

## **Don't leave it to the bush-lawyer!**

**Sarah Ongley** is the runner-up in the inaugural Corporate Lawyers' Association (CLANZ)-Bell Gully Scholarship for in-house counsel.

**Sarah**, Senior Solicitor at the Ministry for the Environment in Wellington, received a \$500 prize as runner-up.

Scholarship applicants submitted a paper on the tips, tools and techniques for managing external counsel - Sarah's entry is featured below.

Entries were judged by a distinguished panel, comprising: Terence Arnold QC, Solicitor-General; Christine Grice, President of the New Zealand Law Society; Ronald Pol, Corporate Counsel at Telecom NZ and President of CLANZ; Nic Short, General Counsel at Carter Holt Harvey and Vice-President CLANZ; and David Flacks, Partner, Bell Gully.

Bell Gully has been principal sponsor of CLANZ – the Corporate Lawyers' Association of New Zealand – for the past two years. CLANZ supports lawyers working in corporate and other organisations, and central and local government through information and networks.

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### **Tips, tools and techniques for managing external counsel**

Sarah Ongley  
CLANZ-Bell Gully Scholarship Runner-Up 2002

#### **Tip 1: Don't leave it to the bush-lawyer!**

It is 5 pm and you need to be at the gym at exactly 5.30 for a combat class. Jane, a member of your organisation, wants legal advice rather urgently. She is in quite a panic. As luck has it, she has already identified the legal issue and the answer wanted. You ask Jane to write down the question and fax it to external counsel you have suggested. You have a brilliant work-out at the gym.

Don't do it!

Your role as in-house lawyer is much more than a 'go-between'. Only you have the insight to put yourself in the position of the external counsel and ask: *"as a lawyer, what would I want in order to be able to provide good legal advice promptly?"*

Don't assume that Jane has correctly identified the legal issue. Don't assume that she has correctly collated all the relevant background information. And don't assume that she will write the instructions in plain English rather than the jargon of your organisation. The time invested by you in addressing these matters can save a significant amount of time (and legal fees) later on.

To give her some credit, at least Jane has come to the legal team before sending instructions to external counsel! This is vital for controlling the outsourcing of advice, and for keeping track of what legal advice has been received. As an additional check, you may wish to make it clear to your external counsel that instructions should only be coming through the legal team.

#### **Tip 2: Identify the right external counsel**

It is important to put some thought into which external counsel to instruct. Do you require routine legal advice, which any law firm could provide competently? Or do you need a specialist in the area with some expertise and standing (for example, to provide you with a 'weighty' opinion to which your organisation can point authoritatively)? Get to know which firms have strengths in which areas.

For most government lawyers, the Cabinet Directions for the Conduct of Crown Legal Business govern the external counsel that can be instructed (Cabinet Office Circular CO (93) 5 19 April 1993). These directions are found in Appendix 3 to the Cabinet Office Manual.

For “Category 1” legal services<sup>1</sup>, if the legal services are to be provided other than by the department’s own staff, the matter must be referred to the Solicitor General or other Crown Counsel designated by the Solicitor General, unless a general or specific approval has been given. Some exceptions apply to instruction of Crown Solicitors on criminal matters.<sup>2</sup> For all other legal services (“Category 2”), instructions may be addressed to lawyers in private practice or to Crown Solicitors without further authority.

Where instructions are to lawyers in private practice, the chief executive of the government department has a duty to ensure that the lawyers engaged: are free of conflicts of interest; have an appropriate level of expertise for the work they are asked to undertake; and are adequately supervised in the work they are engaged to do.

The chief executive will obviously rely heavily on the in-house solicitor in undertaking this duty, so these should be fundamental matters for any government lawyer.

### **Tip 3: Take extra care over the instructions**

Think about whether you should provide written instructions, verbal instructions, or both. If the matter is urgent, often the quickest way to instruct external counsel thoroughly is by setting up a meeting. Don’t forget to invite Jane. You may also want to ensure that the junior counsel working on the matter is present if he/she is to play a large role in providing the legal services. Even if you are giving the instructions verbally, send confirmation of the instructions in writing to prevent any misunderstandings.

Always state a timeframe for the advice. This timeframe should be the *actual* time that the organisation requires the advice. Lawyers in private practice do not appreciate being given false deadlines, and it should not be necessary for you to give a false deadline in order to ensure that you get the advice on time. Staged deadlines are a very good tool where the instructions are ongoing.

Take care over the written instructions. These will be the touchstone for the external counsel. Put the question or issue up front, for example in an executive summary. It is a good idea to include any reasoning by which you have reached your own conclusions.

Provide the external counsel with enough background information so that they can think laterally if this is required. You are not infallible and you may very well have overlooked an issue which the external counsel could identify from this background material.

As well as setting out what you *do* want external counsel to address, state what you *don’t* want them to address. For example, if you have already researched an issue in-house, say so. You don’t want the external counsel re-inventing the wheel at your organisation’s expense.

Run the draft instructions past Jane to ensure that you are asking the right question. If you have time, have another lawyer in your team peer review the instructions. Just like Jane, you may have become too close to the issue to assess the instructions objectively.

For government lawyers, if you are seeking an opinion from the Crown Law Office on an issue over which there is a difference between departments, remember that both or all of the departments must advise the Crown Law Office of their views.

Finally, phone the external counsel to reinforce the instructions, and to provide external counsel with a ‘flavour’ of the matter and the personalities involved (peaking their interest can only have positive spin-offs!).

<sup>1</sup> (a) Representation or advice in relation to actual or imminent litigation to which the government or agency is or may become a party

(b) Legal services involving questions of the lawfulness of the exercise of government power.

(c) Constitutional questions including Treaty of Waitangi issues

(d) Issues relating to the enforcement of the criminal law

(e) Legal issues relating to the protection of the revenue.

<sup>2</sup> Any department may instruct a Crown Solicitor without further authority in respect of a summary prosecution or the taking of depositions for an indictable prosecution.

#### **Tip 4: Relationships - talk to each other**

This cannot be overemphasised. The need to maintain open communication applies both with the external counsel, and internally (i.e. with Jane). You and the external counsel may be happily proceeding while Jane's needs have changed- subtly but pertinently.

As well as keeping an eye on Jane, you should also keep a close eye on the external counsel- even for isolated opinion work. For opinion work, an excellent technique is to ask for a draft opinion before it is finalised so that you can have input into the final product. If it is a litigation matter then ideally you should have sufficient knowledge of the proceedings to make informed decisions, for example about whether certain appearances are necessary.

Human nature dictates that external counsel will only feel comfortable picking up the phone at any time if they know you. Maintain good relationships with firms and external counsel. If you don't know each other it will be all the more important to arrange that initial meeting.

Marketing events run by external providers are obviously a good way to maintain relationships and are beneficial to both the provider and in-house counsel. However you should always think about whether it is appropriate to accept the hospitality offered, particularly if you are a government lawyer.

#### **Tip 5: Getting 'Value for Money'**

In-house lawyers are no doubt familiar with the trials and pitfalls of obtaining value-for-money legal advice. There are many techniques that can be used. First, assess what the advice is worth to the organisation in money terms (by talking to Jane). Depending on the nature of the advice, you may want to use the following techniques or a combination of them:

- ? Obtaining an estimate
- ? Tendering
- ? Fixed or capped legal fees for a job/group of jobs/over a certain time period
- ? Results-based fee setting (contingency fees)
- ? Full-time equivalent allocations

The American Bar Association has recently released a report discussing alternatives to using hourly rates (*ABA Commission on Billable Hours Report 2002*, American Bar Association). Charging by hourly rates is of course the standard procedure used by most firms. However, as the report points out, originally hourly rates were only intended as a management tool - not as an absolute determinant of value and final price.

In fact, hourly rates billing produces quite the wrong incentives: "...pricing based solely on billable hours rewards inefficiency, puts little or no premium on expertise and know-how, and provides no incentive for keeping the client out of trouble and/or solving problems (or closing deals, etc.) quickly and effectively" (page 25).

The ABA Report also notes that for in-house lawyers there are various arrangements that can be made for legal services, ranging from complete outsourcing of the task to shared responsibility between in-house and external counsel, to external counsel providing only a back-up service for testing ideas.

Whichever mechanism is chosen, once the pricing arrangement has been agreed upon you will need to keep track of the costs. If hourly rates are being used, you may need more regular reports on costings than the end-of-the-month billing. Based on your assessment of the value to the organisation, you should require the external counsel to let you know as soon as the legal fees incurred exceed a certain amount.

Don't be reluctant to query the fee if it seems exorbitant. Law firms understand that this is a commercial reality, and querying a fee in a fair and diplomatic way need not destroy good relationships.

For government lawyers, there are rules in the Cabinet Directions about which department is responsible for meeting the cost of legal services where the advice relates to the responsibilities of more than one department.

## **Tools**

### **Tool 1: Checklist for external instructions**

A useful tool is to have a checklist for instructing external counsel, or a precedent letter, followed by all members of the legal team. The ABA Report (page 23) suggests that it could include:

- ? Definition of services
- Basic coverage
- Extraordinary circumstances
- ? Personnel and other resources
- ? Support services and disbursements, if any
- ? Periodic evaluations, and what will be measured
- ? Conflicts
- ? Payment
- ? Other terms of engagement
- ? Contingencies if any
- ? Future changes or rebidding
- ? Transition steps in the event of termination.

This is very thorough and some items may only be applicable if you wish to use an alternative billing arrangement to hourly rates.

### **Tool 2: Record-keeping systems**

Organisations should keep all legal advice received from external providers in a central system that is easily accessible to members of the legal team. Obviously this will be useful (and could save costs) if the same legal issue arises again. In addition to an in-house system, if you have a good relationship with a particular external provider, you could arrange to have access to their precedents database (both for opinions and documents). Some private firms have apparently been willing to make such databases available on certain conditions.

### **Tool 3: Continuing legal education and library**

Again, this tool can be provided by external providers, as well as from your own resources. Some firms are willing to run seminars for in-house legal teams and provide lists of relevant articles from the firm's library.

## **Summary**

Managing external counsel is an important role for any in-house lawyer. Although it may be tempting to underestimate the role, especially in a busy organisation, good management at the outset is the *only* way to obtain high quality legal advice that is on-point, on time, and within budget – and hopefully there will always be another gym class.