of the client can clarify the interests involved in the case and reveal any potential conflict of interest. Because multiple clients may have very different interests, this element is especially important in joint representations. If more than one individual or entity is named as client, the letter should automatically be reviewed to determine whether appropriate steps have been taken to deal with actual or potential conflicts that may arise from multiple client representation, as discussed in Chapter 2, *Making Judgments: Managing The Client Selection Process*.

If a decision is reached to accept the engagement despite a conflict of interest, either the engagement letter or a separate letter should deal specifically with the issue, including the necessary full disclosure. It may also be appropriate to describe the action you will take if a conflict *subsequently* arises that requires separate representation. If appropriate, specify which client you will represent under these circumstances. Warn that if you are required to withdraw because of a conflict of interest, all parties may be denied your services, and each party will then have to pay a new attorney to assume the matter. If warranted, recommend that the client seek independent counsel regarding the conflict of interest and its impact.

Notes:

(1) In multiple client situations, additional language at Item 6 (Methods of Communication - Preserving Confidences) will be appropriate to inform all clients that they do not have separate (only collective) expectations of confidentiality.

(2) Additional language will also be necessary at Item 13 (Agreement of the Client) in every matter where there is a conflict to be waived or consented to, in order for the client(s) to give express waiver or consent to the engagement notwithstanding the conflict.

2. Scope of Engagement

- o Clearly, fully, and specifically describe and define the services you have agreed to perform for each individual representation. This definition is essential in ensuring that you meet the client's goals, and can provide a valuable reference point for discussion of goals and expectations over the course of the engagement.
- o Specifically state any limitations on services and exclude services that you have *not* agreed to perform. Exclusion warns the client that he or she should protect himself or herself through other means if potential issues arise that you do not want to address. Be as specific as possible so that you cannot subsequently be blamed for failing to address a related issue. When you are representing one party to a divorce proceeding, for example, the engagement letter should state that your representation will not include the sale of a house or other property.
- o Disclaim responsibility for providing any services not specifically listed
- o Specify any special areas of authority that the client has agreed to grant you, such as hiring of co-counsel or experts or incurring of significant expenses. Note, however, that this advance grant of authority is not all-inclusive; you may need to seek renewed authorization for authority issues that may arise later in the representation.

Comment: A clear, full, and explicit description of what the firm is - and is not - being retained to do is an essential element in establishing the basis of any fee arrangement (especially any non-time based fee), and in avoiding claims that the firm failed to perform assigned tasks. Ambiguity in the

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definition of the scope of the engagement can be extremely dangerous from a risk management perspective. In one case, for example, a firm was retained "to recover damages for injuries sustained in an auto accident" of a certain date. The firm understood its role to be the filing and prosecution of a civil suit, and did not pursue workers' compensation remedies. When the limitations period expired on the workers' compensation claim, the client sued for malpractice. Because the engagement letter stated broadly that the firm's responsibility was to handle matters related to the accident, the firm and its carrier paid a large settlement on a matter that the firm had never consciously accepted. Limitation of the scope of engagements is expressly permitted by the Model Rules of Professional Conduct, and has been accepted by many courts. It may also be helpful and advisable, to state that a closing letter will be sent at the end of the engagement, after which the firm's representation of the client will cease unless a new engagement letter is exchanged.

3. Nature of Services – Course of Representation (optional)

- o Outline the work to be performed, define a general time line for its performance, and note major tasks, deadlines and milestones. Establishment of a clear framework for conduct of the representation can help you define tasks, meet deadlines and avoid excessive expenditures. It can also alert you to unclear or unrealistic client expectations.
- o Indicate both attorney and client responsibilities on the task schedule. If appropriate, note scheduled ongoing meetings or other channels of communication.
- o If you want to address the likelihood of success in a litigation, be careful to avoid wording — especially a percentage-based estimate — that could be interpreted as a guarantee of success. If you do discuss the likelihood of a positive outcome, be sure to include appropriate caveats.

Comment: This is distinct from the statement of the scope of the engagement, and is intended for the benefit of individual or unsophisticated (especially first-time) clients. This element describes and explains how lawyers will perform the assigned project, and the kinds of activities involved, so that there are no expressions of surprise by the client at the time or efforts spent on activities outside the client's vision or expectation. In litigation matters, such as contested matrimonial cases, it can be very helpful to provide clients with a detailed description - perhaps in a separate document - that explains the steps and timetable for a "typical" case.

4. Lawyers and Others Providing Services

- o Identify the primary attorney responsible for the engagement, other attorneys within the firm, paralegals and all other professional staff who will work on the engagement. Also identify any outside consultants, experts or co-counsel at other firms who will be involved in the matter.
- o If the client is retaining other attorneys besides you, delineate exactly what responsibility and authority you will assume and what responsibility and authority others will have. Make sure the client is clear about this delineation.

Comment: Identify with specificity the lawyers who will be working on the client's matter, or at least those who will be responsible, and with whom the client may communicate.

5. Communicating with the Responsible Lawyer

- o Describe the frequency and form of your anticipated communications with the client. Establishment of clear lines of communication is essential to ensure that changes during the course of the representation — in the matter itself, the firm's or the client's

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circumstances, or the attorney-client relationship — are recognized and adequately addressed.

- Specify the firm's policy regarding the time within which calls or faxes are customarily answered, and what to do if no response is received on a timely basis.

Comment: The most frequent complaint voiced about lawyers – to disciplinary authorities, as well as in malpractice cases - is “My lawyer *never* returned my telephone calls.” Accordingly, this element of the engagement letter presents an ideal opportunity to make a positive commitment that can only have a beneficial effect on the relationship – that **your firm**, and **your lawyers**, understand the importance of being accessible – and *agree* to live up to the firm's policy.

6. Methods of Communication - Preserving Confidences (optional)

- Early discussion of attorney-client privilege — including protections, limitations, and waiver — is critical, especially in matters involving joint representation, and with respect to the use of technological devices (cellular phones, E-Mail, etc.).
- You may want to specify that client records will be returned at the conclusion of the matter or state your document retention policy, including periodic disposal, for other materials whose return the client does not request.

Comment: Much time and energy has been spent in recent years discussing the need for protection of computer systems and data by encryption and the dangers of mis-addressed faxes, and cellular telephones and other threats to attorney-client confidentiality. Many of these potential problems can be eliminated if the issue is directly addressed in the engagement letter and the client consents to whatever security (or lack thereof) is to be adopted in communications between the firm and the client, and within the firm generally. Expression of such concerns in the engagement letter is essential if the client or a particular matter demands special treatment.

7. Client's Obligations

- Identify any important matters that must be decided by the client, and specify any deadlines involved.
- Emphasize that the client is responsible for regular communication and provision of complete and accurate information throughout the engagement. State that you will rely on the completeness and accuracy of that information when performing your services.
- Specify any tasks your client must perform, such as obtaining tax returns or other relevant documents, and state deadlines for their completion.
- Changes in the client's structure, ownership or other circumstances can give rise to new conflicts. If appropriate, specify that the client must inform you of any such changes during the engagement. On a more practical level, some firms state that the client must notify the attorney of any change of address or telephone number and any extended travel plans.
- Further specification of client responsibilities may be appropriate in some personal representations. For example, you may want to stipulate that the client agrees to comply with court orders or medical requirements relevant to the engagement.

Comment: Until serious problems arise, lawyers tend to forget that their clients have basic obligations, especially truthfulness toward counsel. When lawyers discover that clients have lied or committed fraud, during the course of representation, the problems which ensue under every version of ethics codes are nothing less than horrendous. The problems can be significantly mitigated by a

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clear expression within the engagement letter of the client's obligations and the consequences which will follow under the applicable ethics code in the event that these problems arise. If it is clearly and simply expressed, this language can prevent serious trouble later.

8. (f) Fee Arrangement

- Clearly state the basis on which fees will be charged, and note the client's agreement that the fees are reasonable. Many states require that the firm's fee schedule be communicated to the client in writing, regardless of whether a contingent fee is involved. In some states, the attorney must specifically inform the client of the basis of charges at the outset of the engagement. The courts will always resolve ambiguities in the client's favor.
- In all hourly fee engagements, specify the respective billing rates of all professional staff who will be working on the matter, and note any likely change in rates during the course of the engagement.
- Specify any charge you intend to bill on a basis other than straight hourly charges, and describe how such charges will be computed. Specify any additional charge you intend to impose, such as a premium for achieving a favorable outcome. It may be useful to explore potential alternative fee arrangements with the client before formalizing the basis of charges. Specify whether a lesser rate will be charged for travel time; if not, state that necessary travel will be billed at the rates previously set forth.
- Most states require exact written explanation of how contingent fees will be determined — including, as specified by ABA Model Rule 1.5, “the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.” Some states may impose additional requirements.
- If there is any arrangement for the sharing of legal fees with other lawyers (including referral fees), review local ethics rules, and state the sharing arrangement in the necessary detail as set forth in those rules.

Retainer and Management of Client Funds

- State the amount of your retainer, the types of fees and expenses covered, when the retainer must be replenished and what actions you will take if it is not replenished. Careful scheduling of retainer payments can ease the payment process and eliminate surprises as the engagement proceeds. Some clients may prefer to make direct payments to third-party consultants or vendors instead of paying a large retainer.
- Specify whether or not the retainer is refundable if the engagement ends before it is exhausted. Non-refundable or advance-pay retainers may be void or voidable in some states; check local ethics rules and case law first.
- Specify how client funds will be handled and whether or not interest will accrue. Many states require that refundable retainer monies be placed in a trust account; depending on the amounts and times involved, your fiduciary role may dictate that the account be interest-bearing. Trust arrangements are especially vulnerable to outside scrutiny; review all arrangements carefully to ensure that there is no appearance of advantage to you or the firm.

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Comment: Clearly state the nature of the fee arrangement and the firm's policies with respect to all disbursements. Segment 3 of this work, *Fees, Billing and Collections*, will deal at length with the reasons why hourly billing is problematic; what the alternatives are - including contingent, task-based, value-based, capped, flat, discounted or blended fees - and why lawyers will make more money if they adopt them; and how to make the transition.

(ii) Disbursement Arrangement

- o Clearly indicate whether out-of-pocket charges (such as long-distance telephone calls, copying and transcription charges, travel, court costs, postage and couriers, and charges for computerized research) will be passed on to the client, and specify your procedures for doing so. Warn the client if these charges are likely to be significant. If appropriate, explain that internal staff time for word processing and similar tasks is not included in the hourly fee and will be billed. Scrutinize your estimates to ensure that the client receives the best rates possible for such tasks, whether performed in-house or contracted to a vendor.

Comment: There are both ABA Formal Ethics opinions, as well as local opinions, regarding permissible charges for disbursements.⁴ Beyond the negative appearance of substantially marked-up disbursement charges, in many states it is unethical to make a profit on the provision of non-legal services, such as photocopying. While one approach is to provide a schedule of standard disbursement expense charges, many lawyers and firms have concluded that clients prefer a single inclusive bill without separate charges for disbursements – and have raised their rates to accomplish that end.

9. Billing Arrangement

- o Explain your billing and payment requirements and set out a clear payment schedule. Specify the frequency and format of your standard bills.
- o You may want to state that you will submit interim reports specifying what legal services have been performed and what funds have been disbursed during the stated period, even if no payment is due. Interim reports both inform the client and protect the attorney by providing a detailed record of time and expenses. In the event of termination or a future claim against the firm, this record can help establish the reasonable value of services provided.

10. Dispute Resolution

- o Describe the procedures you will take to resolve any disputes that may arise during the course of the representation.
- o Inclusion of a mediation clause is recommended to demonstrate your commitment to lower costs and rapid resolution of possible problems. This method has proven both successful and efficient in resolving disputes; it can help you build good client relations.
- o Consider including an arbitration clause for fee disputes. Some states require ADR to resolve disputes regarding legal fees, while others limit these clauses. Accordingly, before using alternative dispute resolution (ADR) clauses, check with your insurer to make sure they do not violate the terms of your policy or state or local rules. Limitation of this clause to address fee disputes only, as opposed to all disputes, is essential to limit your risk exposure by separating any claims arising from fee disputes from any broader malpractice claims.

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Comment: This element is optional - and in a few states, some elements, such as mandatory arbitration, may be prohibited or restricted. In our view, however, it is always preferable for disputes with clients to be resolved *in private*, rather than in open court where they are likely to be exposed to the glare of the media. We recommend that arbitration always be offered as an option, even where it may not be mandated under local ethics rules.

11. Right of Withdrawal

- o To eliminate any uncertainty, state that the client can terminate your engagement at any time, without cause.
- o Explain that you also have the right — and sometimes the obligation — to terminate the engagement, on written notification and subject to the ethical standards in the Rules of Professional Conduct.
- o You may want to state that you reserve the right to suspend or terminate the representation if the client *either* breaches its obligations with respect to the engagement (see item 7 above) *or* does not pay the firm's invoices within a specified period. This provision can lessen the likelihood that you will have to file suit to collect your fees, which often results in counterclaims by the client. Statements that the client agrees not to contest the firm's withdrawal if its fees have not been paid, however, may violate state ethical standards.

Comment: If, as recommended above, the engagement letter clearly expresses all of the client's obligations to the firm, the courts are likely to honor a firm's request to withdraw in cases where consent is required, provided that this right is also clearly expressed in the engagement letter. This provision, combined with ongoing oversight of billing and collections to prevent accumulation of significant accounts receivable, should enable firms to extract themselves from engagements in which the clients fail to pay their bills on a timely basis. Of course, firms should also not wait until the eve of trial in cases where a court's permission to withdraw is required. Even when such permission is not required, termination just before a transaction is due to close may constitute a violation of applicable rules of professional conduct.

12. Additional Requirements of State Law or Court Rules

- o Include any additional disclosure or discussion of any other items specifically required by the state. See, in particular, New York's rules relating to matrimonial lawyers, and many states' rules regarding the content and, in some cases, the registration of contingency fee agreements.

13. Agreement (Countersignature) of Client

- o Suggest that the client call you to discuss any terms of the engagement letter that are not clearly understood. Your offer to explain the terms can both improve client relations and protect you from possible future assertions that the client didn't know what he or she was signing.
- o Specify that the engagement letter is a binding legal agreement.
- o Provide two copies of the engagement letter and include a clearly labeled space for the client's signature. Request that the client sign and return one copy of the letter and keep the other copy for his or her records. A signed engagement letter is essential to resolve any future questions regarding client consent, client responsibilities, or any other terms of the representation.

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- If the client fails to return a signed copy of the engagement letter, send a reminder noting that you need an executed copy of the agreement to proceed. Ask the client to call you to discuss any questions or problems.

Comment: Unless the client countersigns the letter before the engagement commences or very promptly after initial engagement, the letter may be held to be unenforceable against the client on the grounds that a letter signed after significant work has been performed gives the client no choice but to accept the terms. Worse, an unsigned letter may be enforced against the firm as draftsmen, but not against the client. To avoid these problems, the client intake process should not be concluded, and significant work should not be commenced until the countersigned letter is on file.

L. Letter to Outside Counsel Regarding Compliance with Sarbanes-Oxley

LETTER TO OUTSIDE COUNSEL

To All U.S. Outside Counsel:

In May 2003, Chris Johnson and I wrote you about, among things, the standards of attorney conduct that the Securities and Exchange Commission has established under the Sarbanes Oxley Act of 2002. As we noted, these new standards, requiring lawyers who appear or practice before the SEC to report material violation of law or fiduciary duty "up the ladder" of authority, are entirely consistent with your responsibility under the policy of the General Motors Legal Staff to bring any significant misconduct by GM employees to the attention of our Legal Staff.

In our May 2003 memo, we urged each of you to feel free to contact us directly if you believe that a situation warrants our immediate or direct attention. In addition, we want you to know that the Board of Directors of General Motors has recently designated its Audit Committee as the Corporation's Qualified Legal Compliance Committee or QLCC.

The QLCC, which is comprised of independent directors, has been authorized to receive evidence of a material violation, investigate as they deem appropriate, and recommend the appropriate response. Under the Sarbanes Oxley Act, if for some reason you do not want to raise an issue up to Chris or me, or to another members of the Legal Staff, you may raise it confidentially to the QLCC by writing or calling its Chairman, [contact information deleted].

I recognize that many of the attorneys who will receive this message do not advise GM under the U.S. federal securities law and may be not subject to these new standards under the Act. Each of you, however, when you represent General Motors has a duty, both under GM policy and under the ethical rules of our profession, to assure that GM, its subsidiaries, and its employees are aware of their legal and fiduciary obligations, especially with respect to those matters for which you have been retained as counsel.

We appreciate your continued cooperation and support in helping General Motors as our shared client assure its compliance with legal requirements and with GM's standards of integrity.

Thomas A. Gottschalk
Executive Vice President
Law & Public Policy

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and General Counsel

M. Sample Convergence Spreadsheets

- Hourly Rate Benchmarking Analysis³⁸
 - *Overview of Specialization, Avg.* Summarizes the mean hourly billing rate for each type of billing person (partners, associates, of counsel, paralegals, and administrators) you use for each area of specialization – from bankruptcy to litigation to tax matters.
 - *Overview of Job Class, Avg.* Summarizes the hourly billing rates for each type of billing person you use; includes high-low range, sample size, and mean billing rate.
 - *Avg. by Job Class* Lists the entire billing rate sample for each type of billing person and shows the calculation of the mean hourly billing rates.
 - *Avg. by Specialization* Lists the entire billing rate sample for each area of specialization and shows the calculation of the mean hourly billing rates.
- Legal Fee Analysis (by Region, by Law Areas)
 - Summarizes the total cost of legal fees, by region, for each area of specialization – from bankruptcy to litigation to tax matters.
- RFP Proposed Rates
 - Lists the hourly billing rate received for each type of billing person, proposed by each law firm invited to respond to your RFP. The list can be used to set the mean billing rate that finalists will be asked to accept.
- Firms by Region – for use in RFP
 - Shows the projected total cost of legal fees, by region, using the RFP proposed billing rates that finalists will be asked to accept.

³⁸ Only a few sample pages are included. For a complete copy (47 pages), please contact the ACC's Legal Resources Department at legalresources@acca.com.

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Hourly Rate Benchmarking Analysis

Overview of Job Specialization, Avg.

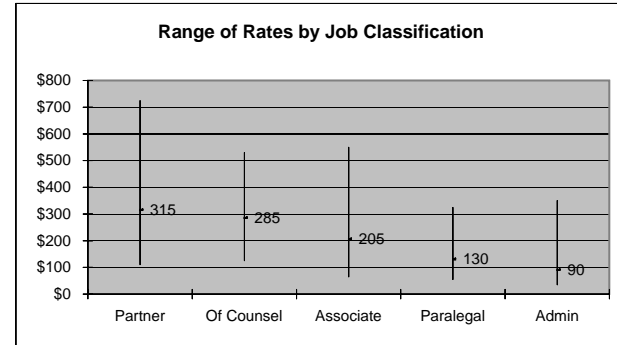
| Specialization | Job Class | | | | | Sample |
|-----------------------|-----------|-----------|------------|-----------|----------------|--------|
| | Partner | Associate | Of Counsel | Paralegal | Administrative | |
| Bankruptcy | \$340.33 | \$225.36 | \$278.75 | \$130.00 | \$99.00 | 15 |
| Business Transactions | \$358.93 | \$252.22 | \$505.00 | | \$102.50 | 14 |
| Corporate Affairs | \$388.89 | \$209.72 | | \$110.00 | \$95.00 | 18 |
| Environmental | \$369.71 | \$255.25 | \$280.00 | \$175.00 | \$100.00 | 14 |
| Intellectual Property | \$344.29 | \$208.75 | \$265.00 | \$120.00 | \$110.00 | 7 |
| Labor & Employment | \$286.72 | \$201.04 | \$377.50 | \$135.71 | \$86.88 | 29 |
| Lending | \$372.38 | \$225.63 | \$225.00 | | \$114.17 | 21 |
| Litigation | \$283.68 | \$192.04 | \$262.11 | \$106.67 | \$105.46 | 101 |
| Mortgage Banking | \$235.00 | | | | | 1 |
| Real Estate | \$287.09 | \$223.74 | \$282.50 | \$136.67 | \$133.00 | 54 |
| Regulatory | \$600.00 | \$200.00 | \$300.00 | | | 2 |
| Tax | \$430.36 | \$264.55 | \$351.00 | | | 14 |
| None Specified | \$283.04 | \$212.05 | \$227.00 | \$151.25 | \$81.63 | 79 |

Hourly Rate Benchmarking Analysis

Overview of Job Class, Avg.

| Job Class | Mean (Avg.) Rate/Hour | Median Rate/Hour | Sample size |
|----------------|-----------------------|------------------|-------------|
| Partner | \$311.18 | \$315 | 369 |
| Of Counsel | \$288.44 | \$285 | 36 |
| Associate | \$213.45 | \$205 | 287 |
| Paralegal | \$126.47 | \$130 | 58 |
| Administrative | \$94.37 | \$90 | 160 |

| | High | Low | Average |
|------------|-------|-----|---------|
| Partner | \$725 | 110 | 315 |
| Of Counsel | 530 | 125 | 285 |
| Associate | 550 | 65 | 205 |
| Paralegal | 325 | 55 | 130 |
| Admin | 350 | 35 | 90 |



Hourly Rate Benchmarking Analysis

Avg. by Job Class

| Last Name | First Name | Job Class | Specialization | Bill Rate | 2003 |
|---------------|---------------|----------------|-----------------------|-----------|------|
| Attorney Name | Attorney Name | Associate | Litigation | | |
| Attorney Name | Attorney Name | | | | |
| Attorney Name | Attorney Name | Administrative | | 350 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 180 | |
| Attorney Name | Attorney Name | Administrative | Lending | 170 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 165 | |
| Attorney Name | Attorney Name | Administrative | Lending | 155 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 155 | |
| Attorney Name | Attorney Name | Administrative | | 150 | |
| Attorney Name | Attorney Name | Administrative | Real Estate | 150 | |
| Attorney Name | Attorney Name | Administrative | Bankruptcy | 150 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 150 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 150 | |
| Attorney Name | Attorney Name | Administrative | Real Estate | 150 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 145 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 145 | |
| Attorney Name | Attorney Name | Administrative | | 140 | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 140 | |
| Attorney Name | Attorney Name | Administrative | | 140 | |
| Attorney Name | Attorney Name | Administrative | | 135 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 135 | |
| Attorney Name | Attorney Name | Administrative | Business Transactions | 135 | |
| Attorney Name | Attorney Name | Administrative | Real Estate | 135 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 135 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 135 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 135 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 135 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 130 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 130 | |
| Attorney Name | Attorney Name | Administrative | | 125 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 125 | |
| Attorney Name | Attorney Name | Administrative | | 125 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 125 | |
| Attorney Name | Attorney Name | Administrative | | 120 | |
| Attorney Name | Attorney Name | Administrative | Real Estate | 120 | |
| Attorney Name | Attorney Name | Administrative | | 115 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 115 | |
| Attorney Name | Attorney Name | Administrative | | 115 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 110 | |
| Attorney Name | Attorney Name | Administrative | Litigation | 110 | |
| Attorney Name | Attorney Name | Administrative | Real Estate | 110 | |
| Attorney Name | Attorney Name | Administrative | Intellectual Property | 110 | |
| Attorney Name | Attorney Name | Administrative | Intellectual Property | 110 | |
| Attorney Name | Attorney Name | Administrative | | 110 | |

| | | | | | |
|---------------|---------------|---------|--------------------|-----------------|--|
| Attorney Name | Attorney Name | Partner | Litigation | 115 | |
| Attorney Name | Attorney Name | Partner | Labor & Employment | 115 | |
| Attorney Name | Attorney Name | Partner | Litigation | 115 | |
| Attorney Name | Attorney Name | Partner | | 110 | |
| Attorney Name | Attorney Name | Partner | Litigation | 110 | |
| Attorney Name | Attorney Name | Partner | Litigation | 110 | |
| Attorney Name | Attorney Name | Partner | Litigation | 110 | |
| Attorney Name | Attorney Name | Partner | Real Estate | 110 | |
| Attorney Name | Attorney Name | Partner | Litigation | 110 | |
| | | | | 114826 | |
| | | | | 369 | |
| | | | | \$311.18 | |

| | | |
|------------|------|-----|
| | High | Low |
| Admin | 350 | 35 |
| Associate | 550 | 65 |
| Of Counsel | 530 | 125 |
| Paralegal | 325 | 55 |
| Partner | 725 | 110 |

184.5

Hourly Rate Benchmarking Analysis



Avg. by Specialization

ACC EUROPE'S 2006 CORPORATE COUNSEL UNIVERSITY

| Last Name | First Name | Job Class | Specialization | Bill Rate | | |
|---------------|---------------|----------------|-----------------------|-----------|------------------------|---------|
| Attorney Name | Attorney Name | Associate | Litigation | 2003 | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Administrative | Bankruptcy | 150 | Bankruptcy | 495 5 |
| Attorney Name | Attorney Name | Administrative | Bankruptcy | 105 | Corporate Transactions | 205 2 |
| Attorney Name | Attorney Name | Administrative | Bankruptcy | 100 | Corporate Affairs | 300 4 |
| Attorney Name | Attorney Name | Administrative | Bankruptcy | 70 | Environmental | 100 1 |
| Attorney Name | Attorney Name | Administrative | Bankruptcy | 70 | Intellectual Property | 220 2 |
| Attorney Name | Attorney Name | | | 495 | Labor & Employment | 695 8 |
| Attorney Name | Attorney Name | | | | Lending | 685 6 |
| Attorney Name | Attorney Name | Administrative | Business Transactions | 135 | Litigation | 5695 54 |
| Attorney Name | Attorney Name | Administrative | Business Transactions | 70 | Real Estate | 665 5 |
| Attorney Name | Attorney Name | | | 205 | None Specified | 5959 73 |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Administrative | Corporate Affairs | 105 | | |
| Attorney Name | Attorney Name | Administrative | Corporate Affairs | 95 | | |
| Attorney Name | Attorney Name | Administrative | Corporate Affairs | 95 | | |
| Attorney Name | Attorney Name | Administrative | Corporate Affairs | 85 | | |
| Attorney Name | Attorney Name | | | 380 | | |
| Attorney Name | Attorney Name | Administrative | Environmental | 100 | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Administrative | Intellectual Property | 110 | | |
| Attorney Name | Attorney Name | Administrative | Intellectual Property | 110 | | |
| Attorney Name | Attorney Name | | | 220 | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 140 | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 90 | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 90 | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 75 | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 75 | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 75 | | |
| Attorney Name | Attorney Name | Administrative | Labor & Employment | 75 | | |
| Attorney Name | Attorney Name | | | 695 | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Administrative | Lending | 170 | | |
| Attorney Name | Attorney Name | Administrative | Lending | 155 | | |
| Attorney Name | Attorney Name | Administrative | Lending | 105 | | |
| Attorney Name | Attorney Name | Administrative | Lending | 105 | | |
| Attorney Name | Attorney Name | Administrative | Lending | 100 | | |
| Attorney Name | Attorney Name | Administrative | Lending | 50 | | |
| Attorney Name | Attorney Name | | | 685 | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 180 | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 165 | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 155 | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 150 | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 150 | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 145 | | |
| Attorney Name | Attorney Name | Administrative | Litigation | 145 | | |

| | | | | | | |
|---------------|---------------|---------|-------------|------|--|--|
| Attorney Name | Attorney Name | Partner | Real Estate | 285 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 275 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 270 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 265 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 250 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 245 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 240 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 210 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 200 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 200 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 200 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 195 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 190 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 175 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 175 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 175 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 170 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 155 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 150 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 125 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 115 | | |
| Attorney Name | Attorney Name | Partner | Real Estate | 110 | | |
| Attorney Name | Attorney Name | | | 1503 | | |
| Attorney Name | Attorney Name | | | | | |
| Attorney Name | Attorney Name | Partner | Regulatory | 650 | | |
| Attorney Name | Attorney Name | Partner | Regulatory | 550 | | |
| Attorney Name | Attorney Name | | | 1200 | | |
| | | Partner | Tax | 725 | | |
| | | Partner | Tax | 550 | | |
| | | Partner | Tax | 540 | | |
| | | Partner | Tax | 475 | | |
| | | Partner | Tax | 460 | | |
| | | Partner | Tax | 460 | | |
| | | Partner | Tax | 450 | | |
| | | Partner | Tax | 410 | | |
| | | Partner | Tax | 410 | | |
| | | Partner | Tax | 375 | | |
| | | Partner | Tax | 370 | | |
| | | Partner | Tax | 340 | | |
| | | Partner | Tax | 300 | | |
| | | Partner | Tax | 160 | | |
| | | | | 6025 | | |
| | | Partner | | 540 | | |
| | | Partner | | 500 | | |
| | | Partner | | 500 | | |
| | | Partner | | 475 | | |
| | | Partner | | 465 | | |
| | | Partner | | 460 | | |
| | | Partner | | 450 | | |

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| Partner | 450 |
| Partner | 425 |
| Partner | 425 |
| Partner | 420 |
| Partner | 400 |
| Partner | 400 |
| Partner | 380 |
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| Partner | 375 |
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| Partner | 355 |
| Partner | 350 |
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| Partner | 300 |
| Partner | 300 |
| Partner | 295 |
| Partner | 285 |
| Partner | 275 |
| Partner | 275 |
| Partner | 275 |
| Partner | 270 |
| Partner | 260 |
| Partner | 245 |
| Partner | 240 |
| Partner | 220 |
| Partner | 200 |
| Partner | 200 |
| Partner | 200 |
| Partner | 200 |
| Partner | 185 |
| Partner | 185 |
| Partner | 180 |
| Partner | 160 |
| Partner | 175 |

| | |
|---------|-------|
| Partner | 175 |
| Partner | 175 |
| Partner | 175 |
| Partner | 160 |
| Partner | 160 |
| Partner | 160 |
| Partner | 150 |
| Partner | 150 |
| Partner | 150 |
| Partner | 150 |
| Partner | 150 |
| Partner | 150 |
| Partner | 150 |
| Partner | 150 |
| Partner | 135 |
| Partner | 135 |
| Partner | 125 |
| Partner | 125 |
| Partner | 125 |
| Partner | 125 |
| Partner | 125 |
| Partner | 110 |
| Partner | 22360 |

184.5

Legal Fee Analysis

ANALYSIS OF LEGAL FEES THROUGH 10-31-04

| Totals | Region 1 | Region 2 | Region 3 | Region 4 | Region 5 | Region 6 | Total | |
|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|---------------------|---------------------|------------------------|--------|
| Litigation | 1,565,672.29 | 163,126.43 | 87,335.02 | 2964189.307 | 513605.7258 | 4588.3134 | \$5,298,517.08 | 43.77% |
| Environmental | 13,486.37 | 69,294.50 | 4,460.06 | 108,340.56 | 1,322.22 | \$51,702.99 | \$748,606.70 | 6.18% |
| Real Estate | 720,878.44 | 68,684.78 | 60,965.32 | 17,213.09 | 30,379.41 | 1,620.77 | \$908,921.81 | 7.51% |
| Business Transactions | 194,900.34 | 185,481.64 | 71,371.08 | 215,722.65 | 90,538.04 | | \$811,230.89 | 6.70% |
| Tax | | | 814,660.40 | 6,215.32 | | | \$820,875.73 | 6.78% |
| Energy | | 247,584.90 | | | | | \$247,584.90 | 2.05% |
| Labor & Employment | 312,839.93 | 127,255.24 | 578,674.64 | 66,578.24 | 57,442.63 | | \$1,142,790.68 | 9.44% |
| Immigration | 11,227.66 | | | | | | \$11,227.66 | 0.09% |
| Lending and Banking Transactions | 884,159.42 | 589,819.47 | 161,143.52 | 166,260.70 | 137,748.57 | | \$1,939,151.68 | 16.02% |
| Intellectual Property | 16,337.25 | 832.14 | 1,169.68 | 157,613.99 | 969.03 | | \$176,922.09 | 1.46% |
| Total | \$3,719,491.70 | \$1,452,059.10 | \$1,779,779.71 | \$3,702,153.85 | \$841,005.62 | \$611,329.22 | \$12,105,819.20 | |
| | 30.72% | 11.99% | 14.70% | 30.58% | 6.95% | 5.05% | | |

| Regional Percentages | Region 1 | Region 2 | Region 3 | Region 4 | Region 5 | Region 6 | Total |
|----------------------------------|----------|----------|----------|----------|----------|----------|---------|
| Litigation | 29.55% | 3.08% | 1.65% | 55.94% | 8.69% | 0.09% | 100.00% |
| Environmental | 1.80% | 9.26% | 0.60% | 14.47% | 0.18% | 73.70% | 100.00% |
| Real Estate | 79.31% | 7.55% | 6.71% | 1.89% | 4.33% | 0.20% | 100.00% |
| Business Transactions | 24.03% | 22.86% | 8.80% | 26.59% | 11.16% | 6.56% | 100.00% |
| Tax | | 100.00% | | 98.24% | 0.76% | | 100.00% |
| Energy | | 27.37% | 11.14% | 50.64% | 5.83% | 5.03% | 100.00% |
| Labor & Employment | 100.00% | | | | | | 100.00% |
| Immigration | 45.60% | | 30.42% | 8.31% | 8.57% | 7.10% | 100.00% |
| Lending and Banking Transactions | 9.23% | 0.47% | 0.66% | 89.09% | | | 99.45% |

Region 1: Texas, Arkansas, Missouri, Louisiana

Region 2: Washington, Arizona, California

Region 3: Georgia, Mississippi, Alabama, Tennessee, Florida, Kentucky, South Carolina

Region 4: Illinois, Ohio, Minnesota, Indiana

Region 5: New York, Pennsylvania, Massachusetts, New Jersey, Delaware, Virginia, District of Columbia

Region 6: Canada, Mexico

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ANALYSIS OF LEGAL FEES THROUGH 10-31-04

| Law Area Percentages | | | | | | |
|----------------------------------|----------------|----------------|----------------|----------------|---------------|----------------|
| Litigation | 42.09% | 11.23% | 4.91% | 80.07% | 61.07% | 0.75% |
| Environmental | 0.36% | 4.77% | 0.25% | 2.93% | 0.16% | 90.25% |
| Real Estate | 19.39% | 4.73% | 3.43% | 0.46% | 4.68% | 0.30% |
| Business Transactions | 5.24% | 12.77% | 4.01% | 5.53% | 10.77% | 8.71% |
| Tax | | | 45.77% | | 0.17% | |
| Energy | | 17.05% | | | | |
| Labor & Employment | 8.41% | 8.76% | 32.51% | 1.80% | 6.83% | |
| Immigration | 0.30% | | | | | |
| Lending and Banking Transactions | 23.77% | 40.62% | 9.05% | 4.49% | 16.38% | |
| Intellectual Property | 0.44% | 0.06% | 0.07% | 4.26% | | |
| Total | 100.00% | 100.00% | 100.00% | 100.00% | 99.88% | 100.00% |

| Percentage of Overall Total | Region 1 | Region 2 | Region 3 | Region 4 | Region 5 | Region 6 | |
|----------------------------------|---------------|---------------|---------------|---------------|--------------|--------------|----------------|
| Litigation | 12.83% | 1.35% | 0.72% | 24.49% | 4.24% | 0.04% | 43.77% |
| Environmental | 0.11% | 0.57% | 0.04% | 0.89% | 0.01% | 4.56% | 6.18% |
| Real Estate | 5.95% | 0.57% | 0.50% | 0.14% | 0.33% | 0.02% | 7.51% |
| Business Transactions | 1.61% | 1.53% | 0.59% | 1.78% | 0.75% | 0.44% | 6.70% |
| Tax | 0.00% | 0.00% | 6.73% | 0.05% | 0.00% | 0.00% | 6.78% |
| Energy | 0.00% | 2.05% | 0.00% | 0.00% | 0.00% | 0.00% | 2.05% |
| Labor & Employment | 2.58% | 1.05% | 4.78% | 0.55% | 0.47% | 0.00% | 9.44% |
| Immigration | 0.09% | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% | 0.09% |
| Lending and Banking Transactions | 7.30% | 4.87% | 1.33% | 1.37% | 1.14% | 0.00% | 16.02% |
| Intellectual Property | 0.13% | 0.01% | 0.01% | 1.30% | 0.01% | 0.00% | 1.46% |
| | 30.72% | 11.99% | 14.70% | 30.58% | 6.95% | 5.05% | 100.00% |

Region 1: Texas, Arkansas, Missouri, Louisiana
 Region 2: Washington, Arizona, California
 Region 3: Georgia, Mississippi, Alabama, Tennessee, Florida, Kentucky, South Carolina
 Region 4: Illinois, Ohio, Minnesota, Indiana
 Region 5: New York, Pennsylvania, Massachusetts, New Jersey, Delaware, Virginia, District of Columbia
 Region 6: Canada, Mexico

ANALYSIS OF LEGAL FEES THROUGH 10-31-04

| | 10-31-04 YTD ANNUALIZED (ADJUSTED) | USED IN RFP | VARIANCE |
|----------------------------------|--|-------------------|-------------------|
| Litigation | \$6,358,220.50 | 2,125,000 | -4,233,221 |
| Environmental | \$866,328.04 | 875,000 | -23,328 |
| Real Estate | \$1,050,718.17 | 300,000 | -750,718 |
| Business Transactions | \$973,477.06 | 350,000 | -623,477 |
| Tax | \$965,050.87 | 1,125,000 | 139,949 |
| Energy | \$297,101.87 | 425,000 | 127,898 |
| Labor & Employment | \$1,371,336.81 | 1,575,000 | 203,663 |
| Immigration | \$13,473.18 | 87,500 | 74,027 |
| Lending and Banking Transactions | \$2,326,982.01 | 3,500,000 | 1,173,018 |
| Intellectual Property | \$212,208.51 | 350,000 | 137,693 |
| | \$14,526,983.05 | 10,712,500 | -3,814,483 |

| | | | |
|----------|------|------|-----|
| Region 1 | 31% | 34% | 3% |
| Region 2 | 12% | 16% | 4% |
| Region 3 | 15% | 19% | 4% |
| Region 4 | 31% | 19% | 12% |
| Region 5 | 7% | 5% | -2% |
| Region 6 | 5% | 7% | 2% |
| | 100% | 100% | 0% |

Region 1: Texas, Arkansas, Missouri, Louisiana
 Region 2: Washington, Arizona, California
 Region 3: Georgia, Mississippi, Alabama, Tennessee, Florida, Kentucky, South Carolina
 Region 4: Illinois, Ohio, Minnesota, Indiana
 Region 5: New York, Pennsylvania, Massachusetts, New Jersey, Delaware, Virginia, District of Columbia
 Region 6: Canada, Mexico

RFP Proposed Rates

| LASTNAME | FIRSTNAME | NAME | 2004 Published Rate | 2004 Proposed Rate | Discount | Avg Published Rate | Avg Discounted Rate |
|----------|-----------|--------|---------------------|--------------------|----------|--------------------|---------------------|
| Attorney | Name | Firm A | 335 | 335 | 0% | | |
| Attorney | Name | Firm A | 270 | 270 | 0% | | |
| Attorney | Name | Firm A | 335 | 335 | 0% | | |
| Attorney | Name | Firm A | 335 | 335 | 0% | | |
| Attorney | Name | Firm A | 270 | 270 | 0% | | |
| Attorney | Name | Firm A | 335 | 335 | 0% | | |
| Attorney | Name | Firm A | 270 | 270 | 0% | | |
| Attorney | Name | Firm A | 270 | 270 | 0% | | |
| Attorney | Name | Firm A | 270 | 270 | 0% | 298.89 | 298.89 |
| Attorney | Name | Firm B | 95 | 95 | 0% | | |
| Attorney | Name | Firm B | 425 | 425 | 0% | | |
| Attorney | Name | Firm B | 250 | 250 | 0% | | |
| Attorney | Name | Firm B | 155 | 155 | 0% | | |
| Attorney | Name | Firm B | 125 | 125 | 0% | | |
| Attorney | Name | Firm B | 155 | 155 | 0% | | |
| Attorney | Name | Firm B | 75 | 75 | 0% | | |
| Attorney | Name | Firm B | 250 | 250 | 0% | | |
| Attorney | Name | Firm B | 140 | 140 | 0% | | |
| Attorney | Name | Firm B | 155 | 155 | 0% | | |
| Attorney | Name | Firm B | 155 | 155 | 0% | | |
| Attorney | Name | Firm B | 170 | 170 | 0% | | |
| Attorney | Name | Firm B | 125 | 125 | 0% | | |
| Attorney | Name | Firm B | 200 | 200 | 0% | | |
| Attorney | Name | Firm B | 300 | 300 | 0% | | |
| Attorney | Name | Firm B | 125 | 125 | 0% | | |
| Attorney | Name | Firm B | 250 | 250 | 0% | 185.29 | 185.29 |
| Attorney | Name | Firm C | 220 | 209 | 5% | | |
| Attorney | Name | Firm C | 415 | 394.25 | 5% | | |
| Attorney | Name | Firm C | 210 | 199.5 | 5% | | |
| Attorney | Name | Firm C | 225 | 213.75 | 5% | | |
| Attorney | Name | Firm C | 325 | 308.75 | 5% | | |
| Attorney | Name | Firm C | 195 | 185.25 | 5% | | |
| Attorney | Name | Firm C | 360 | 342 | 5% | | |
| Attorney | Name | Firm C | 230 | 218.5 | 5% | | |
| Attorney | Name | Firm C | 360 | 342 | 5% | | |
| Attorney | Name | Firm C | 225 | 213.75 | 5% | | |
| Attorney | Name | Firm C | 290 | 275.5 | 5% | | |
| Attorney | Name | Firm C | 325 | 308.5 | 5% | | |
| Attorney | Name | Firm C | 360 | 342 | 5% | | |
| Attorney | Name | Firm C | 165 | 156.75 | 5% | | |
| Attorney | Name | Firm C | 185 | 175.75 | 5% | | |
| Attorney | Name | Firm C | 185 | 175.75 | 5% | | |
| Attorney | Name | Firm C | 400 | 380 | 5% | | |
| Attorney | Name | Firm C | 230 | 218.5 | 5% | | |
| Attorney | Name | Firm C | 120 | 114 | 5% | | |
| Attorney | Name | Firm C | 390 | 370.5 | 5% | | |
| Attorney | Name | Firm C | 300 | 285 | 5% | | |
| Attorney | Name | Firm C | 415 | 394.25 | 5% | | |
| Attorney | Name | Firm C | 365 | 346.75 | 5% | | |
| Attorney | Name | Firm C | 315 | 299.25 | 5% | | |
| Attorney | Name | Firm C | 140 | 133 | 5% | | |
| Attorney | Name | Firm C | 120 | 114 | 5% | | |
| Attorney | Name | Firm C | 205 | 194.75 | 5% | | |

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| LASTNAME | FIRSTNAME | NAME | 2004 Published Rate | 2004 Proposed Rate | Discount | Avg Published Rate | Avg Discounted Rate |
|----------|-----------|--------|---------------------|--------------------|----------|--------------------|---------------------|
| Attorney | Name | Firm C | 285 | 270.75 | 5% | | |
| Attorney | Name | Firm C | 290 | 275.5 | 5% | | |
| Attorney | Name | Firm C | 120 | 114 | 5% | | |
| Attorney | Name | Firm C | 240 | 228 | 5% | | |
| Attorney | Name | Firm C | 365 | 346.75 | 5% | | |
| Attorney | Name | Firm C | 180 | 171 | 5% | | |
| Attorney | Name | Firm C | 140 | 133 | 5% | | |
| Attorney | Name | Firm C | 165 | 176.75 | 4% | | |
| Attorney | Name | Firm C | 390 | 361 | 5% | | |
| Attorney | Name | Firm C | 310 | 294.5 | 5% | | |
| Attorney | Name | Firm C | 225 | 213.75 | 5% | | |
| Attorney | Name | Firm C | 170 | 161.5 | 5% | | |
| Attorney | Name | Firm C | 395 | 375.25 | 5% | | |
| Attorney | Name | Firm C | 155 | 147.25 | 5% | | |
| Attorney | Name | Firm C | 140 | 133 | 5% | | |
| Attorney | Name | Firm C | 405 | 384.75 | 5% | | |
| Attorney | Name | Firm C | 225 | 213.75 | 5% | | |
| Attorney | Name | Firm C | 260 | 247 | 5% | | |
| Attorney | Name | Firm C | 360 | 342 | 5% | | |
| Attorney | Name | Firm C | 350 | 332.5 | 5% | | |
| Attorney | Name | Firm C | 350 | 332.5 | 5% | | |
| Attorney | Name | Firm C | 295 | 280.25 | 5% | | |
| Attorney | Name | Firm C | 120 | 114 | 5% | | |
| Attorney | Name | Firm C | 415 | 394.25 | 5% | | |
| Attorney | Name | Firm C | 225 | 213.75 | 5% | | |
| Attorney | Name | Firm C | 125 | 118.75 | 5% | | |
| Attorney | Name | Firm C | 115 | 109.25 | 5% | | |
| Attorney | Name | Firm C | 385 | 365.75 | 5% | | |
| Attorney | Name | Firm C | 120 | 114 | 5% | | |
| Attorney | Name | Firm C | 335 | 318.25 | 5% | | |
| Attorney | Name | Firm C | 340 | 323 | 5% | | |
| Attorney | Name | Firm C | 390 | 370.5 | 5% | | |
| Attorney | Name | Firm C | 120 | 114 | 5% | | |
| Attorney | Name | Firm C | 305 | 289.75 | 5% | | |
| Attorney | Name | Firm C | 205 | 194.75 | 5% | | |
| Attorney | Name | Firm C | 195 | 185.25 | 5% | | |
| Attorney | Name | Firm C | 365 | 346.75 | 5% | | |
| Attorney | Name | Firm C | 180 | 171 | 5% | | |
| Attorney | Name | Firm C | 305 | 289.75 | 5% | | |
| Attorney | Name | Firm C | 405 | 384.75 | 5% | | |
| Attorney | Name | Firm C | 165 | 156.75 | 5% | | |
| Attorney | Name | Firm C | 415 | 394.25 | 5% | | |
| Attorney | Name | Firm C | 305 | 289.75 | 5% | | |
| Attorney | Name | Firm C | 140 | 133 | 5% | | |
| Attorney | Name | Firm C | 215 | 204.25 | 5% | | |
| Attorney | Name | Firm C | 305 | 289.75 | 5% | | |
| Attorney | Name | Firm C | 180 | 171 | 5% | | |
| Attorney | Name | Firm C | 320 | 304 | 5% | | |
| Attorney | Name | Firm C | 230 | 218 | 5% | | |
| Attorney | Name | Firm C | 195 | 185.25 | 5% | | |
| Attorney | Name | Firm C | 215 | 204.25 | 5% | | |
| Attorney | Name | Firm C | 395 | 375.25 | 5% | | |
| Attorney | Name | Firm C | 385 | 365.75 | 5% | | |
| Attorney | Name | Firm C | 240 | 228 | 5% | | |

| LASTNAME | FIRSTNAME | NAME | 2004 Published Rate | 2004 Proposed Rate | Discount | Avg Published Rate | Avg Discounted Rate | |
|----------|-----------|--------|---------------------|--------------------|----------|--------------------|---------------------|--------|
| Attorney | Name | Firm C | 360 | 342 | 5% | | | |
| Attorney | Name | Firm C | 140 | 133 | 5% | | | |
| Attorney | Name | Firm C | 340 | 323 | 5% | | | |
| Attorney | Name | Firm C | 360 | 342 | 5% | | | |
| Attorney | Name | Firm C | 220 | 209 | 5% | | | |
| Attorney | Name | Firm C | 220 | 209 | 5% | | | |
| Attorney | Name | Firm C | 380 | 361 | 5% | | | |
| Attorney | Name | Firm C | 140 | 133 | 5% | | | |
| Attorney | Name | Firm C | 255 | 242.25 | 5% | | | |
| Attorney | Name | Firm C | 260 | 247 | 5% | | | |
| Attorney | Name | Firm C | 310 | 294.5 | 5% | | | |
| Attorney | Name | Firm C | 320 | 304 | 5% | | | |
| Attorney | Name | Firm C | 315 | 299.25 | 5% | | | |
| Attorney | Name | Firm C | 225 | 213.75 | 5% | | | |
| Attorney | Name | Firm C | 350 | 332.5 | 5% | | | |
| Attorney | Name | Firm C | 180 | 171 | 5% | | | |
| Attorney | Name | Firm C | 310 | 294.5 | 5% | | | |
| Attorney | Name | Firm C | 285 | 270.75 | 5% | | | |
| Attorney | Name | Firm C | 220 | 209 | 5% | | | |
| Attorney | Name | Firm C | 150 | 142.5 | 5% | | | |
| Attorney | Name | Firm C | 205 | 194.75 | 5% | | | |
| Attorney | Name | Firm C | 405 | 384.75 | 5% | | | |
| Attorney | Name | Firm C | 310 | 294.5 | 5% | | | |
| Attorney | Name | Firm C | 425 | 403.75 | 5% | | | |
| | | | | | | Total Average | 268.00 | 254.60 |

Firms by Region – for use in RFP

Projected Geographic Distribution of Fees

| | <u>Location</u> | <u>Total Fees</u> | |
|----------------------|--|-------------------|-------------|
| Region 1 | Texas, Arkansas, Missouri, Louisiana | 2,036,797 | 34% |
| Region 2 | Washington, Arizona, California, | 972,895 | 16% |
| Region 3 | Georgia, Mississippi, Alabama, Tennessee, Florida, Kentucky, South Carolina | 1,142,123 | 19% |
| Region 4 | Illinois, Ohio, Minnesota, Indiana | 1,094,401 | 19% |
| Region 5 | New York, Pennsylvania, Massachusetts, New Jersey, Delaware, Virginia, District of Columbia | 259,754 | 4% |
| International | Canada, Mexico | 400,308 | 7% |
| | | <u>5,906,278</u> | 100% |

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Outside Counsel Management
Association of Corporate Counsel updated September 2004

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Corporate legal departments are increasing their use of more formal business methods when selecting outside counsel. Whether part of partnering, convergence, request for proposal, or some other strategic initiative, such processes often encompass identifying qualified law firms, determining criteria to evaluate the firms, and requesting information from invited law firms.

Whatever approach a law department chooses, one of the most important elements for ensuring a successful process is preparation. Failure to sufficiently plan and prepare can lead to an outcome that does not truly address the needs of the company and its legal department. In the worst case, an unplanned process can be a significant waste of time for in-house staff, as well as for the participating law firms.

A number of specific benefits will follow from properly planning all steps of a counsel selection process. First, by providing a structure for the selection process, a plan will allow staff members to use their time efficiently. Second, a plan that articulates goals and describes the criteria to select a law firm is more likely to get the desired results than a plan that leaves matters vague (or no plan at all). Third, a documented process provides a basis to evaluate the chosen firm during the engagement by comparing selection criteria to actual performance. Fourth, a plan that describes retention of outside counsel can be more easily incorporated into the long-term strategic plan of a law department.

Although the purpose of this article is to provide guidance for every stage of the process, we know that many or even most outside counsel hiring decisions are not made on the basis of an extensively planned process. Even so, the principles that we describe in this article also apply to cases in which the selection process is limited. In the end, no matter what the scope of your selection process, the main goal is for in-house counsel to get as much out of the process as possible with a result that is in the best interests of the company. A number of important topics that are relevant to the relationship between in-house counsel and outside law firms but outside the scope of this article include the following: how in-house counsel can

Richard C. Stewart II, Neil N. Rosenbaum, and Kenneth R. Schaefer, "Outside Counsel Selection Process: Preparing for Success" *ACC Docket* 22, no. 1 (January 2004): 44-62. Copyright © 2004 Richard C. Stewart II, Neil N. Rosenbaum, Kenneth R. Schaefer, and the Association of Corporate Counsel. All rights reserved.

OUTSIDE COUNSEL SELECTION PROCESS

Preparing for Success

BY RICHARD C. STEWART II,
NEIL N. ROSENBAUM, AND
KENNETH R. SCHAEFER



Richard C. Stewart II is chief counsel of intellectual property at International Paper Company in Tuxedo, NY. While managing all activities and personnel of the intellectual property group, he is actively involved in developing intellectual property strategies that support the company's business strategies. He is available at Rich.Stewart@ipaper.com.



Neil N. Rosenbaum is proposal operations manager at Akin Gump Strauss Hauer & Feld LLP in Washington, DC. In his previous position, he provided consulting services to Fortune 1000 legal departments, assisting in-house counsel with strategically planning the selection of outside counsel, as well as the actual implementation of counsel selection processes. He is available at rosenbaum@akingump.com.



Kenneth R. Schaefer is engaged in the private practice of intellectual property law in his own one-man firm in Basking Ridge, NJ. He is a contract attorney for International Paper. He has more than 40 years of extensive experience in international patent, copyright, and trademark matters in private practice and with three Fortune 50 U.S. corporations. He is available at kenschaefer@msn.com or Kenneth.Schaefer@ipaper.com.

tell when it is time to hire outside counsel, how to deal with political issues surrounding entrenched relationships with outside counsel, and the challenges in using alternative fee structures.

This article will take you through each stage of a comprehensive selection process. For each stage, we will identify issues and recommend certain courses of action that legal departments should include in their selection planning. In particular, we will address coordinating time and personnel, determining goals and selection criteria, researching and inviting law firms, providing information to firms, requesting information from firms, information review and assessment, and incorporating feedback into the process. Use the checklist on page 48 to chart your progress.

STEP 1: COORDINATE TIME AND PERSONNEL

Typically, selection of outside counsel occurs on an ad hoc basis, with in-house counsel trying to manage the selection process while simultaneously handling a heavy workload. As a result, planning is

likely to suffer. Nonetheless, involving attorneys in the actual planning and implementation of the process is critical, and determining ways to ensure their full and effective participation is a central issue. A related issue is devising ways for legal departments to remove some of the administrative load of the process from in-house attorneys.

Have Management Set the Tone

To ensure that effective planning occurs, senior legal department managers, such as the general counsel or the deputy general counsel, must emphasize the importance of the selection process to the in-house team. The general counsel's expectations for the process should be specific and clear, preferably set out in a written memorandum. Indifference or mixed signals from management may cause others to avoid allocating sufficient time and effort for the process. For example, a general counsel who initiates the process but fails to stay involved may find that junior attorneys in the department have come to believe that they can ignore the process or give it low priority.

Assign Central Organizer to Supervise the Process

Keeping the process running effectively is not easy. We suggest that you assign one person at the company to coordinate all activity and be the central contact. By centralizing contact, accurate information about the process and its progress can be efficiently distributed to in-house lawyers and outside law firms. The coordinator, who can be either an attorney or a legal assistant, can also invite firms to participate, answer questions, and provide clarification during the process. Although the person in this position cannot take over the whole process, he or she can keep the process organized and on track.

Large in-house legal departments may have a practice manager who is able to focus on the process of selecting outside counsel. Alternatively, some legal departments may elect to ask an in-house lawyer to put aside legal work to manage the process. Another option for many busy departments where the process is important but not urgent is to engage an external consultant. Keep in mind that, no matter what method your department uses to reduce the burden of running a selection process, the need for continuing participation and involvement by in-house attorneys remains constant.

CHECKLIST FOR SELECTING OUTSIDE COUNSEL

COORDINATE TIME AND PERSONNEL

- o Determine who should be involved in the process.
- o Determine the extent of decision-making delegation.
- o Appoint a central contact person at the company to coordinate all activity.
- o Set preliminary due dates for tasks and decisions.

DETERMINE GOALS AND CRITERIA

- o Review the needs of the company and the goals of the legal department.
- o Confirm the type and nature of the process to be conducted.
- o Determine the goals of the process.
- o Establish specific evaluation criteria.

RESEARCH AND INVITE FIRMS

- o Determine the number of firms to invite.
- o Perform preprocess research.
- o Determine which firms to invite.

PROVIDE INFORMATION TO FIRMS

- o Write a comprehensive description of the nature and scope of the engagement.
- o Gather relevant business and legal-related information and documents.
- o Gather statistical data relating to the engagement.

REQUEST INFORMATION FROM FIRMS

- o Determine how and in what format firms will provide information.
- o If appropriate, prepare follow-up questions to use after you have read the information from the firms.

PREPARE FOR THE INITIAL REVIEW OF INFORMATION RECEIVED

- o Assign tasks to team members as needed.
- o Create a score sheet based on the established criteria.
- o Schedule a group meeting to discuss initial impressions.
- o Pick a group of finalists.
- o Develop a plan for evaluating the finalists.

INCORPORATE FEEDBACK INTO THE PROCESS

- o Compile comments and conclusions about the firms made during information review and group decision-making steps.
- o Convert comments and conclusions into useful feedback.
- o Communicate feedback to firms.

Decide Who Should Be Involved in the Process

All interested internal parties need to be involved in planning the selection process. Depending on the significance of the legal work involved, the general counsel, a deputy general counsel in charge of a particular practice area, other attorneys, and, in some cases, certain business personnel should be asked to join the planning process.

Lack of involvement by important decision-makers can cause a range of problems because decisions about the process would inevitably be on hold until a senior legal officer of the company could confirm or reverse the decision. Because all decisions would therefore be tentative until confirmed, participating staff, not surprisingly, would likely be unwilling to devote significant time and effort to the task. Additionally, important decision-makers may have certain criteria that they want considered in the process, or they might have other input that can have a material effect on planning.

When the general counsel or a senior manager delegates the selection process for outside counsel to staff attorneys, the delegation must carry an explicit description of the sections of the process that are being delegated and the expectations for its outcome. Unspoken assumptions can be damaging and costly: for example, an attorney who thinks that she has been given the important task of hiring outside counsel but finds her decisions overruled at the end of the process without warning could rightly conclude that she has been treated in a less than collegial manner.

Establish Preliminary Timeframes

Before notifying outside firms, set an internal timeframe for different stages of the process and establish specific due dates for different tasks and decisions. As with any timetable, flexibility is important, but creating preliminary goals for various tasks will help create reasonable expectations and keep the process moving. Modify dates as necessary as the actual process proceeds, but always have at least a working timeline for the completion of tasks.

STEP 2: DETERMINE GOALS AND SELECTION CRITERIA

This step is the first step of the planning stage, and it has several components.

Identify Elements That Affect Planning

The planning for a counsel selection process needs to take into account three main factors:

- Needs of the company and the legal department.
- Nature of the engagement.
- Type of hiring process.

Hiring outside counsel or electing to maintain current outside counsel never takes place in a vacuum. The company and the legal department usually have specific priorities and needs. In-house counsel should identify those needs because they will form the basis for deciding how to deal with outside counsel. The nature of the engagement is also important. For example, is the department hiring a firm for a single piece of litigation or to take over as national coordinating counsel for complex litigation? Generally, the answer to these types of questions will determine the scope and complexity of the process.

Determine the Goals of the Process

When a team is initially brought together, the first planning step is to determine the goals of the process itself. The group needs to be aware of the issues and needs of the law department that has resulted in a decision to hire outside counsel. The group also needs to be aware of any relevant company-wide directives, such as procurement policies, that could affect the process. In a convergence exercise, the goal might be to reduce the number of firms billing more than \$50,000 per year from 50 to 15. Another goal could be to find the firm best suited to manage a volume of matters under a new relationship and fee structure.

Establish Criteria to Evaluate Firms

When the overarching goals have been defined and set, the team should then determine the criteria that it will use to evaluate outside firms. The purpose of establishing such criteria is (1) to ensure that the selected firm meets or exceeds the qualities desired by the legal department and (2) to assist in distinguishing one firm from another. Such standards should be as specific as possible because details will help ensure that the process actually focuses on those factors that are most important to the legal department. General criteria are likely to lead to frustration and disappointment because outside firms competing for the assignment will no doubt respond to broadly worded questions with broadly worded answers.

Selection criteria should be specific enough to allow the legal department to distinguish one firm from all of the others. For example, a company may want a firm with extensive environmental litigation experience. That description alone is not sufficiently focused, however, because a significant number of firms possess such experience. The challenge in developing criteria is to take initial thoughts and add more specific elements, such as actual trial experience with a certain cause of action related to a specific statute in the courts of a particular geographic region.

STEP 3: RESEARCH AND INVITE FIRMS

This next planning step also has several parts.

Determine Number of Firms to Invite

The number of firms to invite will vary depending on the needs of the corporation and the goals of the attorneys running the process. One major issue that can arise is whether all invited firms will receive equal consideration. Here, in-house counsel should be realistic about the amount of time that staff will have to evaluate information provided by the invited firms. Generally, the company should not invite too many or too few law firms. Determining the exact number is important and requires careful consideration.

Decide Whether to Invite Incumbent Firms and/or New Firms

Firms not already doing work for the corporation often have a sense that many of these selection processes are fixed or wired. Although incumbent firms that have already worked for the client may have a familiarity advantage, a corporation that has a genuine interest in learning about other firms needs to make a concerted effort to ensure that incumbent firms do not receive an inappropriate advantage over new firms.

Eliminate Courtesy Invitations

Corporations often include in the selection process firms and attorneys that have existing relationships with members of the legal department. Inviting such firms or attorneys into the process allows in-house counsel to avoid potentially hurting personal relationships with outside counsel. Nevertheless, such a

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- ACC's committees, such as the Law Department Management Committee and the Small Law Departments Committee, are excellent knowledge networks and have listservs to join and other benefits. Contact information for ACC committee chairs appears in each issue of the *ACC Docket*, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com or visit ACCA OnlineSM at www.acca.com/networks/e-commerce.php.
- ACC/Serengeti 2003 "Managing Outside Counsel" Report, available on ACCA OnlineSM at www.acca.com/surveys/partner03 or at www.SerengetiLaw.com.
- AD HOC COMMITTEE ON BILLABLE HOURS, 2001–2002 BILLABLE HOURS REPORT (ABA), at www.abanet.org/careercounsel/billable.html.
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- COMMITTEE ON LAW FIRMS, DOCUMENTING THE ATTORNEY-CLIENT RELATIONSHIP: LAW FIRM POLICIES ON ENGAGEMENT, TERMINATION, AND DECLINATION (ABA 1999), at www.abanet.org.
- Counsel Select, at www.counselselect.net.
- The Devil's Advocate, at www.devilsadvocate.com.
- eLawForum.com, at www.elawforum.com.
- Free Markets, at www.freemarkets.com.
- Hildebrandt International, Inc., at www.hildebrandt.com.
- International Center for Commercial Law, at www.legal500.com.
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- LawPeriscope, at www.lawperiscope.com.
- LexisNexis Martindale-Hubbell, at www.martindale.com.
- *Outside Counsel Management*, an ACC InfoPAK available on ACCA OnlineSM at www.acca.com/infopaks/ocm.html.
- *PLC GLOBAL COUNSEL 3000: Which Lawyer?* 9th ed., at www.practicallaw.com/A19020.
- Ronald F. Pol, "Get More Value from Outside Counsel: Show Them the Flipside," *ACCA Docket* 21, no. 4 (April 2005): 22–39, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/am03/flipside1.php.
- Procuri, at www.procuri.com.
- Thomas L. Sager and Gerard G. Boccuti, "Achieving the Common Goal: DuPont's Performance Metrics," *ACCA Docket* 15, no. 5 (September/October 1997): 12–26, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/so97/dupont.html.
- *The Survey of Client Service Performance for Law Firms: The BTI Client Service A-Team 2005* (The BTI Consulting Group, Inc.), at www.bticonsulting.com/publications.asp.
- Westlaw, at www.westlaw.com.
- *What Clients Pay Law Firms: BTI's Billing Rate Reference for the Legal Services Industry 2003* (The BTI Consulting Group, Inc.), at www.bticonsulting.com/publications.asp.

ON PAPER:

- *Finding the Right Lawyer in the UK and the World*, METRO. CORP. COUNS. (Mar. 2003), interview of Derek Benton.
- REES W. MORRISON, CLIENT SATISFACTION FOR LAW DEPARTMENTS (Corporate Legal Times MAY 2003).
- Kenneth F. Oettle, *Should I Change Horses in Mid-Stream? Deciding Whether to Hire Appellate Counsel*, METRO. CORP. COUNS. (June 2003).
- LARRY SMITH & RICHARD S. LEVICK, INSIDE OUTSIDE—HOW BUSINESSES BUY LEGAL SERVICES (ALM Publishing, 2002).

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practice can be counterproductive, particularly in cases in which these firms and attorneys do not have a genuine chance of obtaining the work because they are unqualified (or just not sufficiently qualified) in the area of expertise required for the matter at hand.

Truly, it is not fair to invite a firm to participate in a process if the in-house department knows ahead of time that the company will reject that firm. Perhaps unaware that the invitation is merely a courtesy, such a firm would likely put substantial time into a response. Even if the outside firm knows that it is not qualified to handle a matter, the relationship partner of the firm would put full effort behind the firm's participation because the firm has been specifically invited to participate by the company. In the end, a courtesy invitation leads to a waste of time and resources by outside counsel.

In a process in which in-house counsel believes that an existing firm is not qualified for a particular engagement, a more direct approach would be for the general counsel to call the relationship attorney at the firm and be honest as to what the company is trying to accomplish and why that firm does not appear to have the capabilities to do the work. The attorney may be disappointed to learn that it is precluded from participating in the process, but he or she will undoubtedly be relieved to know that it has been spared the requirement of participating in a futile process. Furthermore, law firms will value learning how clients view their capabilities.

Preprocess Research

One approach to making a selection process more efficient is to refine the list of invited firms

through preprocess research. Using the developed criteria, you can easily drop some firms from an invitation list. For example, if a company is seeking to retain outside counsel for a possible plaintiff's antitrust litigation and trial experience will be a substantial factor in the ultimate decision, the company could research the number of antitrust trials that various firm have handled in the last five years.

ONE APPROACH TO MAKING A SELECTION PROCESS MORE EFFICIENT IS TO REFINE THE LIST OF INVITED FIRMS THROUGH PREPROCESS RESEARCH. USING THE DEVELOPED CRITERIA, YOU CAN EASILY DROP SOME FIRMS FROM AN INVITATION LIST.

Preprocess research can be done a number of ways. A common initial approach is to call colleagues for recommendations. Using electronic research tools, such as Lexis, Westlaw, legal publications, and internet sites, may be the most efficient way to collect certain information at this early stage in the process. Alternatively, it may be more productive to contact firms directly with specific questions. If you use this method, be very precise about your questions to avoid misinterpretations by the firms.

For example, if you are looking for an outside environmental lawyer, do not ask, "How many of your lawyers do environmental work?" Instead, ask a firm how many of its lawyers do environmental litigation full time or how many of the lawyers have done any environmental work in the last one or three or five years. If you do not want to disclose that litigation or a major transaction is pending, consider using a third-party consultant to contact the firms and conduct the research for you.

STEP 4: PROVIDE INFORMATION TO FIRMS

It is not uncommon for a corporation seeking counsel to contact a few firms and ask each of them to submit some information on their experience in a certain practice area, but then fail to provide any significant information to the firms about the company's situation. This approach actually impedes the company's ability to determine which law firm can

best meet the company's needs. When the legal department can provide detailed information and precise instructions, firms are better able to focus their responses and address the concerns most important to the corporation.

In general, the larger the quantity of relevant information provided to law firms, the better firms are able to address the issues most important to the client corporation. Most attorneys truly want to be responsive to a client's needs. Firms can best achieve that goal when they receive detailed information about the client and the potential engagement.

When considering what kind of information to give the firms, keep in mind that a well-developed description of the nature and scope of the engagement and a description of the factors that will be used to evaluate the firms are important. Not coincidentally, you can draft an effective description of the engagement only if you have put some thought into the process. Internal corporate memoranda, legal or factual research, case/matter documents, and statistical data regarding the historical cost and volume of the company's legal services are also types of relevant information to share. See the sidebar on this page for a list of the historical cost/matter information that you may want to provide to firms.

Outside counsel selection processes vary widely in scope and detail. In order to be fair to the participating firms, all firms should receive the same amount and type of information. When running a process that includes both existing firms and firms not currently being used, take care to make sure that new firms have the same information as incumbents. Although existing firms will likely have an edge over new firms, the integrity of the process depends on providing a level playing field for all firms.

STEP 5: REQUEST INFORMATION FROM FIRMS

In addition to carefully considering the kind of information to provide to firms, in-house counsel should spend time discussing the type of information that the company needs to receive from the law firms. The selection criteria should help determine both content and format of the information that the firms provide to the legal department.

DATA FIELDS FOR COMPILING HISTORICAL LEGAL COST INFORMATION

Below is a list of the types of data that can be collected for an analysis of a corporation's historical litigation costs. The raw data or a statistical summary can be provided to invited law firms as part of a counsel selection process.

- Firm name.
- Matter name.
- Total legal fees.
- Total expenses.
- Type of case/practice area, such as labor/employment, products liability, and so forth.
- Jurisdiction/location of case.
- Date matter opened.
- Date matter closed.
- How was case resolved, such as trial, summary judgment, motion to dismiss, settlement, and so forth?
- Outcome data: settlement amount or adverse verdict amount, if any.

Determine the Type of Information to Request

The questions to ask firms should be as detailed as possible and should derive from the selection criteria. As noted above, general inquiries, such as “send information on your experience,” will likely produce only general responses that will not be helpful in distinguishing one firm from another. Marketing materials from law firms may provide some insight, but such material probably will not be substantive enough for actual decision-making.

The type of information requested can vary significantly depending on the matter and the legal department’s needs. Depending on the engagement, in-house counsel may want to ask for any of the following: the law firm’s strategy and/or approach to the matter, settlement tactics, lessons learned from similar engagements, specific capabilities, historical experience, the names and professional credentials of the attorneys who will perform the work, fees and fee structure, and the firm’s technology capabilities.

Before interviewing potential firms, in-house counsel should take the time to send a letter to the firms describing topics to be covered in the interview. Such a step will ensure that both parties will be as prepared as possible for the meeting: the client, by being compelled to think about the content of the meeting ahead of time, and the firm, by knowing what questions will need to be answered.

Determine Format of Information to Receive from Firms

Requiring firms to provide information in a specific format allows the in-house team to compare proposals efficiently and to identify similar information among the participating firms.

The format of the response has two components: the overall format of the document and the specific format of each section. If there is a round of written information, your legal department may want to consider using a more formal questionnaire-type document. Even if most of the information will be gathered during a personal interview, we recommend that interviewing in-house attorneys write their impressions on a structured form. Organizing and sorting information by using a standard form/format makes the ultimate selection easier. See the form in the sidebar on page 58 as an example.

Determine Amount of Information to Request

Be reasonable about the volume of information that you request from firms. The quantity of requested data should be consistent with the size of the engagement, the importance of the matter, and the sophistication of the work, as well as the ability of the legal department to properly analyze and review the information. The legal department should be sensitive to the amount of time and effort that firms put in to responding to the invitation and ask only for information that is important to the decision-making process.

STEP 6: PREPARE FOR THE INITIAL REVIEW OF INFORMATION RECEIVED

After you have received the requested information from the invited firms, take the following actions to get organized to prepare for decision-making.

Assign Responsibilities to Team Members

Assign specific responsibilities to team members for the evaluation process. No process takes care of itself. The person designated to organize the process should keep the team focused and keep track of the assignments that need to be completed to move the process forward.

Set Aside Sufficient Time to Analyze Information

It is important to devote sufficient time to reviewing and analyzing all information received through written submissions and interviews. Rushing through the process of reading the information does a disservice to both the legal department and the law firms.

Use an Evaluation Score Matrix

We suggest that you create an evaluation score matrix based on the criteria established at the beginning of the process. This evaluation score matrix will allow each of the evaluators to assign a numerical rating to their impressions, providing an efficient way to compare firms. To promote uniformity, you might want to discuss with the evaluators the kinds of information that would normally receive a high mark and what absences or deficits of information should get a low mark. The numbers should not be the only basis for hiring a particular firm, of course, but they can provide a basis for discussing the strengths and weakness of the attorneys and firms.

Hold a Group Feedback Meeting

After everyone in the decision-making group has had a chance to review the initial round of information, schedule a group meeting to discuss first impressions. At this meeting, each person can discuss the scores on his or her evaluation score matrix. After the group has compared each person’s perspective, take time to determine whether new issues have come to light as a result of reviewing the submitted information. Often, if a law firm is truly client-focused in its presentation of information, the firm will teach the company something that it did not know before the process started.

Select a Group of Finalists

Many in-house counsel find it helpful to refrain from selecting a firm after the first evaluation and to pick, instead, a number of finalists for further consideration. The nature of the follow-up process will depend to a certain extent on the number of finalists and the factors that will separate the best firm from the others.

Evaluate Finalist Firms

Once the final group of firms has been chosen, the team should decide the nature and content of the concluding evaluation process. The key to this part of the process is determining the factors that will differentiate the firms. At this point, all of the firms under consideration are qualified to do the work or they would not be finalists (if you are still unsure, perhaps additional information is required). Not surprisingly, it is a common practice to have in-person discussions with attorneys at the finalist firms to assess, among other things, the chemistry between the in-house team and the outside counsel. You may also want to use a revised version of the evaluation score matrix to record impressions.

STEP 7: INCORPORATE FIRM FEEDBACK INTO THE PROCESS

An important but frequently neglected aspect of running an outside counsel selection process is the

USING TABLES FOR INFORMATION GATHERING

The manner in which information is requested from firms can significantly help or hinder your ability to understand and compare each firm’s response. Below are two versions of a question about litigation experience. Decide for yourself which one would be more effective in getting the information that the company needs.

STANDARD FORMAT

Please list your attorneys’ wage and hour class action experience.

TABLE FORMAT

| Partner Name | Wage & Hour Class Action Case Name | Location (state & court) | Jury or Bench Trial | Verdict/ No Verdict | Result (win /loss) |
|--------------|------------------------------------|--------------------------|---------------------|---------------------|--------------------|
| | | | | | |
| | | | | | |
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appropriate treatment of nonselected firms. It is both courteous and appropriate to notify eliminated firms of their status in a timely manner, as well as to provide substantive feedback on the firm's performance during the process. Collecting and providing feedback should not be considered an afterthought that takes place after the final firm has been selected.

IDEALLY, FEEDBACK SHOULD INCLUDE THE STRENGTHS AND WEAKNESSES OF THE NONSELECTED FIRM'S PROPOSAL AND GENERAL OBSERVATIONS ABOUT THE PROCESS; AFTER A FINAL FIRM HAS BEEN SELECTED, FEEDBACK COULD INCLUDE REASONS WHY THAT PARTICULAR FIRM WAS SELECTED.

Importance of Feedback to Firms

When a company provides substantive feedback to firms that it has not selected, the company is telling the firm that its participation in the process is appreciated. From the law firm's perspective, feedback provides important buyer-side information that will help the firm improve its performance in future competitions. For example, a firm may not have figured out how to best market its services and to address perceived weaknesses in the firm's capabilities; feedback will provide this information. Likewise, a firm may not realize that certain aspects of its submissions may create unintended negative impressions for a reader; again, feedback will provide this information.

Substance of the Feedback

Ideally, feedback should include the strengths and weaknesses of the nonselected firm's proposal and general observations about the process; after a final firm has been selected, feedback could include reasons why that particular firm was selected. Specific—but tactful—guidance on ways in which the firm could improve its performance in the future is also helpful.

Effective Feedback Collection and Dissemination

During the counsel selection process, each team member should record specific impressions of the firm's proposals and/or interviews. During team meetings, those comments should be consolidated and further documented. One person should be responsible for compiling this information and ultimately creating a document that constitutes the basis for the feedback to provide to the firms. A senior member of the in-house legal department should give the feedback to the firms; law firms will appreciate feedback when it is delivered by a senior person in the legal department.

Failing to Provide any Feedback

In many outside counsel selection processes, very little or no feedback is provided to the participating law firms. Thoughtful and considerate feedback is the only "reward" that most firms will get from the selection process. Firms are generally not paid to participate in such processes and do not expect to be paid; participating in outside counsel selection processes is part of the cost of doing business. At the same time, the corporation receives value from every firm that participates, often in the form of information about an area of law or a discussion of an approach to a particular matter. Providing feedback is a matter of simple courtesy.

AVOID PERCEPTIONS OF IMPROPRIETY

Some companies intend to run a bona fide process but inadvertently give the impression that the winner has been predetermined and that firms have been invited for the purpose of putting pressure on the preferred firm. A number of different signals can send such a message:

- Failure to maintain communication with the firms.
- Setting an unreasonably short time frame for receiving information.
- Significant delays in the process.
- Failure to provide specific information to the firms as part of the process.
- Failure to provide feedback.
- Failure to interview firms.
- Indifferent or negative attitude of staff in communicating with the firms.

These lapses in the process, which are usually unintentional, can occur because in-house team members

are busy with other tasks. Companies should do their best to avoid these occurrences. If some event arises that might interfere with the process, the best course of action is to keep the lines of communication open with the firms. An additional reason to avoid creating the perception described above is that firms will compete most aggressively when they believe that are participating in an even-handed process and that their credentials will be considered fairly.

ONE COMPANY'S APPROACH TO SELECTING COUNSEL: INTERNATIONAL PAPER'S SEARCH FOR INTERNATIONAL PATENT COUNSEL

In March 2002, one of the authors of this article, Rich Stewart, chief intellectual property counsel at International Paper Company, made a strategic decision to change the manner in which the company handled its Patent Cooperation Treaty ("PCT") and subsequent European Patent Office ("EPO") and national phase filings in Europe. Previously, the company had relied on U.S. firms that prepared U.S. applications to do work in Europe and elsewhere. He believed that he could lower costs, improve the quality of work, and establish a more productive relationship by directly engaging a lead patent firm based in Europe.

Although he knew his goals, he also realized that trying to identify qualified law firms and managing a counsel selection process would be too time-consuming for him and his deputy for this process, Ken Schaefer, a contract lawyer for International Paper and another author of this article.

Fortunately, his company had established a relationship with an outside consulting company that could help with the process. The other author of this article, consultant Neil Rosenbaum, was brought in to assist.

Initial discussions among us included identifying International Paper's goals and the important characteristics for law firms. We established basic criteria: a European-based firm with extensive PCT and EPO patent filing and prosecution experience willing to adhere to a flat fee structure on a per filing basis. The selection process would be a new approach for the company, there were no incumbent firms, and International Paper did not know many firms in the European market.

Based on these initial conversations, research began on patent firms for International Paper to consider. In an attempt to limit problems with language differences (a consideration made more compelling by a problem that International Paper had had with an overseas firm that arose from a language barrier), we limited research to patent firms in the United Kingdom. Research targeted a variety of sources, including printed directories, electronic databases and websites, recommendations from attorneys in private practice and in-house settings, and direct contact with partners at potential firms. The key to the research was finding firms with sufficient expertise, the ability to handle volume filings, and experience in dealing with a patent portfolio of a Fortune 500-sized company.

The research phase also included discussions between the consultant and International Paper about the structure and the timing of the process. This communication resulted in two documents that would be at the center of the process: the request for proposal ("RFP") description and the RFP questionnaire. The RFP description presented information about International Paper, its legal department, its expectations during the engagement, how it viewed the PCT filing and preliminary examination process, and the volume of patent filings during the previous years. The RFP questionnaire requested a wide range of information about the firm, its capabilities and experience, and its proposed method for handling a large volume of patent filings if selected for the engagement. The documents reflected the priorities of International Paper and used a number of tables to allow the legal staff to analyze the law firm responses.

International Paper had decided that the fee arrangement for the engagement would be a flat fee per filing (excluding government fees and translation costs) with the incentive to the firm that it would handle all PCT filings of the company as long as quality remained high. As part of the engagement, the selected law firm would be responsible for setting up an international network of firms in Europe, Latin America, and Asia to handle the national phase filings and prosecution. Thus, the invited firms needed to identify the network of firms, as well as provide translation rates as part of the fee structure information that International Paper requested.

International Paper used the consultant company's website as a central point of communication with the law firms participating in the process. Firms registered on the site and then received access to the RFP documents. As the consultant to International Paper, Neil Rosenbaum handled all of the administrative organization for the process, from inviting the firms to coordinating their responses. During the process, firms asked a number of questions about conflicts and the terms of the engagement. Observations and questions by the law firms provided important substantive information to International Paper, allowing the legal department to improve its PCT filing approach by using the knowledge provided by the overseas law firms.

USING MORE FORMAL BUSINESS METHODS WHEN SELECTING OUTSIDE COUNSEL CAN IMPROVE THE RESULTS OF SUCH PROCESSES, AS WELL AS HELP RAISE THE STATURE OF THE LEGAL DEPARTMENT WITHIN THE CORPORATION.

After having received replies from a number of overseas patent firms, International Paper asked the consultant for a summary of the highlights of the proposals. The multipart fee structure required a customized Excel spreadsheet to allow for a proper comparison of the fee proposals of the law firms. In addition, Neil Rosenbaum provided a summary of the experience of each of the firms and their proposed approaches. The two attorneys on the International Paper side of the team reviewed each of the proposals, as well as the consultant's summary, and, using the criteria established at the beginning of the process, narrowed the field down to five firms.

Focusing on the finalists, Ken Schaefer and Rich Stewart conducted interviews by telephone with each firm to obtain an in-depth understanding of the firms and their responses to important inquiries in the RFP. During these interviews,

the in-house attorneys gained more insight into options and strategies for PCT filings. After the conversations, they narrowed the field down to one firm and had an in-person interview to confirm their initial impression. In the end, International Paper engaged Hammond Suddards Edge (now Hammonds Law), a firm that has principal offices in the UK, branches in other countries, and a Munich-based patent group.

During the process, Neil Rosenbaum assisted in summarizing information to be used for feedback to the participating law firms. After International Paper had retained its firm, Ken Schaefer contacted each of the nonselected finalists to notify them of the company's decision and to express appreciation for their efforts.

The engagement with Hammonds is in place today, and International Paper has been very impressed by the quality and responsiveness of the firm's intellectual property group. Because of its multinational office resources, this firm has also been able to provide advice on patent matters involving several countries.

CONCLUSION

Using more formal business methods when selecting outside counsel can improve the results of such processes, as well as help raise the stature of the legal department within the corporation. By carefully implementing each stage of the process—from identifying qualified law firms to determining evaluation criteria to requesting information from the invited law firms to making a final decision—the legal department team can make the process more professional, more business-oriented, and more likely to achieve desired goals. Even an abbreviated process, such as one that involves only a few firms and is limited to one round of interviews, can benefit significantly from planning and preparation of each step.

Running a firm selection process can be a complex undertaking, and maximizing the company's benefits from such a process requires recognition of the importance of preparation and planning. The time needed to prepare properly is an important investment by the legal department, an investment that increases the likelihood of a more efficient process and a more satisfying result. ❏