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LITIGATION

Clearing the Way to Work Effectively With Outside Litigation Counsel

Relations between in-house counsel and outside litigation counsel come in all varieties. Birds of a feather. Oil and water. Everybody obviously wants to avoid the latter. And in today's economic climate, it is more important than ever to maximize utility of outside counsel. Clients continue to pare their outside counsel lists and are focused on value and efficiency. Outside counsel relationships that are not running smoothly may be the first to go.

There are legions of articles about how outside counsel can improve client relations and what they need to do to avoid losing clients. Likewise, scores of consultants speak to in-house counsel about cost management strategies for outside counsel fees. Beyond budgets, new software tracking systems and fixed fee arrangements, what role can in-house counsel play in maximizing the relationship with outside counsel? Here, from the perspective of both outside and in-house litigation counsel, are some suggestions for clearing the way to an effective, productive and enjoyable relationship.

Clear Goals

Nothing is more harmful to the relationship with outside counsel than dashed expectations. It can be the result of an unexpected high bill or a surprisingly adverse development or outcome in litigation. In either case, this is a moment of crisis between outside counsel and their clients. Effective in-house counsel can lessen this risk with focused discipline on the front end of the engagement.

First and foremost, be clear as to goals, expectations and priorities. For example, suppose a business client goes to in-house counsel up in arms about a competitor's advertisement. After gathering some information, in-house counsel dials up outside counsel and asks for assistance in going after the competitor for false disparaging advertising.

Outside counsel says "no problem" and takes off



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investigating the facts and commencing litigation. What's missing? A discussion of the overall goal to be achieved for the business client and the company as a whole. Outside counsel does not know if the goal is to win at all costs, to position the case for a quick negotiated settlement, or something else.

Similarly, suppose outside counsel is representing a company as a defendant in a product liability case. Is the goal to deter future lawsuits or to end the litigation for a given sum of money, regardless if it is spent on trial or in payment of a settlement? Without a discussion and understanding of these goals, outside counsel cannot pursue the path that best suits the client's expectations. Outside counsel certainly should take the initiative in having a conversation about these issues. At the same time, in-house counsel should not assume that outside counsel necessarily knows what the end game is.

On any particular engagement, strategies, tactics and goals can, and often do, change over time. Still, in-house counsel has the opportunity at the outset to set the agenda. What is the foremost goal? How

feasible is the goal? At what cost? What resources will be necessary? What are the risks and are strategies available to hedge against those perceived risks? "Management by Objective" may sound outdated, but it remains a surprisingly effective reminder for how in-house counsel can force the hard, disciplined thinking about an engagement at the front end. Missing this opportunity only increases the risks of 'surprises' down the road, and the associated struggles in the relationship with outside counsel that inevitably ensue.

Clear Communication

Be clear about lines of communication. This has several facets. First, in-house counsel should explain to what extent outside counsel will have direct access to the business client and witnesses. Having to go through in-house counsel for all information may be an unnecessary bottleneck as well as an imposition on in-house counsel. But some in-house counsel prefer it that way. If so, that should be made clear.

Alternatively, should outside counsel have free reign to call any employee witness, or will there will be a point person even if it's not in-house counsel? And where another attorney, whether inside or outside, is involved in some aspect of the case or a related dispute, will outside counsel be able to freely contact that attorney to discuss matters, or will in-house counsel want to be the conduit? Most sophisticated clients have institutional practices for communications between outside counsel and the business clients. Again, the important thing is to set the ground rules at the outset, both for the sake of efficiency of collaboration and resources.

A related issue is making sure that outside counsel has an understanding of how frequently in-house counsel prefers to be contacted by outside counsel and by what method. Does in-house counsel wish to receive regular periodic updates? Does he or she want to be cc'd on all internal e-mails between team members at the firm? Does he or she prefer e-mail or phone mail? These and other preferences should all be made known from inception of the matter.

Clear Direction

In-house counsel should be clear about what they want, not just what they don't want. One particularly vexing problem is when a client simply says "no" to

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a proposed course of action without explaining what specifically he is concerned about or what options he prefers. If in-house counsel has suggestions for alternative language in a brief or settlement agreement, then she should offer them.

Oftentimes, particularly at the front end of an engagement, in-house counsel should use a “no” as an invitation to provide valuable feedback, whether in the form of suggested edits or clarification of strategy and tactics. Just as in business management, effective and fact-based feedback can be an invaluable tool, not only for the benefit of outside counsel, but also to force in-house counsel to think through the problem in sufficient detail so that she can “teach” a point of view.

But just saying “no” or that in-house counsel does not like something can be paralyzing and unconstructive. Likewise, in-house counsel should make clear what is a suggestion that should be considered but need not be followed versus what is a direction or requirement. If in-house counsel has a suggestion and outside counsel expresses concerns about it, in-house counsel should not assume that the idea will be implemented just because the topic came up.

On a more basic level, if the company has guidelines for outside counsel, in-house counsel should provide them at the outset of the matter. Most outside counsel should be savvy enough these days to ask if the client has guidelines for outside counsel. But don’t wait for outside counsel to do something that’s contrary to the guidelines and then fault them for it when they didn’t even know the guidelines exist.

Clear Context

Provide clear background for outside counsel. Don’t assume that outside counsel knows everything that’s important just because in-house counsel knows it. Obviously outside counsel should be diligent in doing their homework and finding out everything of import they can. But in-house counsel almost always will know significant information unknown to outside counsel. For instance, has the company had any other cases involving the same issues, the same product or the same adversary? Has the company ever taken contrary positions in other disputes? Is the company currently undergoing any change in personnel that could affect witness availability or attitudes? Has the business client embarked on a new strategic direction? These pieces of information can be critical to shaping the case.

For more major engagements, it can be particularly valuable for outside counsel to receive a primer on the client’s business, its self-described position in the market, successes or setbacks, management structure and personal insights into key client resources or witnesses, as well as the culture the business seeks to promote. In-house counsel should take it upon his or herself to help pull this information together. The more in-house counsel invests, the greater the return, ideally in the form of outside counsel thoroughly committed to the overall success of the business and, just as importantly, the good standing of in-house counsel among his or her management team.

Clear Resources

Paramount in any case is to make sure outside counsel has access to the resources necessary to devise and implement the strategy that will hopefully win the case or result in a desirable outcome. Don’t leave it up to outside counsel to figure out what those resources are or how to access them. In-house counsel and their business client often can be a rich source of significant resources that can aid a case. In-house counsel should make sure those resources can be tapped and pave the way for doing so.

A common area where this arises is with experts. Often the business client deals with or knows industry experts and thought leaders that can serve as consultants or experts in a case or at least that may have leads to experts if they cannot play that role themselves. The case will not be helped if in-house counsel does not make serious efforts to identify the business personnel with access to these resources. Similarly, where particular facts need to be tracked down, in-house counsel usually will be in a better position than outside counsel to know the personnel with key information.

Clear Authority

Unless otherwise freely delegated, direction on how to proceed with a case or matter ultimately must come from the client. To be equipped to do that of course, outside counsel needs to provide requisite information and advice in a timely fashion. But once outside counsel has done that, in-house counsel, and their business clients, must be timely and clear with how they want to proceed.

In-house counsel should be clear about what they want, not just what they don’t want. One particularly vexing problem is when a client simply says ‘no’ to a proposed course of action without explaining what specifically he is concerned about or what options he prefers.

All too often, however, deadlines may be blown, adversaries made unduly suspicious or judges or co-parties aggravated by counsel’s inability to directly respond on an issue because they do not have clear direction from the client. While the client’s interests are paramount, the client may be doing herself a disservice if she does not do all she can to ensure her counsel is fully authorized to timely respond to requests from an adversary or judge.

Clear Reason

Think twice about asking outside counsel to take unreasonable positions that cannot be defended in good faith or which could compromise credibility. This admonition has both legal and practical aspects to it. When representing a client, an attorney undertakes the responsibility to do

so zealously. But there are limits. Counsel must act within the bounds of the law and adhere to legal ethics.

An attorney cannot well represent the client if what he or she is being asked to do transgresses the bounds of proper conduct. And from a practical point of view, it will disserve the client in the long run if counsel is directed to take a position that ultimately cannot be well defended. Nothing can deflate the client’s cause more than having its attorney take a position before a judge that cannot be credibly defended. Credibility is similarly imperative with opposing counsel. Outside counsel must be prepared to carry through on threats and demands, and that requires in-house counsel being prepared to do the same.

Of course, this is not meant to suggest that in-house counsel should shy away from robust discussion of aggressive tactics and out-of-the-box ideas. The key element, here, though, is that in-house counsel engage and listen. Much good can arise from these discussions, where prodding can unleash unexpectedly novel ideas and strategies. But that cannot occur if outside counsel does not fully trust that inside counsel is listening to the pitfalls, as well as the benefits, and will quickly rein in discussions where outside counsel clearly communicates unacceptable adverse risks.

Clear the Air

Lastly, be clear about how things are going. As in any relationship, not discussing negative feelings may only deepen the problem. If in-house counsel is unhappy with how a matter is being handled, he should speak up. Outside counsel certainly does not want their client to be displeased, and while it’s part of outside counsel’s job to do their best to keep the client happy, they cannot always foresee how to do that.

What satisfies one client may turn off another. In-house counsel will best be served by nipping any such concerns in the bud early before they fester and make a problem worse. So, while outside counsel certainly hopes to receive some praise, everyone will be better served in the long run if the client is frank about the way things are and how any issues can be addressed. An effective tool for this task is nothing more complicated than: “Here’s where you all are doing a terrific job [insert]; here’s where I believe we can be doing better [insert]”.

Conclusion

It’s often said that the number one complaint clients have about outside counsel is lack of effective communication. That may be true and something all outside counsel need to take to heart. But it’s a two-way street. In-house counsel has a similar responsibility to ensure lines of communication are clear and that outside counsel has an understanding of the goals and means to fulfill the client’s expectations and achieve a positive outcome.

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