

How to Get the Best Advice From Your Outside Counsel — From Someone Who Has Been on the Inside

By Julianne R. Davis

In-house lawyers rely heavily on their outside counsel to give them legal advice that is concise, clear and up to the minute, making the relationship one of great importance. Indeed, it is outside counsel's job to do his or her best to make the in-house lawyers look good in the eyes of company management by providing thoughtful and insightful advice. In order to accomplish that goal, outside counsel needs to take the client's business goals into consideration when offering advice and guidance. In-house lawyers are almost always too busy to sit down and undertake the thorough analysis necessary to consider all legal ramifications to a particular problem or set of circumstances. As such, it is incumbent on in-house lawyers to communicate what the potential impact is on the business for each assignment they allocate to outside counsel.

Outside counsel may know a lot about the client's business, but the reality is, they do not live and breathe it in the same way that in-house lawyers do. This is true even if the company has worked with a particular lawyer for years. Companies are dynamic, and in today's fast-paced, instant information and ever-changing business environment, a company must be nimble, flexible and immediately responsive to market forces. No outside counsel can possibly know the nuances of market changes and business pressures on each of its clients. Likewise, no outside counsel knows the inner workings of a company as well as in-house lawyers.

If in-house lawyers are seeking guidance with respect to a dispute, it is not enough to simply tell outside counsel that help is needed with respect to "an employment matter," a "contract issue" or a "real estate problem," and ask what the law provides or requires with only a bare bones factual background. In-house lawyers need to explain how a particular matter could affect employees, immediate initiatives, long-term projects, or other matters involving the employees or matter in question.

If the advice sought concerns a contract matter, outside counsel needs more than just the contract and the legal context of what is at stake. They also need to understand what business units could be impacted and how, what that impact would mean company wide, and ways to minimize that impact. Perhaps the contract at issue involves a project that is part of a long-term goal, or part of a research and development initiative that could be a game changer for the company. It could be that the matter involving the contract has diminished value since its inception. I know as outside counsel that my perspective changes given the business context of the advice sought. I also know that when I was Assistant General Counsel at Nike, the more business context I gave my outside counsel, the better advice I received.

To illustrate my point, consider the following hypothetical. An in-house lawyer is asked to assess the legal impact of the company severing ties with an employee who has played a major role in the development of an important product. The employee first began working on the development project as a consultant, and was later hired as an employee to ensure the company would continue to receive the benefit of that individual's expertise. The product has now reached the marketplace and is proving to be a commercial success beyond the most generous of sales projections. The in-house lawyer contacts outside counsel and provides the above stated information. The outside counsel has worked with the company for years and knows that unless the consultant was hired as an executive, no employment contract would have been executed. Outside counsel bases her advice on the preceding information.

However, the in-house lawyer doesn't convey the following facts to her: 1) the individual in question did have a consultant agreement; 2) the consultant agreement had no expiration date and included provisions relating to confidentiality, competition and the division of intellectual property; 3) not only is the product a huge commercial success, but processes developed for the production of the product will likely have a far reaching industry-wide impact; 3) it is imperative that the company retain complete control over the product and processes; 4) the team that worked on the development of the product includes three of the company's most highly regarded and productive Research and Development team members; 5) all team members formed an extremely tight working relationship and bond during the development project; and 6) in order to take the research and development surrounding the product to the next level, the company will need to partner with an entity founded by the consultant/employee (who still has some ownership interest).

These facts add many additional layers and considerations from a business point of view. While the advice provided without the above business context may well be legally correct, it will almost certainly be inadequate. Without the totality of the business interests at stake, outside counsel will be unable to provide the best advice and most comprehensive guidance, and will certainly be unable to make inside counsel "look good in the eyes of company management."



Julianne R. Davis is Counsel to the Firm at Lane Powell, where she focuses her practice exclusively on intellectual property matters, with an emphasis on litigation and strategic counseling. Prior to joining Lane Powell, she was Assistant General Counsel at Nike from 2005-2010. She can be reached at davisj@lanepowell.com or 503.778.2118.

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