Session 808

# Selecting and Managing Your Outside Counsel Resources

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# ACCA Annual Conference Selecting and Managing Your Outside Counsel Resources

#### **Selection Process & Criteria**

1. What is it you want from your outside counsel?

Highest quality Areas of expertise Lowest cost Value Added Services

Fastest response, etc. Location

Ease to work with Name and Reputation, etc. Efficiency Flexibility in billing/payment

Accessibility, amount & flexibility of resources within the firm

Note: While the above are not mutually exclusive, almost NO ONE has it all.

- 1. Prioritize the above list: be honest with yourself and realistic in your expectations!
- 2. How many outside counsel do you wish to employ?

  (All or nothing approach or do you wish to have multiple suppliers)
- 3. Decide the mechanism for measuring/scoring the selection criteria.

Objective evaluation of work product (preferred).

A more subjective evaluation, e.g., beauty contest based on intuition. Word of mouth on the street (first hand and second hand information) Personal experience.

Note: the measurement criteria used in selecting outside counsel should be the same criteria you intend to use in measuring the actual performance of your outside counsel. Does it drive the desired behavior and work product? Will it help you establish your desired goals & objectives?

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4.	<b>Decide</b>	upon	the	nature	of	the	bid?
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Open call - RFQ to the top 20 qualifiers.

By invitation only.

Personal reference only.

Only existing firms used by the company.

5. Send out RFQ or make invitation to bid for the project/litigation. Solicit <u>all</u> the information necessary to evaluate each potential candidate.

6. Evaluate all candidates (Rack 'em & Stack 'em).

Bring back the winning candidates and negotiate on price, metrics, billing arrangements, value added services, etc.

Use Competitive bidding (Iterate using the Lopez or similar approach)

# **Engaging/Retaining Outside Counsel**

### 7. Engagement Letter

What is it?

What should be included in it?

- A. Roles of inside and outside attorneys,
- B. Scope of work,
- C. Process of engagement for new work,
- D. Responsible attorney/Lead attorney,
- E. Persons qualified to handle matters,
- F. Objectives and measurements,
- G. Communication mechanism,
- H. Type of compensation,
- I. Billing,
- J. Other.....

What benefits does it provide?

#### 8. Conflicts Waiver Letter

#### 9. Outside Counsel Guidelines

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# **Managing Outside Counsel**

# 10. Measuring Performance and Financial Management Issues:

- K. Educate the law firm on your business & legal objectives <u>and</u> where and how they add value to the process (and where they may detract from it).
- L. Quantify the value expected from the law firm by establishing metrics and the process for gathering such metrics (Whenever possible, make the metrics and data gathering process part of the normal business process and not a process unto itself.)
- M. Establish a baseline of performance measurements
- N. Agree upon performance criteria and set mutual goals/objectives
- O. Tie compensation and incentives to performance & Reward the performers

#### 11. Day to day Management Issues:

Amount of communication required between inside and out Process for communicating & sharing information Reporting mechanism Access to resources within the company by outside counsel Access to resources within the firm by in-house counsel Matter management system

Note: Use technology to its fullest in all aspects of outside counsel management!!

# 12. How to Break Down Barriers between Inside and Outside Counsel

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# 13. Changing Counsel Mid-Crisis

P. Trouble Signs
Lack of Communication

Lack of Control

Lack of clear, concise exit strategy

- Q. When to "Trust the Force"
- R. Make or Buy Analysis

Costs

**Knowledge Creep** 

Zero-Time

S. Alternative Asset Streams

Backstepping

Backstopping

Team-defending (inside)

Team-defending (outside)

# 14. Tools to Better Manage Outside Counsel

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# XYZ Company Sample Outside Counsel Engagement Letter

	[Date]
Lead Outside Counsel Name Law Firm Name Address	
Re: [Matter Name]	
Dear:	
This letter will confirm to connection with your representation	hat [XYZ Company] has asked you to represent us in the above matter. In we have asked you to [describe scope of the engagement].
or specifically agreed to by me, the subsequent matters in which you ar matter and will be responsible for et be lead inside counsel on this mat which apply to your representation representation responsive to the ne	ding a copy of our Outside Counsel Policy. Except as set forth in this letter, Policy will govern your representation of [XYZ Company] in this matter and all re retained. We have agreed that you will be the lead outside counsel on this neuring adherence to the Policy. I [or name of appropriate inside counsel] will ster. We believe that providing you with a clear statement of the principles of [XYZ Company] will assist us both in providing effective, high quality legal seeds of the company. I urge you to raise any questions you may have about or [other lead inside counsel] at the outset.
[If fixed-fee billing and budgeting a (monthly, quarterly, for all the work approval.] We have agreed that yo	u will be compensated for your work on this matter [insert fee arrangement]. applies, we have agreed that you will prepare [a] task-based budget[s] necessary to complete this assignment, for each phase of this matter) for my u will submit your bills [monthly, quarterly, or at the completion of this matter]. and staff who will work on this matter are:
Name Name	Billing rate Billing rate
I look forward to working abide by the Policy by returning a s	with you on this matter. Please confirm that you have received and agree to igned copy of this letter to me at your earliest convenience.
	Very truly yours,
	XYZ Company Attorney
	Company's Outside Counsel Policy and agree to be governed by that tion of [XYZ Company] and its affiliates.
	Law Firm Name
	By Lead Outside Counsel

### Outside Counsel Policy-Billing Requirements and Disbursement/Expenses Summary

#### I. General Requirements

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

#### II. Billing Requirements

A. <u>Billing Rates</u> (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. <u>Task Based Budgeting and Billing</u> (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.
- Detail of fees by lawyer, paralegal, number of hours by task, description
- Expenses/disbursements detail and charges by category

#### IV. Expenses/Disbursements

#### A. Non-Reimbursable Overhead (VIII.A)

- 6. Computer, e-mail, word processing charges
- 7. Conference room charges, rent
- 8. Supplies
- 9. Library use, staff
- 10. Clerks
- 11. Proofreaders charges
- 12. Meals (except during business travel)
- 13. Taxis and limousines to and from firm office (even at night)
- 14. Support salaries, overtime
- 15. Local telephone calls
- 16. 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)

- Airfare. Coach only fare in U.S., within Europe, Asia, Latin America; business airfare may be 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. <u>Telephone/Facsimile/Photocopying</u> (VIIIE)

- Photocopying: \$0.10 per page or firm's actual annualized per page if lower.
- <u>Telephone/facsimile:</u> No local call charges, toll charges only for outgoing transmissions, no charges for incoming faxes.
- 3. <u>Messenger services</u>: Only actual charges.
- F. <u>Computerized Research</u> (VIII.F) Actual charges only without firm mark-up, admin charges; use XYZ password when provided.

Secretarial time, Word processing (VIII.G) No charges for secretarial, word processing charges, including overtime.

# XYZ Company

# Sample 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.]

[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,
Received and agreed to:	
[Attorney at law firm ]	XYZ COMPANY Attorney
Other client representative ]	

# XYZ Company

# **IP Dashboard**

	Pr	Project		Portfolio Analysis Right To		To Practice Foreign Filing				Surveillance		
	Firefly	Firefly			Jay & Peter 11/09/1999							
			Right To Practice			Patent Application						
Peter	Docket	Number	Screen	Search	Inside Analysis	Outside Opinion	Disclosure to Drafting Attorney	Draft Appl. To Inventor	Inventor Review Returned	Formal Papers Signed	Date Filed	Time Elapsed
PHJ	ABC	1000	N/A	N/A	N/A	N/A	8/1	9/1	10/15	Rob 11/1/99	11/1	92
PHJ	ABC	1001			Jay 10/25/99	12/01/99	8/8	10/1	Jay 10/22/99	11/01/99	11/06/99	90
	Project Po		Portfolio	Portfolio Analysis R		Right To Practice		Foreign Filing Matrix			Surveillance	
Bob	Aurora						Bob + Susan 10/15/99					
RLC	ABC	1005	Not needed				7/1/98	8/1/98	9/1/98	9/15/98	9/16/98	77
RLC	ABC	1006	07/09/99	07/21/99	11/10/99	Bob 4/1/1999	09/01/99	Joe 10/1/99	Joe 11/15/99		11/30/99	90
JGD	ABC	1007	07/09/99	07/21/99	11/10/99	Bob 4/1/1999	10/1	11/01/99	11/15/99		12/29/99	89
		Work is p	resently on-go	oing	Item has be	en Completed	t	Item is Past	Due			

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#### 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:

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

We recognize that it is difficult at an early stage in litigation to project accurately what will be required for discovery, motion practice, trial preparation and trial, but we ask that you take about one hour to organize your thoughts and reflect them in the defense plan and budget. The plan should be modified as the case progresses but it should reflect your best judgment as of the time it is prepared. This plan should also include the name, status (e.g. partner, associate, paralegal) and hourly billing for each individual assigned to the case.

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 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 judgement 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 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 judgement. 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.

#### 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:

- the name or initials of the attorney handling the matter;
- the date of service and time allocated to the service, a full description of the service rendered and the billing rate of the attorney;
- disbursements in amounts less than \$750.00 should be paid by the firm and included on monthly attorney bills and
- additional expense items should be specifically detailed as to date, purpose/payee, amount,
   etc.

When reviewing the statement before it is sent, please insure that a copy of all-important briefings, correspondence, and court filings which the statement covers have been sent to us. If obvious questions are raised by an invoice, such as legal research on a basic point or involvement

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., experts 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.

Name & Title		
Date		

#### MEDIATION, ARBITRATION AND TRIAL PLAN

Sixty (60) days before any scheduled mediation, arbitration or trial, outside counsel should submit a written arbitration, mediation or trial plan to the managing attorney for discussion and

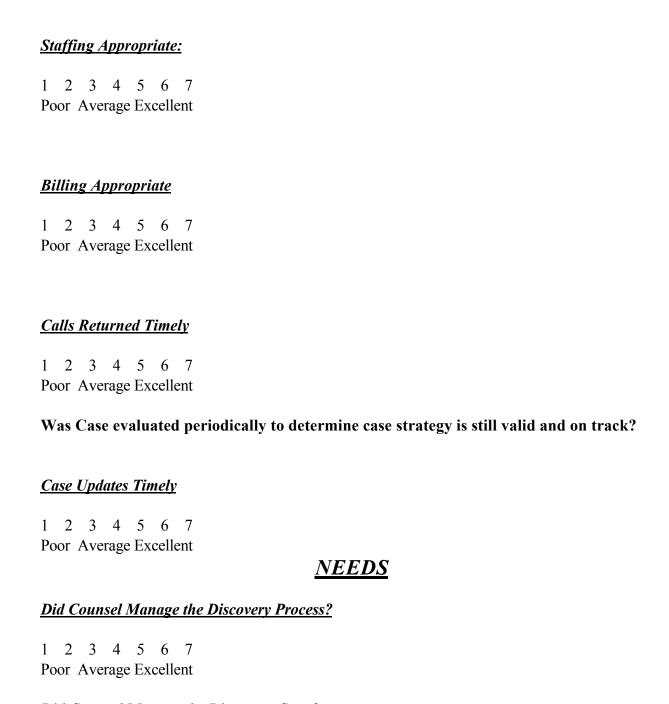
adoption. The plan should address the following issues:

- Status of litigation / updated defense plan;
- Budget Update (as appropriate)
- Plaintiff's case:
  - Anticipated basic theory for the fact finder;
  - Principal trial strategy;
  - The most significant points plaintiff will try to make at trial;
  - Rational plaintiff's choices of strategies;
  - The plaintiff's likely evidence including -
  - Fact witnesses, expert witnesses, and key documents;
  - What plaintiff will try to prove with each;
  - Strengths and weaknesses of each;
- Sedgwick's planned approach to each (e.g., cross examination strategy, evidentiary motions, pretrial motions) plaintiff's likely pretrial motions, rationale for each and our strategy for addressing. In jury cases please set forth plaintiff's likely jury selection strategy.
- Sedgwick's case:
  - Basic theory of case for the fact finder;
  - Proposed principal trial strategy;
  - Outline of closing argument, including the most significant points we should make at trial;
  - Rationale for choosing the strategies;
  - Proposed evidence (fact witnesses, expert witnesses, and key documents);
  - Description of each witnesses' testimony;
  - Strengths and weaknesses of each;
- Cross examination strategy, evidentiary motions, pretrial motions and our intended strategy for this approach. Please recommend the rationale for each pretrial motion and the plaintiff's anticipated response. In jury cases, recommend a jury/strategy and other issues.
- Set forth the anticipated jury instructions.
- Recommendations for who should represent.
- Sedgwick at trial, and rationale supporting these recommendations.

<u>KNOWLEDGE FORM</u> (To be submitted within 30 days of close of case)

Date:	
Case #:	Case Name:
Outside Counsel:	
Law Firm:	
Lead Counsel:	
Address:	
Date Case Resolved:	
Reason for Resolution:	
Indemnity Paid:	
Costs Paid:	

# **OUTSIDE COUNSEL REPORT CARD**



# **Did Counsel Manage the Discovery Costs?**

1 2 3 4 5 6 7 Poor Average Excellent

<u>Did Counsel Provide I</u>	Defense Plan within 30 days of assignment?
1 2 3 4 5 6 Poor Average Excellen	
Any Shift in Trial Co	ounsel's View of Case Late in the Game?
Yes(explain):	
- -	
No:	
Any Concern About	Counsel's Trial Position?
Yes (explain):	
-	
No.:	
What Did We Learn?	<u>IN HOUSE REPORT CARD</u>
What Did You Learn'	?
Ways to Improve the	Legal Process:
Ways to Improve The	e Business Process:

# Selecting and Managing Your Outside Counsel Resources

Suggested Resources:

<u>Effective Litigation Management; Litigation by In-House Counsel;</u> Robert O. Lewers, American Corporate Counsel Association (1991).

<u>Evaluating Corporate Counsel Performance</u>; American Corporate Counsel Association (1990)

Representing the Corporate Client: Designs for Quality; Richard H. Weise; Prentice Hall Law & Business (1996)

See Also the INFO PAKS created by the American Corporate Counsel Association