

Balancing Acts

Five Best Practices for Managing Outside Counsel

BY WILLIAM SOWINSKI AND KEITH SCHRODT

The relationship between outside counsel and their in-house counterparts can be somewhat complicated when cost management comes into play. On one hand, both parties share a goal – to effectively manage matters and achieve successful outcomes. On the other hand, their goals often conflict when it comes to cost reduction.

As the state of the economy necessitates a reduction in corporate spending and executives demand that legal departments slash costs, in-house counsel must find ways to manage litigation more efficiently. Outside counsel, however, who need to turn a profit despite the difficult times, may push back when in-house legal departments implement cost reduction processes.

To protect in-house and outside counsel relationships while managing cost, legal departments should consider five critical best practices.

LEVERAGE APPROPRIATE RESOURCES

Litigation requires several types of work that can be broken down into various categories and sub-categories, or “buckets.” Those buckets will require different levels of legal and technical expertise.

Non-legal/technical or “support” work involves areas of litigation that do not require extensive legal expertise and can often be accomplished by someone without a law degree. This work may include organizing and reviewing documents during the discovery process, gathering records, reviewing medical information, and copying pertinent documents. Great value can be added to the litigation effort by those providing supporting roles and applying raw intelligence rather than legal/technical expertise. Making certain that the correct non-lawyer resources are assigned to those tasks can save money and improve results without interfering with lawyers’ work.

For those tasks that require legal expertise, make sure to select the right attorneys to handle them. To ensure the law firm applies the correct level of legal expertise, communicate those expectations and facilitate continuous communication. This allows you and the firm to maintain overall control over the legal resources applied to particular aspects of the litigation and, thus, to manage cost.

MATCH SKILL SETS WITH NEEDS

When selecting outside counsel, you must match the unique skill set of the attorney to the technical and legal demands of the matter to maximize the results of your legal spend. For example, if you are searching for a good trial attorney, create a pool of candidates based on the specific needs of the case and each candidate’s reputation. Invite selected lawyers to participate in mock presentations and grade them on a scale to determine what levels of cases they are capable



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of handling. You will invariably find that some lawyers are better at handling juries, while others may have expertise in niche areas such as science or medicine. Identify the true trial lawyers, who are quick on their feet, and who make sound and good decisions when cross-examining witnesses, applying the rules of evidence and conveying a story. Hire trial lawyers to try cases and legal scholars to prepare briefs.

Once you have screened potential candidates and decided whom to retain for a matter, be sure to clearly explain to the lawyer exactly why he or she was retained and your expectations. If you contracted outside counsel because of his or her trial skills, be sure to convey this intent. Likewise, make it known that you are retaining the lawyer specifically for the execution of his or her expertise and that other legal work by that lawyer not requiring that expertise is unauthorized. Make certain that work falling outside of the specialized skill set is performed internally and by lower-cost resources.

COMMUNICATE EXPECTATIONS

Communicating expectations to outside counsel – over and over and over – is essential. Aside from ensuring that outside counsel operate solely or at least primarily within the scope for which you hired them, it is important to ensure that your goals, both at the matter and department levels, are communicated effectively.

For example, if you are charged with maintaining a strict litigation budget, outside counsel must be made aware that you are operating within such a budget. Whether to fully disclose the extent of this budget is discretionary. In any case, make it clear that unexpected charges, especially involving work unrelated to the tasks for which the outside lawyer was hired, will not be tolerated absent advance notification and approval.

You must also discuss matter management to decide who will dictate case strategy and tactics. In the optimal scenario, if you have sufficient resources, the matter will be managed internally, regardless of how much responsibility outside counsel are assigned. Where internal resource constraints or lack of matter management skills exist, matter management should be assigned to outside counsel with the clear

understanding that both in-house and outside counsel will work closely together and stay in continuous communication.

EMPHASIZE MANAGEMENT SKILLS, METRICS

Your in-house lawyers must develop good management skills. By taking ownership of matters and managing all the various elements – from vendors and outside counsel to your internal resources – you take control of the process, reduce costs, and eliminate the potential for surprise expenditures.

As legal department managers, in-house personnel will have a variety of duties, such as ensuring continuous communication among the various stakeholders in the case, tracking expenses, maintaining the budgets, and driving strategy. Development of a good set of metrics measuring those duties helps in-house lawyers to develop and use management skills. Metrics focus managers on what is important and determine the overall success of management efforts, keeping everyone aware of articulated strategies, costs, and priorities.

The outcome of various matters is a crucial metric, but other data points are important to ensure your outside counsel are performing cost-effectively. These other metrics should be based on the strategies initially implemented for a matter or groups of matters. Metrics evaluating performance such as cycle times, whether the matters were resolved using the designated resolution tactics, compliance to budgets, resolutions within projected loss ranges, the resources applied to matters, and others are easy to develop and are essential to good cost management. Whatever goals you initially establish should be tied into a reporting system that will track results.

To create effective metrics and to leverage their use, it is important to include the use and development of metrics in an internal-management training program. Without an understanding of how to create and evaluate metrics, your litigation management team cannot determine the effectiveness of your outside counsel relationships and may focus on irrelevant measures.

CONTINUE RELATIONSHIP ASSESSMENTS

Continually revisit your outside counsel relationships using the metrics created to track outside counsel



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performance. Metrics are designed by determining what is important to track and measure. Those metrics need to be broadcast frequently to remind both internal and outside counsel of what is important and how everyone is performing relative to those measures.

The metrics should be generated at a summary level to measure overall effectiveness. However, to drive discipline and hold individuals accountable, the metrics should be built in such a way that individual performances of law firms, lawyers, and in-house managers can be evaluated separately. If law firms or individuals are underperforming or overcharging relative to established objectives and standards, communicate this finding swiftly and effectively.

Do not conduct such evaluations only once or twice a year. Evaluating your outside counsel should be a routine process – and one that should be expected and welcomed by your counsel. At the same time, do not manage outside counsel with an “iron fist.” If you notice that a particular lawyer or firm is underperforming, work to resolve the issue rather than immediately ending the relationship. After all, these lawyers may have some institutional knowledge regarding your company’s business and areas of risk – an invaluable asset when working with outside counsel.

Occasionally, a relationship with outside counsel must end. If proper management and metrics have been used, then the ending of that relationship won’t come as a surprise. The periodic replacement of counsel is inevitable, and you should always focus on succession planning within a firm and work with the firm in developing new talent. Doing so provides you the option of keeping the firm and

merely replacing an individual, thereby preserving a good part of the investment you have made in the firm. Internal competition within a firm for your work by up-and-coming talent bolsters your management effort and makes the transition to a new lawyer much easier.

THE BOTTOM LINE

In summary, not all litigation work needs to be performed by lawyers, and not all lawyer work needs to be performed by specialists. By segmenting the type of work needed to be done and identifying the level of skill required, you can apportion the work appropriately – internally and externally – to the right level of resource at the right price. By developing good management skills internally and creating the right metrics, you can meaningfully communicate your priorities, expectations, and evaluations to outside firms and act on them as necessary. ✱

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