

Tips, tools and techniques for managing external counsel

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Communication, communication, communication: the most important tool in any business relationship. The relationship between in-house counsel and external counsel is no different.

“Communicate”. It sounds easy, and perhaps a little simplistic. The concept is that if the service provider understands what you want, everything will run smoothly. However, in-house and external counsel know that in reality it can be a little more complicated.

It is often an eye opener when a lawyer makes the move from private practice to in-house, or vice versa, and sees the issues from the other side.

It never occurred to me that managing external counsel would be anything but straight forward. After a number of years in private practice, I knew the issues that arose when receiving instructions and believed that by simply looking at it from the other side I would cover off all issues when instructing. The reality was that I found instructing external counsel to be another skill to hone.

The reasons for managing external counsel effectively are obvious. Risk and cost management are both important issues for in-house counsel. Therefore, it is definitely worthwhile spending some time thinking about how to do this effectively.

There are many things that can impact on the ambit and form of a legal service and some may be particular to the in-house/external counsel dynamics. When dealing with members of your own profession, it is easy to fall into the trap of assuming that they will immediately understand your requirements and issues.

That extra 10 minutes taken to discuss your expectations may be the determining factor in getting what you really want.

Declare your expertise

Make sure external counsel know your expertise in the matter concerned. External counsel will not know what it is that you “don’t” need to be told unless you tell them.

If you don’t, you may end up being the costly result of being provided with a summary of the relevant act and case law in an opinion that you don’t require.

Also, your intention may be that external counsel only provides part of a wider service, some of which you are capable of completing. If this is not clarified, external counsel may assume that your instructions were intended to cover the whole job and provide you with more than you need.

Specify delivery requirements

Discussing the form of the service is equally important. For example, it is easy to assume that external counsel will know when you ring them for advice on recent developments that all you want is for them to have a quick discussion with their colleagues on that one point and ring you back. Without specifying this clearly, you may end up with an unnecessarily extensive report.

Of course, this links back to the point above - make sure external counsel are aware of your expertise. If it is an area in which you do not practice, a formal opinion may be appropriate, whereas a phone call to clarify a point may be all that is required if you are familiar with that area.

Be clear on who will provide the service

Be sure that you know who will be doing the work. A very simple point, but easy to forget if you simply assume that the service will be provided by the person you contact.

Check whether the work will be delegated and, if so, up or down. This is important for cost considerations.

If you are instructing because you want a particular lawyer's skills or are more comfortable working with that person, you will want to know whether the work is to be passed on to someone else. It's then your decision to take it elsewhere if your chosen lawyer won't be handling the work.

You may have built up a working relationship with your initial contact to the extent that they are familiar with your expectations. If the work is being passed on to someone else, you may want to provide more detailed instructions.

For example, does that person know your experience in this area and that you prefer an initial email response with a follow-up discussion? Your initial contact may know these things instinctively but may not think to pass this information on when delegating.

Discuss fees and time to be spent

A discussion of fees and time to be spent is a useful exercise, even for small jobs. It is a useful tool to highlight any misunderstandings over the ambit and form of service to be delivered.

It will soon be obvious that your expectations have not been clearly understood if there is a disparity between your idea of likely timeframe and cost and the external counsel's estimate.

Clarify your role

There are many reasons why in-house counsel outsource work and these can vary from job to job. Assumptions by external counsel of the work required are often based on general assumptions about the in-house counsel's role.

If the external counsel has worked with the in-house counsel before, assumptions can also be made that in-house counsel's role will always be the same. For example, if in-house counsel also perform company secretarial duties, will they be checking the company constitutions and drafting resolutions even though external counsel are preparing the documents?

In many cases, in-house counsel provide the link between the in-house business client and external counsel and will often provide management with an overlay to the external advice. However, depending on the reason for outsourcing, this will not always be the case.

To prevent any incorrect assumptions, a clear communication of your intended role is necessary. Reasons for outsourcing work can include the following:

- ? Lack of time for in-house counsel to complete the job
- ? Lack of expertise within in-house counsel to complete the job
- ? Risk management requiring external counsel to be employed

Depending on these and other factors, in-house counsel's role can include one or more of the following components.

- ? Simply providing initial instructions with the external counsel then dealing directly with the in-house business client
- ? Providing an interface between the business client and external counsel to varying degrees
- ? Working closely with external counsel and providing legal and business input to the project

- ? Being directly responsible for some of the legal services whilst external counsel cover other areas

For example, if work is being out-sourced due to workload, in-house counsel may want to completely hand over the file and have external counsel complete all aspects.

If work is being out-sourced because in-house counsel will be managing the larger project, in-house counsel may wish to be closely involved with the provision of legal services and provide some services themselves.

If there is a lack of clarity about the roles, work may be duplicated or a risk that some items may fall between the cracks.

Discuss the relevance of estimates

External counsel may not realise that an important function of obtaining an estimate is for budget purposes. This is a slightly different from pure cost minimisation.

Estimates can be used to secure sufficient funding for a project within a business. If there is a blow-out in costs, extra funding may not be easily forthcoming. This could put a project at risk or require it to be downsized, especially where a project is competing for funding with other business initiatives. Under-estimating - although it may win a job - could have dire consequences for a client.

Making these issues clear to external counsel can encourage them to give ranges and estimates without the fear that in doing so they could lose a job on cost.

To manage cost over runs, communication is again an important tool. Clarify your expectations on cost reporting from the start. Regular reporting of time spent will enable potential blow-outs to be foreseen and action taken internally to secure extra funding before it is too late.

Tender process

Managing the tender process may be focused around cost considerations. However, if the job is large or complex, the cost of the legal service may be hard to price.

Other than giving an indication for budget purposes, the worth of such estimates should be kept in perspective - especially in cases where external counsel are not able to give a cap on fees.

Again, external counsel should be encouraged to provide ranges so that budget issues can be managed where it is foreseen that costs may move depending on the development of the project scope.

If both in-house and external counsel accept that costs are not easily estimated, external counsel can be encouraged to be creative in their tender to distinguish it from other tenders.

For example:

- ? Offering a percentage discount on the final fee
- ? Offering a discount to recognise any internal training opportunity created by the project
- ? Offering a "credit" for legal services if the estimate is exceeded
- ? Provision of support services to in-house counsel, e.g. training, library resources, etc.
- ? Caps on certain components of the project that can be more easily priced
- ? Junior in-house counsel working on the project under external counsel for training purposes

Have fun and share information

In-house counsel do not always have the same opportunity as external counsel to pop into a colleague's office to discuss legal issues. We all know the advantages in talking things through and getting a second opinion.

Relationships can be built with external counsel where a quick phone call to do this is acceptable but this may soon reach the realm of the chargeable call.

However, external counsel will be happier to work with you on a non-cost basis if they know that the arrangement works both ways. External counsel can gain benefits from the knowledge of in-house counsel- although passing on information to their external colleagues is not something that in-house counsel immediately think of doing. However, it can help the flow of information, with obvious cost and risk management benefits.

For example, relevant industry practice and information can be beneficial to external counsel. If you become aware of overseas trends in your industry or have recent experience in dealing with regulators and other authorities, this can also be useful information.

The sharing of legal resources is another barter tool - a recent opinion or precedent may be useful to your external counsel. Obviously discretion is needed, but sharing knowledge can be mutually beneficial.

Lastly, remember that it can be fun when dealing with external counsel. Engage external counsel with which you feel comfortable and who provide the service you require.

In-house lawyers can at times feel secluded from the rest of the profession. The relationships between in-house counsel and external counsel can happily replace this interaction.