

## Managing external solicitors – the good the bad and the furry



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### Managing external counsel - the trends

There are a number of distinct trends in this area. This data originates mainly from the ACLA sponsored survey to which many of you responded last year but some are anecdotal.

- 66% of you say that more legal work is being done in-house
- 70% of you so you are spending more of your time monitoring outside counsel
- 65% are tending to reduce the number of law firms you use
- 48% say that reducing legal costs is becoming increasingly important
- 60% are seeking alternatives to hourly rates
- There is a greater tendency to tender the higher the organisation's legal spend, with most going out to tender if legal expenses exceed \$500,000 per annum.

### The broader context

Issues such as negotiating with external solicitors, questions of caps or volume discounts and the performance of external solicitors should only be considered in the broader context of a framework for managing the delivery of legal services by both internal and external advisors.

Essentially the model I wish to recommend to you use a cyclical one. It is cyclical

because of course the process never ends. The key steps in the process are:

- **review**
- **tender**
- **manage**
- **deliver.**

As will be seen, any management regime requires that you get your own house in order first. Poor internal management will undermine any attempts to better utilise external resources.

### **Review**

Very few of you I suspect are in the position of having come to a 'green fields' site. In taking on the role as corporate counsel you are often seized with the decisions of your predecessor as to legal counsel. It is common sense to suggest therefore that you evaluate the situation carefully before making any decisions to change the status quo - for one thing the CEO may have made the decision as to who is the company's counsel!

Once the essential information is gathered as to the nature of the work being performed, the identity of the external solicitors and who sends out the work to them, can be ascertained, a more formal review should be undertaken. The formal review can be used to capture information about not only the external counsel but also your own team and processes.

The purpose of the formal review is to get as much information that you can about whether your external solicitors are meeting the needs of the company. A relatively simple written survey can be designed to capture the views from the company's perspective. Decisions can then be made as to the need for more detailed follow up. Such a survey has two major outcomes. The first is to show a genuine concern on your part to ensure that the company's business units are being properly served by their external and internal advisers. (Never ignore the need to demonstrate/market your own function). The second is to find out how those advisers are performing and detect shortcomings in your own personnel and processes.

In many cases I see in-house counsel who have little or no control over:

- who does what work internally – lawyer/paralegal split
- what matters go to outside counsel and at what point
- who instructs external counsel
- which outside counsel is utilised
- the amount of fees being charged
- the quality of what is delivered externally

A survey goes a long way to enabling in-house counsel to get control over the processes accompanying the use of outside counsel. It can provide fertile ground for further investigation as to why counsel are being used in certain cases, (in preference to in-house counsel) and enable the changing of reporting functions to ensure that you are properly kept abreast of matters that are in the hands of outside counsel. It can also serve to

identify certain counsel that you may not have been aware were being used by the company and can be the first step in bringing the spend on outside counsel under control.

You should also interview external counsel with whom the company clearly has a lot of contact in order that a balanced impression be obtained, particularly where company employees have made specific criticisms. In many cases they also may have a better idea how the company works in some areas than your own employees might and are willing to make suggestions as to how the company could better use them.

Having conducted such a review you are well placed to begin to make changes. In many cases poor results are obtained from external solicitors where the internal processes of the company do not place a premium on reliability, responsiveness or technical accuracy or guidelines as to cost are not clear or enforced. It is therefore necessary to get your own house in order first. If for instance you are of the view that matters are better briefed through yourself as the sole point of distribution of legal work to external solicitors, this is the time to get that process in place. Once you have an established and well understood procedure you can begin to make other changes such as widening or narrowing the panel, setting budgets, defining reporting regimes and settling the terms of your service agreement with external solicitors.

Your internal processes must also reflect the role you have determined for external counsel. i.e. good choices as to what goes to counsel and at what point.

### **Tender - to tender or not to tender...?**

Having reviewed in the situation the next step is to decide whether you intend to go to a formal tender or not, and if so in respect of which portion of the company's legal work. It is common to find tenders being employed where the amount exceeds \$500,000 per annum. As with the review process I recommend, it is often better for such a process to be handled by a third party consultant who brings not only a wider knowledge of the market to the process but also a degree of objectivity. As with any tender it is important that any process is entirely fair and that it not be used simply to justify a decision has already been made.

I will make one or two observations about the tender process. Firstly unless you are very dissatisfied with the solicitors you are using it is better to work with the solicitors or panel solicitors that you currently use to bring them 'up to pace' to the standard you wish rather than to embark on a full-fledged tender process.

The outcome of any negotiated arrangement with external counsel should be encapsulated in a comprehensive 'service agreement' which should be as much about the process of advising the company as the price of the services being provided.

Finally in-house counsel should have a clear view about his or her own cost to the company. This will assist in deciding what should be sent to outside counsel – when does it become more cost effective?

### *What to do about the cost?*

Whilst cost does not appear as a strong priority in surveys of in-house counsel it nevertheless remains a substantial issue which in-house counsel must deal with. Whether you intend going to tender or not it is important that the basis upon which external counsel charge the company be explicit. It should be explicit in respect of each type of work that is being undertaken. You should not expect to be charged the same rate for different types of work without good reason. Estimates should be provided on all matters and you should expect/demand revisions as matters continue.

Much saving can be achieved by setting up such things as a FAQ page, creating standard contracts and better qualifying what is done internally before outside counsel get involved.

### *Hourly rates and 'blended billing'*

If you are a substantial provider of legal work to one or more firms it is quite appropriate for you to expect some form of discount in the firm's usual hourly rate. The hourly rate is of course only one indicator of the cost of external solicitors. More important is the 'blended billing rate' that the firm is charging you for the type of work you commonly brief out.

As you are aware there are different hourly rates for partners, senior associates, solicitors and articulated clerks. Whilst the hourly rate for each of these different levels of seniority is important, at the end of the day the total cost of a job being performed by the firm depends on how many hours are contributed at each level. The blended billing rate is the average rate that you are charged bearing in mind the time that the various levels of seniority of the lawyers are recording in working on your particular matter. It is important that you concentrate on the blended billing rate than upon any specific hourly rate, particularly when comparing different firms.

Such a blended rate is a far better indicator of how the matter is likely to be staffed by the firm concerned and is a far better guide to the likely size of the account at the end of the matter. A firm which can staff your matters appropriately is more desirable in my view than one that has a lower hourly partner rate.

### *Discounts and profit margins*

External solicitors are invariably open to negotiation when it comes to securing long-term work from reliable clients. It is impossible to generalise about just how negotiable they may be, because that is so intimately concerned with the firm in question at the particular time negotiation take place. Several broad observations can be made however.

Profit margin of solicitors varies between 20% to 50%. For most of the larger firms who have greater than say 100 employees the margins are likely to be between 25-35%. Smaller firms e.g. less than 20 employees may well charge a good deal less but are quite capable of achieving profit margins of much the same order as their larger competitors. It can be quite misleading therefore to compare discounts obtained from smaller firms with larger firms and assume that in some way they are 'equal'.

What should also be borne in mind is of course that if you are seeking a 10 percent discount then this normally represents approximately one-third of the firm's profit margin. If you seek 15 percent then this may well amount to 50% or more of the firm's profit.

In time, the firm will adjust the way it works with you to maintain its level of profitability and this is usually at your expense in the sense of the seniority or experience and expertise of the practitioners handling your matters. Another outcome the discounting is that within the firm the better practitioners will simply not choose to work on your matters nor seek to be assigned to the partners that normally deal with them because they will find it difficult to achieve their internal budgets. Again there are less hazardous means of achieving 'discounts' ranging from provision of low cost secondees through to continuing legal education, training for your staff etc.

I would exercise caution therefore in seeking deep discounts. Far better it would seem to me to set and enforce high standards for work performance in the key areas of responsiveness, reliability and technical expertise and to set appropriate 'blended' rates and fee caps for as much work as you can. You can and should reserve the right in any arrangement with your solicitors to seek tenders on specific work or for large or sensitive matters.

#### *Segment the work and the external counsel to achieve optimum results*

Perhaps the most important observation I can make is the desirability of segmenting your work and matching it to the solicitors/para-legals (internal and external), that perform it. In cases such as liability claims, workers compensation, employment disputes etc much can be achieved by carefully prescribing what you are willing to pay for each stage of the matter concerned. In other words caps can be imposed without affecting the quality of the output. In most other cases this is a relatively difficult approach and is better handled by imposing limits at which point the matter must be referred to your attention for further instructions if the likely costs of the exercise are to exceed say \$10,000.

All of these issues must be carefully captured in an appropriately worded 'service agreement' which guides the relationship between external counsel and the company.

#### **Manage**

Despite the best of intentions many in-house counsel fall down in enforcing the terms of their carefully negotiated service agreements. It helps if the onus is largely upon the solicitors to comply with reporting regimes, the calculation of discounts etc but there is no substitute for careful management of those obligations by you and your staff.

The most obvious needs are adherence to file opening, file estimates and reporting regimes. This is best managed on a regular basis by meeting with external counsel and working through a fixed agenda to ensure these issues are addressed regularly. This keeps you abreast of all matters that are being handled by that firm and keeps you in touch with changes in law firm personnel, difficulties with your own staff as well as adherence to

pre-agreed standards. Minutes should be kept.

The results of interim reviews and feedback from your staff can also be considered at these meetings.

It is at these meetings that you can also gauge what input the firm might have to new strategic developments in the company and give them warning of new instructions or issues that may require additional staffing, preparation etc. In the case of major litigation you should not shy away from attending the regular in-house meetings of those personnel working on the matter so that you keep on top of the situation, rather than relying on set piece meetings or long written reports.

### **Deliver**

By delivery I mean that you should take control of the situation as between the company and its advisers. The advice should be provided to you as in-house counsel rather than to individuals. You may well simply forward such advice to the manager concerned but you should not abandon the field to the external advisers. It is common to see in-house counsel marginalised in this way and you should be careful that your terms of engagement with outside counsel spell out what you wish in this area.

Senior management should also be in no doubt about what your expectations are in this regard either. The 'private' securing of advice from external solicitors without your knowledge or input should always put you on the alert. You may not be able to stop it but you should make it very clear as soon as you can that this is not 'standard procedure' at any level within the organisation.

### **Conclusion**

In-house counsel adds value through:

- their knowledge of the company i.e. its people, processes and products
- their ability to act defensively or preventively - to 'nip matters in the bud'
- managing the workflow which is performed internally and externally efficiently
- their ability to add legal insights relevant to the company's strategic deliberations

In order to deliver that value:

- You must be in a position to speak authoritatively about what the legal needs of the company are, and how the inside/outside solicitors are performing – and comment on their relative cost/benefit
- The terms of engagement must be clear and be designed to achieve the strategic and financial aims of the company.
- The arrangements must be actively managed so you can not only remedy day-to-day issues but also give external counsel a 'heads-up' on more long-term issues.
- Finally you should not risk being relegated to a mere administrative role with the 'real' legal work being performed externally. Keep on top of the relationship, keep control of access points to external counsel and do not be shy to add your comments where appropriate or to become more active in a strategic sense.

