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THE BENEFITS OF 'INSIDE/OUTSIDE' COUNSEL

by: Darryl Ross, Esq.

Your company is growing, but it is not large enough to support its own in-house team of attorneys. Or, your company is large and you use counsel throughout California and the United States, yet your company's growth makes it difficult to coordinate counsel wherever your interests lie. Or worse yet, you are subject to any of the increasingly large number of class action lawsuits being filed wherein a band of plaintiffs' attorneys seek to pull the lever on the company slot machine.

Do any of the above scenarios sound familiar? Employing outside counsel while regarding the as "inside counsel" is becoming increasingly popular as it promotes efficiencies on my levels including:

- access to counsel fluent in company operations, objectives, policies, and culture;
- the development of proactive strategies designed to minimize your company's litigation risk, including auditing to improve QA process and employee relations;
- management of company litigation related messages to assure uniformity across civil, regulatory, and criminal proceedings; and
- reduced costs associated with having a centralized repository without having to carry employees on their payroll.

LITIGATION COUNSEL

Litigation counsel is customarily retained to represent a single facility through entity insurance policies on a case by case basis. Using "panel" counsel on an as needed basis may effectively deal with an isolated case. But what happens when company objectives shift between cases? Does counsel handling a geographically specific case have access to a repository of testimony and discovery responses that assures consistent information is provided? Do they have access to a warehouse of documents and pleadings which when unused, not only maximizes uniformity, but drives down legal fees and, potentially, insurance rates? In the world of class actions, which often start with plaintiffs' counsel 1) stitching together pieces from multiple cases located in different jurisdictions, 2) accessing any number of databases containing information from "consumer attorneys", or 3) reviewing on-line financial disclosures from public websites, company personnel must re-evaluate how they view the company operations.

Long gone are the days of counsel finding an isolated deposition transcript here or there. Instead, plaintiffs' attorneys have access to vast repositories that track facility statistics on topics such as staffing, budgeting, hiring/firing, etc. The use of outside counsel that functions as inside counsel gives company executives the necessary tools to not only collate information and identify litigation trends, but at the same time, the opportunity to proactively intervene to avoid civil, regulatory and even criminal exposure.

EVALUATION

As you evaluate your company, and it's legal needs, you should consider whether the following services are being provided, and if so, are they being carried out with the protection afforded by the attorney-client privilege.

Risk Management

- Do you receive privileged reports concerning sentinel event investigations?
- Do you have access to 24/7 crisis management including responding to media inquiries?
- Do you receive privileged analysis regarding adherence to company policies, procedures and practices inclusive of recommendations to remediate deficiencies?
- Are privileged audits of QA processes conducted by JD/RN/Certified Risk Managers to maximize the confidentiality of your investigations?
- Have you developed, or do you have access to privileged litigation policy manuals to assure uniformity and consistency in all phases of civil and / or regulatory proceedings?
- Does your legal team have the ability to work side by side with your team, including on-site reviews to 1) identify weaknesses, and 2) provide in-service training to remediate identified problems?

Continuity of Representation

The continuity of inside/outside counsel relationships with the company translates into a partnership wherein everything the firm does focuses on helping the client. The firm's culture is service-oriented. And the firm regards the company's business with a sense of importance and, when appropriate, with a sense of urgency. Most importantly, legal services do not stop at the conclusion of any single case. Inside/outside counsel continues to serve and provide legal guidance on day-to-day business issues that impact company operations.

Additional benefits of inside/outside counsel include:

- improved efficiencies and effectiveness of legal services based on the close relationship between company and counsel
- counsel providing real-time advice or information to facility staff before they have to make difficult judgment calls
- counsel's willingness to consider the company's ability to be competitive in the marketplace, including making alternative billing arrangements when necessary, and
- a willingness by inside/outside counsel to understand how and when to collaboratively with other law firms, and how to manage them including deferring to those law firm's strengths.

E-DISCOVERY

Have you heard of that term? If not, you will soon. Aggressive plaintiffs' attorneys have quickly learned that a simple request for electronically stored information can bring a company to it's knees. Documents sought typically include emails from company servers, including archived emails. The most recent trend is to seek information from Blackberry and other PDA devices. As these requests become more common, it is essential that the company have a protocol in place to 1) periodically audit company email traffic to identify problem areas, and 2) respond to e-Discovery requests including procedures to (a) efficiently harvest data, and (b) review sample data as a means to combat opposing counsel's overly broad requests.

As you evaluate your e-Discovery exposure, you should consider whether company personnel have:

- 1) the expertise with data extraction / harvesting of sensitive information;
- 2) the ability to host sensitive data for review; and
- 3) the capability to assemble production and privilege logs.

'INSIDE/OUTSIDE' COUNSEL IS A WIN/WIN

Effective Inside/outside counsel ultimately serves as a tremendous benefit to general and / or Compliance counsel, as well as key company executives. Inside/outside counsel serves as an extra layer of "privilege" in a legal world where privileges are increasingly being eroded. This includes the ability of inside/outside counsel to conduct discrete investigations with the flexibility to go where needed, when needed. Your inside/outside counsel must be mobile and utilize all modes of technology to maximize efficiencies and ultimately, to save your company money.

Wroten & Associates is fortunate to enjoy strategic relationships with clients that transcend the case by case assignment. By continuously working with our clients as their "inside/outside" counsel before, during and after regulatory and litigation matters, we are able to help identify trends and provide guidance. We are able to provide recommendations with respect to necessary preventative or corrective measures. And we pride ourselves in our ability to assist our clients in the development of a consistent message that will withstand scrutiny regardless of the forum. As we start the new year, Wroten & Associates highly encourages you to critically analyze your company and evaluate whether you have the necessary systems, and strategic relationships in place to reduce your litigation risk.

Darryl Ross is a Shareholder with the firm of Wroten & Associates and maintains a diverse litigation practice with experience handling all aspects of civil litigation including arbitrations, complex settlements, trials (jury and court), and appeals. Mr. Ross' practice focuses on the defense of nursing homes and residential care facilities. He has successfully handled a wide variety of health care matters for public and private entities including insurance coverage issues, product liability claims, interpretation, advice and enforcement of medical staff bylaws, as well as class action litigation.

Mr. Ross is a frequent speaker at industry conferences and forums and has given numerous Webinars for clients on a variety of issues impacting their operations. Recent presentations include How to Deal with a Challenging Resident?, What Rights Do Facilities Have When They Discover A Sex Offender is Living in the Building?, and How to Protect the QA Process.

Mr. Ross is a member of the California Association of Healthcare Facilities Legal Committee, as well as a member of the American Youth Soccer Organization's (AYSO) National Legal Commission. Mr. Ross is also a Planning Commissioner for the City of Aliso Viejo California, as well as Regional Commissioner of AYSO Region 889 located in Aliso Viejo, California.