

HERDING CATS

MANAGING THE OUTSIDE COUNSEL RELATIONSHIP

October 21, 2009



Presented by:

Alston & Bird LLP

Michael Young
Thomas Wingard
Kyle Ostergard

HERDING CATS

MANAGING THE OUTSIDE COUNSEL RELATIONSHIP

-- Selection of Outside Counsel

Requests for Proposals

Engagement Letters

Alternative Fee Arrangements

-- Ongoing Management

-- Management of a Transaction

-- Pet Peeves

SELECTION OF OUTSIDE COUNSEL

Good question, Carol. Here are some thoughts...

**You pick your
all those
look the same!**



Carol Channing

The Chief

- Get beyond the website
- Don't hesitate to interview counsel about the specific matter
- Get references

SELECTION OF OUTSIDE COUNSEL

Very good question, Carol....

Why don't you just hire the same attorneys who handled the transaction? They know the facts best.



Carol Channing

The Chief

SELECTION OF OUTSIDE COUNSEL

LITIGATION FOLLOWING A TRANSACTION

Rule 5-210

Attorney shall not act as trial counsel **before a jury** which will hear testimony from that attorney unless:

- Testimony relates to an **uncontested matter**;
- Testimony relates to nature of **value of legal services** rendered in the case; or
- the attorney has **informed written consent** of the client.

SELECTION OF OUTSIDE COUNSEL

LITIGATION FOLLOWING A TRANSACTION

Rule 5-210

Policy: When a lawyer representing a party is also a witness in the trial, his/her **effectiveness as a lawyer and as a witness may be impaired** in the eyes of the jury.

Court has discretion to remove an attorney as trial counsel.*

“Close call” resolved in favor of client choice.

SELECTION OF OUTSIDE COUNSEL

LITIGATION FOLLOW-UP

Why not just send out a **Request For Proposal**? Those are always fun.



Carol Channing

The Chief

SELECTION OF OUTSIDE COUNSEL

REQUESTS FOR PROPOSALS

Attorney-Client Privilege vs. Duty Of Confidentiality

-- **Attorney-client privilege** is codified in Evidence Code

(Evid. Code § 952)

-- As a **rule of evidence**, it precludes disclosures of communications between attorneys and clients

-- **Duty of confidentiality** is codified in State Bar Act

(Bus. & Prof. Code § 6068(e)(1))

-- **Duty** to “maintain inviolate the confidence, and at every peril to himself or herself to preserve” client secrets

SELECTION OF OUTSIDE COUNSEL

REQUESTS FOR PROPOSALS

Attorney-Client Privilege vs. Duty Of Confidentiality

-- **Duty of confidentiality** is much broader than attorney-client privilege

Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621, fn. 5

-- **Precludes disclosure** of information obtained from any source

LA Bar Ass'n Form.Opn. 436 (1985); ABA Model Rule 1.6(e)

SELECTION OF OUTSIDE COUNSEL

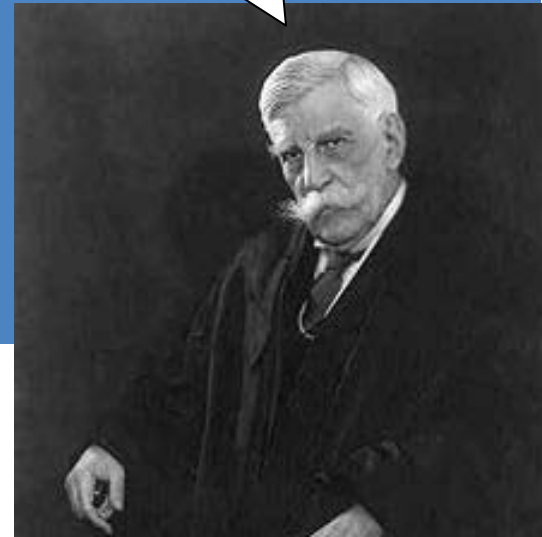
Can a prospective client expect confidentiality from an attorney that it **never retained or engaged?**

OR PROPOSALS

*But of course. Even **potential** clients are covered by the duty.**



*(Cal. State Bar Form. Opns. 1984-84, 2003-161; see ABA Model Rule 1.18(b))



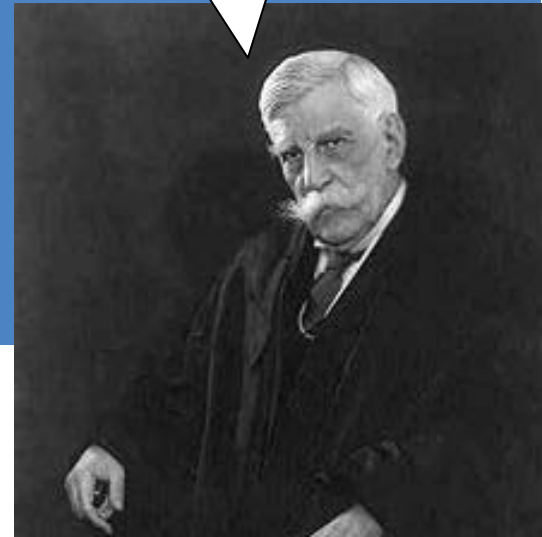
SELECTION OF OUTSIDE COUNSEL

What about the submission of an RFP to counsel? Can that counsel be **precluded from representing an opposing party?**

*Fer Sure, Dog, if confidential info is, like, totally shared in the RFP thingy.**



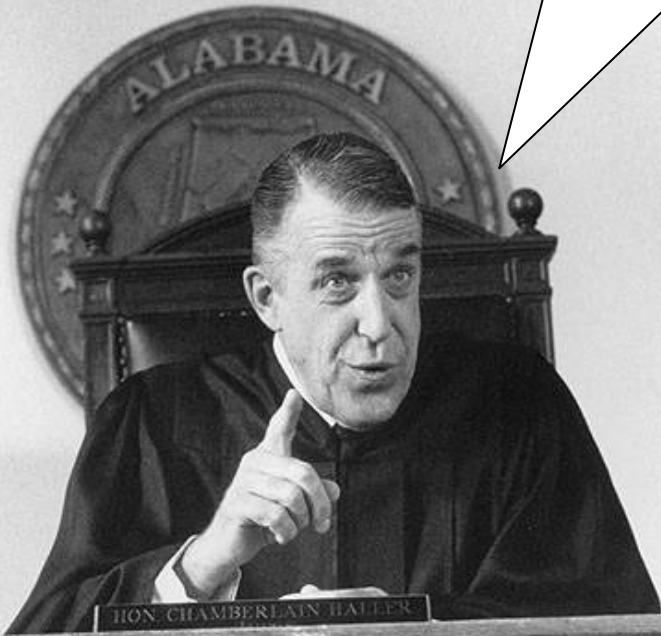
*** See, e.g., *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067**



SELECTION OF OUTSIDE COUNSEL

*What about **engagement letters**, Mr. Gambini? Are there any special considerations of which one must be aware?*

Dat there are Judge. Now, see if you can follow dis....



SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

When Required

-- Contingency Cases

Cal. Bus. & Prof. Code § 6147; Rule 1.5(d), ABA Model Rules

-- (Cal.) **Non-contingency** cases where client not a corporation and fees foreseeably > \$1,000 (absent exigent circumstances)

Bus. & Prof. Code § 6148(a), (d)(4)

-- (AZ, CO, Conn, D.C., GA, NJ, Penn, RI and WI) **All Non-contingency** cases

SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

Contingency Cases (California Law)

- Statement of contingency fee rate
- How costs impact client's recovery and total fee
- Disclosure of requirement to pay for "related matters"
- Statement fee is not set by law and is negotiable

Cal. Bus. & Prof. Code § 6147(a)

SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

Contingency Cases (ABA Model Rules)

- Percentage attorney keeps if settlement, trial, or appeal
- Whether expenses to be deducted from the recovery
- Whether deduction is calculated before or after contingent fee
- Expenses for which client liable regardless of prevailing

Rule 1.5(c), ABA Model Rules

SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

Non-Contingency Cases

- **Basis of compensation** (hourly rates, statutory or flat fees, other standard rates, fees and charges)
- General nature of legal **services to be provided**
- **Responsibilities** of both attorney and client

Cal. Bus. & Prof Code § 6148(a)(1)

SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

New rule re malpractice insurance coverage

SELECTION OF OUTSIDE COUNSEL

*What IF. The outside
COUNSEL. Wants to use
CONTRACT. ATTORNEYS.
Mister ... Hart?*

Uh..., is it the
Rule in Shelley's
Case? Sir?

Snicker,
snicker



SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

Use Of Outside Contract Attorneys

-- No sharing of fees with a lawyer who is not a partner, associate, or shareholder **unless the client consents in writing after full disclosure and no increase in total fee**

Rule 2-200(A), California Rule of Professional Conduct

-- Payments to non-employee contract lawyers governed by **Rule 2-200(A)**

Cal. State Bar Ass'n Form.Opn. 470 (1993))

SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

Use Of Outside Contract Attorneys

- Rule against fee splitting is not violated if:
 - amount paid is for **work performed and obligated to be paid** regardless of whether client pays firm, and
 - amount paid is **not based on the fees paid to the firm**, and
 - amount paid is **not based upon a percentage** of the client's recovery

Chambers v. Kay, 29 Cal.4th 142, 154-155 (2002)

SELECTION OF OUTSIDE COUNSEL

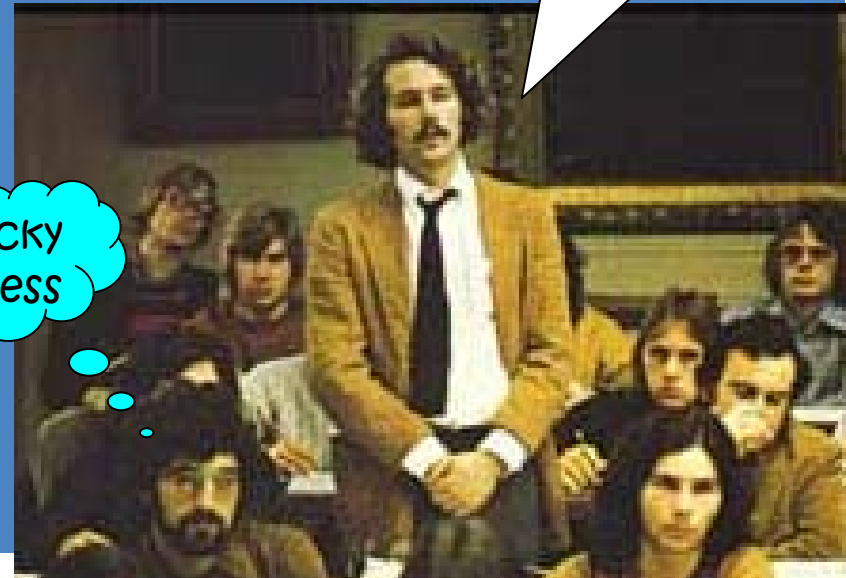
Is it PERMISSIBLE. For outside COUNSEL. To charge a PREMIUM on the contract attorney's RATE?... Mister Hart?

LETTERS

Contract A

Uh, that's OK under Rule 2-200(A).*

Lucky Guess



**Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, 459

SELECTION OF OUTSIDE COUNSEL

ENGAGEMENT LETTERS

Use Of Outside Contract Attorneys

-- Under ABA Model Rules, client must consent to surcharge if billed as a cost, **but not if billed as legal services**

Form.Opn. 00-420

SELECTION

UNSEL

Billable rates have gotten out of hand.
I feel so helpless. I'm being taken advantage of.

Fear not, William.
There are many alternatives to the billable hour.

ive to



SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS

BLENDED RATES

One rate for all attorneys, regardless of experience; or associates charged out at single rate and partners charged out at a single rate

SPLIT BLENDED RATES

Rates depend upon phase of case; generally lower during discovery and increase during trial

SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS

FLAT FEE/FIXED FEE ARRANGEMENTS

Handle project or case/transaction for fixed amount

SPLIT FLAT FEE

Flat fee pertains to a distinct phase of, or assignment within, a matter

SELECTION OF OUTSIDE COUNSEL

Those aren't confusing enough. Don't you have something that's really hard to understand?

(Like "Styles" in Word.
Heh heh heh.)

GEMENTS



SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS

COLLAR/FUNNEL (Applied With Flat Fee)

Flat fee with shared risk funnel

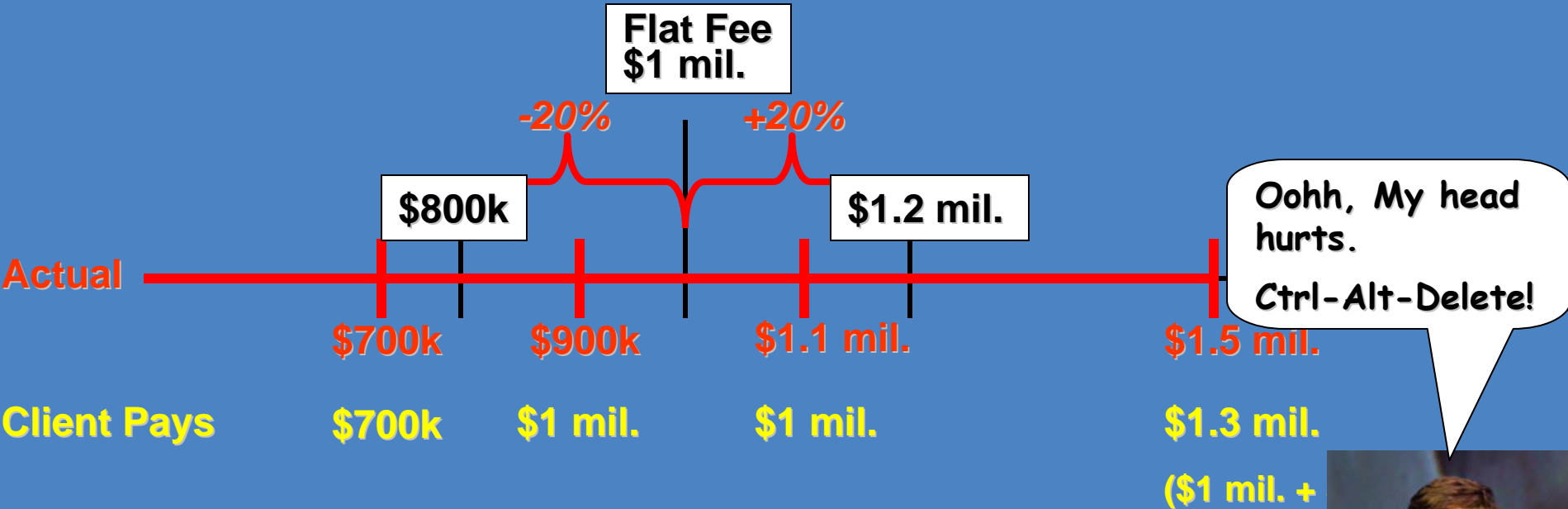
EX: Assume Flat Fee of \$1 million. If actual fees fall within 20% (\$800k-\$1.2 mil.), then Flat Fee is paid

If actual fees are below 80% (<\$800k), client pays actual

If actual fees are above 120% (>\$1.2 mil.), client pays Flat Fee (\$1 mil.) *plus* amount over \$1.2 mil.

SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS



SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS

VOLUME DISCOUNTS / BUNDLING FEE AGREEMENTS

Reduced rates in exchange for volume of matters

CAPPED FEES

Firm agrees to cap fees at agreed upon level

CONTINGENCY

Client pays a percentage of the recovery, and costs

SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS

RELATIVE VALUE

Services broken into tasks and multiplier (+/-) applied to hourly rates depending on complexity of task

MERIT BASED BONUS / SUCCESS FEE

Bonus to firm for favorable outcome

SELECTION OF OUTSIDE COUNSEL

ALTERNATIVE FEE ARRANGEMENTS

HYBRID CONTINGENCY

Discounted billable rate and smaller contingency

REVERSE CONTINGENCY

For defense, attorney is compensated for agreed-upon percentage of amount client saves

CONTINGENT HOURLY RATE

Enhanced hourly rate if resolved on favorable terms (dismissal/summary judgment), discounted rates if trial

MANAGEMENT

COMMUNICATE EXPECTATIONS OF COUNSEL

Staffing

Ongoing Communications Re Progress of the Case

Communications Between Outside Counsel and Client

Review and Approval of Work Product

Document Discovery

Bills

In-House Counsel's Role in Litigation or Project

Pet Peeves

Other

PET PEEVES

Like we won't find out soon enough. I know which attorneys I like. I just hit "Delete."

Don't you hate getting emails from [redacted] letting us know the latest laws filed against [redacted]?

Didn't I copyright the "Delete" button?



MANAGEMENT

DEALING WITH SPECIFIC PROBLEMS

Problems with associates or other staff

Problems with partner or billing attorney

Communicating bad news

MANAGEMENT OF TRANSACTIONAL COUNSEL

DEFINING SCOPE AND TIMING

Big Picture

Understanding the company's business, vision, goals (long and short term)

Immediate Picture

Understanding the objective and goals of transaction

Timing

Establishing and conveying realistic deadlines and other timing considerations and constraints

MANAGEMENT OF TRANSACTIONAL COUNSEL

PROCEDURES AND EXPECTATIONS

Who is the Client?

From outside counsel perspective
From in-house counsel perspective

Flow of Information

Only through in-house counsel?
Other project manager?

Document Repositories and Virtual Deal Rooms

MANAGEMENT OF TRANSACTIONAL COUNSEL

DIVISION OF TASKS

What Does Client Want and Expect?

Considerations

Experience (general and task specific)

Conflicts of interest

Budgetary

Timing

Privilege

Hiring and oversight of consultants

PET PEEVES

I've got some more pet peeves about outside counsel.

Hey, me too!

We've got a few thoughts about in-house counsel ourselves.



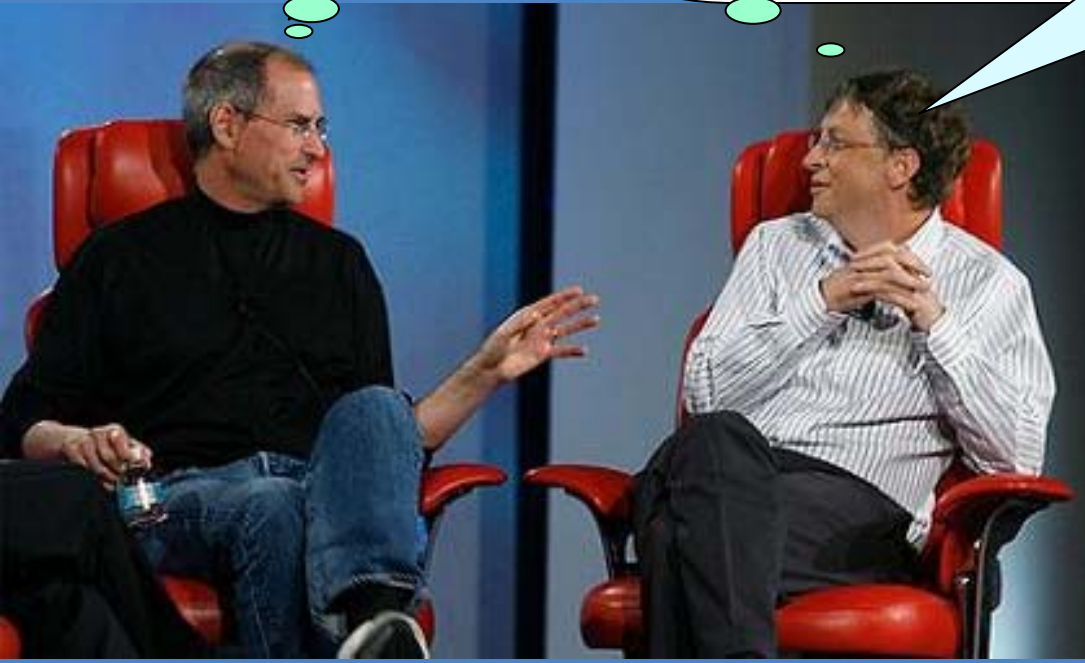
EYES

The attorney lets a pile of discovery requests sit on her desk for several weeks before forwarding it a

He probably does that.

How about when motions or discovery are filed a week in advance, with major revisions filed before the filing a

Yeah, I hate that. It's like when counsel doesn't give me the chance to review pleadings or arguments being submitted before they are filed.



PET PEEVES

BILLING



How about when I get a bill that records 2 hours for what I know takes about 15 minutes. I hate that. I will never use that attorney again . . .

PET PEEVES

BILLING

Oh yeah, me neither.

And just as bad as bloated billing are billing surprises. Things like unauthorized work, unnecessary work (like those young associate memos), or unexpectedly high bills.



PET PEEVES

BILLING



Yeah, don't you hate it when you get a billing entry for younger associates for research that a senior attorney with 15-20 years experience in the field will know off the top of her head?

PET PEEVES

BILLING

Oh yeah, that's so lame.

It's as bad as when you get a nice budget from your counsel, and then they blow past it without any warning.



PET PEEVE

BILLING

“Can you just give this a high-level overview review, but don’t spend a lot of time on it,” and then they hand you this really complex document with all sorts of difficult and important issues.



It’s a trap. You can do the “quick and dirty” that the client asks for...and get complaints for submitting unpolished work

Or you can do it right and then not get paid!

PET PEEVES

BILLING

Or how about when the client asks for a quick turn around on some complex issues....



...and then complains about the size of the bill and the number of attorneys it took to do the job.

PET PEEVES

COMMUNICATION



How about those blow hard attorneys who pontificate about an area of law without first learning, or appreciating, the client's knowledge level on the subject.

This ain't no hat rack here, you know.

PET PEEVES

COMMUNICATION

Um, not here either.

How about when the attorney states the law wrong, and then when questioned, spins it like I "misheard" him. Fess up to your mistakes, Dude.



PET PEEVES

COMMUNICATION



Or how about when the attorney spends more time telling us why things may not work just to cover their REAR rather than spending the time giving us ideas of what might work.

PET PEEVES

COMMUNICATION

Or failing to keep us updated, especially when there is a change in circumstances. Boy I hate that.



PET PEEVES

COMMUNICATION

What bugs us? Clients who don't timely respond to requests for authority or critical information.





PET PEEVES

THE UGLY



- Lead lawyer does **not review bill** before I see it.
- **Overly optimistic assessment** of case only to **urge settlement** after exchange of discovery and nothing new was discovered.
- **Signing off invoices** without actually knowing the content
- **Major CYA:** the attorney spends more time telling us why things **may not work** just to cover their a.... rather than spending the time giving us **ideas of what might work.**



PET PEEVES

THE UGLY



- Making unnecessary calls or emails to **generate billing time.**
- Putting **too many lawyers on a case**, each assigned a different task.
 - Too many conferences among lawyers, etc. It's just not as cost effective.
- Putting a young associate on something that then a more experienced lawyer has to **rewrite**. (And, of course, we get billed.)
- **More than one lawyer at a deposition.** Unless absolutely necessary, I hate when they try to get this one past me.



PET PEEVES

THE UGLY



-- DON'T call me from your kid's soccer game, baseball game, Costco, or anywhere else where you **can't hear** what I am saying, I can't hear what you're saying, you're in a **public place** with other people listening to our conversation, and you're spending half the time talking to someone else (or shushing them), or otherwise **multitasking**.

I am not getting your full mindshare (yet I'm probably paying for it).

I'd rather get an e-mail or text saying "got your message, tied up, can I get back to you later" than have a conversation with half of you.



PET PEEVES

THE UGLY



-- DON'T make me **redo your work**.

I am not here to correct your grammar, catch abundant typos, find names spelled wrong, or correct substantive facts and arguments in your briefs and written work.

-- An over the fence relationship **rather than collaboration**.

Outside counsel creates the “perfect document” without discussing with inhouse lawyer, resulting in work based on misunderstanding of the question, and **perceived disregard for the legal input and creativity of inhouse lawyer**.

The outside/inside relationship should be a partnership where the solution is jointly developed.



PET PEEVES

THE UGLY



-- I continue to be floored by amount of **outside counsel bills** and they make me very reluctant to pick up the phone.

Outside counsel should show sensitivity to this and always have an eye out to leverage the client's own capabilities in order to reduce costs.

-- **Any suggestion that California law should be chosen as the law of any contract.**

-- Not accepting my risk analysis, and then billing time to research why I am wrong. (It is risk tolerance. It is not right/wrong.)

-- **Billing for summer associate** time. Usually the research will be unimportant, and it will take 3x longer to perform.



PET PEEVES

THE UGLY



- **Switching the attorney** handling the matter without consultation. We do not hire firms. We hire attorneys.
- The Hard sell.
- Pitch themselves as the **perfect lawyer** for ANY legal problem.
- Asking for **waivers of conflicts** in adversarial matters.

PET PEEVES

**Don't we do
anything right?**





PET PEEVES

THE GOOD



- **Keep us educated.** We like it when you send us information about new developments in our practice areas.
- **Think outside the box.** We appreciate counsel who look at new and different theories even when something seems like a complete loser.
- Counsel with **industry specific knowledge** (my employer's industry) so I don't have to educate on terminology, practices, players, etc.
- Counsel with knowledge of industry specific **litigation trends.**
- **Cost/fee saving suggestions.**



PET PEEVES

THE GOOD



- Counsel who keep in close **contact**.
- Counsel who **involve us** in the discussions and conversations.
- Counsel who **seek our input**.
- Counsel who treat us as a **part of the "team,"** not a distant overseer.
- Lead lawyer **reviews bill** before it goes out and actually cuts some inefficient time.
- Lawyer that we frequently use **does not bill me for some general advice**.



PET PEEVES

THE GOOD



- Being **responsive** - calls back the same day.
- Attorneys who do written **work like they care** about it.
- **Nice to our business people.**
- **Remember stuff**, so it's not like starting from scratch each time an issue comes up.
- **Efficient** and will actually give a **quick answer** even though it would be possible to make a 20 hour (or more) research project out of it.



PET PEEVES

THE GOOD



- Outside counsel who have the same **passion and energy** for the issue as the in-house attorney and the client.
- Quick, **periodic inquiries** that are designed not to create billable hours but to understand the internal status of the issue.
- They **don't do work at the last minute**, assuming whoever they need to review and sign stuff will be available.
- **They care.**



PET PEEVES

THE GOOD



-- They understand that being in-house doesn't mean sitting around all day **eating bon bons and drinking martinis.**



HERDING CATS

MANAGING THE OUTSIDE COUNSEL RELATIONSHIP

October 21, 2009



Presented by:

Alston & Bird LLP

Michael Young
Thomas Wingard
Kyle Ostergard