

# Working Effectively with Outside Counsel Checklist

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**This Checklist provides in-house counsel with general guidance on working more effectively with outside counsel. This Checklist addresses hiring outside counsel, outside counsel guidelines, applying legal project management principles to legal matters, insourcing and outsourcing legal work, analyzing matter outcomes, and terminating outside counsel.**

In addition to competently handling a company's legal matters, a corporate legal department must demonstrate how it creates value for the company. In turn, outside counsel must show in-house counsel how they create value through their representation of the company. Legal departments and their outside counsel can deliver on this value proposition by creating efficiencies in the attorney-client relationship.

## HIRE THE RIGHT OUTSIDE COUNSEL

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.

Factors to consider when hiring outside counsel include the firm's:

- Reputation.
- Expertise in the areas of law governing the matter.
- Track record with similar matters in terms of size, scope, and issues involved.
- Office size and location. To facilitate in-person meetings, the firm's offices should be located near the company's headquarters. If the company has offices located throughout the US or in other countries, the firm should also have offices in those locations.
- Language abilities and cultural sensitivity, especially if the company:
  - is foreign; or
  - does business outside of the US.

- Knowledge of the forum, judges, adverse parties, and opposing counsel, for a litigation matter.
- Knowledge of the client and its industry, internal politics, and challenges, for all matters. While certain information about a company and its industry can be obtained through public sources, law firms with experience representing a company on prior legal matters or other clients in a company's industry have a better understanding of its risk tolerance and business objectives.
- Conflicts (see Practice Note, [Outside Counsel Conflicts of Interest \(w-001-3406\)](#)).
- Billing rates.
- Willingness to offer alternative fee arrangements which compensate outside counsel based on a structure other than hourly billing, including:
  - fixed (flat) fees which provide predictable pricing for routine legal matters;
  - blended (hybrid) rates where the law firm charges an agreed rate for all attorneys staffing a legal matter;
  - capped fees, which are based on the number of hours each attorney bills to the matter at that attorney's usual hourly rate, but the law firm agrees that the total bill cannot exceed a capped amount;
  - collared fees where the client pays the law firm hourly fees subject to a case budget and a collar (a range above and below the budget, typically 10%). If the total fees are less than the lower collar amount, outside counsel receives a bonus. If the total fees are higher than the upper collar amount, the client receives a discount off the law firm's regular hourly rate;
  - holdbacks where the client withholds an agreed fee amount until a certain result is achieved or until the end of the engagement;
  - success fees where the client pays the law firm a bonus for achieving a certain result; and
  - contingent fees where the client pays the law firm a percentage of the total financial recovery obtained in a matter.

For more information on alternative fee arrangements, see Engagement (Retainer) Letter: Practical Considerations Checklist:

Determine an Appropriate Fee Structure ([7-524-9346](#)) and Overview of Counsel Fee Arrangements Chart ([8-538-5965](#)).

- Proposed matter team, including attorneys as well as non-attorney support and technical staff.
- Diversity of the:
  - proposed matter team; and
  - entire firm.

As the success or failure of a matter can turn on the strength of the relationship between in-house and outside counsel, in-house counsel should believe both that:

- Its outside counsel has the experience and credentials to capably represent the company.
- The relationship partner and other attorneys and legal assistants staffing the legal matter are:
  - responsive;
  - approachable; and
  - likeable.

For additional issues to consider before signing an engagement letter with outside counsel, see Standard Documents:

- Engagement (Retainer) Letter: Hourly Fee Arrangement ([6-521-3395](#)).
- Engagement (Retainer) Letter: Alternative Fee Arrangement ([4-523-3525](#)).
- Engagement (Retainer) Letter: Contingency Fee Arrangement ([0-521-9300](#)).

For a sample policy setting out the procedures governing a company's retention of outside counsel, see Standard Document, Use of Outside Counsel Policy ([w-001-5981](#)).

### CONSIDER USING A COMPETITIVE BIDDING PROCESS

If a company has never hired outside counsel or seeks to change its current counsel, it may wish to invite several firms to participate in a "beauty contest" or competitive bidding process where they:

- Present their capabilities to the company.
- Introduce the proposed matter team, including all partners, associates, and legal assistants who may staff the matter.
- Submit a bid that includes a detailed estimate of all fees and costs for the representation in compliance with the company's outside counsel guidelines (see Set Outside Counsel Guidelines).
- Provide a list of previous engagements for similar matters along with client references.

If a company decides to hold a competitive bidding process, it should ensure that the request for proposals (RFP) sent to prospective law firms contains clear guidelines for participation, as some law firms may decline to participate in the RFP process if the requirements to do so are too expensive or time-consuming. For more information on drafting an RFP for legal services, see Practice Note, Drafting an Effective RFP for Legal Services ([w-002-7832](#)).

### BUILD A STRATEGIC RELATIONSHIP WITH OUTSIDE COUNSEL

Once hired, in-house counsel can build a long term, strategic relationship with its outside counsel by:

- Regularly communicating company business objectives to outside counsel.
- Inviting outside counsel to meet key employees at the company to better understand how it operates.
- Encouraging outside counsel to share relevant industry news with the company, including new business leads.
- Sharing feedback with outside counsel during the course of a matter or at its conclusion (see Analyze Matter Outcome).
- Attending educational programs offered by outside counsel:
  - at the law firm; and
  - on company premises.

### CREATE AN APPROVED OUTSIDE COUNSEL LIST

After a law firm is retained, and assuming that the firm provided competent, well-priced service, the legal department should add the firm, specific attorneys at the firm, and their practice areas to a maintained list of approved outside counsel for the company. An approved outside counsel list is a law department management tool that enables in-house counsel to quickly find reputable counsel that:

- Has the required expertise for a given matter.
- Understands the company's business and risk tolerance.
- Previously achieved a favorable outcome for the company.
- Provided cost-effective service.
- Has agreed to comply with the company's outside counsel guidelines (see Set Outside Counsel Guidelines).

### SET OUTSIDE COUNSEL GUIDELINES

To control costs and set out their expectations for the attorney-client relationship, many companies create outside counsel guidelines addressing:

- **The basis for professional fees.** For example, some outside counsel guidelines require that law firms bill the company at the lowest billing rates for any of their similarly situated commercial clients.
- **Cost estimates and budgeting.** Outside counsel guidelines generally require that law firms provide in-house counsel with a cost estimate or budget before commencing work on a legal matter.
- **Billing and expenses.** For example, some outside counsel guidelines:
  - do not allow law firms to bill for copying and other overhead expenses;
  - place tight restrictions on travel and meal expenses; and
  - require in-house counsel's prior approval before conducting extensive legal research.
- **Matter staffing.** For example, some outside counsel guidelines:
  - prohibit staffing matters with junior attorneys;
  - require diversity in the law firm and on the legal team; or
  - do not allow staffing changes without client consent.
- **Conflicts of interest.** For example, some outside counsel guidelines prohibit giving blanket waivers of conflicts of interest to law firms. For more information about how to identify the

existence of a conflict, see Practice Notes, Navigating the Complex World of Conflicts ([w-000-4847](#)) and Outside Counsel Conflicts of Interest ([w-001-3406](#)).

- **Communications with the legal department.** Limiting outside counsel's contacts to one or two in-house attorneys reduces costs by eliminating duplicative phone calls, emails, and other communications.
- **Maintaining confidentiality.** Outside counsel guidelines generally require that law firms treat all legal matters as confidential.
- **Dealing with media inquiries.** Many outside counsel guidelines prohibit law firm contact with the media.

The legal department should periodically review and update its outside counsel guidelines to ensure they:

- Reflect changes within the legal department and its management.
- Comply with other company policies.

Although some law firms may push back on onerous outside counsel guidelines, those placing reasonable expectations on outside counsel are generally accepted.

For sample outside counsel guidelines, see Standard Document, Outside Counsel Guidelines ([w-000-4857](#)).

## IMPLEMENT LEGAL PROJECT MANAGEMENT

Legal project management (LPM) applies traditional project management principles to the management of transactional and litigation matters. Some legal departments have used LPM for many years. However, it has emerged only recently as a trend in the delivery of legal services by outside counsel, especially among those offering alternative fee arrangements, because LPM:

- Improves communications between outside counsel and the client.
- Increases the predictability of legal fees and costs.
- Better manages risk and client expectations.

### LEGAL PROJECT MANAGEMENT STEPS

LPM involves:

- Defining a matter's scope, including:
  - setting a clear goal against which to measure the matter's success (for a transactional matter, the goal may be closing an M&A deal by a date certain and for a litigation matter, the goal may be settling the case for an amount covered by insurance);
  - identifying the legal work that must be performed;
  - outlining the steps that must be taken to complete the legal work;
  - determining the legal team's size;
  - setting a schedule for completing each work phase; and
  - determining a budget (see Litigation Budget Toolkit ([1-576-7265](#))).
- Obtaining in-house and outside counsel's agreement on the matter's scope and budget.
- Selecting a legal team composed of attorneys and legal assistants with the right level of experience.
- Assigning specific tasks to each member of the legal team, including in-house counsel and other company employees.

For an overview of the key steps involved when in-house counsel must manage civil litigation, see Managing Litigation Checklist ([0-586-9448](#)).

- Effectively communicating with the legal team throughout the matter's duration. Consider using a secure shared site or other technology that enables law departments and their outside counsel to:
  - monitor matter status;
  - track matter metrics; and
  - store and manage documents.
- Continuously tracking all work against the budget established at the matter's outset.
- Meeting all due dates set out in the schedule.
- Addressing any unforeseen events by adjusting the matter's scope and budget, if necessary.
- Managing client expectations.
- Analyzing the results obtained after the matter concludes (see Analyze Matter Outcome).

Legal departments are increasingly asking their outside counsel to use LPM to manage their matters because it enables in-house lawyers to:

- More closely collaborate with their outside counsel.
- Improve internal and external communications about a legal matter.
- Forecast budgets more accurately.
- Reduce overall legal spend.
- Better manage company risk.
- Achieve more predictable outcomes on both transactional and litigation matters.

Some law firms have resisted embracing LPM in an effort to preserve firm culture and with it, the billable hour model of providing legal services. However, as more legal departments demand alternative fee arrangements in connection with implementing LPM, even these firms must rethink their approach to providing legal services.

For additional information about improving legal processes within a legal department, see Article, Applying Lean Six Sigma Methods to Litigation Practice ([9-549-6388](#)) and Lean for Law: Legal Process Improvement Checklist ([3-550-5890](#)).

## INSOURCE AND OUTSOURCE LEGAL WORK

Whether or not a legal department and its outside counsel use LPM to manage a legal matter, the legal department can make more effective use of its outside counsel by:

- Insourcing certain legal work (see Insourcing).
- Outsourcing routine legal tasks (see Outsourcing).

### INSOURCING

As legal departments continue to grow and become more sophisticated, in-house counsel often need to look no further than their colleagues in the legal department to provide advice and other assistance with company legal matters. Although legal departments are hiring more attorneys and legal assistants to facilitate insourcing legal work, they also are hiring:

- **Interns.** For key issues to consider when hiring interns, see Practice Note, Interns, Trainees, and Volunteers under the FLSA ([3-506-0346](#)) and Internship Program Checklist ([5-535-1405](#)). For a sample unpaid internship agreement, see Standard Document, Unpaid Internship Agreement (Learning Contract) ([2-507-0789](#)).
- **Contract attorneys.** For independent contractor classification considerations, see Using Independent Contractors and Outside Firms: Avoiding Employee Misclassification Checklist ([2-501-3609](#)). For a sample independent contractor agreement, see Standard Document, Independent Contractor/Consultant Agreement (Pro-Client) ([2-500-4638](#)).
- **Seconded attorneys.** A secondment is a mutually beneficial arrangement between a company and its outside counsel where a law firm attorney works in the company's legal department full-time on a fixed-price basis for a set time period to learn more about the company and its business. In addition to reducing outside counsel fees, secondments can assist the company in staffing:
  - maternity leaves and other attorney leaves of absence; or
  - large projects, such as a company-wide audit.

For key issues for in-house counsel and their outside law firms to consider when establishing a secondment arrangement, see Practice Note, Secondment of Outside Counsel to Law Departments ([3-619-7555](#)). For a sample secondment agreement for employers to use when transferring employees within the US, either to another part of the employer's organization or to an outside organization, see Standard Document, Secondment Agreement (Domestic) ([9-521-8725](#)).

The benefits of insourcing legal work include:

- Lower costs.
- Better client service.
- In-depth knowledge of the client and its industry.
- Better understanding of how a given legal matter affects the client's business.

For example, in a complex M&A matter, outside counsel may draft the purchase agreement while in-house counsel drafts certain ancillary documents, including:

- Corporate resolutions.
- Assignment and assumption agreements.
- Employment and consultant agreements.

## OUTSOURCING

Another cost-savings option is using legal process outsourcing (LPO) providers. These service providers, unlike law firms, do not engage in legal practice, but conduct work related to legal practice using non-practicing attorneys in lower cost jurisdictions, including:

- Litigation document review.
- Deposition and trial preparation.
- Legal research.
- Merger and acquisition due diligence.
- Contract preparation.
- Corporate secretarial services.
- Patent research, preparation, and prosecution support.

For more information about LPO, see Practice Note, Legal Process Outsourcing in Litigation ([5-583-2706](#)).

## ANALYZE MATTER OUTCOME

At the end of every transaction or litigation, in-house counsel should analyze the matter's outcome to better understand how outside counsel achieved a favorable or unfavorable result for the company. Issues to consider include:

- Comparing the matter's outcome to the goals set forth at its beginning.
- The positive and negative factors that contributed to that outcome.
- Lessons learned by the legal team during the course of the matter.
- How to replicate the same outcome in future matters, if the matter ended favorably for the company.
- Ways to do things differently in future matters, if the matter ended badly for the company.
- Rating outside counsel by compiling feedback from:
  - members of the legal department; and
  - other company employees who interacted with outside counsel on a matter.

For more information on evaluating outside counsel, see Standard Document, Outside Counsel Evaluation Form ([w-001-3910](#)) and Outside Counsel Evaluation Process Checklist ([w-001-4083](#)).

This matter outcome analysis should be documented and saved for use in future similar matters. In addition, in-house counsel should consider using an electronic tool to:

- Track matter metrics, such as legal spend by matter type and business unit (see Using Metrics to Measure Law Department Performance Checklist ([7-618-8766](#))).
- Compile historical matter data.
- Compare and track outside counsel performance, including their:
  - efficiency;
  - effectiveness;
  - responsiveness; and
  - accuracy.
- Generate reports for:
  - the legal department; and
  - company management.

In-house counsel also should share the results of its matter outcome analysis and other feedback received with outside counsel, especially if in-house counsel intends to use the same outside counsel on future legal matters.

## TERMINATE UNDERPERFORMING OUTSIDE COUNSEL

Outside counsel's failure to deliver value to a company, however defined, may reflect poorly on in-house counsel, who may feel pressure from management or the general counsel to terminate the relationship. Common reasons for terminating outside counsel include:

- Lack of responsiveness.
- Failure to keep the client informed.

- Providing bad advice or poor work product.
- A lack of expertise.
- Poor results obtained from the representation.
- Bad matter management.
- Overbilling.
- Late billing.
- Personality or other conflicts.
- Loss of the main relationship attorney or other key attorney.
- The matter concluded.

If in-house and outside counsel maintain open lines of communication with each other and raise concerns in a

representation early and honestly, many difficult situations can be resolved. If they cannot, in-house counsel must protect its client's best interests by:

- Re-negotiating terms of either or both:
  - billing, including requesting billing write-offs when appropriate; and
  - payment.
- Requesting staffing changes to improve the outside counsel relationship.
- Terminating outside counsel, if problems persist.
- Hiring new counsel.

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