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Cooperation Not Conflict

A healthy relationship between in-house and outside counsel is built on mutual understanding

By Stephen F. Ellman

Surveys usually cite money as the greatest cause of conflict in any close relationship. This is equally true in the relationship between outside and in-house counsel. It is unquestionably the primary cause of conflict and, when combined with large egos and professional ambition, it is a powder keg for discord. It need not be, and this article will discuss how both sides can work to make it what it should be at its best: cooperation to the benefit of the client and both its in-house and outside counsel.

Having served as both a senior partner in a law firm and a senior counsel at a large money center bank, I have seen the issue from both sides. The road to a successful relationship can be fraught with landmines, especially when combined with poor communication, differing expectations and surprise — that monster feared by lawyers and business people alike.

Yet, when handled properly, there are significant benefits for both parties. But, like all relationships, each side must contribute to a successful affiliation. The solutions require effort and adaptability and include good communication, trust, responsiveness by both sides and, needless to say, quality work. Any problems which develop can be alleviated by a mutual understanding of each other's concerns.

The trick is for both in-house and outside counsel to step back and see the strengths and also the inherent weaknesses in the process. From corporate counsel's perspective, use of outside counsel provides the expertise, experience or manpower an in-house lawyer or even a department of in-house lawyers may lack. It is a way to keep overall costs down while acquiring quality representation. Certainly there is, for example, no need for a corporation to hire a full-time patent attorney to prosecute one patent. The in-house attorney also wants a firm that has the substantive or geographic capabilities that the in-house legal organization may lack.

Outside counsel needs to understand the concerns and priorities of the in-house attorney who has a dual role, both counsel and client. The latter, who is truly a peer, generally offers his or her knowledge and expertise about the day-to-day concerns and overlying legal issues of the corporate client. In-house counsel is seeking a high level of competence and proficiency that will result in a successful conclusion of the matter or ongoing matters.

Billing — a Source of Conflict

Conflict is certainly known to arise from the clash of egos, or even differing substantive perspective between outside and in-house counsel, but most often it arises in the financial arrangements.

The corporate counsel is usually focused these days on budgets for the handling of legal matters, along with the traditional focus on obtaining quality work. After all, that is the process followed by other in-house executives. Corporations have come to expect such from outside counsel. On the other hand, most outside lawyers abhor the concept of project budgets and seek to provide their professional services on an unfettered hourly basis.

This issue is best faced at the outset by setting parameters. The business and the law firm should work cooperatively to define the nature of the outside counsel assignment with consideration given to what tasks the law firm is expected to handle and those that should be handled by the in-house lawyer.

Working on a project or hourly-based budget with a ceiling may be of some benefit to all; it helps to impose an overall restraint on a law firm but does not pin it down to specific amounts for all or part of the project. A firm must carefully allocate its resources without assigning excess attorneys to a matter. However, a firm must ensure that improvement in productivity does not come with the cost of sacrificing quality. The goal of a successful relationship is providing quality representation at a price and method that fits into the client's financial structure.

The law firm must understand the client's budget and establish procedures to stay within it. If on an hourly basis, the fees must be constantly monitored by the law firm with monthly billing serving as a benchmark. If it appears that the budget is going to be exceeded for good substantive reasons (i.e., unexpected issues arise), the law firm should immediately notify the client and negotiate whether to increase the budget or streamline the work and/or have the client assume more of the tasks. If, on the other hand, it looks like the budget will be exceeded because the outside lawyers are just spending too much time on the matter, counsel should seriously consider writing off such time. Loss of some extra billing is a much better solution than antagonizing in-house counsel with non-substantive requests to increase the budget.

Whether it is the general counsel, another in-house counsel or a senior officer of the corporation, clients like to seek law firms that think about the business needs of the company, with attorneys also thinking creatively about the substantive and financial relationship between lawyer and client. In our firm, we have handled work such as certain financing or even a group of similar litigations on fixed fees. (One such fixed fee project has been working successfully for seven years.) Another arrangement is a shared approach to legal work. Contingency and partial contingency/bonus arrangements have also been employed successfully by outside counsel.

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Cooperation

Communication Is Key

Certainly, the rapid rise and acceptance of office technology has created both benefits and potential pitfalls. The positives are the tremendous increase in the speed of communication and the delivery of materials. Changes and edits can be made within minutes, and today's law firm must be prepared to do this. At the same time, this creates pressure for an almost instantaneous response to phone calls, e-mails and receipt of papers. While many prefer the efficiency of e-mail, it diminishes personal contact.

To overcome that lack of personal communication, it is helpful to schedule periodic face-to-face meetings with in-house counsel, whether in an office, at a meal, or at a seminar provided by the outside counsel to business people, as well as attorneys (sometimes even for CLE credit). The time and expense spent traveling to clients' offices is invaluable, as it provides the opportunity for both personal as well as business contact.

An important part of any lawyer/client relationship, including one between in-house and outside counsel, is mutual trust and mutual appreciation. No matter the state-of-the-art technology, that relationship is best developed in person. Communication is easier, and that intangible but valuable ability can be more easily accomplished. Not only is it easier to exchange personal information, but such get-togethers give counsel an opportunity to discuss the relationship as well as the nature of the business done by the client. With the hourly billing meter off, outside counsel can offer general business and legal advice which will no doubt be well-appreciated by the in-house colleague.

Simple Secrets

In working with corporate counsel, the most important thing to remember is that each corporate client has its own personality, as people have their own personalities. It is critical for outside counsel to understand a corporate client and its legal personality. Some corporations litigate matters "to the death." Some settle all disputes the minute they come in the door. Most take a stance in between. Some prefer arbitration or mediation over court litigation. Similarly, some corporations favor long complex agreements while others prefer the "short and sweet" method. I cannot emphasize enough that it will pay outside counsel to get to know the legal personality of its corporate client.

The major concerns of in-house attorneys often revolve around the company's financial procedures. Since there can be consequences internally for in-house counsel who fail to properly manage budgets, outside counsel need to understand the internal pressures faced by in-house colleagues. If the project or hourly fee is going above budget, it can impact negatively on the in-house attorney, who may question whether true value is being delivered. Bills not sent on a timely basis often create tension. Timely bills help to avoid the dreaded surprises and give the two parties an opportunity to correct the budget before it is too far off track.

For the firm attorney, a major concern is getting information in a timely manner and having access to those needed either to mount a strong case or to successfully bring about the successful conclusion of a deal. At times, in-house attorneys are not responsive to requests for information, which in the long run creates inefficiencies and drives up fees.

The in-house attorney should make certain the staff works closely with the law firm rather than hindering their efforts, but what is outside counsel

to do if saddled with an overwhelmed in-house attorney, who despite good intentions is uncooperative? There is no substitute for getting to know your client. Find out where to go within the corporation to get information.

Often, information from the operations or line people gets filtered to the outside counsel and may be incomplete or just plain inaccurate. (This is best illustrated by the child's game of "telephone," where information is passed down the line and inevitably the last person in the line hears a different message than that conveyed by the first.) Early access to those employees with actual first-hand knowledge of the facts greatly improves the quality and efficiency of outside attorneys.

Fact development is the most important part of building a case or handling a corporate transaction. A weakness for some law firms is that too often this task is relegated to the most junior attorneys, and partners don't focus on the facts until they are under time pressure. Often, this critical work is even delegated to paralegals, who have no contact with the company employees and little practical experience.

Finally, and I cannot emphasize this enough, outside counsel should never take on matters outside of their area of expertise. A firm may be asked to handle a new matter for which it has little expertise or experience. This tough decision involves an area of paramount importance in any relationship — trust. The client must be confident that the firm will work in the client's best interest, even if it means not accepting a possible matter. It is almost unfathomable for a firm to turn down a big fee. But overall, doing so strengthens the relationship between the two parties and gives the client a better opportunity to get quality representation on a specific matter.

Good firms know who they are, and what they do best, and their clients appreciate that. Likewise,

when major policy matters arise, it is the firm's obligation to point out to clients the implications and advise them whether another firm may be better suited to handle these matters.

Conclusion

In seeking ways to have a solid relationship from the start, we have found these tips to be valuable:

- Be sure to insist at the outset that both sides identify what they need and want, and what they expect.
- Establish a realistic timetable for all matters that suits the needs of in-house counsel and at the same time may be accomplished by outside counsel within that time frame.
- Remember, this is a partnership, so keep an eye on costs throughout the matter.
- Communicate on substantive matters as often as necessary.

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Stephen F. Ellman

is a partner at Zeichner Ellman & Krause and has served as vice president and senior counsel at Manufacturers Hanover Trust Company (now part of JPMorgan Chase).