

Some Things to Think About When Retaining Outside Counsel

November 30, 2021

Mary Massaron
(313) 983-4801
mmassaron@plunkettcooney.com

Henry W. Saad
(248) 594-8668
hsaad@plunkettcooney.com

DRI - In-House Quarterly - Fall 2021

Most experienced lawyers with top firms and seasoned, corporate, in-house counsel know, in their bones, that finding the “perfect” lawyer for an important and consequential legal matter (corporate or litigation) takes great care and work. It is not easy.

Indeed, the task of finding the right counsel whether for a family member or friend in divorce, or a colleague who needs a business or litigation lawyer, places a great deal of responsibility on the person authorized to conduct the search and make the ultimate decision, which has serious ethical and legal consequences. Accordingly, when tasked with this undertaking you know, instinctively, it is a serious matter and you also know, through hard experience, that, typically, only a few select lawyers have the combination of personal, political, and legal characteristics that fit the bill. You hope that these few lawyers have not been conflicted out. And you also know that your opponent is likely to know the top lawyers and— to take the advantage—may have already done some footwork to conflict out the best.

Having said all this, let’s examine the ways and means to select the one who will give you the best chance of achieving your objectives, in the least expensive, but most competent fashion. Much has been written about the qualities of good lawyering. And even more has been said in criticism of the practice of law with its sophistries and sharp practices. But in our world, with its plethora of international, national, and local laws and regulations, lawyers are a necessity. So, the question becomes how to find the “good lawyer” for the task at hand. One of the most difficult and important decisions that any client makes is their selection of outside counsel. The process of finding the best lawyer to handle a matter and the criteria that a client employs to select the lawyer are important—both to the client and the retained counsel. Finding the right lawyer and cultivating a relationship between the client, the in-house lawyer, and the out-side counsel is vitally important to obtaining a satisfactory outcome. Yet this is a topic that gets often gets short shrift. Your authors include an outside counsel, a former chief judge of an appellate court, and an in-house lawyer. We offer some considerations and guideposts to help with that process from our unique and varied perspectives.

1. Start with the End Goal in Mind

Most law departments—whether in large global corporations with huge in-house legal departments or in mom-and-pop businesses with only a rare need for outside counsel—find that they occasionally need to locate and retain an outside lawyer to help with a matter. The lawyer they choose will depend on the kind of work that they need help with. Outside counsel are often retained for commodity work, special one-off projects, or bet-the-company work. Each of these requires consideration of different factors. Careful analysis of the work for which outside counsel will be retained is vital to finding the right lawyer and the right law firm. What tasks are you handing off? What areas of law will be important? Will this require negotiation skills? Management of discovery? Trial? Regulatory work? Legal strategy and appellate advocacy advice? Strong writing skills? What substantive, technical, scientific, or industry knowledge will be key to success? What other specialists will you need to include on the team? A publicist? Technical or scientific experts? Who from within your company will need to be involved? Once you have thought through the nature of the assignment and of the person or team you will need to put in place, you will be ready to begin a focused search for the best lawyer for the task.

2. Confer with Reliable Legal Friends and Contacts to Find the Top Lawyers in the Field

Your search can begin by speaking with reliable legal friends and contacts to determine who the top lawyers in the field are. A recent study from Thomson Reuters revealed that in 2020, 71% who reached out to hire an attorney listed personal recommendations by family, colleagues, and friends as key influencers. *Yesterday, Today, and Tomorrow: Legal Consumers Have Changed What Your Law Firm Must Do to Change with Them*, Thomson-Reuters.

This form of vetting lawyers is age-old. One of the reasons that in-house lawyers often participate in associations such as the American Corporate Counsel Association or other bar groups and industry associations is to develop relationships that provide a wide and deep vantage point from which to search out the best lawyers. In-house lawyers typically also have good relationships with friends in organizations such as DRI and its sisters, the FDCC, the IADC, and the ADTA, and in industry associations and groups, who can also be tapped to identify potential lawyers.

These colleagues can often offer specific input about lawyers with whom they have worked in the past. They can share their confidential perspective on the lawyers they believe have high credibility with the bench, bar, and applicable administrative agencies. And they can tell you from their vantage point who has an over-sized reputation. They can confidentially advise you about those who may be a strong candidate on the surface but have shown themselves to be difficult to work with in the past or who have not performed well under pressure. These insights are invaluable—and worth every minute that you spend in ferreting them out.

In-house lawyers who have good relationships with members of the state and federal judiciaries and regulatory agencies can also obtain recommendations from those who have had the opportunity to see the lawyers work before that forum. An appellate judge or administrative official can provide confidential thoughts about which lawyers appearing before that court or agency are always well-prepared and persuasive. That advice will help you narrow the field of candidates to those with a truly strong track record.

You are looking for lawyers who have had successful outcomes in litigation or in resolution of matters in the same field and in the same forum. You are looking for lawyers who are highly regarded for ethical representation, zealous representation, and honest and fair dealings with clients. This includes their reputation for reasonable billing, outstanding communication with clients, and working closely with clients and the in-house team of lawyers to pursue the client's best interests. And there is perhaps no better way to gather information about a lawyer's capabilities than asking questions of those in your network.

3. In Today's World, Internet Research Can Help You

In-house counsel today can verify the recommendations they receive from their key advisers by conducting online research. In the past ten years, those using the internet to help with their search have increased from nine percent in 2010 to thirty-five percent in 2020. Yesterday, Today, and Tomorrow: Legal Consumers Have Changed What Your Law Firm Must Do to Change with Them, Thomson-Reuters. Information about the lawyer and law firm is easily found on most law firm websites. Law firm websites typically contain a biography of all their lawyers, lists of key cases that the lawyers have handled in the past, links to briefs or articles that the lawyers have written, and other pertinent information. A Google or Bing search is a quick way to find much of the information that you need. And it allows you to readily weed out lawyers whose track record looks thin in the area you need. Information may also be available through LinkedIn, Facebook or Instagram. These social media sites can also disclose problematic affiliations or posts that may create publicity problems if the lawyer is hired. In today's culture, a lawyer's reputation in the community (whether it's the traditional community of charities, churches, and cultural organizations or the on-line community of heated political and social commentary) may be a factor to consider.

Other resources are also available and can be extremely useful. Many appellate courts today keep an archive of oral arguments that is available to the public online. Just as the best lawyers use archived arguments to study the judges before whom they expect to appear, in-house lawyers can readily observe the lawyers under consideration as they do their work. This provides invaluable information that was not available in the past unless you traveled to a potentially distant courthouse to observe a lawyer. When you watch or listen to an archived oral argument, you can see for yourself if the lawyer is eloquent. You can discern whether the lawyer seems well-prepared. You can find out if the lawyer's tone is patronizing or antagonistic or argumentative and sarcastic with the judges on the bench. You

SOME THINGS TO THINK ABOUT WHEN RETAINING OUTSIDE COUNSEL Cont.

can evaluate whether the lawyer is agile in responding to questions and comments from the bench and in refuting opposing counsel's arguments.

Less often, trials are available to see. But transcripts of prior trials may be available and can be a source of information about the lawyer's agility in the courtroom during a difficult jury trial. Westlaw, Lexis-Nexis, and other legal research engines also have statistical data that provides information about the lawyer's track record with different kinds of cases. The statistics can be revealing, although like any statistical analysis, the data is only as good as the information from which it is compiled. It may offer more of a snapshot that can identify questions to ask than an answer to who to hire.

4. Think About Whether the Lawyers Have Deep Knowledge of the Forum, Local Practices, and the Predilections of the Decision-Makers

For complex litigation or regulatory matters, a team is often needed. You will want lawyers who are familiar with the courts or regulatory agencies involved. Do they have good relationships with the judges or regulators that will decide the matter? Do they know the local customs and practices that govern in that arena? Many law firms have former agency regulators or former judges on their staff. These individuals can provide invaluable insights about the inner workings of the forum and the predilections of the bench. Local lawyers also may have deep insights about the jury pool in different places and can assist in analyzing removal or change-of-venue questions.

Many in-house lawyers insist that they hire the lawyer and not the law firm. And certainly, the specific individual lawyer who will handle your matter or lead your team is critically important. But in complex and substantial matters, the capabilities of the law firm may also be important. If skills of various disciplines are likely to be needed, it can be a huge plus if the law firm has the backup and resources of a full-service law firm. For example, if negotiations take place simultaneously with litigation, and if the matter involves multiple levels and branches of government, a law firm with litigation, negotiation, and government-law practice groups provides strong support to the lead lawyer as the matter progresses in these different areas. Coordination is easier and the lawyers can readily work together in the multifaceted effort.

5. Consider the Skill Set of the Lawyers on Your Team

While many lawyers are multi-talented, few can be the best in every area. Lawyers skilled in difficult negotiations may not be great writers. Lawyers who manage discovery with ease and organization may not be adept with cross-examination at trial or at presenting an appellate argument. Consider the likely course of this matter to determine the kinds of skills that will be needed and put together a team with all those skills. Some law firms have large litigation practices, but their lawyers rarely try cases. If this is a matter that may go to trial, you will want a lawyer who regularly tries cases. Otherwise, you may end up being pushed into a settlement merely to avoid the trial. Be sure to inquire deeply into the specific

experiences of the lawyers who will be involved in handling the matter.

If this matter will start in a regulatory proceeding or trial and then proceed to a likely appeal, consider at the outset who will take the lead at each of these stages. You will want to put a team together—and be sure that the members of the team can work together cooperatively and seamlessly. Years ago, lawyers often worked alone on matters and law schools encouraged a highly competitive approach to learning and practice. Today, because of the complexity of the law and litigation, it may be more important to put a premium on lawyers who can and do work collegially with in-house and outside counsel. Lawyers handling complex matters need to work with multiple individuals and departments from inside the company and any number of outside consultants, such as crisis management and publicity people, technical experts, jury consultants, political operatives, and computer specialists who handle e-discovery. They need to know how to consult with this wide group of persons and entities. They need to know how to resolve disagreements about strategy. They need to have the ability to maintain confidentialities and to understand and appreciate each person's role on the team. Does the lawyer you are thinking about hiring have the proper control, discretion, and keen sense to know when to get the client's consent on actions? Will the lawyer identify and report on any problems that arise before they become serious issues? These abilities are also key components in selecting counsel for serious matters.

6. Find Lawyers with the Substantive Knowledge You Will Need to Succeed

Many areas of law are predicated on deep technical, scientific, and industry knowledge. Litigation regarding computers, technology, media platforms, or products liability, or pharmaceuticals, or medical malpractice requires a deep knowledge of the substantive field as well as of law. The lawyer with extensive knowledge of the field will be valuable. Watch out, though, for lawyers whose knowledge is so deep that they can no longer explain what they know to nonspecialists. Shakespeare's comment of one such person was:

[H]e speaks an infinite deal of nothing.... His reasons are as two grains of wheat hidden in two bushels of chaff: You shall seek all day ere you find them, and when you have them, they are not worth the search.

Shakespeare for Lawyers: A Practical Guide to Quoting the Bard, quoting Shakespeare, *The Merchant of Venice*, pg. 65. If your substantive expert cannot communicate in an understandable way, all his or her deep knowledge will become a hindrance to your case rather than a help.

State and federal courts in this country continue to be served by generalist judges. While the team needs the deep knowledge, it also needs good communicators who can translate the technical jargon, scientific concepts, or statistical the studies into language that a judge without that deep knowledge can understand. We see this illustrated repeatedly in the battles over expert testimony under Federal

Rule of Evidence 702. Generalist trial judges struggle to determine whether a credentialed expert is appropriately applying a recognized scientific methodology to record facts. Hiring lawyers who can present these complex matters in plain English will undoubtedly increase the odds of getting your expert testimony admitted and blocking that of your opponents.

7. Think About Any Potential Political or Policy Component of the Matter

Virtually all legal matters that in-house counsel confront, and almost certainly all-important legal matters, have a political or policy component. Alexis de Tocqueville's famously said that “[s]carcely any political question arises in the United States that is not resolved sooner or later, into a judicial question.” Alexis de Tocqueville, quoted in *The Quotable Lawyer* (editor Tony Lyons), pg. 228. This is no less true today than in 1835 when he wrote it. Effective outside counsel, especially on a significant piece of business or government litigation, should be well-connected politically because of this aspect of many disputes. Ideally, out-side counsel should be with a firm that has lawyers who have good relationships with, if not leaders from, both political parties. Understanding the political backdrop against which the litigation will occur is critical to evaluating the strategy and responding to the felt necessities of the time. Abraham Lincoln offered a thought that is helpful here:

“A universal feeling, whether founded or ill-founded, cannot be safely disregarded.”

The Wit and Wisdom of Abraham Lincoln: A Treasury of Quotations, Anecdotes, and Observations, James C. Humes, pg. 36. A lawyer who is well-schooled in the political and policy trends of the moment brings this knowledge to bear in determining strategy and addressing the currents of public opinion. Lincoln recognized that it is difficult, if not impossible, to permanently maintain a policy when it does not rest on some “philosophical public opinion.” Id. He found “both a power and a magic in public opinion.” Id. As one epigram teaches, “laws that do not embody public opinion can never be enforced.” *A Dictionary of Legal Quotations*, Simon James & Chantal Stebbings, pg. 150. A good lawyer understands this and has a keen ear for the policy currents pertaining to the case and a persuasive approach to addressing them. In today’s overheated political and cultural world, a lawyer with sensitivity to the many conflicting currents of public opinion and an ability to understand how they may affect the matter or influence the decision makers is especially helpful.

8. Select the Best Two or Three Candidates and Conduct a Personal Interview

In any professional field, not only is expertise a key to victory, but so is having personnel who people like. The best way to figure out if your potential outside counsel has a “winning” personality is to conduct a personal interview. This “likeability” factor may seem minor or even trivial, but it is not. In every endeavor, it is critical to have someone on your team who is a “people person.” You generally want some-one who happily engages with others and who others like to deal with. The law is no exception to this rule. In their terrific book on advocacy, Justice Antonin J. Scalia and Bryan A. Garner

SOME THINGS TO THINK ABOUT WHEN RETAINING OUTSIDE COUNSEL Cont.

urged advocates to “demonstrate to the court, mostly by the manner of your presentation that you are likeable and not mean-spirited.” Antonin J. Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, pg. 141. Good lawyers “assume a posture of respectful intellectual equality with the bench.” *Id.* at pg. 33. Good lawyers also can engage in a colloquy with their clients and colleagues that reflects their deep know-ledge, openness to considering everyone’s ideas, and a willingness to convey their thoughts to the team and to accept ideas that others offer in a creative and cooperative way. We have all met lawyers whose patronizing manner is infuriating. We have all met lawyers whose bombastic rhetoric makes any real interchange of ideas almost impossible. You don’t want to hire these lawyers. They will not be good team players. They will not impress the members of the bench. They will not draw a sympathetic response from agency regulators. And they will likely not impress your top management.

To make this “likeability” judgment requires face-to-face interviews. This is one area that should not be overlooked even during these days of virtual meetings. And if conditions do not allow for an in-person meeting, minimally, set up a conference on Zoom or Microsoft Teams or Facetime so that you have the chance to both see and hear the candidates.

9. Have a Frank Discussion with the Prospective Lawyer About Staffing, Billing, Supervision of the Project, and Other Matters at the Outset

In the interview of a candidate, the hiring in-house lawyer has the privilege of thoroughly questioning the billing practices and safeguards used by the firm to assure accurate billing and to avoid duplicative or unnecessary work. You will want to dis-cuss the nature and level of staffing. Lawsuit expenses can be doubled and tripled by over-staffing a matter.

Outside counsel should be ready to negotiate regarding supervision of the project and the retainer agreement. Any signs of arrogance or prickliness by outside counsel on these topics is a bad sign since confident and prudent counsel will welcome forthright communication up front on all issues. You will want to dis-cuss whether you expect the lead partner to handle all the work or to hand off work to more junior lawyers, and if so, how it will be supervised and what quality control is in place. You will want to evaluate whether the lawyer and his or her firm has sufficient resources to handle a large complex matter with extensive discovery. You will want to consider whether matters will be handled efficiently. Bringing in new and different junior members of the team can dramatically increase costs as each new lawyer reviews the file to get up-to-speed.

Frank discussions with prospective lawyers about their experience and relationship with opposing counsel and the judicial forum or regulatory agency are also important. What is the lawyer’s track record when opposing this lawyer or appearing before this court? You will want to agree on how the lawyer will be reporting progress to you, how the lawyer will be budgeting the work, and when the lawyer will be seeking your advance input on key strategic decisions. Taking the time to clarify your

SOME THINGS TO THINK ABOUT WHEN RETAINING OUTSIDE COUNSEL Cont.

expectations at the beginning can help assure a strong relationship and avoid the problems that come from differing approaches to handling the matter.

10. Make Your Choice and Be Ready to Work Together

Once you have selected the outside counsel or team of lawyers who will handle a project, you are ready to work together toward the goals that you have outlined for the team. Participating in working relationships like this provides one of the great joys of the practice of law. If you have carefully identified the goals for the project and thoughtfully vetted the lawyer or team of lawyers you have hired, you should be able to move forward. You and your outside counsel can embark on a satisfying relationship as you seamlessly move forward toward the goals you set at the outset.