Friday November 8, 2019 1:30 to 2:45 PM

**The Key to Success: The Relationship between In-House Counsel and Partners**
Sponsored by In-House Counsel/Partners Network Panel

As an aspiring or existing partner, how can you expand your in-house counsel relationship and expand your book? Considerations and techniques that in-house counsel have developed over the years with outside counsel to successfully “see around corners” and, in turn, maintain positive relationships with outside counsel as you progress in your career.

**Moderator:** Linda Lu, Deputy General Counsel, Trans Union

**Speakers:**
Joseph Centeno, Shareholder, Buchanan Ingersoll & Rooney P.C.
Christopher C. Javillonar, General Counsel, Permobil
Ekwan Rhow, Principal, Bird Marella
Susan L. Shin, Partner, Weil Gotshal & Manges LLP
Bonnie Wolf, Counsel, Nationwide Insurance Company
The Key to Success: The Relationship between In-House Counsel and Partners

2019 National Asian Pacific American Bar Association Convention, Austin, TX
Moderator & Panelists

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# Relationship Goals

- **For Outside Counsel:** the ability to develop business, maintain good working relationships with In-House Counsel, and provide value to the client

- **For In-House Counsel:** the selection and management of Outside Counsel, practical considerations such as costs and diversity, and navigating internal company politics within the context of the Outside Counsel relationship
Disconnect Between Outside and In-House Counsel

- “Survey: Inside/Outside Attorneys Often Not on the Same Page”
  - Today’s General Counsel

- “Survey Highlights Outsourcing Growth, Disconnect Over Billing and Communication Issues”
  - General Counsel News

- “Cracking the In-House Counsel Code”
  - American Bar Association

- “This Legal Ops Veteran Wants In-House and Outside Counsel to Be Friends”
  - Law.com
Changing Dynamics in Legal Industry

- Increasing penetration of technology into how lawyers practice
- Consolidation of Law Firms
- Growth of size and sophistication of in-house law departments
- Increasing Pressure to Reduce Cost, Increase Efficiency and Deliver Value
- Increasing need for lawyers to differentiate themselves, think outside the box, and see around corners
Impact of Changes on Counsel/Law Firm Relationships

- Greater Focus on Costs/Efficiencies in Law Firm Selection
  - RFPs
  - Preferred Lists/Convergence
  - Why the move to fewer firms and preferred lists?
- Selection and retention of law firms based on “relationship issues”
- Increased competition
  - How do law firms compete in this environment of compression and change?
  - In-House Counsel: what drives the selection process in this environment?
How Can IHC & Law Firms Collaborate to Deliver High-Value Legal Service?

- Defining Success, Value, Goals, and Risks
- Communication and Clarity
- Feedback
Defining Success, Value, Goals, Risks

- Discuss and Define Pre-Engagement: What is the most important value and goal in the work to Corporation/In-House Law Department?
  - Cost Control and Management?
    - Predictability, Budgeting and progress reporting, Project management, Leveraging technology, Efficient use of all resources, No surprises
  - Level of Service?
    - Efficient communications, Appropriate sense of urgency, Innovation, Teamwork, Results driven, Accountability
  - Resolution?
    - Desired outcome, Speed to completion, Appropriate cost, Fairness
  - Expertise?
    - Subject matter, Legislative or government influence, Accountability, Data processing, Discovery or diligence management
  - Corporate Goals?
    - Understand client business model and objectives, Reputational considerations, Confidentiality, Loyalty, Data security, Accountability
Communication and Clarity

- Goals and values are related and integrated and balanced:
  - Cost management may trump all other goals and values in some situations, whereas resolution and urgency might outweigh cost in others; Corporate goals around reputation could be the key value
  - Acknowledge the complex nature; demonstrate teamwork and innovation

- Examples
Feedback From IHC to Partner Is Key

Ongoing feedback ensures that level of service remains consistent with the goals and values agreed to by In-House Counsel/Law Firm at the outset.

Determining feedback mechanism or evaluative metric is important to ensure this communication occurs regularly.
Meeting and Anticipating Client Demands and Expectations

- Thorough familiarity with both client demands & expectations
- Primary goal: make in-house counterpart’s job easier
- Be accessible
- Thorough familiarity with client’s corporate culture and management hierarchy
- Openness to alternative billing arrangements
- Know your clients’ business industry
- Seek to provide value and help counsel “see around corners” and anticipate what’s next
Forming Relationship of Trust Between In-House Counsel and Law Firm Practitioners

- The relationship between the people that matters most
  - Even for large multinational sophisticated corporate legal departments
- Mutual trust between the client and the lawyer is most crucial – IHC trusts that Law Firm Partner has:
  - Good judgment
  - Firm Grasp of Legal Issues
  - Puts Client First
- How a Relationship of Trust is Formed and Developed
  - Examples from IHC and Law Firm partners
Ethics:

When in-house counsel/outside relationship of trust & loyalty are strong(er) and conflicts of interest arise – law firm representation of organizations and conflict of interest
Conflicts of Interest

Model Rule of Professional Conduct 1.7: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.
Conflicts of Interest

Model Rule of Professional Conduct 1.13:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
Conflicts of Interest

- Law Firms typically represent organizations. While individuals run the organization, the client is the corporation and not any of its employees or other constituents.

- In-House Counsel will be deemed to represent the entity and not its officers, directors, employees or shareholders.

- Discussion:
  
  - What conflicts can and do arise when outside counsel represents the corporation, but the relationship of trust (and often friendship) between the law firm partner and house counsel is stronger and interests diverge?

  - Does the relationship of trust and loyalty that develops between law firm partner and in-house counsel over time ever raise conflict of interests between the lawyer and the client?
Does Your In-House/Outside Counsel Relationship Need Counseling?

By Kristin Casler, featuring Jeffrey Singer, Segal McCambridge Singer & Mahoney Ltd.

Attorneys who take their client relationship for granted do so at their own peril, and that of their client, too, for that matter. If you are among those who have been neglecting your relationship, it’s time to turn things around. Here are a few expert insights to help you make a fresh start.

How to Foster the Long-Lasting Relationship

As with any other relationship, you need a foundation of trust. You know this doesn’t come immediately or without some level of effort. It takes time. But it starts with exhibiting and maintaining an attitude of fairness and equal treatment. You are collaborators on a project, and you need to trust one another to share information, be forthright, and to uphold your end of the bargain. When there is suddenly a new development on a case, a change in strategy, a suggested fee arrangement or a billing dispute, you can rely on that trust foundation to allow a civil, productive conversation that doesn’t damage the relationship.

Extend that trust beyond a few in-house and outside attorneys at the firm. Associates, staff and paralegals are often the people interacting. They need to work on the same touch-points to be part of the trust network.

The Importance of Client/Counsel Communication

Everyone knows the drill—constant, clear communication from both sides is essential. You can’t build anything without clear instructions. And no one wants surprises. What is the budget? What are the priorities?

“But, you’d be surprised how many lawyers make the mistake of not asking basic questions, and not just in the early stages,” said Jeffrey Singer, Co-Chairman of Segal McCambridge Singer & Mahoney Ltd.

Outside counsel needs to better understand the nature of the in-house counsel’s job. What are their challenges each day, both short term and long term? Singer asked. Outside counsel may not really recognize the challenges and expectations that inside counsel have. They have to ask. And this goes beyond discussing a case or a corporate witness interview. What do they need to get their jobs done properly and meet corporate expectations? What can you do to make their job easier? How does the counsel’s boss play into the job?

“When outside counsel is aware, they can add value,” Singer said. “They can help in-house counsel succeed. This is progressive thinking, and it’s not always done.”

Additionally, in-house and outside counsel should speak often, so everyone stays on track and corporate objectives are met. The more often this takes place in person, the better. Email makes it too easy to never see your team. Face-to-face meetings definitely develop closer ties.
While the work needs to be on a professional level, there’s room for friendly exchanges. You are, after all, on the same team. Corporate counsel who openly discuss the pressures they face or when in-house and outside counsel share things in common such as family or outside interests, it adds a human element and makes the trust come more readily.

When it comes to responsiveness, you need to define expectations. It may seem like a no-brainer, but given the speed of today’s communications, this can be a source of friction. What if in-house counsel prefers to respond by phone but outside counsel is accustomed to a near-immediate email response? Either side could stew over perceived failures in responsiveness that could have been addressed from the get-go.

*Litigation Guidelines*

Litigation is often the chief task for outside counsel. Good communication in this arena is especially key. Singer said outside counsel need to ask: What’s your philosophy about trying or defending cases? What is the big picture for your company? What do you need to report? Do you need to pass on more meaningful information about the case?

“These are not intimate questions,” Singer said. “If the company likes to settle cases early, I don’t want to put a team together to litigate. If you decide on a litigation plan that is WWII, and you are spending a lot of money, and the client doesn’t want that, you’ve made assumptions that you shouldn’t have.”

Singer advised asking these questions even of long-standing clients. Philosophies change.

On the other side of the coin, corporate counsel must express the litigation philosophy early on. Effective communication is a two-way street.

“You’d be surprised at how often there is a reluctance to address questions like what you project as the eventual outcome and whether the road to it involves intensive litigation, a lot of discovery or mediation,” Singer said.

Sometimes, outside counsel just make strategy decisions, saying, ‘Well, it’s my case,’ Singer said. “Why not ask the corporate counsel if that’s a strategy the company wants to pursue? It seems logical, but it doesn’t always happen. Of course, busy inside counsel often are happy to delegate strategy decisions.”

*Fostering a Stronger Relationship*

Just as inside counsel can boost the relationship by sharing, outside counsel can open up. Letting corporate counsel have a say in some firm business can further develop the relationship and reinforce that both sides are in fact on the same team, that you are working as peers.

Another useful team-building tool is the post-case review. It’s easy to put a case behind you once it’s resolved, but a quick exit interview can go a long way to resolving any issues – big or little — that may crop up in the next case. Either in-house or outside counsel can initiate this, and it really should be standard practice.
How the Relationship Can Be Jeopardized

Money is at the root of a good deal of relationship deterioration. In the case of corporate/outside counsel, there’s a natural conflict. In-house counsel have to live within a budget but want high-quality work. Law firms want to proceed without restrictions, preferably on an hourly basis. How do you mesh the two?

Start from day 1. Maintain harmony by making budget objectives clear. Define the assignment and who will carry out which tasks. And for each strategy, be sure to thoroughly discuss the cost-benefit analysis.

Unfortunately, the best-laid plans don’t always evolve as expected. Law firms need to monitor monthly billing and notify the client when the budget goes off the rails for valid, substantive reasons. If it is out of whack because of inefficiencies at the firm, the firm might be better off eating the extra hours spent rather than jeopardize the corporate budget or the in-house relationship.

Besides money disputes, relationships can be harmed by lack of communication and responsiveness, changing expectations, or even poor-quality work.

When Things Unravel

What to do when things go awry? Be frank. Clear communication is more important than ever when things are unraveling. Avoidance is easy. Don’t take the easy road. You’re all professionals, after all. Outside counsel don’t want to dance around issues they can fix, and they don’t want to be shut out of future business for a misunderstanding or misstep that could be rectified.

“If there is a loss of trust, then the relationship is going to be very hard to rehabilitate,” Singer said. “When we are asked to take over cases from law firms, it is usually because of a lack of communication, lost confidence in the outside counsel, or the outside counsel are in over their heads. The corporate counsel may feel the firm is no longer on his side. This is probably because they haven’t had enough of a discussion, or they may just have overlooked the basics.”
Legal Ops Grows; CLOs Strive “See Around Corners,” says Survey

Posted by: Contributing Writer
March 2, 2016
Corporate Counsel

Corporate legal departments will experience healthy growth this year, according to the latest findings from the Association of Corporate Counsel’s (ACC) Annual CLO Study. The survey finds legal operations roles are in high demand and broadly, CLOs plan to invest more money in-house, than in previous years.

Last week we wrote about how the survey relates to current corporate legal trends - Study Suggests 4 Corporate Legal Trends on the Rise - this week we’re diving into the survey itself a little more closely.

The ACC study suggests as GCs face increased pressure to do more with less and prove value to the business, operational roles in the legal department are becoming more important than ever:

“GCs who invest in chief operating officers or other legal management professionals enable their departments to employ innovative strategies to reduce costs, use technology in new ways and restructure work flows, freeing the GC to focus more time on contributing to business strategy,” said ACC president and CEO, Veta T. Richardson in a statement.

Inside Counsel Spending to Outweigh Outside

This year’s survey finds internal legal department spending will exceed outside legal spending. In addition, as more corporations vie for global business in an increasingly digital market, CLOs report issues of compliance and increased regulatory scrutiny as the top two issues that “keep them up at night.”

“An astounding one-in-three general counsel told us that their companies have been targeted by regulators in the past two years, reflecting the additional risk companies are exposed to as they increase their cross-border work and face a wider range of government scrutiny,” added Ms. Richardson.

5 Takeaways from the 2015 ACC CLO Survey

The study examines a myriad of issues facing the Office of the General Counsel and gives clues as to what can be expected over the next 12 months. Here are aspects that stood out for us:

1. Legal department headcount grows. GCs are arming themselves with additional operational support staff to help them work more effectively and efficiently. According to the report, almost half of all respondents reported legal operations staff positions in their department. This represents a stark contrast to just a year ago, when just two in 10, reported these roles.

The study found it’s not just legal ops that plan to grow – CLOs have designs to increase staffing throughout the entire legal department. The study indicates nearly 40 percent of CLOs added in-house staff last year. Survey respondents report a need to beef up expertise in the
following areas: compliance, contracts, general legal advice, and regulatory or government affairs.

2. CLOs Try to See Around Corners. More than 70 percent of CLOs said issues of ethics and compliance are the top issues “keeping them up at night.” Regulatory challenges too were rated high, ranking within a percentage point.

In addition, the study found 31 percent of CLOs were targeted by a regulator or government entity for a violation in the last two years. CLOs in particular, are feeling the heat because they are tasked with “having to see around corners,” in order to protect the corporation from unanticipated risks. Government entities are enforcing stricter penalties for non-compliance and, in some rare cases, can even lead to huge monetary payouts and jail time for some executives.

3. The White Knuckles of Cybersecurity Continue. Nearly 60 percent of CLOs said data security is a pressing issue this year. Additionally, 22 percent of CLOs said their company has experienced a data breach in the last two years. Although data security issues are almost impossible to completely avoid today, however, more and more government entities are enforcing mandatory notification and emergency response plans.

4. Happy to be Business Partners, Strategic Advisors. Although the responsibilities of CLOs continue to evolve with more expectations being put on them to serve as strategic advisors to the business, an overwhelming majority of CLOs, 82 percent, report a level of satisfaction with their jobs.

What’s more, a little more than 40 percent report the highest level of satisfaction in their roles and a majority of CLOs said being a partner to the business is how they prefer to spend their time. Perhaps this explains why today’s CLOs bring with them a host of useful non-legal skills such as emotional intelligence and executive presence, as they seek to build these identical skills in their own staff.

5. Gender Gap Remains. Seventy percent of men reported making more than $200,000 annually while only 62 percent of women reported making the same. In addition, only 21 percent of men reported making under $200,000, while more than 30 percent of women reported the same. It is important to note, according to the study, experience doesn’t explain these variances in salary.

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A summary of the last year’s survey, the 2015 CLO Survey, can be found here: Budgets, Compliance, Security Top CLO Priorities, ACC Survey Says.

This post is by Carla Del Bove, who provides support to the business of law software product line based in the LexisNexis Raleigh Technology Center.
Outside Counsel Cost Management: A View Around The Corner

Peter Krakaur, PK Consulting

Courage can’t see around corners but goes around them anyway. Mignon McLaughlin

It is 2017; time to manage outside counsel spend. Again. You are not alone. Historical pricing practices and market dynamics offer opportunities for additional legal service delivery cost reductions. In this corner of legal department operations, outside counsel management offers a relatively easy target to realize savings.

You can, should, and no doubt will focus on continued outside counsel management initiatives. Before proceeding too far, look around the corner and consider who should be doing the work. Are your outside counsel management initiatives designed to address specific, albeit important, cost management targets? Alternatively, are your initiatives integral components of your broader legal service delivery strategy?

Below, I suggest a number of factors that legal departments might consider as they embark on or continue with outside counsel management initiatives. In particular, I focus on various operational issues associated with managing outside counsel in the light of all available legal sourcing options.

Although addressed primarily towards in-house practitioners and operations professionals, the following content is also relevant to law firm professionals. After all, effective law firm-department relationships are partnerships. Ideally, the following suggests opportunities to grow in this regard.

Your Plan

You’ve got to be very careful if you don’t know where you are going, because you might not get there. Yogi Berra

Thankfully, your 2016-authored strategic plan identifies elements of your outside counsel management approach:

- Update outside billing guidelines and automate their enforcement through an enhanced eBilling platform leveraging advanced analytics, coupled with more consistent internal payment processes.

- Manage law firm pricing negotiations with RFPs/RFQs, focusing on increased use of value pricing and alternative-based fee arrangements (AFAs).

- Create, manage and monitor budgets for your matters.

- Identify, collect, and report on key performance indicators (KPIs) and industry benchmarks in light of current and future trends (and by organizational areas, practices, and geographies).
• Use data analytics and modeling to extract meaningful and actionable information about outside counsel costs and pricing.

• Implement systems and processes for evaluating and providing law firm feedback (e.g., QBRs – quarterly business reviews).

Depending on your team, their skills and your culture, legal operations professionals (existing or new roles) may conduct pricing negotiations consistently, objectively and strategically. These professionals will also likely architect a deliberate legal IT strategy to manage this vision.

Your approach may also include two additional elements worth highlighting.

Legal project management

Setting the right price is important, but absent project management you run the risk that you will not meet your budgets and plans. Project management helps you manage scope, quality, time, and cost, ensuring pathways to successful value delivery. Law firms are investing in legal project management. In conjunction with your law firm cost management initiatives, you might collaborate with key law firms to develop and implement thoughtful project management partnerships.

Convergence

You better cut the pizza in four pieces because I’m not hungry enough to eat six. Yogi Berra

How many law firms do you use? Are there any other organizational areas that have direct relationships with law firms that are not part of the legal budget? You might examine the number and percentage of firms accounting for greater than $X (e.g., $100k) of spend. What are the amounts and percentages of invoice adjustments or rejections, and the accuracy of submitted accruals for each law firm? What are their percentages of matters with budgets or that are AFA- or value-based? These and other metrics may suggest that your outside counsel management plan include an intentional reduction in the number of outside counsel used by your organization.

A convergence/preferred provider initiative offers at least two benefits. First, the use of many outside firms translates to additional overhead. Someone must track and manage pricing negotiations, e-Billing and other system integrations, procurement and finance vendor approvals, invoice and time entry reviews, accruals, and rate increase and conflict waiver requests. More relationships to manage, more communications, and more distractions for the team.

Second, a convergence initiative offers you an opportunity to partner with select law firms to develop and implement thoughtful pricing structures within and across your practice teams.

Ideally, your outside counsel management initiatives will make you feel less bloated from a cost perspective. Will these initiatives really change your overall legal eating habits? Although you may benefit from different pricing structures, fewer firms, and focused department efficiency, you may not have altered the way you deliver legal services. Efforts to create more focused bites at the pie should not distract you from broader, systemic cost saving opportunities that await around the corner.
Your Portfolio

I never blame myself when I’m not hitting. I just blame the bat and if it keeps up, I change bats. After all, if I know it isn’t my fault that I’m not hitting, how can I get mad at myself? Yogi Berra

When managing financial investments, it is prudent to conduct regular checkups to maintain a current, balanced and diversified portfolio – stocks, bonds, funds, and cash equivalents. In certain respects, the use of outside counsel is an “investment” in one asset type. You’ve chosen the resource. The harder part is remembering how, why and when to use it.

As you conduct your outside counsel checkup, consider if you can secure short- and long-term savings through thoughtfully managed outside counsel costs and a diversified legal service sourcing portfolio. Put another way, if your focus is on outside counsel cost reduction alone, you may be missing broader opportunities. Prioritize long-term cost-effectiveness over straight, short-term cost savings to secure durable value. Start with your in-house team and explore your options to insource, outsource and otherwise value staff.

Your Team

You can talk all you want about having a clear purpose and strategy … , but ultimately this means nothing if you are not investing the resources you have in a way that is consistent with your strategy. In the end, a strategy is nothing but good intentions unless it’s effectively implemented. Clayton Christensen

Look for intelligence and judgment and, most critically, a capacity to anticipate, to see around corners. Also look for loyalty, integrity, a high energy drive, a balanced ego and the drive to get things done. Colin Powell

Your in-house team is your core. It includes a broad talent mix: counsel, paralegals, legal operations, and other legal professionals. You may now or in the near future integrate AI to your legal service delivery model.

In addition to outside counsel, you may diversify your legal staffing portfolio with temporary or contract hires, consultants, and managed/outsourced service and talent providers (LPOs for short). Where and how you invest will be driven by organizational and departmental strategies, adapted to meet episodic and continuous demands for legal service.

As you (re)explore your sourcing portfolio, you might consider the following team management issues:

- Talent: What is the optimal mix of skills and experience for your team and organization, now and in the future? Your answers may suggest that you train, borrow, buy, or try and buy talent (i.e., insource, outsource, hire contractors and temporary employees, leverage secondees and interns, etc.) Also consider how staffing allocations impact team growth, training and cross-training opportunities.
• Culture/Diversity: What type of culture are you fostering in your legal team? How will your sourcing decisions impact this? Consider your diversity goals. You can continue to promote diversity by pushing all your providers to expand and create opportunities at all levels.

• Process: Effective solutions involve an integrated mix of people, process and technology. How will changes to the staffing (people) element change your legal service delivery processes? How should you disaggregate your work and where should it go? What work should be shifted from lawyers to paralegals or other legal professionals? What processes are best outsourced or insourced? Analyze the impacts on your legal project management strategies as you partner internally, and with law firms, LPOs, and your other legal service delivery partners.

• Collaboration & Engagement: How can you enhance collaboration and engagement within your team and with your organization? How do sourcing decisions impact your ability to learn and adapt to ongoing business needs or your ability to partner with internal clients? How do they impact your ability to measure internal client satisfaction?

• Knowledge Management: How does the use of law firms, outsourced providers or temporary/contractors impact your KM strategy? How many internal resources will devote time to maintain your KM platform given your sourcing decisions? Can elements can be outsourced?

Your Costs

A nickel ain’t worth a dime anymore. Yogi Berra

Fully loaded apples

In addition to team management issues suggested above, optimal sourcing decisions are based on cost comparisons. Presumably, you have specific, negotiated rates with law firms, outsourced providers, contractors, and consultants. As you gather comparative internal numbers, remember that there are costs beyond salary -- benefits and other compensation elements, taxes, rent, perhaps travel or other unique costs relating to your team, geographies, and organizational structures. Consider how you calculate fully loaded costs for your comparisons.

There is no magic percentage to apply as the mix of inputs varies widely by organization, location, and industry. Where possible, you might try to derive a blended hourly rate for counsel and for other legal professionals internally and for each type of other provider that can serve as a basis for apples-to-apples analysis. Even assuming that you derive these data-driven costs, you might include an additional internal cost adjustment.

Productive Time

There are so many things that we wish we had done yesterday, so few that we feel like doing today. Mignon McLaughlin
How many X (e-mails, invitations, meetings) do you have today, this week? How much time was correctly spent on training, hiring, reviews, and other team management activities? How do these numbers grow when you survey your entire team? As you calculate fully loaded costs, you might also revise your calculation to account for “productive time.”

Consider how in-house teams scrutinize outside counsel bills and individual time entries in particular. This painful process enables legal teams to evaluate productive outside counsel work, and to approve, reduce, or reject certain activities accordingly. Although there are some exceptions, many legal departments do not track their time and have little, direct visibility into the productivity of individual team members. Absent these details, it may be easier to assume 85-90% of your calculated fully loaded cost to develop a comparative “productive” hourly rate for your team. Or not.

Your Data

Data is like garbage. You’d better know what you are going to do with it before you collect it. Unknown author.

Data supports strategic decision making. Your outside counsel management initiatives no doubt include plans to track relevant data (e.g., fee types, rates, budgets, client satisfaction, ratio of inside counsel to outside counsel spend, etc.) In parallel, you may track your internal historical and current operational costs (by matter type, practice, geography and organizational unit). Finally, you may have identified benchmarks and KPIs to measure your success, and to create dashboards to monitor your progress.

Carefully identify the relevant data you capture and the business value you hope to derive from that data. In addition to helping you stay on track, your data that will help your team better understand the cost for each provider and resource, perhaps by phase, task, and matter/project. Under the light of value-based pricing, what should you do about shadow billing? If your team has the luxury of understanding, defining and measuring value, shadow bills offer only additional overhead and may be misleading. Moreover, there are clearly benefits to keeping things simple. That said, for the moment this data may provide the context your team needs to have comfort with and develop the prices for your work. As your team develops a better pricing expertise and you (re)balance your sourcing portfolio over time, the data may be less relevant.

In-house and law firm project leads do not always understand how to price, scope, or determine the underlying value of a matter/project. Training on these issues is one area in particular where in-house and law firm lawyers have a shared need and interest. Perhaps in-house teams can partner with select outside counsel to provide joint training in this regard? In the meantime, there is no perfect approach regarding the capture and use of shadow billing. Legal teams need to weigh the costs and benefits in light of their data and outside counsel management strategy.

Importantly, time-based billing is still embedded in many e-Billing systems. There is rich data to help with matter value estimation and correlate historical costs with understood results. Even though legal departments and law firms continue to explore beyond hourly billing and appropriately rely on AFA’s and value pricing, hourly rates remain durable and relevant in
pricing discussions and analysis. Collectively, this data will help you understand the comparative costs of all providers and formulate your current, optimal legal sourcing strategy.

Your Future

Remember, the future ain't what it used to be. Yogi Berra

Legal service delivery requires agile assessment of staffing and sourcing options. Given the relative inefficiency in the way outside counsel services historically have been priced and managed, these services offer a logical target for in-house teams. As you continue to manage client expectations and your spend, view all corners of your legal department strategy to develop and manage a holistic staffing mix. You will realize savings, lock in long-term efficiencies, and deliver value.

This article originally appeared on LinkedIn in January 2017 and is available here.

Peter Krakaur, Principal of PK Consulting, is a senior legal operations executive and lawyer with over fifteen years of experience creating and executing innovative strategies that drive operational efficiencies in support of the business and practice of law. He has developed and led teams of lawyers and legal professional managing legal projects, pricing and billing, knowledge management, change management, and technology initiatives.

As the former Director of Legal Operations at a Bay Area energy company, Mr. Krakaur was responsible for the development and administration of processes and systems that supported the legal department and its collaboration with all company employees, law firms, and third-party legal providers. As former Chief Knowledge Officer for a global law firm, he directed the strategic direction of global knowledge management initiatives, leading the knowledge management, client risk acceptance and client collaboration teams. He also designed legal project management initiatives in support of the firm's pricing, matter budgeting and client service strategy.
September 19, 2018

ETHICS CORNER: Representing Organizations and Job Mobility

Robert Evans III

Andy was leaving an ethics CLE training session, chatting with one of his partners when he learned that one of the firm’s public company clients, Hopwell Corp., was looking for a new general counsel. Andy, a New York corporate and securities lawyer, has a good friend from law school, Rachel, who is the general counsel and sole in-house lawyer at another firm client. Andy’s first instinct is to call Rachel and offer to introduce her to the recruitment committee at Hopwell.

Before he does that, Andy calls a more senior partner in the firm, the relationship partner for Rachel’s company. The relationship partner’s reaction is that Rachel is deeply involved in several critical matters for her company, that the CEO of her company would not appreciate Andy and the firm luring her away from her post at this time and so Andy should not mention the job to Rachel.

Andy is torn. He knows Rachel is ambitious and would be interested in the opportunity. He believes it would be better for the firm to have Rachel as GC of Hopwell (a much bigger company with way more legal spend) than for her to remain where she is. From a business point of view, he disagrees with the relationship partner. Beyond his business concerns, perhaps because his head is full of ethics rules and cautionary tales from his recent seminar, Andy wonders if the ethics rules might limit what he can do.

Identifying the Client

As a corporate and securities lawyer, Andy rarely represents individuals. So, he is quite familiar with the New York ethics rules regarding representing corporations. Rule 1.13 Organization as Client tells him that in most cases the corporation is the client, not any of its employees or other constituents. So Andy concludes that he will not treat Rachel as a client. He does identify both companies (Rachel’s company and Hopwell) as firm clients.

Considering Conflicts

Andy then examines whether helping Rachel get a new job might involve him in a conflict of interest. To do that, he examines Rule 1.7 Conflict of Interest: Current Clients (see sidebar for the language of the rule). That rule limits a lawyer’s representation of a client if it would involve the lawyer in representing differing interests or if there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

Following some of his learning in his ethics CLE, Andy first thinks through the rule using himself as the lawyer. He decides that he may have a personal interest, his friendship with Rachel and his hope for more business for his firm if she goes to work for Hopwell. He concludes that he would not be “representing differing interests” and does not believe his professional judgment would be clouded in any real way. He then tries to imagine how to apply...
the rule with the term “lawyer” applying to his whole firm. One aspect of the situation that he did not take into account when thinking about himself is the Hopwell-client relationship. His firm is counsel to Hopwell and owes duties to that client. Andy decides that in zealously representing Hopwell, the firm should want to introduce Rachel. However, he also considers that to be a bit outside the scope of the firm’s representation.

Before he ends his study of the ethics rules, he recalls that his firm has offices in several states that have adopted the ABA Model Rules of Professional Conduct. Andy checks and discovers that, while substantively similar, Model Rule 1.7 (see sidebar for rule) has a slightly different language and emphasis. It does not cover “differing interests” the way the New York rule does, so it seems somewhat narrower. “Differing interests’ include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”

Consulting Others

Another lesson Andy learned in his ethics CLE is that the perspective of the person considering a conflict can be impaired by the potential conflict itself. Therefore, Andy’s next step is to consult with other lawyers in his firm. His firm does not have a general counsel, but does have a Conflicts and Ethics Committee. He decides to consult only with committee members just in case they conclude there is a conflict so that those discussions will be privileged.

The committee member Andy consults points out to Andy that the firm is frequently in the position of representing clients that are direct competitors. Because the firm is comfortable representing multiple clients that compete, it has gotten comfortable with the line between taking actions that might disadvantage a client and those that would violate Rule 1.7. The committee member sees Andy’s current situation as similar — some actions that Andy might take should be OK. They go through a range of choices such as calling Hopwell to champion Rachel for the job, introducing her to the recruitment committee, and pushing Rachel to consider the job.

The committee member suggests that Andy can call Rachel and alert her to the job opening. They decide that doing much more than that would make them uncomfortable (though they do not parse strictly between the potential ethics issue and the business and relationship one).

Andy goes back to the relationship partner for Rachel’s company and works through the business and relationship concerns. They conclude that Andy will let Rachel know about the job opportunity.

Conclusion

Reflecting on his experience, Andy realizes that potential conflicts between existing clients can arise in perfectly ordinary ways. Before this situation, Andy tended to think of conflicts as arising only in the course of actively representing a client. For example, if he would have to negotiate against a client, he would know to get a waiver or turn down the new assignment. He now has a better appreciation for the scope of Rule 1.7 and a realization that more situations raise ethics questions than he imagined. He also is comforted to know that many potential conflicts can be resolved through careful consideration and managed without violating the rules.
New York Rules of Professional Conduct

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

For comment on the rule, click here.

Model Rules of Professional Conduct

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.