The Corporate Counselor®

Finding the Right Outside Counsel For Your Company

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In today's challenging, competitive business environment, finding qualified outside counsel with the right fee structures is a top priority for corporate counsel. Following is some practical guidance to help corporate counsel achieve this goal.

When retaining outside counsel, corporate counsel should focus on three key areas: 1) Conducting thorough research of the potential firm's reputation, particularly its billing practices; 2) Exploring flexible billing arrangements that are tailored to suit the nature of the engagement; and 3) Effectively communicating to create clear goals, strategies, and billing guidelines. By taking these steps, in- house and outside counsel can establish productive relationships that will help prevent unwanted surprises from appearing on the bill.

Targeted research of The Potential firm's Billing Practices and Reputation

After identifying several firms with experience in the area of law for your engagement, it is equally important to vet those firms' billing practices and reputations with respect to attorneys fees. Your network can provide in-valuable information about the billing practices of a particular firm.
Your best resource to get a realistic perspective on their billing practices is their existing and former clients, or former attorneys who were employed at

the firms. The legal community is very tight. By tapping into this resource, you can get a sense of hourly rates, the nature of the firms' time entries, and whether your contacts believe that the billing and the work product were in alignment. Even if your contacts worked with different practice groups than the one you might be considering, there should be a significant degree of continuity between one area and the next within the same firm.

During your initial contact with the firm, ask for a budget for the different phases of the litigation: Pleadings, Discovery, Dispositive Motions and Trial. This will help you compare apples to apples and assist you in selling which law firm you believe to be the correct one to your Board/CEO. Although every case is unique, if the firm recently handled a very similar matter, it is possible that it will not need to duplicate certain tasks, which could result in a decreased overall fee for your matter. For litigation matters, another important factor is how well potential counsel knows the relevant court system or judge. In many cases, counsel's understanding of the judicial circumstances of a case can help inform how quickly or slowly the case is likely to proceed, and estimate how it could impact total fees. Intimate knowledge of the particular judge before whom a matter is pending is absolutely critical to the bottom line of a case. There can be a stark difference in the ability to get hearings in front of a particular judge. For some, it can take days or weeks; for others, it may take months.

When establishing a relationship with new outside counsel, consider proposing a "test run" with a smaller, less complicated matter that is likely to be resolved quickly. This will give you a first-hand sense of the firm's billing practices and allow you to make an informed decision before engaging the firm for more complicated matters. Giving the new firm the opportunity to earn your business and demonstrate the quality of its billing practices is the best way to get the flavor of how the firm works a case. Should you decide to later engage the firm for more complicated matters, you will have already laid the groundwork and established expectations for the firm's bills.

Explore Flexible Billing Arrangements

Both inside and outside counsel have long had a relationship of necessity with the billable hour model. However, alternative fees arrangements continue to become increasingly popular and may suit the needs of certain engagements better than the traditional billable hour arrangement.

Pure Contingency

In a pure contingency arrangement, the law firm receives a fixed amount or percentage from any potential monetary recovery in a lawsuit. Usually, the client will only pay the hard expenses during the litigation. This structure is most common for plaintiff's cases that may lead to a reasonably large potential recovery. In a pure contingency arrangement, the law firm bears nearly all of the risk of the engagement and is, therefore, invested in obtaining a favorable outcome.

Hybrid Fee Arrangement

In a hybrid fee arrangement, the law firm receives a percentage of its usual hourly rate, and some level of contingency fee dependent on the outcome of the matter. If the matter does not yield a favorable result, no additional fee is paid. If the firm obtains a successful outcome, it is paid the agreed additional amount. Such arrangements shift part of the risk of the engagement to the law firm, and align the client and the law firm's interests. This approach lets the firm have additional "skin in the game."

This arrangement is most common in plaintiffs' cases, but can also be used on the defense side to create and reward the accomplishment of certain benchmarks or particular outcomes. It can also be used on the defense side to reward an ultimate outcome that is significantly less than the amount the client is being sued for.

Under such an arrangement, the firm may agree to accept a reduced hourly rate, in exchange for the client's agreement to pay a percentage of the difference between the amount the client is being sued for and the ultimate

outcome. For example, the client may agree to pay the firm $300 per hour, although that is significantly lower than the firm's standard rates, and pay 30% of the difference between the amount sued for and the ultimate outcome. If the client was sued for $2 million and the case was ultimately settled for $1.5 million, the client would pay the law firm 30% of $500,000 or $150,000 at the end of the case.

The hybrid fee arrangement allows significant room for creativity because benchmarks with a small award can be set throughout the case and for a variety of reasons. For example, benchmarks might be set for length of time for disposition of the matter to incentivize quick resolution, various outcomes (different awards for settlement, prevailing at summary judgment, or prevailing at trial), or success on specific issues in the case.

Blended-Rate Arrangement

A blended rate is another available alternative fee arrangement. Under a blended-fee arrangement, the hourly rates of each of the attorneys on a file are considered and a single hourly rate is determined that applies to all attorneys. For example, the senior partner may typically charge $800 per hour, the junior partner $650 per hour and the associate $400 per hour. Based upon these rates, a single hourly rate of perhaps $500 per hour would be established for all attorneys billing on the file. This may be most appealing in complex matters in which junior and senior partners are expected to do a significant amount of work, as it could help create sizable savings for the client.

Another possibility is to create a structure that rewards law firms for submitting bills below budget, for example, by awarding a percentage of the amount under budget. As an example, if the overall budget for a case is $500,000, but the case is resolved for $350,000, the client would agree to pay the law firm a percentage of that savings. These are only a few examples of possible alternative fee arrangements. Law firms are becoming increasingly willing (or should be) to evaluate these possibilities. The old mentality of "take it or leave it" by the big law firm has gone by the wayside as the business

of law has evolved. You should feel absolutely comfortable negotiating an arrangement that is beneficial for both your company and the law firm.

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