

# DOWNLOAD PDF WHO SHOULD BE DOING WHAT : MOST EFFECTIVE USES OF IN-HOUSE AND OUTSIDE COUNSEL

## Chapter 1 : Outside Counsel Cost Management: A View Around The Corner - LOPSIDER

*Bernadette Bulacan Starin was founding employee and former assistant general counsel of Serengeti (now known as Legal Tracker), the most widely used matter management and electronic billing platform for corporate legal departments, acquired by Thomson Reuters in October She knows what it's like to work in private practice as well as the in-house world.*

Rate it using the stars above and let us know what you think in the comments below. As a result, partners are rightfully concerned about their relationships with both existing clients as well as prospective clients and how to best solidify and foster those relationships. This article addresses several different, and relatively simple, ways in which outside counsel can demonstrate their worth to a client that can help them stand out from the crowd and solidify that relationship. Specifically, in-house counsel are demanding more and more from their outside law firms. Thus, in order to address those concerns, law firms should do what they can to help in-house counsel accomplish their primary goal: One technique that can be helpful in achieving this goal is to provide a projected budget for the expected fees and expenses for a new deal. This approach is particularly helpful for repeat transactions. By doing so, you allow the in-house counsel to manage expectations with management regarding the total costs associated with a particular deal so that there are no surprises at the end of the deal, which can often lead to angry and frustrated clients. As the Survey notes, more and more companies are using Internet-based systems to track spending, budgets, and accruals. This was the case at my old company, which routinely requested projected budgets for each new fund formation deal from our primary outside counsel. While this may seem to be an incredibly difficult task, and one that most firms would prefer not to do for obvious reasons, you will demonstrate to your client that you understand their fiscal concerns, which will be greatly appreciated in the current market. Clients understand that unexpected circumstances generally arise in every deal, and when that happens, simply provide an updated budget. More importantly, clients will appreciate your willingness to help make their job easier. Remember, in-house counsel have to answer to their internal bosses and do not want to be embarrassed or blindsided by an unexpectedly high legal bill for any given deal. Thus, setting a budget that is signed off on by the client can help avoid this undesired outcome. In my experience, outside attorneys who routinely responded in an extremely quick manner were definitely at the top of my list whenever I needed a question answered. In addition, routinely updating your client as to the status of a current matter is also quite worthwhile. This is especially true if the original deadline cannot be met, at which point as much prior notice as possible should be given so that appropriate actions can be taken. Again, while an extremely simple solution, I cannot stress how often this simple piece of advice is ignored. In one extreme and unfortunate case, not receiving a timely answer ultimately placed the general counsel of my old company in the awkward position of having to attend an important strategy meeting without being properly prepared for the primary issue being discussed. The outside firm had been given weeks to advise us as to how we should address an important issue. However, instead of providing a timely response, the general counsel was put in the undesirable position of having to track down the attorneys to whom the question had been addressed in the last few hours leading up to the meeting in order to obtain the necessary legal advice, which turned out to not be as detailed as desired. Not surprisingly, this did not sit well with the general counsel as it placed him in a fairly embarrassing situation. Needless to say, the outside law firm was soon replaced by another firm. In-house attorneys typically do not have access to legal research tools such as Lexis or Westlaw. Thus, in-house counsel typically rely upon their outside attorneys to keep them updated regarding developments in relevant areas of law. Again, while this seems to be a fairly simple idea, the number of firms that actually provided such updates was surprisingly small. In addition to sending out the standard monthly newsletter, one creative way to keep your clients apprised of legal developments that will be greatly appreciated is to invite your clients to continuing legal education CLE seminars. Like private practice lawyers, in-house attorneys also have to maintain their CLE requirements but typically have a much more

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difficult time finding ways to satisfy such requirements. At a firm, CLE seminars are usually plentiful, either through firm-sponsored meetings or through outside sources. Thus, invite your clients to attend any firm-sponsored or outside CLE events to which you have been invited. Your in-house attorney will most likely be very appreciative, as I was whenever I received such an invitation. If there are no upcoming CLE seminars to which you would want to invite a client, consider volunteering to conduct your own CLE seminar through the Association of Corporate Counsel ACC , of which most in-house counsel are members. Almost the entire legal department at my old company routinely attended these lunch meetings, primarily because it provided the perfect opportunity to earn CLE credit in a relatively easy manner. These meetings were often well-attended by in-house attorneys within the area, thus providing the opportunity for the firm to establish itself as an expert in a particular area of law and opening the door to potential new clients. Maintain a Dedicated Client Team A client is more likely to provide you with additional matters if you have demonstrated that you can run a deal in the most cost-effective manner for the client. One way to accomplish this is to have a dedicated team assigned to a particular client, and try your best to maintain continuity with that team even in light of the usual attrition. In this way, the client will feel comfortable that you understand their specific way of approaching certain transactions. For example, my old company used one law firm as their primary outside counsel for fund formation matters. She was responsible for the vast majority of the hands-on work involved in each deal. Conclusion The foregoing are just a few examples of techniques successfully used by outside attorneys in maintaining long-standing relationships with happy, satisfied clients. Again, some of these methods may seem incredibly simple and obvious, but surprisingly are too often ignored.

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## Chapter 2 : How to Work with In-House Trademark Counsel

*Most in-house lawyers have many more cases, meetings, and emails than the average outside counsel; they can't give as much attention to any individual case, so don't waste their time.*

Everyone in the legal industry always wants to hear insights from a distinguished panel of representative in-house clients discussing what they value most when working with outside counsel. I believe that the firms that are successfully able to adopt a strong client-centric mindset will have a significant advantage over their competitors. Requesting feedback enables you to get deeper insights to ensure that client expectations are being met and that you are delivering value to them. Every outside lawyer should be in consistent communication with the client at every step in the matter life cycle and client relationship, so that there are no surprises and so that the client is put first. Remember, your goal is to become a client-centric law firm that not only collects client feedback but acts on it in an effective way to enhance the customer journey. Trust, predictability, truly understanding my business, being proactive and cost sensitive are most important to this group of general counsel and I would argue most GCs today in the qualities of their outside counsel. Always aim to deliver in these areas and put the client first. Cultivating relationships is vital to your success as a lawyer in private practice. Enhance these relationships with a combination of in-person and online networking LinkedIn being THE place where professionals convene and interact. In addition, look for opportunities where you can provide unique insights to clients and targets where you have expertise and they need guidance, such as a key development in the law that impacts their business. These in-house lawyers said they are seeking outside counsel who they can call on for thoughtful quick answers and not be billed a fortune for that type of guidance, who really understand their business and anticipates their needs. At the heart of it, your clients want to know that you consider their business and legal issues to be of the utmost importance and that you will be a fierce advocate for them, protecting their rights and interests. Remember if you are client-centric and predictable at all times, you will delight and retain the client. Bills from a law firm should be bulletproof and always reviewed by the billing partner, according to this group of in-house counsel. What do general counsel want in content from law firms? Tailored, value-added, short and easily digestible alerts and newsletters with engaging and to-the-point subject lines is what resonates most with them. It goes without saying that the content produced and shared by law firms should always be client-focused – think of show vs. Also, the content that is sent to clients and prospects should be sent strategically and sparingly. Spend the time to segment your mailing lists and to analyze engagement and open rates. Your email marketing software and social media analytics provide a treasure trove of information that most firms underutilize in this respect. Always remember to delight the client - put yourself in their shoes at all times and think about how you would want to be communicated with if you were them. Personalization is one of the biggest factors to whether general counsel look at marketing materials sent by law firms newsletters, client alerts, etc. These in-house counsel said it would stand out from the sea of email content they receive each week. On staffing, the panel encouraged law firms to develop a strong bench of lawyers for the future and to make sure your clients know exactly who is on their legal team. They want multiple points of contact with their outside counsel and they want to get to know the associates working on their matters. They also prefer to work with a handful of outside law firms versus firms in the double digits, hinting at a trend of overall consolidation in the number of firms being used by clients, and their desire to have closer relationships with their outside counsel. One GC said that he often has to ask for this from his law firms and that many firms do not proactively provide this to him, or will send him something that is not helpful to him. Developing a client-focused, user-friendly matter status report is a great way for firms to differentiate themselves and delight the client. The days of taking a client to lunch, or for a purely recreational social activity are falling by the wayside. Your clients are very busy individuals who are getting pulled in many different directions both professionally and personally. General counsel prefer to build the relationship with their outside counsel through touchpoints that enable law firms

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and lawyers to demonstrate how you provide value to them. Invest in your clients in a way that enables you to showcase your talents and to build the relationship, which is a win win for everyone involved. So going forward, follow through, put the client first and do what they ask you to do. She has worked at some of the most prominent law firms in the world, developing and executing global revenue generating, business development, internal and external communications strategies, including media relations, branding, content marketing and corporate journalism, and multi-channel content marketing and thought leadership campaigns. She is currently the secretary of the LMA Northeast Region and is a frequent speaker and published author.

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## Chapter 3 : 5 Signs You're Destined To Go In-House - Law

*Help Manage Outside Legal Costs At the end of the day, one of the most important factors from the client's perspective in the decision to retain outside counsel is the overall cost of external legal fees.*

After taking care of your team, nothing is more important than being able to successfully manage your outside counsel spend. As I have said before, the legal department is a cost center and the business is always looking to cut costs. Being able to demonstrate that you are paying close attention to costs and that you are thoughtful in what you are spending and why, will make conversations with Finance and the CEO go much easier. In-house lawyers who run their matters, teams, or department like a business have more credibility at budget time - and during those really tough times when the business is looking for more difficult cost cutting measures. One thing you will want to do up front is establish some metrics so you can measure success, e. For fee-based metrics you can also pull it from court fee requests available on PACER or you can buy data about average hourly rates by city by type of work from several sources. With that background, here are some ideas: If you have an e-billing system, this can usually be handled via features in that tool. You may have to modify a few things to get the information in the most useful format and require your outside firms to include new or different information , but doing so should not be a show stopper. For example, at the beginning of May we would ask all of our outside counsel to tell us: The Excel spreadsheet captured all of this data over the course of a 12 month period with a running total showing how we were doing against budget overall. Additionally, in the middle of the month we would go back out to our outside counsel and ask if anything changed in the forecasted spend. This gave us a very detailed and accurate look at spending. A monthly budget forecast gives you precision and allows you to exercise proactive reductions in spending if necessary. It also causes you to talk more with your outside counsel about what is driving costs. My experience has been that outside counsel are happy to discuss spend and ways to reduce it they would rather have those proactive discussions vs. Likewise, you may want to charge trademark searches to the marketing department to help drive efficient behavior. You will still need to be on top of all legal spend whether it hits your budget or not but being clear on what hits your budget gives you better ability to actually manage the spend you will be measured against. Use alternative fee arrangements. There are a number of ways you can go with this angle. Some of the ones I used include: A percentage contingency fee i. Cost sharing with other companies involved in your matter joint defense, share expert costs, local counsel costs, translations, etc. If you can, get the discounts to apply back to the first dollar spent vs. One thing I remember pretty clearly: If the firm thinks they need first years then either substantially discount the rate or, better yet, let the first year tag along for free. A flip-side idea is to get free summer associate time for simple but time consuming projects There are many more ideas here. Nothing gets you cost savings faster than being willing to move work. If you are unhappy with the firm or simply made a mistake in terms of sending a low value project to a high dollar firm , move the work to a firm better suited for what you need and offering costs savings that justify the move. You may wish to give the current firm a chance to retain the work if they can match the cost savings. And, if you do move work, be sure to get free hours from new firm to get up to speed on the matter. Use less expensive firms for certain types of work. Be sure you and your team are sensitive to which work goes where and why. Just be sure to have a discussion with your team about which firm should get the work. Not only will you make a better decision, you will start to train the next generation of department leaders about how and why to make such decisions. We created the list from our own experience or from speaking with colleagues at different in-house departments. A niche firm is typically a smaller firm that specializes in a particular area of the law and is usually staffed with lawyers who moved away from the larger firms. One niche firm described themselves as 5-star lawyers for 3-star price. Use and try to stick to outside counsel guidelines. If you do not have an outside counsel billing policy, put one in place quickly. And be sure that you send it to counsel with every new matter and to counsel you use most frequently on a yearly basis. This policy will set out clearly, among other things,

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what you do and do not pay for. For example, the policies I created stated we did not pay for online research e. Also, we reserved the right to reject any bills we did not receive within three months of the work be performed. Nothing kills budget planning like getting a bill in November for work performed back in January. A policy will also help you in the event you did not get an engagement letter for the project. You can find a number of sample policies online with a simple search. You will probably get better rates, and you usually get some free analysis of your legal problem as firms like to set out how they would attack the problem. You can find sample RFP documents online. Sometimes you can a firm you prefer to match the rates offered by a competing firm. There is not always time to go through an RFP process or you may have other reasons for not doing so. That is fine as everything depends on the circumstances at hand. Likewise, engagement letters are more important than you might think. Be sure to get one for every engagement or at least have a master engagement letter with your preferred law firms. Your law firm will likely take the first cut at the engagement letter. The letter should clearly spell out any discounts or alternative fee arrangements you bargained for and be sure that your outside counsel policy trumps anything contradictory in the engagement letter unless otherwise agreed in writing. Get to mediation fast. Ninety percent of litigation settles, why wait two years with your wallet hemorrhaging? Consider if it makes sense to see if you can get the other side to agree to mediate early. I can recall several times where there was a dispute pending and I simply picked up the phone and spoke with either an in-house lawyer or outside counsel on the other side and worked out a quick resolution. If you go this route you can create some simple decision trees to help you analyze where you think a case may go if it goes to trial including the cost of trying the case and use that to help set your settlement authority for the mediation. Set expectations up front with outside lawyers. Face it, if you tell outside counsel you want something, they will move heaven and earth for you to get the answer. Problem is, moving heaven and earth is pretty expensive. Sometimes you just need a little dirt shoveled. Set your expectations up front with your outside lawyers. It can be a cap on the amount of money you are willing to spend e. Doing these things will provide clear guide posts for counsel. Create a monthly or quarterly report showing savings. It will also keep you focused on the task at hand. Two easy things to do: On this one you will need to be both creative and conservative. Keep things simple and make sure you can reasonably support any assumptions or assertions you make in the report. The report can show things like the following: We did this in the spreadsheet I mention above; Cost savings based on using lower-cost counsel, or based on deals you struck to shave costs off standard hourly rates or savings on vendor costs; Costs avoided legal , e. Primary attorneys fees Costs avoided business , e. I know a small innovative firm that is already creating reports like these for its clients “ exactly the type of information general counsel love to have. Also, get your team involved. If people get excited about the process of saving money the entire process starts to snowball in a good way. Set up a big board or something to show costs saved and if you hit a certain target there is a small reward for the team such as a lunch out, or an afternoon sneak away to the movies. There are dozens of other ways to save costs, but I need to stop writing or else my blog will turn into a slog. Also, nothing is in stone. Not every situation lends itself to cost savings or easy management of outside counsel. Some cases or deals are just too complex, too important and too risky. Sterling Miller If you find this blog useful, please pass along to colleagues or friends. It is intended to provide practical tips and references to the busy in-house practitioner and other readers.

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## Chapter 4 : Tips For Getting More From Your Outside Counsel

*In-house attorneys are regarded as SECOND OR EVEN THIRD STRINGERS, and once they go in-house even the management of the company starts thinking of them as less competent than outside counsel. They are the weak gazelles that the lion was able to grab from the herd.*

May 21, at 6: Given the global reach of the internet, however, the GDPR also has extraterritorial application that reaches all the way to the U. S. and into your software agreements as a result. The EU and U. Since the advent of the internet, the U. Although there are some federal statutory restrictions on the collection, use and disclosure of certain types of personal information such as under the Health Insurance Portability and Accountability Act, as well as the Graham Leach Bailey Act and under certain state statutes, there is no comprehensive federal statutory approach to the privacy of personal information. Such information can be collected without the specific consent of the individual at the outset, subject to specific notice, consent, onward transfer, and other requirements after the fact. In fact, such legislation has been left to the states, and not all of them have implemented laws addressing data breaches and notice, and for those that have, the requirements are widely disparate. When it comes to U. Well, there are lots of open questions regarding compliance, and the application of the GDPR to such businesses require tailored review and solutions dependent upon how personal data is processed, accessed and stored. That said, there are a number of things every company with SaaS solutions should do once it finds that GDPR compliance is required. Commensurate with the breadth of the GDPR, the number goes beyond a single article. When addressing any SaaS platform, effective legal compliance can only occur when an appropriate foundation for compliance exists. With this in mind, every company providing SaaS solutions should, at a minimum, do the following: Engage in Data Mapping. I realize that this seems like a difficult task as for some companies, it may be , but it is a necessary step for a number of reasons. Know Where Your Backups Reside. As part of any data mapping exercise, it is important to know where your backups reside for a multitude of reasons. A core requirement of the GDPR is the obtaining of informed consent to the collection and use of personal data. Building upon the data mapping results, companies must establish processes to outline their practices regarding collection, use and disclosure of such personal data so as to obtain actual informed consent. Further, procedures must be implemented to address data security at the data level – in this case, revising data breach incident response plans to address GDPR disclosure requirements so that necessary procedures are in place. Although the above tips are not exhaustive, they provide a decent outline of the technical and procedural hurdles that companies providing SaaS solutions should take to set the appropriate foundation for in-house counsel or outside counsel to effectively implement GDPR requirements. Granted, the above elements are not inherently legal, but believe me, they set an essential foundation for the contractual considerations I will be outlining in Parts II and III of this series. In private practice for over 20 years, Tom is a sought-after technology lawyer who uses his industry experience as a former computer systems engineer to creatively counsel and help his clients navigate the complexities of law and technology in their business. News outlets reach out to Tom for his insight, and he has been quoted by national media organizations.

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## Chapter 5 : Outsourcing v. Hiring In-house: Pros and Cons | Practical Ecommerce

*Hiring the right outside counsel is one of the most important steps in creating an effective working relationship between the legal department and outside counsel.*

Negotiations occur constantly on micro and macro scales, both in the office and in everyday life. As in-house counsel, you are sure to encounter numerous types of negotiations as part of your daily tasks, such as salary negotiations, contract negotiations with outside counsel, settlement negotiations during litigation, union negotiations, purchase order negotiations, and more. This QuickCounsel provides a summary of the advantages and disadvantages of different types of negotiating formats, negotiating styles and preparation strategies.

**Negotiation Formats** While countless types of negotiations exist, running the gamut from negotiating with your spouse over which tv show to watch to settling a civil suit, there are only two main formats in which these negotiations take place. Positional bargaining, also known as distributive negotiation, involves arguing based on a position. Each side takes an extreme position based on its wants, needs, and limitations. These positions are almost always on opposite ends of the spectrum. The parties then treat the negotiation as a zero-sum game in which only one party can "win" the negotiation. By starting with an extreme initial position, the parties are then forced to make concessions to reach agreement. The smaller the concessions made, the more victorious one party feels. However, by starting with extreme positions and making only small concessions, the parties find that the negotiations become tense and drag on. A failed negotiation results when a stalemate is reached, and no final agreement is made. Positional bargaining is best characterized by a pie analogy - each party is competing for the biggest slice of the pie. The negotiating room grows hostile, and communications may involve threats and lack transparency. A lack of trust ensues, and the future of the relationship may seem precarious. As the negotiation continues, parties grow even more entrenched in their positions, refusing to change their minds. Parties strongly commit themselves to one position and one position only and focus only on their own goals. Despite its flaws, there is a time and place for positional bargaining. It works best when haggling on price, compromising on a position with another party that has conflicting underlying interests, or acting in a situation of immediate crisis.

**Principled negotiation**, also known as integrative negotiation, is another negotiation format in which parties work together to forge a value-creating agreement that leaves both parties happy with the outcome and with the status of the relationship. Principled negotiation creates a collaborative environment in which parties establish shared interests and work together to build mutually beneficial solutions. Parties are able to understand each other and trust each other while also being creative in solving the shared problem. Rather than thinking in terms of positions, the parties think in terms of interests and problems. Rather than a zero-sum game, principled negotiation leaves both parties no worse off than when they started the negotiation. Principled negotiation can also be characterized by a pie analogy - each party collaborates with the other to try to create a bigger, mutually beneficial pie in which to share. There are five main negotiation styles. Each negotiation style deals with conflict differently. These five styles are competing, collaborating, compromising, avoiding, and accommodating. Each style has its advantages and disadvantages, and it is crucial to be tactical in which style you choose, considering such factors as the style of the other negotiator and the type of negotiation. The competing style is the most adversarial style. Negotiators who gravitate to this style see negotiations as competitions that have winners and losers. The other negotiation styles see competing negotiators as aggressive and strategic. However, the competing style does not work well when used against another using the competing style; often, deadlock occurs, and relationships become frayed or even hostile. Accommodators are ready and willing to give information and to make concessions. Accommodators often let the other side of the table win on issues. This can be dangerous when negotiating against a competing style. However, accommodators put relationship as a top priority, and this style can be very successful in negotiations in which mending or maintaining relationships is critical. For example, if your company is in the midst of a crisis, an

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accommodative strategy can be very successful at avoiding litigation and appeasing the other party. However, unless the situation involves a relationship crisis, use accommodative strategies sparingly - giving away too many concessions or too much information in a negotiation might lead to a less than ideal outcome. The avoiding style is passive aggressive and tends to skirt issues rather than confront them head on. Avoiders tend to come across as less transparent and honest, and lines of communication can be weak. Often times, this style is employed by negotiators who do not respond well to conflict or aggression. Rather than make accommodations, the avoiders simply avoid the situation. With that said, an avoiding style has its advantages in a highly emotional negotiation. Avoiders can avoid confronting emotions and passions and instead focus on hard numbers in order to reach an agreement. The avoiding style also works fine when the negotiation is simple or trivial. However, due to looming communication issues, the avoiding style has the ability to result in deadlock and resentment, as well as strained relationships. If you find yourself using this style and negotiations have become rocky, consider taking a break from the negotiating table to think through strategy before returning to negotiations. The compromising style involves meeting halfway. One side makes some concessions, while the other side makes some concessions. In the end, there are no clear winners, but rather, what is believed to be a fair result instead occurs. Parties tend to start out at extreme positions, then work their way to the middle. This style is used often in positional bargaining. It works well when there are time constraints or there is an ongoing and strong relationship with the other party. While this format helps keep relationships strong, the agreements are usually not the most optimal agreements for both parties. Parties brainstorm on how to create mutual value and think outside of the box on collaborating on a solution. Collaborating is all about value creation and is commonly encouraged by those who support the principled negotiation format. This style is great at forming strong bonds or maintaining good relationships. However, the collaborating style is the most consuming style and the most mentally exhausting style. It also requires the most preparation. In addition, it does not work as well with competing style negotiators as they may try to take advantage of the situation. In addition, collaborators need to be wary of how much information is shared in order to avoid being taken advantage of.

### Negotiation Preparation Strategies

While many individuals feel as if successful negotiations are simply the product of natural skill, the key behind reaching an optimal agreement is preparation - know the issue, know yourself, and know your party. Preparation includes knowing your needs and limits, understanding what the other party wants and anticipating their limits, asking the right questions, and being creative in your proposed solutions. Good preparation allows you to strategize and to think on your feet in the negotiation room. One of the most popular forms of negotiation preparation involves using a Seven Elements approach, as first outlined in *Getting to Yes: The Seven Elements* include interests, options, legitimacy, alternatives, communication, relationship, and commitment. By considering all of these different elements of a successful negotiation, you can enter the negotiating room fully prepared and fully informed. Interests are not positions. Interests are merely the reasons behind a position. Your interests in reaching an agreement may be readily apparent to you. Try to put yourself in their shoes. Why did they agree to sit down at the table with you? What will they get out of this agreement? After you devise a list of interests, circle the common interests. You will highlight these shared interests at the negotiation. Starting off a negotiation on the same page creates a foundation for agreement down the road. It also creates a sense of mutual understanding at the table and opens lines of communication. A good agreement fulfills interests, not positions. Second, brainstorm options for the agreement. Not every agreement involves just a black-and-white agreement on a monetary amount. How can you create value? What options create value for both parties? For example, if you are negotiating an employment contract with a new employee, think outside salary. Options can include benefits such as health care and paid time off, training, trade association memberships, telecommuting, and more. Options create value and help fulfill even more shared interests. Third, consider how you can add legitimacy to these options. What objective criteria or standards create a sense of fairness in the transaction? This dissolves a sense of arbitrariness from negotiations. For instance, if you are negotiating on a real estate purchase, you can use property appraisals or recent sales as objective criteria. Fourth, think about the

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alternatives for both parties. What alternatives do you have if you do not reach agreement? What alternatives might the other party have? This is your plan B. This puts the value the agreement creates in perspective. Never forget that the other side might have other competitive offers. Fifth, focus on keeping lines of communication open. Ask about their interests. Before going into the negotiation room, write out a list of questions that you need to ask.

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## Chapter 6 : What Every In-House Counsel Should Know in | Legal Insight

*Outside counsel are always interested in their performance because they are, for the most part, wired to please their clients. Providing feedback to outside counsel may seem at first like an arduous task, but it should not be.*

**Litigation Management for the In-House Generalist:** This article series introduces the art of litigation management from the in-house perspective with tips for various phases of litigation. This article discusses retaining outside counsel, and the role you need to play as in-house counsel. Retaining outside counsel A critical early step to take in litigation and of course where your company is the plaintiff is to retain counsel to represent you. The quality and skill of your representation can be proportional to success in litigation, and the ability to manage the litigation and its costs. There are a number of factors that go into the selection of counsel. Some companies prefer to have long-standing relationships with a few counsel who are their go-to litigators for most types of litigation. Others prefer to use a variety of counsel. Often, primary outside counsel must be supplemented with local counsel in the jurisdiction where the dispute exists. Depending on the amount of time available to select counsel, consider using a request for proposal either formally or informally. RFPs gather similar data points from multiple counsel to permit more of an apples-to-apples comparison. An RFP, whether formal or informal, should ask for an array of information to permit that comparison: Consider asking for references and attaching your outside counsel guidelines more on this later. Limit the number of firms invited to submit a proposal and the time to respond. Once counsel is selected, finalize a retainer letter or if using existing counsel, the firm should open a new file and send a new matter acknowledgment letter specifically setting forth the scope of this engagement. Receive and review a budget before accepting the engagement. Strong outside counsel guidelines can effectively set expectations for outside counsel. The retainer letter or new matter acknowledgment letter should expressly reference and incorporate any outside counsel guidelines i. The retainer letter or new matter acknowledgment should also require counsel to share outside counsel guidelines with any local counsel they retain directly with your consent. The role of in-house counsel While different in-house counsel exercise different degrees of involvement, in-house counsel is more than just an overseer. Among other things, in-house counsel helps guide the strategy and course of the litigation. This includes evaluating the strength of the case; managing indemnification and insurance tenders; identifying document custodians and corporate witnesses; assisting with deposition preparation; leveraging internal resources to manage outside counsel costs; reviewing outside counsel statements and requesting periodic progress reports; updating legal proceedings memoranda and disclosures in securities filings; facilitating the gathering of potentially relevant documents responsive to discovery requests; reviewing and editing pleadings and motions drafted by counsel; and evaluating and participating in settlement conferences, arbitration and mediation. Litigation management may also include interacting with expert witnesses and third party consultants. Insist on being a voice at the table with counsel and third parties. Of all of the parties involved, you have a unique and often the best combination of legal acumen and knowledge of the business. Part of your job is to help outside counsel and others bridge the knowledge gap and translate their experience to the business. Part of the job is to keep the appropriate amount of pressure on internally to ensure the commitment from the business to assist with the litigation does not falter or wane or if it does, re-evaluate the desire of the company to continue litigation versus settling the matter. Litigation management attorneys are usually involved in risk management and strategic direction sessions with general counsel and senior management. As the person living at the nexus of the litigation and the business, you will likely be called on to provide your advice and guidance on the litigation strategy, updates on the litigation, the litigation budget and settlement.

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### Chapter 7 : The Best Question To Ask Your Potential Outside Counsel - Law

*Clark notes that one of the most effective ways to negotiate OCG terms “and avoid rocking the boat” is to entrust the task to firm personnel (in-house firm attorneys, if the firm has them, certain partners if it does not) other than client relationship partners.*

First, let me say that Calgary is a wonderful city and a great place to visit and the people are awesome too. One of the topics I spoke on was what to do when you are faced with a data breach. It was a very interactive session with lots of great questions and feedback from the lawyers in the audience. In particular, we spent some time discussing the recent Equifax data breach and the very negative fallout that company is experiencing “ mostly because it seems Equifax was very unprepared to deal with a breach. This is very surprising given the nature and the amount of sensitive data in its possession. We also talked a lot about things in-house counsel should be doing before there is a breach. Some of those things were in my presentation, others were brought forward by members of the audience. And as I stood on stage listening to the discussion I knew I had my next blog forming right before my eyes. As important as it is to know what to do if you have a breach, there are a number of things that all in-house lawyers should focus on before there is a breach and by doing so, you can substantially limit the potential damage caused by a breach. A data breach which involves the loss of personal data drives a myriad of obligations, whereas a data incident does not. Unless you are an experienced privacy lawyer or have one on your team , trying to handle a true data breach situation or even just figuring out whether you have a breach or not may not be the wisest thing to undertake without the guidance of experienced outside counsel. Have a data breach response plan. If you are in-house counsel to a company that does not have a written data breach response plan , make getting one in place in a top priority. You do not want to face a data breach without having a plan that outlines, among other things: Not only do you need to have a plan, you need to update it yearly at a minimum and “ more importantly “ you need to practice it every year as well. The same is true if you experience a real data breach, i. While a full-blown data breach response plan is a necessity, having a short checklist you can pull out to get yourself oriented and pointed in the right direction in those first 15 minutes can make a huge difference and allow you to be the calm in the eye of the data breach hurricane. This one may not be obvious to you, but how your company communicates during a data breach is probably among the most critical decisions that will be made. Do it poorly e. Companies with bad reputations lose customers, have a falling stock price, and have a tougher time with regulators. Get it right, and you can help put a data breach behind you in a dramatically shorter time frame. In-house and outside counsel will be key players in drafting and reviewing communications and in developing a communications strategy. Not in this day and age. And trying to force your spokesperson to communicate through a mouthful of legalese is a recipe for disaster as well. The best way to solve this problem is for in-house counsel to participate in the same media training that most companies offer to their senior executives. While the lawyers and the communications people may not always agree on what exactly to say or not say , in-house counsel that has gone through media training will at least be speaking the same language as the communications professionals and can marry that training with their legal skills, business acumen, and “ hopefully “ good old fashion common sense. All of which are skills that make in-house lawyers so valuable to companies, especially in times of crisis. As part of your training, you should review case studies of companies that communicated well or poorly during a crisis and take those lessons to heart. Put the right contractual protections into place. It was strangely inept of Equifax to try to sneak a class action waiver into the sign-up terms and conditions of the free credit monitoring services it was offering post-breach. For example, do your website terms and conditions contain the right limitations of liability, arbitration clause, class-action waivers, choice of law, exclusive venue and jurisdiction provisions? If not, put those into place before there is a problem. Similarly, is your public-facing privacy notice up-to-date and does it accurately describe how your company handles personal information? An out-of-date and inaccurate privacy notice can

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cause your company almost as many problems as the data breach itself. Be sure to review and update yours on a yearly basis. Do you have the right contractual protections “including force majeure” in your vendor contracts, provisions that will allow you to properly recover against them if they are at fault in a data breach incident? And have you fully vetted your vendors to see if they can live up to the promises they make? On the flip side, do you have clauses in your contracts that minimize your exposure and appropriately shift the risks of a data breach? All of these are things you must do now because once there is a breach you cannot wish your way into a new contract. If your company handles personal data, it should invest in cyber-risk insurance. While it is possible that some of your existing insurance policies may cover a data breach. Also, keep in mind that there is not a one-size-fits-all cyber-risk insurance policy. You need to be very careful that you truly understand what your policy covers. The best cyber-risk policies provide customer notification services think notice obligations under various data breach laws , ransomware demands, forensic investigation costs, business interruption costs, your first-party expenses, your third-party obligations, litigation costs; credit-monitoring, regulatory costs, and so on. Keep asking questions until you are sure your policy covers the scenarios and damages you want to be covered. If personal data is encrypted and is stolen, for the most part, you become immune to most, if not all, of the obligations, burdens, and liabilities normally associated with a data breach. In fact, many data protection laws explicitly carve out personal data that is encrypted from any of the notice and other obligations. It is worth having a long discussion with your IT friends about the process of encrypting any personal data your company stores “both in transit and at rest. It is also a good idea and in some cases the law to encrypt the hard drives of company laptops, including requiring a password to even get past the first screen of the computer. If the hard drive is encrypted and is stolen, the data on that hard drive is basically worthless. That said, over time, the cost of encryption technology should come down and be more affordable. If you cannot encrypt, consider segmenting personal data, i. The most inexpensive way to help prevent a data breach is by properly training your workforce. This includes training on creating proper passwords along with having technology that requires those passwords to meet certain criteria and be changed frequently ; how to spot social engineering attempts e. For some reason, many people on the business side think any data in the possession of the company is theirs to do with what they want. Training also includes ensuring that your IT department is aware of viruses and security patches and promptly and properly implements those patches. Finally, training can include teaching your workforce how to properly report an incident and how to draft such a report in a way that sets out just the facts, and not a lot of unnecessary and usually inaccurate commentary that you, as in-house counsel, will have to deal with as part of the breach. The good news is that most of this training is fairly inexpensive in the overall scheme of things and can be very effective in preventing problems down the road. Just about any company that handles personal data has a regulator to answer to in the event of a breach. Often, more than one. The caveat here is to be sure you have your house in order generally before setting up such a meeting. That could make for some awkward discussion at the meeting. Here in the U. Establishing a relationship with the local office can pay off if there is trouble down the road. Knowing who exactly to call and having them know who you are can be a big advantage when faced with a data breach. With the respect to the FBI, consider joining the local branch of InfraGard which is a public-private partnership where the FBI works with local business to keep them abreast of cyber threats and gather information and intelligence from the members about potential threats or issues. Limit the data you collect and access to the data. Simply put, the less data you have collected and stored , the less data the bad guys can access in the event of a breach. Make sure that all employees have access only to the data they need to do their jobs. Make sure everyone in the company knows the rules of the road around the use and handling of this data. Additionally, in the event of a breach, rest assured the regulators will be asking to see all of your internal policies. Just another reason to have these buttoned up. Stay up to date. In addition to the various links above, here are a few things to read that will get you up to speed on the issues:

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### Chapter 8 : Why Going In-house Is Often the Worst Decision a Good Attorney Can Ever Make | [www.nxgvi.com](http://www.nxgvi.com)

*You may have to modify a few things to get the information in the most useful format (and require your outside firms to include new or different information), but doing so should not be a show stopper.*

Want More from Your Outside Counsel? Apply Your People Management Skills, March We all want more productive relationships between in-house and outside counsel. With high billable rates for external counsel, some in-house lawyers may presume that paying invoices is sufficient to guarantee the best possible outcomes at all times. However, savvy in-house counsel understand that they are not represented by firms, but by people. And they invest in managing the people who are part of their outside counsel teams, being clear to establish expectations, discuss processes for working together, provide feedback, and take the time to review projects once completed with a view to improving future work. This is not inherently a time-consuming process, and the return on investment can be the elevation of good teams to great, and great teams to exceptional. Make counsel aware of your organizational objectives You often challenge outside counsel to know your business. While outside counsel typically endeavor to do so by poring over publicly available information, such information alone will not provide your view of your business. This effort includes identifying for outside counsel, your internal stakeholders, and their respective interests in the outcome of a particular dispute or transaction – this is not publicly accessible information. This may require a bit more of your time, but it does benefit to commitment to the process. In addition, the check-in can include short conversations on past deliverables with an eye to making future deliverables more user-ready. The content was exactly what I needed. For future reference, I made the attached revisions because the format is more likely to help him focus on the issue. Similarly, you could use the check-in to describe an unfurling issue that is creating a sense of frustration. Could you designate one person to provide me with a daily update email unless something is urgent? Make time for post-performance feedback During the course of a project, in-house and outside counsel typically communicate very frequently about a plethora of issues, availing themselves of all the tools that technology has made possible – email, phone calls, text, video conferencing – and doing so at unusual times of the day and for weeks on end as the matter requires. The often-overlooked feedback phase is a critical element of managing outside counsel effectively because it can improve performance on subsequent engagements. Outside counsel are always interested in their performance because they are, for the most part, wired to please their clients. Providing feedback to outside counsel may seem at first like an arduous task, but it should not be. Remember, this is an investment. No topics about performance should be off-limits so long as the exchange is civil and respectful. Thus, clarity of direction, planning issues, fees issues, as well as conduct and attitude are fair game for feedback. Catch people doing something right Feedback does not have to be negative. Simply put, most people respond better to praise than punishment. When most of us think back to our own careers, it is been the time that we have been properly acknowledged that have felt most rewarding. Your management of outside counsel and internal staff needs to incorporate the praise principle. This is simply the most effective way to demonstrate appreciation for thoughtful work. The recognition needs to be quick, because it demonstrates that you are paying attention to what people are doing. To the extent possible, it should be public because that promotes the status of the individual. And it should be specific, so the individual sees that you understand the value of his or her contribution. Discuss opportunities for improvement directly and constructively While we recommend praising in public, correction needs to be done in private. Nobody likes to be embarrassed publicly, and a public thrashing is only likely to lead to blame shifting. If performance has been below expectations, that message needs to be delivered in a manner where it can be heard. That is usually best done one-on-one, and preferably, in person or via voice conversation. The conversation about subpar performance or identifying areas of improvement should be very open, honest, and respectful. Again, consistent with the positive reinforcement principle, start with what went right. Did outside counsel respond to your questions in a timely fashion? Did she write a good brief? Did she present well at oral

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argument? How did he handle the cantankerous opposing counsel or party. Pointing out the good at the beginning of the conversation sets the tone for a constructive exchange instead of one filled with finger pointing and defensiveness. Invite conversations on process improvement from outside counsel. As professionals, we should be working on our own professional growth and figuring out how to better serve our clients. Like anybody else, we need feedback on how to do so. Outside counsel can be a useful source of that kind of feedback. First, they may see you more in the trenches of the legal issues that you manage than your internal clients. Second, they probably can make comparisons between how you manage a situation and how their other clients may approach a similar problem. Your outside counsel should also be invested in your success in the organization. So why not enlist them as allies in your professional growth? When you are doing a debrief of the project or at the end of the year, you may want to consider asking questions such as the following: The overarching point is that investing in making your outside counsel a part of your team opens up the process for continuous process improvement. This may take a little more of your time, but it does require focus. Set expectations early, and do course corrections as needed. Take the time to ensure that they understand your business as you see it. Celebrate their successes with them in a public manner. Do not shy away from difficult conversations, but make them objective and specific. In the end, your leadership in this area will result in a more efficient and effective legal program for your company.

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## Chapter 9 : Effective Negotiation Strategies and Preparation

*Why You Should Use Competitive Bidding for Outside Counsel (FindLaw's In House) GCs Want More Value, Expertise From Outside Counsel (FindLaw's In House) FindLaw has an affiliate relationship with Indeed, earning a small amount of money each time someone uses Indeed's services via FindLaw.*

Outsourcing your General Counsel – When is it appropriate? Some business organizations may be able to contract outside the organization, resulting in improved efficiencies and profit. The concept of outsourcing certain business and services functions is not new. It has been used for years. For example, most companies do not maintain their own payroll function, they outsource it – there are specialists outside contractors who can manage the function more cost-effectively. For the same reason, many companies outsource most non-strategic functions – the annual report preparation; staff recruitment; insurance; public relations; advertising; internal audit; staff training; and information services. When considering a task or job function, a two-question test can be applied as follows: Should this be done in-house? If not, can it be done outside as well, or better, and as cheaply? So what is new about outsourcing? What is new is that outsourcing has become a major response to the profit pressures on many businesses. Using a medical analogy, many companies are going through major surgery. There are several favored surgical procedures that have new titles but are familiar in reality. Outsourcing, on the other hand, seems to be the favorite post-surgical procedure. In the past, companies have outsourced mostly functions considered non-strategic to the company, such as some of those listed above. The potential application of outsourcing is now such that one has to assume that no aspect of the company is safe from outsourcing. We may come to see a company outsourcing entire departments and functions such as accounting, sales and distribution, human resources, corporate affairs, and even manufacturing. In each case, the directors and senior management will need to be satisfied that the essence of the business remains intact, even if most of the functions are contracted out. Come to think of it, why not also contract out the directors and senior management? We may then be left with shareholders owning a company whose only non-cash asset is a brand name and whose only staff and functions are those which are required by law to remain in-house; and, of course, those required to stay around to manage the outsourced contractors and suppliers or, could that function also be outsourced? Outsourcing the general counsel legal function. Where does the outsourcing of the general counsel legal services sit in the outsourcing question? It is important to understand that for some business organizations not all functions should be outsourced. The strategic and cost-efficiency test provided above should be applied in each case. Modified to apply to the general counsel legal services function, the test may be posed as follows: Are there strategic reasons why the general counsel legal services function should be delivered in-house? If not, can general counsel legal services be delivered from outside as cost-effectively? There is not space in this article to go through the detailed analysis that may be required to arrive at final answers to these questions. It generally comes down to the following principles. Due to business reasons and company culture, some companies may not want to entirely entrust certain functions to outside contractors – strategic planning, operational planning and control. On the other hand, once a company has made a strategic decision, the legal services involved in the implementation of such decision may need to be handled by a legal specialist in an outside firm. As a general rule, these transactions that implement the strategic decisions may include the buying and selling of businesses and other assets, financing arrangements, applications for regulatory consents and licenses of all kinds, and litigation and dispute resolutions in all forms. It simply may not be cost-effective for an outsourced general counsel to duplicate such specialized legal services, unless they are strategic to the company; but, the outsourced general counsel can manage the services to be performed on behalf of the company by outside counsel to ensure cost efficiency and quality of work. In practical terms, this involves an on-going legal risk and opportunities audit, and an ongoing legal compliance program. Small to middle market companies must make tough decisions when addressing such strategic legal resources. Such companies are constantly seeking

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ways to obtain the strategic legal resources that their business requires while at the same time trying to save money and increase efficiency. When outside counsel fees climb, emerging companies consider hiring an inside counsel as an employee. With all the benefits that employee status entails, hiring someone to be an inside counsel can also be costly; such companies simply may not have the justification or the resources to hire a full-time in-house general counsel. Outsourced general counsel services offer an attractive option to such companies. For a specified fee, the company contracts with an experienced and well qualified attorney to provide strategic in-house counsel legal services. The outsourced general counsel is an independent contractor, not an employee. Thus, the attorney reduces his or her overhead, while providing the same high quality, high level of service of law firms or employee counsel. In no event, should any company buy the idea that the outsourcing of general counsel legal services decision is an all or nothing choice. Certainly, some legal services are best delivered externally, from law firms that offer specialized legal services. As in most things, it is a matter of balance and the result of informed and objective analyses. Standards of legal services. What qualities are required of the lawyer who performs the strategic legal services provider role for the company in an effective way? Most companies who have addressed this question would agree with many of the following: An outsourced general counsel can provide this level of service and resources for the company. A classic example of this is the legal compliance area. In recent years and with the recent corporate scandals, there has been a proliferation of laws directed against businesses. Higher standards of compliance are required and stiff penalties threatened. As a result, businesses are coming to see the need to introduce formal legal compliance programs. However, many limit their efforts to the issuing of a manual, which does little more than recite, at great length, the relevant laws affecting the company. The typical manual is usually thick, and while it looks handsome on a shelf, it is seldom consulted by employees. The manual represents a raising of awareness about compliance but is not, of itself, compliance. Compliance only occurs when the relevant legal compliance obligations are reflected in company culture, policies and procedures, agendas, minutes, reports, guidelines, price lists, terms of trade, and so on. Compliance must be embedded into the way the company does business externally and in the way it operates internally. The only way such compliance will be achieved and maintained is through the disciplined, determined and unglamorous efforts of lawyers and managers. This is a very detailed and time-consuming job. Even if outside lawyers tried to do the same job, they could not provide the same quality program as an outsourced general counsel, and their fees would be beyond what most companies would be willing to pay. By following the approach as set forth in this article, a company will ensure that it has the correct mix of internal and external legal resources to meet its legal services requirements, and the outsourcing of general counsel services may be one avenue to provide the company with confidence that they have arranged their legal resources accordingly. This entry was posted in Articles on.