LJN LAW JOURNAL NEWSLETTERS

The Corporate Counselor®

An ALM Publication

Volume 25, Number 1 • May 2010

Putting Socks on an Octopus

Managing Outside Counsel

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Managing one attorney is not easy. Managing outside counsel, particularly a large firm, can be particularly challenging. Sometimes it is easier to put socks on an octopus.

However, this important relationship needs to be managed effectively if its value is to be fully realized and its cost minimized. This requires a frank and open conversation about the relationship up-front as opposed to working out problems while counsel is engaged in a matter, or worse, after the fact.

This article discusses 10 recommendations for strengthening the partnership between inside and outside counsel. Many of these recommendations assume the existence of a strong relationship partner at the firm who focuses not only on the tasks at hand, but also on the relationship in which the tasks are carried out.

1. Authority to Consult

An important first step is to determine who has the authority to consult with outside counsel. Inside and outside counsel should develop this list together.

Of course, there could be emergency circumstances that warrant or demand an exception to the list. What constitutes an emergency and how it will be handled should be discussed as well.

Determining who can consult with counsel makes sure that the fees are not run up unnecessarily. It also helps to ensure that those who should not seek privileged advice don't seek or obtain it.

2. Communication Preferences

It is not always possible for inside and outside counsel to connect live. The question is how outside counsel should communicate with inside counsel when they cannot connect live. Is e-mail or voice mail preferable? Does anyone other than the inside counsel read her e-mail or listen to his voice mail?

Discuss up-front how you wish messages to be left in terms of medium and level of detail. Also, discuss how substantive work product should be communicated. Do you want formal memos or are informal e-memos acceptable?

As inside counsel, you are entitled to your communication preferences. But don't assume that outside counsel will know what they are unless you tell them.

3. Forms

Most professionals have "form" documents — agreements, policies, letters, etc. In the context of a meaningful relationship, inside counsel should not pay to see those forms. But outside counsel needs to be careful to make clear that the forms cannot be taken as legal advice unless customized in light of the client's specific needs and circumstances. Develop an understanding as to how forms will be shared without increasing the client's cost or exposing the outside firm to professional responsibility claims.

4. Research

Some research is undoubtedly necessary. Any lawyer who believes he knows everything does not know himself.

However, sometimes research is done to allay the attorney's anxiety. While well-intended, it can still be unacceptably expensive.

Set parameters for when prior approval is required for research. For example, you might have a general rule that, absent emergency circumstances, prior approval is required for research in excess of one or two hours.

5. Billing

The frequency and content of the billing should be discussed. How much detail does the inside counsel want and how should the bill be presented? Will there be separate bills for each matter or one combination bill? And to whom do the bills get sent? Failure to resolve these issues up-front may result in inside counsel not getting what she has a need to know or others getting what they don't have a need to know.

6. Budgeting

Most litigation and transactional matters warrant a budget. Develop a budget up-front for the matter (or for defined periods of time). Don't wait until the bills are out of control to figure out how to manage the cost.

We all know that cost is a product of rates times hours. So make sure you see both the rates and the projected hours. Even if the rates are low, the projected price may be too high if the hours projected are not reasonable. When it comes to litigation, it is particularly important to be clear on the client's business goal. Not all litigation is scorched earth, and varying levels of intensity (and fees) may be desirable depending on the client's business goal. Litigators need to be able to operate in modes other than full throttle.

For example, if the amount at stake is relatively small, the company's position strong and the likelihood of similar claims being filed by others slight, then the company may want to limit the amount of offensive discovery it conducts to contain costs. Conversely,

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if there are potential plaintiffs waiting in the wings, the company may want to be more aggressive with discovery to send a message. For some matters, you may be able to agree upon a fixed rate. It is important to be clear not only on the fee, but also on the scope of services covered by it. Drill down now to avoid misunderstandings later.

7. Risk Assessment

Dissatisfaction on the part of inside counsel (and his or her constituents) often exists because of the way in which outside counsel communicates risk. Inside counsel knows there is risk or she wouldn't be incurring the cost of reaching out to outside counsel. The question is how to characterize the risk. In my experience, the six top mistakes made by outside counsel when it comes to managing and communicating legal risks are:

- Failure to distinguish between what is illegal versus what has legal implications;
- Failure to distinguish between what is legally mandated versus what is legally desirable;
- Failure to weigh the likelihood of a claim and/or the severity of damages;
- Failure to recognize when it is only a question of timing relative to an inevitable risk;
- Failure to consider the reality that there are certain legal risks in avoiding other legal risks; and
- Failure to consider competing business and employee relations risks in avoiding legal risks.

Make clear your expectations for how outside counsel will evaluate and communicate risk. Be up-front if your expectations are not being met.

8. Gatekeeper

Clearly, no lawyer is qualified to handle all substantive areas of law. Cardiologists don't dabble in radiology the way that some lawyers dangerously dabble in fields other than their own.

It is the responsibility of the relationship partner to find the right person in the firm to handle a matter beyond her ken (and not to charge the client for finding that person). Sometimes that is not the person who happens to be immediately available. Providing outside counsel with the name of the attorney selected is not sufficient. The relationship partner should make the connection. The relationship partner also must be honest if the right person does not exist within the firm and help find the client resources outside the firm. This is not only an ethical issue, but also a credibility issue.

9. Knowing the Client's Business and Its Players

The effectiveness of outside counsel is enhanced if she understands the client's business, including how the legal matter relates to its business objectives. While outside counsel can obtain some valuable information from public documents, the most important information is not available in the public domain.

Inside counsel needs to educate outside counsel on what he or she needs to know to be effective. This may include, for example, the organization's short- and long-term strategic plans. It also may include a frank assessment of the key players — from whom to get information, whose agenda may cloud his helpfulness, etc. The more inside information (not in the SEC sense!) outside counsel knows, the more adept he or she will be in helping the client to minimize fees and maximize achievement of the client's business and legal goals.

10. Evaluation

Perhaps the best way to increase the likelihood of the relationship's success is to establish criteria for evaluating it and periodically applying those criteria. By way of example, here are some of the criteria that should be considered:

- Response time — for example, does inside counsel receive at least an initial response by the close of business? When the matter is complete, is there follow-up on the part of outside counsel?
- Efficiency — for example, are there internal firm meetings that are unnecessary or at least should not be billed? Not every breath outside counsel takes relative to your matters is or should be charged to the matters.
- Substantive knowledge — for example, is there any research that is not necessary to advance the ball, but rather may indicate a lack of adequate knowledge or appropriate confidence?
- Ability to make recommendations on imperfect information — for example, are there delays that could be avoided if assumptions were made and communicated to the client?
- Risk-managing rather than risk-avoiding — for example, can the attorney distinguish between "must do" versus "good idea" without striking out?
- Supporting in-house counsel rather than upstaging them — for example, subject to the ethical reality that outside counsel represents the company and not any individual, do the outside attorneys understand that, unless otherwise directed, they play a "supporting" and not a "lead" role?
- Seeing beyond the issue at hand for potential problems and opportunities down the road — for example, do the outside attorneys spot issues and practices that may create problems in the future and suggest ways to minimize the risk (while still achieving the business goal)?
- Practicality — for example, where an alternative lower-risk approach is recommended, is the alternative practical from a business standpoint? If the recommendation is not practical, it is worthless.

Conclusion

The evaluation process should focus not only on the firm, but also on the individual attorneys. One weak link can irreparably harm the relationship. And, as with all partnerships, success or failure turns on the strength of the relationship. With a little help from the octopus, putting on his or her socks isn't so hard after all.