

## **Agony or Ecstasy: Working with Outside Counsel to Get it Done On Time, On Budget and As Expected.**

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*By Christopher Mirabile*

*[Editor's note: This is the sixth segment of a six-part series – Succeeding In-House – by Christopher Mirabile, former general counsel and CFO at IONA Technologies in Waltham, Mass. (now Progress Software), in which he will explain why basic legal skills are not enough for long-term success as an in-house attorney.]*

Great advice being greeted with hostility? Feel like you are the last to find out about every project? Do you feel misunderstood from time to time?

Advancing your in-house career takes more than just traditional legal skills. It takes a different mindset, and the deliberate fusing of those legal skills with business awareness for a blended approach to in-house service.

In this multi-part feature, we've gone beyond the typical kinds of career advice to explore the harder-to-define skills that are essential in transforming an in-house lawyer from a duckling to a swan.

In this column I will explore some of the techniques to use when wielding your most important tool: outside counsel.

### **Avoiding the Pitfalls So You Can Get it Done On Time, On Budget and As Expected**

Outside counsel are typically the single biggest expense line-item incurred by most legal departments. Used correctly, outside counsel have the power to markedly increase your effectiveness and expand your capabilities. They also have the power to cause you terrible embarrassment, nasty fee surprises and a significant loss of credibility. As with any tool of such power, it is well worth a little time and thought to make sure you wield it safely and with maximum effectiveness.

Note on Scope: lately a great deal is presently being written and discussed about the economics of engaging with outside counsel – alternative billing, value billing, flat fees, concierge law plans and more. This article is not intended to be a detailed exploration of that subject. For more reading on that topic, there are many excellent resources such as the ACC's website materials on The Value Challenge<sup>1</sup>, good blogs including The Client Revolution<sup>2</sup>, The Alternative Fee Lawyer<sup>3</sup> or resources such as the Versage Institute<sup>4</sup>.

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<sup>1</sup> <http://www.acc.com/aboutacc/>

<sup>2</sup> <http://www.clientrevolution.com/>

<sup>3</sup> <http://thealternativefeelawyer.blogspot.com/>

## **Issues to Consider Before Engagement**

**Check the References.** Before engaging a new firm, go beyond cursory, non-specific references. Find someone who has used the same individual lawyers for the same type of work. Having someone tell you they have “had good luck with a firm in the past” is close to useless: you need to look at the office, the practice area, the specific people and the type of project.

**Discuss Your Preferences.** When assigning work or forging new relationships, be very specific about what you want. There is no greater law firm cliché than the expensive, excessive research memo delivered after it’s too late. Have the conversations, and develop the common vocabulary necessary to be clear about what is needed. Outside counsel are not mind-readers, and they have more incentive to be slow and thorough than they do to be brief and responsive.

**Have the Money Conversation in Advance.** No one enjoys talking about fees, prices and budgets. But it has to be done. It does not have to be an overly involved conversation (current trends in the legal industry notwithstanding). You just need to understand the billing rates, staffing and general approach before it’s too late. Insist on prior approval before any rate increases can take effect. Request estimated timeline and budgets. Track weekly postings against budget and discuss important variances in real time. And in structuring fee arrangements, keep abreast of emerging trends and take advantage of alternative value-based billing arrangements which may save you money and frustration compared to the traditional hourly billing approach.

**Consider Written Guidelines.** Rather than repeating yourself with each new firm, consider documenting key expectations in written guidelines. They can be as simple as an informal memo about your preferences, or as involved as an appendix to an engagement letter. Rather than procrastinating, start small with a few bullet points – you can always add to the document over time.

**Get to Know A Gatekeeper.** With large international firms it is crucial to find someone you can trust to steer you to the best resources in their system. All large firms vary in quality from practice to practice and region to region. Don’t assume past performance in one area is a reliable predictor of future performance in another. Culture a relationship with someone who will stake their reputation on their inter-office referrals.

**Spread the Work Out.** By tradition and habit, a majority of a company’s legal work gets sent to the general corporate firm (or firms). But complacency and fear of change can cost you money and drive sub-par results. Selecting and managing outside counsel should be a core skill of any General Counsel. Practice it. Be detached and objective about the performance and efficiency of the work being done by your main firm. Don’t let relationships and comfort make you lazy. Seek opportunities to experiment with boutique practices and solo-practitioners specializing in one type of matter or transaction. The solo-specialist can be a bargain on routine matters and a godsend in overflow situations.

## **Issues to Consider During Engagement**

**Invest in the Relationship.** Trust and comfort are the bedrock of an advisory relationship. Take the time to meet and grow comfortable with your advisors. Attend a concall in person at their office, or invite them out to yours. Make sure they get to know the lawyers in your group and the members of your senior management team. If they are attending a board meeting, consider including them in the board dinner the night before. Invite them to speak at your departmental off-site meeting, or include them in a departmental outing. A good relationship will lead to better calibrated advice and more trust, comfort and understanding. And do not ignore the non-lawyer people on the team – when you are in a crisis, the secretary has a lot of

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<sup>4</sup> <http://www.verasage.com/>

influence over how quickly you are rescued. Take the time to get to know him/her and build a relationship of friendliness and respect

**Have Some Appreciation for Their Situation.** Take a little time to understand your partner's practice, their fiscal year, how they like to work, other major client commitments, and other things relevant to them. They are humans too, and knowing when they are under extra pressure can go a long way toward avoiding unnecessary conflict. The same goes for senior associates, especially those who are approaching partnership – careless words or unfair criticisms can do incalculable damage. A little consideration goes a long way.

**Watch the Substitutions.** Keep track of the associates on the team and, wherever possible, insist on meeting new ones before they are allowed to work on your matters. Firms will resist an effort to impinge on their freedom to assign associates, but with the important or recurring matters, hold your ground and make sure you get a chance to look someone in the eye before you rely on their advice. Your partner should be clear that you will not pay the bill of anyone whom the partner has not at least discussed with you in advance.

**Watch the Splits.** If a matter requires branching into new areas of law, double-check the competency of the lawyers involved. Diversions into new areas can go unnoticed until after someone has spun their wheels, given bad advice, or caused a delay. Be watchful and insist on proper staffing for the new areas of law. If you don't, your counsel could go off and learn a new subject area at your expense.

**Have a Pregame Ritual and A Plan of Attack.** For important meetings, don't leave things up to chance. Review the goals and approach with outside counsel in advance. Go over likely scenarios, discuss likely atmospherics and personalities, anticipate likely questions or objections and review answers. Be very clear on the desired outcome. Plan to sit next to them so you can keep things on track by exchanging scribbled notes. Where co-location not feasible, try text messaging or emailing each other mid-stream (being mindful of privilege and discovery issues). Where such private sidebars are not possible, pre-meeting preparation all the more important. Nothing is worse than paying someone to stick their foot in their mouth and make you look foolish or get someone up in arms unnecessarily.

**Control Access.** Allowing outside counsel to interface directly with non-lawyers in your company can be efficient. But it can very easily get out of hand. Controlling cost, quality and consistency requires having a very clear policy on access to outside counsel. A good starting point is a clear understanding that you will not pay for advice not given directly to you or one of your legal staff. This can be waived on a case-by-case basis, but if you don't start with a strict baseline, costs can spiral out of control and confusion and misdirection can ensue.

**Pay for the Partner.** Trying to force work down the billing-rate scale can be a false economy. Many experienced general counsel will insist that a little undivided attention from a senior partner is worth much more than a lesser expenditure for associate time. The logic is hard to dispute: there is no substitute for experience - and the perspective which comes with it. The conversation is more focused, you become aware of issues you would never have thought of, and you can talk about nuanced ways of managing issues. Don't confuse cost, quality and value: associates can be lower cost, but senior partners are often much better value.

**Question Authority.** It can be tempting to take the advice of "expert" outside counsel as gospel, but this can be a costly mistake. While you may lack specialized expertise, you don't lack common-sense, and you know your company and its goals. Trust your instincts: use that common sense to challenge advice that doesn't feel right or doesn't take you where you need to go. Ask to review the basis, materials and the assumptions being used in formulating the advice. Ask what the real risk is. Challenge any perceived lack of creativity. Sometimes being a little more distant from primary sources of law in your day-to-day practice can actually be very helpful in seeing the big picture. And that's your job.

**Provide the Specifications.** When requesting written work product, in-house counsel usually review deadline and cost, but they often fail to discuss the real driver of value: precisely what it is they want and in

what form they want it. When you have something specific in mind, say so. If you are not crystal clear on what you will be receiving, ask. The all-too-common crisis of receiving the wrong work product when it is too late to be redone is totally avoidable. Certainly, there are situations where outside counsel can go off the reservation, but when you think about it, whose is really at fault? If you don't explain what you want, outside counsel will guess.

**Garbage In, Garbage Out.** When requesting written work product, specify the approach you want taken in its preparation. Human nature being what it is, too many deliverables are hastily prepared at the last minute by means of a quick hack to an existing model and tossed over the transom at 11PM on the day they are due. You can avoid that with a little prep work up front. Discuss the approach. Insist on status updates along the way. Ask for interim drafts, insist on the use of multiple models, even ask to see the models in advance. If you have a particularly open and honest relationship with outside counsel, you can even obtain models and do the first draft in house. This has the added benefits of developing skills on your team and flushing out important issues which might otherwise be missed as mere "default" settings in a form.

**Document the Logic.** When making a complex decision such as deciding to settle a dispute rather than litigate, undertaking a known risk, or embarking on a strategic undertaking, ask outside advisors to document their logic. Create a formal decision tree which clearly illustrates the various alternatives, assigns probabilities and risks and documents key assumptions. While this can be a very advanced science, your process needn't be formal or complicated to be effective. A simple white-boarding exercise can unpack how counsel arrived at the conclusion in their advice and develop a better understanding of the problem and its potential solutions. It also provides a forum for reviewing assumptions which may not be shared, calibrating tolerances for risks, and for reviewing assumed probabilities and magnitudes. A decision tree can show how a minor tweak to an early assumption can lead to a completely different outcome. Even if you don't change the ultimate decision, you will understand it far better and be better able to articulate it after the exercise.

### **Issues to Consider After Engagement**

There has never been a process which could not be improved. And the best time to consider improvements is immediately after completion.

**Paper the Files.** Try to make sure you have your own filing back up of all important work-product provided to you and any supporting materials relevant to that work product. Not only does it allow you to move work more easily between firms, it serves as a disaster recovery back up in the event of a catastrophe. And wherever possible, always insist on an electronic copy of any written work product. It allows much easier reuse of models, and it gives you finger-tip access to documents for questions which might otherwise lead to a call to outside counsel.

**Give Feedback Promptly.** Improvement requires learning and learning requires review of mistakes. Get in the habit of doing regular post-mortems on major interactions with outside counsel. And do it promptly – if you have feedback for outside counsel give it while things are still fresh and it is still possible to have a meaningful conversation about it.

**Don't Subsidize Sub-Par Performance.** If outside counsel's performance didn't meet your expectations, speak up. Ask for a discount on the work. Ask the partner to ensure it never happens again. Don't just simmer and avoid the confrontation until you have reached the boiling point and are ready to throw the baby out with the bathwater. Over time you will come to realize it is much easier to resolve it in real time.

**Insist On Meaningful Billing Detail.** This is often more of a problem with non-US law firms, but if there is insufficient detail to allow you to tell precisely what work has been done, send the bill back with a request for more detail. If the bill has plenty of narrative, but is sloppy or unclear or full of typos or meaningless abbreviations, send it back for more clarity. The bill is your only means of mapping activity to value - if the bill doesn't allow you to, obtain one that does.

**Read the Bill Carefully.** It should go without saying, but once you have a detailed bill in hand, you must take the time to closely read the narrative and make sure there is real value in the work being done at your expense. Is someone charging you to research a point of law they really should be expected to know? Is the staffing right? Do any huge chunks of time leap out at you? Excessive “attorney conferences”? Any names you don’t recognize? If so, seek resolution promptly – it is much easier to get a write-off when the matter is fresh and when you have an unblemished record of prompt payment than if you let a billing issue linger into overdue status.

**Remind Them You Are Paying Attention.** One of the simplest tactics is the most effective: question something on every law firm’s bill at least once a year. You don’t need to manufacture issues - if you look closely enough you’ll find something you are unsure about in every large bill. It shows you are paying attention, done constructively it can lead to a valuable dialog, and it can save you significant money – it is not uncommon, for example, to see time from another client’s matter accidentally billed to yours.

**Measure to Manage.** If you use internal departmental metrics to track aspects of your department’s performance, consider expanding them to include measurements of outside counsel. It does not take a lot of work or an enormously complex system – even rudimentary data and analysis will allow you to discern patterns and meaningful firm-to-firm comparisons. Needless to say, electronic billing is very helpful for extracting this data. Start with a simple system tracking type of project, cost, hours, effective billing rate, satisfaction level, and other observations. Use an intern or an assistant to set up and manage the system. Over time it will provide you with the data you need to properly manage the firms you work with.

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Choosing and managing outside counsel is a core skill for senior in-house lawyers. Done well, it can contribute enormously to your success. Done poorly, it can lead to misery. Take the time and put in the effort necessary to learn to properly wield your most important tool. The payback is enormous.

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