

031 Selecting Outside Counsel: Ask the Right Questions, Get the Right Results

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Faculty Biographies

Michael R. Booden

Michael R. Booden is the senior associate general counsel to the American Bar Association in Chicago. His responsibilities include providing legal counsel to the organization in a variety of substantive areas, including employment law, litigation, technology agreements, ecommerce, intellectual property, and tax.

Prior to joining the ABA, Mr. Booden was general counsel to the Finch University of Health Sciences/The Chicago Medical School in North Chicago. In addition to providing counsel and advice to all levels of management in many areas of the law, Mr. Booden served as either first or second chair in a number of trials in state and federal court. He also authored several appellate briefs and represented his client before state and federal appellate tribunals. Upon graduation from law school, Mr. Booden was employed as a judicial clerk to Justice John J. Stamos, who formerly served on the Illinois Appellate and Illinois Supreme Court.

He is secretary to ACCA's Litigation Committee and serves ACCA's Chicago Chapter as a board member, treasurer, and coordinator of pro bono activities. He is also chair of the Corporate Law Committee of the Chicago Bar Association.

Mr. Booden received his BS from Northern Illinois University and his JD from John Marshall Law School.

Garen E. Dodge

Garen E. Dodge is a shareholder in Littler Mendelson's Washington, DC office. He advises and represents corporations and other entities in a wide variety of employment, wage and hour, OSHA, and discrimination matters, including the Americans with Disabilities Act, the Fair Labor Standards Act and the Civil Rights Act of 1991.

He has written extensively on federal and state drug and alcohol testing requirements, and regularly assists companies in establishing workplace substance abuse programs. Mr. Dodge appears frequently before employer groups regarding employment issues, and has appeared on radio and television programs. He has been awarded "av" status, Martindale-Hubbell's highest rating for attorneys.

Mr. Dodge is a member of the editorial board of *Employment Testing*, a publication that monitors developments regarding drugs, alcohol and AIDS, and has contributed numerous articles to their biweekly report.

Mr. Dodge graduated *summa cum laude* from the University of Wisconsin-Green Bay. He earned his law degree from the College of William and Mary. After law school, he worked for an appeals judge in the U.S. Department of Labor.

Matthew E. Horsley

Matthew E. Horsley is senior vice president and general counsel for SurfControl, Inc. in Scotts Valley, California. The legal matters that he directs include general contract negotiation, IP licensing, mergers and acquisitions, and management of outside counsel.

Before joining SurfControl, Mr. Horsley was an associate in the Palo Alto office of Gray Cary Ware & Freidenrich LLP, a law firm specializing in the representation of high technology companies. While at Gray Cary, he was a member of the firm's Corporate and Securities Group and represented companies in connection with public offerings, venture capital financing, and mergers and acquisitions.

Mr. Horsley holds a BA from the University of Southern California, an MA from Georgetown University, and a JD from Northwestern University.

Lilliemae I. Stephens

Lilliemae I. Stephens is general counsel and senior vice president of legal and business affairs for bebe stores, inc. in Brisbane, California. Her responsibilities include providing legal counsel to the corporation, overseeing the compliance with Securities and Exchange Commission and Nasdaq reporting requirements, as well as managing other areas such as trademarks, licensing, employee and customer litigation, and contract matters.

Prior to joining bebe, Ms. Stephens served as a corporate and securities associate for Gray Cary Ware & Freidenrich, LLP in Palo Alto, California. While at Gray Cary, she provided counsel to various companies related to merger transactions, public offerings, and corporate governance.

She currently serves as a charter member for Stanford Law Society of Silicon Valley, and is the alumni fund raiser and delegate for the Stanford Law Fund Committee.

Ms. Stephens received a BA from University of California, Santa Cruz and is a graduate of Stanford Law School.

ACCA ANNUAL MEETING
OCTOBER 15, 2001

**SELECTING OUTSIDE COUNSEL:
ASK THE RIGHT QUESTIONS, GET THE RIGHT RESULTS**

I. Introductions

- a. Purpose of seminar
- b. Issues we will cover
- c. Issues we will not cover
- d. Roadmap and introduction of vignette format

II. Rate Your Objectives

- a. Fight because we did nothing wrong
- b. Establish precedence
- c. Preserve goodwill with employees/customers/vendors
- d. Quick resolution
- e. Minimize attorneys' fees
- f. Avoid drain on in-house resources

III. Acquire and Assess Information About Potential Attorneys/Firms

- a. Requests for Proposals (RFP's)
- b. Requests for Qualifications (RFQ's)
- c. **Assessing responses**
- d. One law firm's perspective of the process

IV. Assess Requisite Skills During Pitch

Brief the attorney on the basic facts of the case.

- a. **Analysis**— Ask for initial thoughts on the matter. The attorney's off-the-cuff ability to analyze the limited information and formulate a fact-finding strategy will give you a sense of the attorney's ability to spot issues and gather evidence.
- b. **Knowledge of law**—The attorney's ability to walk you through the analysis of the facts and apply the relevant law will let you know whether the attorney has expertise in this field.
- c. **Knowledge of recent settlements**—If you would like to pursue the possibility of settlement, inquire whether the attorney knows the market rate for similar cases.
- d. **Listening and questioning**—The attorney's follow-up questions will demonstrate both listening skills and an ability to extract evidence out of witnesses, which are essential skills if you believe that depositions and/or trial time are imminent.
- e. **Persuasion and Style**—Consider taking an excessively strong position during the discussion to assess the attorney's means of taking a contrary stance and/or steering you back into the right direction. If the attorney tries to be overly accommodating or allows you to continue in a misguided direction, the attorney may be unfamiliar with the law or unwilling to productively handle conflict. This exercise also will

demonstrate the attorney's ability to convey thoughts and be persuasive, as will be necessary to persuade the fact finder.

V. Vignettes

- a. Case Study #1
- b. Case Study #2
- c. Case Study #3
- d. Case Study #4

VI. Questions and Answers

The following letter is a sample Request for Qualifications (RFQ):

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.
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).

5. *Responses Submitted.* Responses to this RFQ should be in written form only. Responses should be “stand-alone”— that is, they should be complete and self-contained and *not* require reference to other documents or sources in order to be complete. Responses should mirror, to the greatest extent possible, the format and requirements of the RFQ and should *not* include elaborate or unnecessarily lengthy material.
6. *Qualifications to Submit.*
 - a. *Experience.* Describe the nature of your practice and your experience in intellectual property litigation. If you practice with a firm, describe your firm's history, culture, management structure, specialty areas and unique qualifications. In particular, describe your firm's experience in litigating intellectual property matters. Your description must be limited to matters on which current firm members and associates worked. As to each of these matters, please list the firm members and associates who worked on them. Please describe the track record, court, jury trial and appellate experience of yourself and these individuals, with particular detail regarding those key attorneys whom you anticipate being involved in matters on behalf of the ABA.
 - b. *Resumes.* We request your resume, and if you practice with a firm, the resumes of your key attorneys and other firm employees who you would anticipate being involved in the ABA's intellectual property litigation. Each resume should be limited to one page and should include only those experiences and qualifications relevant to the subject matter of this RFQ.
 - c. *Membership and Involvement in ABA.* Please include whether you are a member of the ABA, if you practice with a firm and whether the firm is a member of the ABA's firm billing program. If your firm does not participate in the firm billing program, list those attorneys who are members of the ABA. Also, describe the extent of involvement of you or your firm's attorneys in ABA volunteer activities, leadership and/or governance.
 - d. *Hourly Rates.* For all persons whose resumes are submitted, please include lists of their current hourly billing rates.
 - e. *Administrative Processes.* Describe your practice in timekeeping on an hourly basis (e.g. minimum charge, segments of time billed--tenths of an hour or one quarter of an hour), notification of changes in billing rates, net terms of bills issued, etc.
 - f. *Other Fee Bases.* Please state whether you or your firm accepts engagements on bases other than hourly and if so, briefly describe

each of them. In addition, please describe your recent experience with fee bases other than hourly.

- g. *Other Charges.* Please list and give current rates for charges other than those based on time billed to clients on litigation matters, e.g. facsimiles, copying, court filing charges, computer research, secretarial overtime, word processing.
 - h. *References.* Please include the name, titles, addresses and phone numbers of at least three (3) client references. References should be limited to clients who have retained you or your firm to represent them in intellectual property litigation.
 - i. *Conflicts of Interest.* To the extent they can be foreseen from the information in this RFQ, please indicate any actual or potential conflicts of interest that might arise from you and/or your firm's representation of the ABA in one or more of the matters listed.
 - j. *Firm Contacts.* Please include in your submission to the ABA the names, title and phone numbers of the primary *and* backup contacts in your firm for the purposes of this RFQ and evaluation.
7. *Questions.* If you have any questions about this RFQ or how to respond to it, please call or write me. If your question illuminates a significant deficiency in the RFQ, our response to it will be sent to all attorneys receiving the RFQ.

Sincerely,

Michael R. Booden

cc: Darryl L. DePriest

The following document may be use to evaluate performance by outside counsel.

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

1. Legal Knowledge/Skill/Effort Results (Overall)

	This Evaluation	Last Evaluation
Results		
Legal knowledge/expertise		
Quality of service/advice/counsel		
Professionalism		

2. Matter/Case Management and Administration (Overall)

	This Evaluation	Last Evaluation
Efficient staffing of cases		
Cost consciousness and control; working within budget		
Cooperation with other legal services providers		
Organization and planning		
Timeliness of work product		

3. Use of Systems, Process and Technology

	This Evaluation	Last Evaluation
Timely and detailed case plans and budgets		
Timely and Detailed invoices		
Uses of e-mail for communication		
Sensitivity to cost issues – expenditures, experts, travel, lodging, service providers		

4. Compliance with Set Goals and Procedures (Overall)

	This Evaluation	Last Evaluation
Timely delivery of documents		
Timely delivery of legal research studies and memoranda		
Securing approval when appropriate or required		
Prompt notice of significant changes or events		

5. Teamwork (Overall)

	This Evaluation	Last Evaluation
With other outside counsel		
With client's in-house counsel		
With other legal service providers		
With outside counsel		

6. Cost Consciousness and Control (Overall)

	This Evaluation	Last Evaluation
Understanding client position re legal expenses		
Willingness to consider the/use alternative billing arrangements, rate discounts and freezes		
Performance re budget and plans		

The following document is used internally by Littler Mendelson when an attorney receives a Request for Proposal from a current or prospective client.

PUTTING TOGETHER A SUCCESSFUL PROPOSAL

Garen E. Dodge, Esq.
Washington D.C. 20005.3914
gdodge@littler.com

Prepared by:
Client Relations & Marketing
LITTLER MENDELSON, P.C.

A. THE PROCESS

1. Call Littler's In-House Proposal Manager!
2. Evaluation
3. Information Gathering
4. Writing/Editing/Proofreading
5. Production/Graphic Design Assistance
6. Debriefing

B. EVALUATION

1. Conflicts Check
 - Have we represented or been adverse to the issuer?
 - Has another Littler attorney worked with them?
2. Feasibility
 - Littler*
 - Do we have expertise in this area?
 - Do we want to represent them?
 - Can we price our services cost-effectively?
 - Do we have the resources (staffing, technology)?
 - Client/Prospect*
 - Who else is receiving the RFP, and how well qualified are they?
 - Is it a legitimate RFP?
3. Timeline
 - To-Do Checklist with deadlines for major areas, items with lead times
 - Assignment of responsibilities
 - Special delivery requirements (electronic, number of hard copies)

4. Team Members
 - Where will work be done?
 - Prospect's legal and other needs?
 - Pre-existing relationships/contacts with Littler attorneys?
 - What is most cost-effective? (use of paralegals, etc.)
 - Respond to the client!

C. INFORMATION GATHERING (about the Request and the Requester)

1. Requester

Why?

- RFP may not include all information you need to respond
- Information you may need to gather: service issues, delivery of legal services, fee sensitivity, background on decision makers, who else is responding
- Your competitors are doing it!

How?

- Some RFPs allow in-person or written questions
- Ask for an information interview to determine needs
- Questions for Prospect/Client Development

2. Other Sources

- Accountants
- Other attorneys
- Employees
- Board of Directors
- School Boards

3. Internet and Other Data Sources

What?

- Annual reports, product information, geographic locations, Board/key employees, mission statements, employee statistics, job openings, press releases, key developments, litigation

Where?

- Prospect's website, other business and news websites, other websites (Client Relations)
- Lexis/Nexis (Littler's Library)

4. Internal Data

- Proposal Team (tailored biographies, anecdotal information)
- Other attorneys' experience with company/industry
- Proposal data base (Client Relations)
- Accounting data
- Diversity, other statistics (Human Resources)

5. Winning Strategy
 - Key issues of concern to prospect
 - Littler's "unique competitive advantage"

D. WRITING/EDITING/PROOFREADING

1. Process
 - It's a collaboration
2. Key Elements
 - Cover Letter
 - Executive Summary
 - Approach to meeting client's needs
 - Tailored benefits of using Littler Mendelson (include success stories)
 - Team members & their relevant experience
 - (include success stories)
 - Practice group and firm overviews
 - Fees and costs
 - References (if appropriate)
 - Supporting materials (Photobiographies, reprints, articles, work product, Employer invitation)
 - The "next step"
3. Format
 - Many options:
 - Formal proposal
 - Proposal letter
 - Package of client development materials
 - Informal meeting
 - PowerPoint presentation
4. Proofreading and Formatting Checklist

E. PRODUCTION/GRAPHIC DESIGN ASSISTANCE

1. Production Options

Client Relations

- Higher stakes
- Higher production values
- Longer lead times

Littler Offices

- More informal
- Shorter lead time

2. Production Checklist
 - Color Copying
 - Paper / Hewlett Packard Bright White Inkjet Paper (24 lb)
 - Cover
 - Tabs
 - Binding / Black Coil Binding, clear front, black back
3. Graphic Support for Covers (Client Relations)

F. DEBRIEFING

1. Internal – team members
2. External
 - If not part of process, request it
3. What you will learn:
 - How Littler compares to the competition
 - How we are perceived in the market
 - Strengths and weaknesses
 - How to improve!

NEW MATTER OBJECTIVES AND COUNSEL WORKSHEET

In-House Attorney's Name _____

Matter/Case _____

Lead Outside Attorney's Name _____

Date of Pitch _____

Law Firm _____

Pitch Meeting Attendants _____

Contact Information (phone) _____

Proposed Case Team _____

(fax) _____

(e-mail) _____

Referral from _____

Outcome of Pitch _____

RANKING	OBJECTIVES	CASE SPECIFIC CONSIDERATIONS	REQUISITE SKILLS	APPLICATION OF SKILLS	✓
	Fight because we did nothing wrong		Analysis of issues	What are the issues? Seeing the big picture	
	Establish precedence		Knowledge of law	Why reinvent the wheel? Identifying/applying relevant law accurately	
	Preserve goodwill with employees/customers / vendor		Knowledge of recent settlements	Know the market rate for similar cases	
	Quick resolution		Listening	Ability to extract evidence out of witnesses	
	Minimize attorneys' fees		Persuasion	Convincing fact finder Negotiation ability	
	Avoid drain on in-house resources		Style	Big Bully vs. Gentle Giant Client sensitivities	

CASE STUDY #1

Michael Brilliant, an in-house litigator at a Fortune 100 company, receives a promotion (in title only) and inherits a stack of cases from his predecessor, Joe Golfer. Among the stack of cases, one case involves a \$200,000 sales commission dispute. Unknown to the General Counsel, the attorney hired by Golfer, Peter Excessive of Large Firm USA, has already billed \$180,000. Discovery has been completed and Excessive has asked Brilliant for permission to go forward with filing a motion for summary judgment. Brilliant is leery of allowing Excessive to continue handling this file given the large and disproportionate fees that have already been incurred. Having recently transferred from another jurisdiction, Brilliant does not know Excessive but has been told by others that he is an antagonistic, hard-nosed litigator who always disagrees with opposing counsel regardless of the issue; that rather than turning over the “right” stones, Excessive turns over every stone. Brilliant also has been informed that Excessive golfs once a month with the GC at the country club where they both belong. What should Brilliant do?

CASE STUDY #2

You are the General Counsel of a publicly traded software company in California with resellers and business customers throughout the world. Customer 1 (a small, struggling software company/reseller in New Hampshire with which your company rarely does business) purchased 20 units of software at a discounted price from your company. Customer 1 purportedly made the purchase to integrate your company's software with customer 1's own product on a trial basis.

Soon thereafter, customer 2 (a regular and important business customer from New York that purchases approximately 300 units of software per month from your company at standard prices) stopped purchasing your software for three consecutive months and then renewed its purchasing pattern.

After a preliminary investigation, it is apparent that customer 1 has illegally copied your software and resold it to customer 2 during the three month period.

After discussions over a period of time with customer 1, customer 1 will not admit to any wrongdoing, but customer 1 is willing to settle for what would have been its cost for the purchase of the allegedly copied software (\$30,000). The state law that will apply to the contract at issue provides for treble damages in cases like this and you believe that a court will base the damages on your company's lost profit (over \$300,000). However, customer 1 appears to be struggling financially and barely hanging on and you know that even if you are able to win at trial you may not be able to collect anything.

You and your CEO decide that you should go after customer 1 for everything you can get because you don't want any customer, potential customer or competitor to think that your company will be anything less than extremely aggressive with anyone who makes illegal use of your software.

CASE STUDY #3

You are the Assistant General Counsel at a large company with operations in 35 states. An employee in New York seems to have mastered the art of making a nuisance of himself by filing multiple complaints against your company in many forums. You thought you were rid of the problems when you fired him for abusing your company's absentee policy, and for failing to comply with production standards clearly outlined in his job description.

To date, your top notch human resources department has earned its stripes by successfully defending administrative charges filed by this individual with the state workers compensation agency, the New York Division of Human Rights, the federal Equal Employment Opportunity Commission, as well as retaliation claims filed under Occupational Safety and Health laws and multiple other complaints. This time, however, this employee has gone too far - he has hired an attorney, received a "right to sue" letter from the EEOC, and has now filed a lawsuit in federal court. You cannot believe your eyes as you glance over the complaint that has just been received in your office. He is claiming that your company has violated the Americans with Disabilities Act by not "accommodating" a "disability" that you knew nothing about. Moreover, he has claimed that you have retaliated against him for holding him to the same absentee and production standards required of everyone else in the company.

"This has gone too far" you say to your administrative assistant. "We have done absolutely nothing wrong." You think to yourself "the heck with the cost, I am simply going to do the 'right thing' and defend this case vigorously." But suddenly, you begin to think to yourself: "Do I have the proper perspective? Should I use the defense of this case to send the strong message that we will take no more of this extortion?"

CASE STUDY #4

You are the General Counsel of a publicly traded women's clothing retail company that operates over 200 stores in the United States. Your company's trade name is well recognized all across the country as one of the leading fashion retailers. Since the company's inception and through its rapid growth, your CEO has made a concerted effort to be a socially responsible leader in the community. Being a female corporate executive who worked her way up, one of your CEO's hot issues has been promoting a harassment free workplace. With such a successful company, she has been able to give real meaning to such goals during the past several years.

One day you receive a letter from Lisa Mills' attorney. Ms. Mills worked as a sales specialist at one of your mall stores for a year and was recently terminated. The letter claims that Ms. Mills was sexually harassed by her male store manager, Chris Hall. According to her vague allegations, Mr. Hall asked Ms. Mills out to dinner on several occasions, and Ms. Mills declined. She also claims that Mr. Hall had told her she looked "hot" on several occasions, but does not mention when or under what circumstances. She claims she was fired from the company because she continually turned down Mr. Hall's sexual advances. She is demanding \$10,000 in damages for wrongful discharge and sexual harassment.

You begin your initial investigation and find that Mr. Hall denies all allegations of misconduct. He explains that Ms. Mills' has had a horrible track record during the past several months. Her cash drawer had been short 3 times in the last 2 months. The first time her cash drawer was short, she was missing \$92. The second time her cash drawer was short \$143, and the most recent time, she was missing \$139.

In addition, Ms. Mills always had problems coming to work on time, if she comes at all. She called in "sick" 5 times within the last 2 months and they were all for Saturday or Sunday morning shifts. At least twice a month, Ms. Mills came to work about 30 minutes after her scheduled shift had begun.

Mr. Hall gave Ms. Mills several verbal and written warnings. He says he has tried to counsel and train her so that she may become an asset for the company. However, after realizing that she had continually proved herself as an irresponsible employee, Mr. Hall decided to terminate her employment with the company.

You are confident that Mr. Hall is telling the more accurate version of the facts and that both of her claims are totally frivolous and will ultimately be dismissed. However, if Ms. Mills takes these claims to the public, your company will be sure to get two or three days of publicity that is bound to give your company an undeserved negative reputation.

**ACCA ANNUAL MEETING
OCTOBER 15, 2001**

**SELECTING OUTSIDE COUNSEL:
ASK THE RIGHT QUESTIONS, GET THE RIGHT RESULTS**

The following contains selected excerpts from the Report on Selection of Outside Counsel by Corporations, written by the Greater New York Chapter of the American Corporate Counsel Association on July 15, 1997.

Introduction

The process of selection of outside counsel is crucial to the success or failure of legal services performed by law firms for corporations. At no time during an engagement is the corporation's bargaining position and ability to mold the legal services greater than at the moment the corporation is about to select outside counsel. At the moment of selection, the corporation frequently may specify the particular lawyers within a law firm who will work on the matter, the billing method and billing rates, the working relationship between inside and outside counsel, as well as numerous other important components of a legal representation.

It is crucial that the corporation employ a rational and objective process to define the needs of each engagement and then use an additional objective process to determine the type of lawyer who will do the best work on that matter. We further believe that a corporation should use a third objective process to identify the law firm that will be best suited to do the work. This third process will include identification of specific individuals who will staff the corporation's matters. In general, corporations should select the lawyer and not the law firm. However, even the best lawyer cannot produce optimum results if his or her law firm does not have the necessary resources for the engagement. Despite our belief in the desirability of objective selection processes, we recognize that some of the criteria used for the selection must be subjective, such as the ability to work well with the client.

Differences between Current Approaches

Corporations vary greatly in their current approaches to selection of outside counsel. Some corporations believe that it is important to develop strong relationships with a small number of law firms and then to give all of the corporation's legal work to those firms. The theory underlying this approach is that the law firm's substantial knowledge of the client's business and personnel will result in good quality and efficient work.

Another approach is to place greater emphasis on the specific experience and expertise an attorney and his or her law firm has in handling a particular type of matter and less on the extent of the attorney and law firm's prior experience in doing work for the corporation. Yet another approach is to select the law firm which appears to be willing to do the work for the lowest total cost or to bear some of the risk. In some circumstances, this approach may result in use of alternative billing methods such as contingent fees, capped fees, or flat fees. In other circumstances, where the corporation uses hourly billing rates, some corporations may select the law firm willing to do the work for the lowest hourly billing rate. Each corporation must decide

which combination of these and other factors will work best for it in selecting outside counsel for a particular engagement.

No particular approach is appropriate for all corporations and for all engagements. We believe, however, that the experience and expertise of the outside counsel will always be relevant. The more complex, specialized, and unusual the subject matter of the engagement, the more likely it is that specific experience and expertise will produce a better result. It is important that any corporation selecting counsel to handle a particular matter consider carefully the nature of the matter and the types of legal skills, which will produce the best result. The corporation can then apply a more thorough cost/benefit analysis to the candidates for the work and make a more informed decision.

Analysis of Reasons for Selecting Outside Counsel

The rationale for retention of outside counsel may have significant impact on how the selection process should unfold. One principal reason for selecting outside counsel is to provide experience and expertise in a specialized area in which the inside counsel does not have sufficient mastery and which the corporation does not wish to acquire permanently by hiring a full-time employee. Other reasons are to provide additional legal and support service capacities on a temporary basis until the demands of a particular legal problem are satisfied; to permit the corporation to utilize technological capabilities developed by a law firm to achieve efficiencies; to shift part of the risk of a loss from the corporation to a law firm (for example, a law firm which agrees to handle a matter on a contingent fee basis); to accommodate the requirement of a lending institution or underwriter; to benefit from the reputation and prestige of an outside counsel (such as in a high profile investigation); to give support to, and to shoulder some of the risk and responsibility with inside counsel for matters in which inside counsel are concerned about the consequences of a negative outcome.

Definition of Objectives and of Optimal Results of an Engagement

A corporation should establish overall business goals and priorities for an engagement prior to selecting counsel. The corporation should also conduct a preliminary cost-benefit analysis. These preliminary assessments can help determine which attorney and law firm are retained and the appropriate level and configuration of staffing by the law firm.

A corporation that responds to the presentation of a legal problem by simply calling its regular outside counsel and giving the matter to them is not optimizing the use and preservation of its resources. Instead, corporations should invest time in preliminary planning before selecting counsel. Such investments will generally pay substantial dividends later in the engagement and the outcome.

The corporation should determine the best possible result at the optimal cost and should select the lawyer best qualified to achieve that result at that cost. The approach and result desired are fundamental to the selection process. For example, in litigation, a corporation may be interested in an early settlement or in using alternative dispute resolution methods and should, therefore, select outside counsel who the corporation concludes are well qualified for those approaches. In another case, the same corporation may be concerned about the possible effect of a quick settlement on other pending cases or whether a quick settlement will encourage other cases. In

such a case, the corporation should be more interested in counsel skilled in litigation than in settling cases and may be particularly interested in counsel familiar with recurring litigation. Under these circumstances, the corporation may decide to select a law firm that is well known for its thorough and aggressive defense of litigation to send a message to other plaintiffs and their counsel that they should not plan on quick and easy settlements.

A corporation may also be concerned about adverse publicity and may therefore want a law firm that has extensive crisis management experience. There may also be an important business principle involved in the dispute so that the amount of the claim is not as important as the principle.

There may be other considerations. For example, in certain matters involving product liability, negligence, or employment claims, the corporation may eliminate firms that represent plaintiffs in those areas of the law. In addition, one benefit of an ongoing relationship with at least one law firm is to have available sufficient personnel who are knowledgeable about the corporation to enable them to jump into an emergency ready to go.

By identifying the corporation's objectives at the outset of the matter, the corporation can improve its selection process and increase the likelihood of a desired outcome.

Selection Strategies which Increase the Cost-Effectiveness of Legal Services

Corporations considering selection of outside counsel should employ strategies designed to enhance the cost-effectiveness of the legal services they receive. These strategies include conducting cost-benefit and risk-benefit analyses of the engagement. Corporations should use the results of these processes in determining the type of law firm and the skills of the particular lawyers in the firm which are best suited to obtaining a cost-effective result.

Analyses of this nature should include evaluation of the strengths and weaknesses of the corporation's position, an assessment of the most likely outcome, and an attempt to determine the extent to which that outcome might be improved by selecting more sophisticated or experienced counsel as well as the cost of doing so. For litigation matters, a corporation can search compilations of jury verdicts for lawsuits involving similar facts to obtain a better sense of what a case is worth. Corporations can also use probability theory and decision trees and percentages to evaluate the corporation's litigation exposure.

Corporations should request that candidates provide a plan and budget for doing the work. At the very least, candidates should be asked for an estimate of the fees and other expenses that the law firm believes the corporation is likely to incur. Evaluation of plans submitted by different candidates may assist the corporation in identifying the law firm best qualified for the engagement. Such plans may also provide the corporation with valuable suggestions about ways to increase the effectiveness and to decrease the cost of the legal services.

Different Types of Selection Methods and the Circumstances Under which each Method is Appropriate

Corporations can pursue various inquiries to enable them to make a better informed selection of outside counsel. Inside counsel may ask candidates for a list of similar transactions or cases they have handled, and may look into how those matters were handled. They may also request candidates to supply references and may check those references. Inside counsel may solicit the views of other inside counsel and non-lawyers within the corporation about the performance and qualifications of law firms that have previously worked for the corporation on other matters. The corporation may also select a law firm that has performed well in opposition to the corporation in the past. Inside counsel may ask friends and colleagues whose judgment they respect to suggest appropriate candidates. Inside counsel should ask their counterparts at other companies involved in similar matters about the performance of their outside counsel. ACCA's Member-to-Member service is a useful tool for locating inside counsel by geographic and practice areas who may be called for references. Inside counsel may also call outside counsel involved in similar matters and ask how good a job was done by the law firm which represented the party most similarly situated to inside counsel's client.

Accountants, investment bankers, and commercial bankers are other good sources of information about candidates. Inside counsel may also use directories such as Martindale-Hubbell as well as computerized directories and databases that provide information about counsel in relevant leading cases.

Requests for Proposals

Requests for proposal (RFPs) are often used when a corporation seeks to select counsel to handle a large number of matters. The RFP process will generally be governed by formal written rules prepared by the corporation and distributed to all potential candidates. The process often requires written responses by law firms to a written request by the corporation as well as oral presentations by some or all of the candidates. Because of the expense and effort required to design the RFP, respond to it, and evaluate the responses, RFPs should generally not be used unless a substantial amount of legal work or a large number of repetitive cases is involved.

Beauty contests and presentations are frequently employed in connection with RFPs but they are also often used informally and without a written RFP. They generally involve a meeting in which candidates describe their experience and expertise and respond to questions. They offer corporations opportunities to pick the brains of competent outside counsel and to consider alternative legal and cost-control strategies.

Bidding is generally used when the work is susceptible to being done for a flat or fixed fee. It is more often used for corporate and real estate transactions and recurring types of matters, such as trademark filings, than it is for litigation. Bidding caps the corporation's costs encourages outside counsel to be innovative. A potential problem presented by this method is that the lowest bidder may submit an unrealistically low bid designed to obtain the work and then cut corners in ways that affect quality and outcome. In addition, in many cases, selection of outside counsel is more suited to an RFP-type process to facilitate an evaluative approach, rather than bidding based purely on price.

Presentations

Presentations can offer invaluable opportunities for a corporation to ask questions about numerous aspects of a law firm's qualifications for a particular engagement. For example, a corporation may obtain additional information about a law firm's experience in the subject matter of the engagement and its knowledge of the relevant business. Presentations can also assist a corporation to evaluate the outside counsel's ability and willingness to work with inside counsel and the client.

Presentations can provide a forum for negotiation of the business terms of an engagement. For example, they provide an opportunity to negotiate hourly billing rates, to explore alternative billing arrangements, and to discuss staffing issues. Finally, presentations allow the corporation to consider candidates' creativity in analyzing the issues presented by the engagement and to use the ideas generated during that analysis.

Corporations should request information about the manner in which law firms operate and administer their practices. They should consider asking law firms to make presentations at the firms' own offices to obtain more information about the firms' facilities and the scope and availability of their support staff and technological resources.

Should the Corporation Select the Law Firm or the Particular Lawyer(s) within the Firm?

Historically, corporations typically selected a law firm and then passively awaited the firm's decision as to who it would assign to work on the matter. Although that process is no longer as prevalent, we believe that further change is appropriate.

Not all lawyers within a law firm are of equal ability. Although a law firm may have an excellent overall reputation, the corporation may not be satisfied with the lawyers who are actually doing the corporation's work. In addition, some lawyers' skills are more appropriate for certain kinds of matters than others. For example, a lawyer who is most skilled as a mediator is probably not the best lawyer to handle a litigation that presents little likelihood of resolution without a trial. A lawyer's experience and expertise in one field may not prepare him or her to handle a matter in a different field.

For these reasons, we recommend that a corporation obtain an agreement at the time it selects outside counsel as to the particular lawyers who will work on the matter and that the law firm will not change the composition of the legal team without the corporation's prior permission. This type of arrangement has the additional benefit of insuring continuity of the legal team. One of the least efficient ways to handle any legal matter is to keep assigning new lawyers to work on the matter who must familiarize themselves with the matter at the client's expense.

We believe that it is particularly important that the corporation select the lawyer who will have principal responsibility for the matter within the law firm and then define the nature of that responsibility. For example, a corporation selecting a law firm to represent the corporation in litigation should obtain an agreement during the selection process that the particular lawyer the corporation has chosen will try the case. Similar agreements should be considered during the selection process for the staffing of other major tasks such as argument of dispositive motions and representation of the corporation's senior management at depositions.

Selection Of Outside Counsel When An Insurance Company Is Involved

Selection of outside counsel when an insurance company is involved depends on the nature of the insurance policy and the nature of the matter for which counsel are to be retained. Some insurance policies permit the insured to select the outside counsel subject to certain controls by the insurer. Other insurance policies do not permit the insured to select the particular law firm which will represent the insured, but applicable state law will probably give the insured the right to insist on competent counsel who will adequately represent the insured's interests. In some circumstances, the insurer may be willing to consider the insured's views about selection of outside counsel even if the policy does not permit the insured to select the firm. Corporations are well advised to take a role in the selection of outside counsel wherever possible.

Some corporations choose not to become involved in the selection of outside counsel when they are covered by insurance on the theory that the insurer will be required to pay any judgment that may be entered as well as counsel fees. One problem with this approach is that the judgment may exceed the policy limits and the excess may be the insured's own responsibility. In addition, the policy may be "experience rated" in that the total paid out by the insurer in a given policy year for judgments and counsel fees may be added on to the insurance premium for the following year. In other words, the insurer is, in effect, spending the insured's own money when it retains outside counsel. Another problem with taking a hands-off approach is that the counsel designated by an insurer to represent the insured may produce a litigation result that will have a substantial adverse impact on the insured in other litigations.

Finally, the law firm designated by the insurer may have done substantial work for the insurer in the past and may be looking to the insurer for substantial additional work. Under such circumstances, the insured should consider whether the law firm has the undivided loyalty to the insured which is necessary to represent adequately its interests. Corporations may request that the insurer provide information which will enable the corporation to evaluate the relationship between the insurer and the law firm it has selected to represent the insured. Under some circumstances, the corporation may demand that the insurer provide an outside counsel who does not have strong business ties to the insurer.

If the insurer has reserved its rights with respect to coverage issues, the insured should be careful that the law firm designated by the insurer does not allow the facts to develop in a way that provides a basis for denial of insurance coverage. For example, such a law firm may not prepare the insured's employees for deposition testimony in areas relevant to policy exclusions in quite the same way as a more independent law firm. Thus, the insured should participate in the selection process and may wish to follow the litigation closely or even retain its own counsel to insure that its interests are being adequately protected. It can be particularly important for the insured to select its own counsel to represent the insured's interests during settlement negotiations to make sure that the law firm selected by the insurer does not reject a reasonable settlement offer within the policy limits only to obtain a verdict far in excess of those limits. At a minimum, the insured should seek to have the law firm selected by the insurer agree to communicate with the insured's attorneys.

What Issues Should Be Resolved Before Outside Counsel Are Retained?

A corporation's bargaining position in relation to a law firm is never stronger than at the moment the corporation is deciding whether to select the law firm to represent it. Corporations should more fully utilize their bargaining position during the selection process. One way to do so is to request that the law firm agree to the corporation's engagement letter or corporate policies and procedures before the law firm is selected.

At a minimum, there should be agreement between the corporation and a law firm on the following three matters before the corporation selects the law firm to represent it: (a) who specifically will work on the matter; (b) what billing arrangements and rates will apply to the matter; and (c) the nature and extent of the services to be provided (for example, all services or only certain unbundled portions).

It is often advisable for a corporation to obtain agreement on additional aspects of the representation prior to selecting outside counsel. For example, the corporation may request that the firm agree to its policies with respect to disbursements. Such policies may cover such matters as prohibitions or limitations on reimbursement for various law firm overhead and administrative expenses or requiring that law firms adhere to the same expense policies that the corporation uses for its own employees. The corporation may also request that the law firm agree not to increase its billing rates either for a specified period or without prior notice and/or agreement by the corporation.

It is also crucial to resolve as many staffing issues as possible before outside counsel are selected. Corporations should consider requesting the law firm to agree not to change the composition of the legal team without the corporation's consent. In addition, the corporation should request the law firm to agree that the corporation will not be asked to pay the cost of a new lawyer becoming familiar with the matter if one of the original members of the team becomes unavailable for any reason. In general, the more issues resolved at the outset, the better the relationship that ensues.

Conclusion

As demonstrated above, there are many different ways that corporations can improve the process of selecting outside counsel. Although no one approach is best for all corporations, many of these approaches require the development of a more objective and rational process for evaluating engagements and law firms. The result should be more cost-effective and better quality legal work.