

Tips For Managing The In-House And Outside Counsel Relationship

By

David F. Johnson

Introduction

- Corporate counsel owe duties to their clients to retain effective and cost-appropriate outside counsel.
- It is important to have a good working relationship between in-house and outside counsel to meet the client's needs.
- This presentation is intended to give practical advice to improve the relationship between in-house and outside counsel so that the client has the best possible results.

Selecting Counsel



Downloaded from
www.winstead.com

www.winstead.com

Selecting Counsel

- How should in-house counsel hire their outside counsel?
- There is no one right answer.
- What is the legal work that needs to be done?
- Highly complex or more routine?
- Does the assignment require expertise that justifies a higher rate/expense?
- So, in-house should determine what type of attorney is necessary.

Selecting Counsel

- In-house should then determine who the attorneys are with the necessary experience to efficiently handle the assignment.
- Attorneys are becoming more specialized—take advantage of that.
- Is industry knowledge necessary or helpful?
- In-house should utilize industry networking to assist in identifying qualified counsel.

Selecting Counsel

- “Relationships matter, and I will generally select an attorney (or firm) that I know and respect for his or her expertise and integrity. Ideally, outside counsel knows my client well enough that I do not have to reeducate the attorney on the nature of my company’s business and key business clients.”

Selecting Counsel

- Consider the following factors:
- Ethics;
- Reputation;
- Expertise in the area of law (“Thought Leaders” in the area);
- Track record;
- Firm size, resources, and location;
- Knowledge of forum and/or judge;
- Rates;
- Willingness to consider alternative billing arrangements;
- Team;
- Diversity; and
- Responsiveness.

Selecting Counsel



Selecting Counsel

- If you are the outside counsel, be honest with yourself and the potential client on your expertise.
- If the client is better served with another attorney in your firm or a different firm, tell the in-house counsel.
- This will only serve to build your credibility, and the in-house counsel will likely work to use you in a matter in which you are experienced in the future.
- You are better off working on a matter in which you have experience and are more likely to get the second assignment.

Engagement Letters



Engagement Letters

- Engagement letters are very important to both in-house and outside counsel.
- These are the contracts that set the stage for all future work and disputes.
- The use of properly drafted engagement letters is not only a critical risk management tool, but also forms the foundation of client communication and trust.
- Need different engagement letters for different assignments.

Engagement Letters

- Things to include in letters:
- Identify client (and who is not the client);
- Rates/Fee Arrangement;
- Retainer;
- Who pays bills and retainer;
- Billing and payment;
- Scope of assignment (and limitations);

Engagement Letters

- Multi-party issues;
- Termination;
- Technology/hacking;
- Conflicts of interest and waivers;
- Business conflicts;
- Rules of ethics;
- No guarantee on results or cost; and
- Dispute resolution terms.

Fee Issues



"BE CAREFUL, HE JUST CHARGED ME \$350 FOR HIS 'TWO-CENTS WORTH'."

Fee Issues

- At the outset of all legal assignments there should be an agreement and understanding as to the fees and compensation.
- Written agreement required for contingency fee cases.
- Written agreement should be executed for all assignments.
- Market rates for the level of expertise required and/or the locality of the work.

Fee Issues

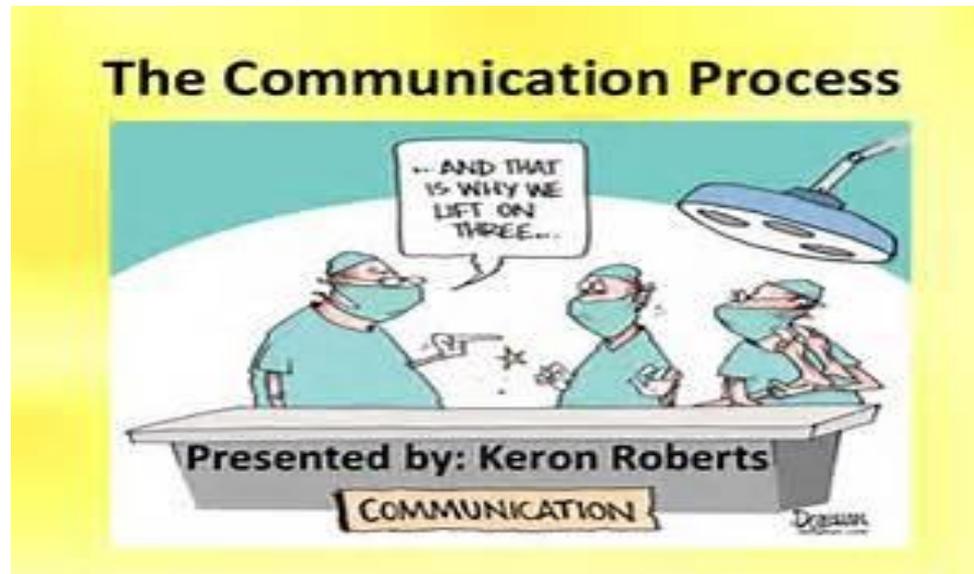


"It's a coupon. File four frivolous lawsuits
and get the fifth free!"

Fee Issues

- Consider different rates for different types of work even for the same counsel.
- Consider alternate billing arrangements such as lower rate/partial contingency.
- Insurance issues? Panel requirements or fee limitations?
- Warning: what a client is willing to pay counsel may not correlate to reasonable fees for the purposes of a recovery in a court of law.

Communication



Communication

- Constant, clear communication from both sides is essential.
- The first step is to set an understanding of what communication is expected, how often, and in what medium.
- What communication is expected?
- How often is outside counsel expected to communicate?
- How does in-house counsel prefer the communication (emails, phone calls, etc.)?

Communication

- Communicate expectations at the outset.
- Timing considerations?
- What is the budget and expense considerations?
- Formal written budget (update requirements)?
- Rate issues?
- Aggressiveness?
- Staffing?
- Experience requirements?
- Confidentiality/Privacy?
- Internal political issues?

Communication

- Communicate during the engagement.
- Is the assignment proceeding on schedule?
- Is the assignment on budget? If not, why not?
- Attorneys on team up to expectations?
- Any change in goals, strategy?

Communication

- Communicate after the assignment is over.
- Outcome consistent with goal?
- Work product issues?
- Budgeting, timing, staffing issues?
- Issues for next project for improvement?

Staffing Issues



Staffing Issues

- There should be an understanding early on and throughout a relationship regarding what attorneys the outside counsel should use on his or her team.
- Younger, less-expensive attorneys?
- Older, higher-rate attorneys?
- Expertise requirements?
- Personality issues?
- Diversity issues?
- What task will be handled by what attorney?

Know Your In-House Counsel



Know Your In-House Counsel

- Outside counsel needs to understand the nature of the in-house counsel's job.
- What are his or her challenges each day, both short term and long term?
- What do they need to get their jobs done properly and meet corporate expectations?
- What can outside counsel do to make the in-house counsel's job easier?
- Know his or her gender and name and spell it correctly.

Know Your Client



Know Your Client

- Outside counsel should know the client, its business, objectives, and culture.
- Take time to know anything that will support the rendition of effective legal services.
- An easy way to learn more is to search the internet and to review any public filings.
- Another way is to simply ask questions in the beginning of the relationship.

Litigation Issues



Litigation Issues

- Litigation can be especially stressful on the in-house and outside counsel relationship.
- There should be open communication about the following:
- What's the in-house counsel's or client's philosophy about trying or defending cases?
- What is the big picture?
- What does the in-house counsel need to report?
- How involved does in-house counsel want to be in litigation decisions and course of the case?

Litigation Issues

- Outside counsel should be respectful of in-house counsel's time.
- Forward drafts of motions/briefs/pleading with sufficient time for review.
- Be responsive, answer emails and voicemails.
- No surprises.

Bills



Bills

- In-house counsel needs to communicate what entries you do not expect to pay for or see on a bill.
- Block billing, task codes, etc.?
- Outside Counsel should review all bills to ensure that inherently offensive items are not included: no inter-office conferences, multiple attorneys on same task, research that has not been pre-approved, attorneys that have not been pre-approved, tasks that are unexpected, etc.
- “Although the conversation about bills is probably one of the least fun for both in-house and outside counsel, it can also be productive because it reinforces our need to collaborate in defining a project, managing fees and costs, and providing the best advice to our client.”

Ideas for Better Management



Ideas for Better Management

- Create an approved counsel list for different legal issues
- Regularly review and add to and subtract from the list.
- Consider technology to assist the assimilation and distribution of communications to all relevant individuals.

Ideas for Better Management

- Create written outside counsel guidelines:
- Fee requirements (lowest rates, etc.);
- Billing: work that can be billed and what cannot;
- Cost estimates (preferred vendors)
- Budgeting requirements;
- Reporting requirements;
- Staffing;
- Confidentiality and media issues; and
- Actual and business conflict issues.

Tell The Truth!



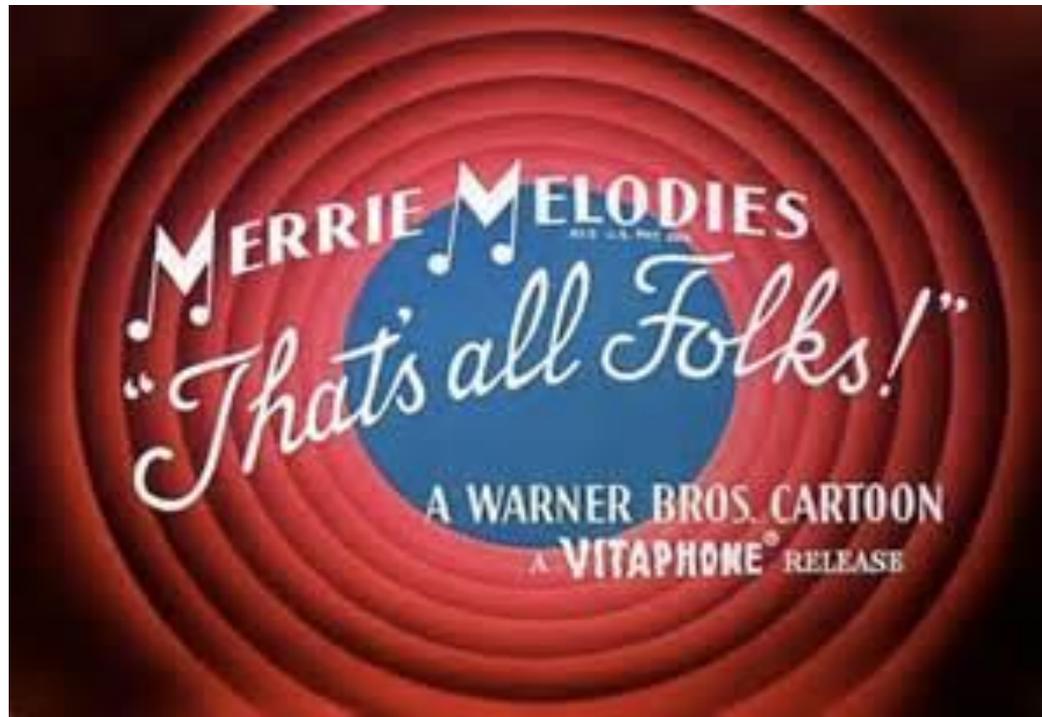
Tell The Truth!

- There are several different types of outside counsel.
- Debbie Downer—your case is terrible and maybe the outside counsel can salvage it for you.
- White Knight—your case is great and he or she will vindicate you.
- Honesty is important and also part of outside counsel's fiduciary duty.
- Don't accept anything less.
- However, there is some limitations on what outside counsel can forecast—do not ask for percentage of chance of success or failure.

Tell The Truth!

- Worst feeling for an outside counsel is never getting that next call and not knowing why.
- In-house counsel should tell their attorneys the bad news—what did they do wrong or could do better.
- This is true even if the in-house counsel does not intend to hire the outside counsel again.
- Call it a public service.

Conclusion



Conclusion

- The goals are to have relationships built on trust and that are built for the long term.
- Those types of relationships do not occur immediately and take effort by both parties.
- The suggestions in this presentation are meant to further those goals.