BROWN LAW LLC

Brown Law LLC
Radnor Financial Center
150 N. Radnor Chester Road
Suite F-200
Radnor, PA 19087
tel: (610) 977.2078
fax: (484) 585.1681

www.brownlaw-llco.com

Five Steps Necessary for General Counsel to Achieve Cost Predictability and Control When Working with the 21st Century Law Firm

By John F. Brown Jr.
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Scant progress has been made since Fulbright & Jaworski, LLP published its “Second Annual Litigation Trends Survey,” in 2005. According to the survey, litigation cost was the single most cited concern by senior corporate counsel. Three years later, the Altman Weil, Inc. “2008 Chief Legal Officer Survey” again cited cost control as the greatest concern in the coming three to five years. As one sign of a growing disconnect between senior corporate counsel and their outside law firms, *Inside Counsel’s* “19th Annual Survey of General Counsel,” released in July 2008, reported that only 11.6% of in house counsel believe law firms are actively seeking ways to reduce the cost of legal services.

Senior corporate counsel are equally concerned with the predictability of those costs. In their third survey published in 2006, Fulbright reported that only 22% of inside counsel felt law firm budgets were frequently accurate and reliable. In 2008, InsideCounsel found that well under half of inside counsel said that law firms generally adhere to budgets. In the interim, hourly rates have reached preposterous levels that are not sustainable.

In the 2008 Eversheds report, “Law Firm of the 21st Century,” some survey participants reported a lack of bargaining power when confronted with big firms raising rates to a similar degree. The answer will not come from “big law”; rather General Counsel must, in a series of steps, simultaneously challenge their outside counsel to do better and take advantage of more sophisticated technology that is being deployed to track spending and budget performance over the life of litigation matters.

Step 1

Take Measure of Outside Counsel’s Confidence in their Game Plan by Exploring Their Willingness to Share Risk

A willingness on the part of the law firm to share in the risk of a cost overrun or adverse result is an excellent barometer of how confident they are in their estimate of budgeted legal costs and outside expenses and the likelihood, in view of the exposure, of achieving a favorable case outcome.

Following the release of their 2008 report, Eversheds sponsored a New York conference attended by senior corporate counsel from some of America’s top companies. Eighty-one percent of those attendees believed that the risk of budget overruns should be shared with outside counsel. Interestingly, less than 5% of them had put a structure into place to facilitate such an arrangement.

Creative arrangements that structure the right incentives do not require abandoning the hourly rate altogether; instead, it should be used as a springboard. There is both truth and humor in the

following observation: "Who ever [sic] says to a client that my billing system on its face rewards me at your expense for slow problem solving, duplication of effort, featherbedding the workforce and compulsiveness—not to mention fuzzy math?" Turow, Scott. "The Billable Hour Must Die." *ABA Journal* (August 2007).

Too ingrained to die, the hourly rate is in need of a hard tweak. Why not require your outside counsel to steeply discount their hourly rates and only recapture that discount (or more) if they can meet and deliver defined success criteria established at the case outset? These criteria could include a settlement target, meeting budgetary expectations and avoidance of certain costs, time of disposition and other factors.

Another approach would be to require your outside counsel to track time at their published rate and also provide a fee budget at the time of their initial assessment. If they bring the case in significantly under budget, reward them with a "kicker" over their hourly rate. If they are over budget, make them "eat" the first part of the incurred overage, and agree to pay for the remainder of the hours only at a discounted rate. Additionally, structure a success fee which incentivizes the firm to achieve cost predictability.

If your outside counsel lacks the confidence to do either of the above, the relationship deserves scrutiny. In short, sharing risk incentivizes cost control and predictability while pure hourly rate engagements may actually incentivize firms to simply throw people at the work.

Step 2

Less War Stories and More Measurement of Performance

Every firm brochure and relationship manager trumpets the same handful of war stories that depict their firm as smarter, tougher, and more result focused than the last firm that pitched your corporation's business.

War stories aside, most surveys tell us that outside counsel do far less than a stellar job with regard to the more pertinent task of meeting budgeting and forecasting expectations. The Altman Weil survey reports that almost half of General Counsel plan to fire one or more of their law firms due to these and other shortcomings. Only 17% of outside counsel make the "A" grade according to *Inside Counsel*.

Approximately seventy-five percent of in-house counsel now require budgets according to the "2007 Association of Corporate Counsel/Serengeti Managing Outside Counsel Survey." With outside counsel also making progress in implementing software to track budget and actual performance over case lifecycles, the foundation is in place to move from a law firm evaluation era based largely on anecdotes and relationships to one where you can actively manage and evaluate outside counsel with objective metrics.

Additionally, monitor the frequency and magnitude of cost and result deviations projected by outside counsel in their initial case assessments. Within practice silos, compare the time to disposition, average legal cost and expense, and average judgment/settlement cost across cases ranked by severity deciles to compare not only resource allocation but objective performance by different legal service providers used for that specialty.

Once performance is measured by those and other criteria, steps can be taken to close the gap between cost and result projections and actual performance.

Step 3

Change the Focus of Your Litigation Management Plans

Every CEO running a business takes prudent risks based in large part on information that is not perfect; no less should be expected of the corporation's outside lawyers. Require your outside counsel to focus on what they really need, not what they can justify as potentially relevant. Discovery should be a surgical tool, not a process of pursuing all possible relevant information that might perfect outside counsel recommendations but in reality only gain the client scant advantage. Litigation management plans should not be a license to embark on a linear aggregation of complex arguments and talking points that might bear, at best, offhand mention in mediation; rather they should focus on creating concentrated leverage along a critical path that will best position a matter for trial or a negotiated settlement.

An early, rigorous, and thorough case assessment that follows a disciplined robust methodology and fully takes into account the business perspective will pay off not only by positioning counsel to be more selective in targeting discovery but also by enabling them to avoid the common pitfalls of a more typical learn as you go approach. Achieving efficiencies and streamlining the process in this way will deliver the return on investment from your legal expense dollar that you should expect.

Step 4

Make Sure the Litigation Team is a Match for Your Plan

Put another way, when reviewing a billing summary, a limited number of readily identifiable and familiar names should appear, each associated with a sharply defined role in the litigation. From the outset, billing timesheets should confirm a commitment from the designated trial partner that he or she is actively and meaningfully engaged in your case on a day-to-day basis.

Establishing usable trial evidence by determining what evidence to pursue, how to pursue it and with what intensity and allocation of resources, requires the experience and active participation of a trial partner who is "living" the case. This is 180° turn away from the model of a trial partner who conducts bi-monthly meetings of a larger than necessary segmented hierarchical team and appears at a few key depositions or court appearances.

Explore whether the culture and business model of your counsel of choice are a match with a cost-effective litigation approach that features an unyielding commitment from the designated trial partner. Because rainmaker-trial partners can only effectively handle and try a limited number of matters, challenge them to address the following questions:

- Is there a true sharing of firm clients?
- What is the firm's attitude towards associate development and emphasis on trial skills?
- Is there any minimum threshold of demonstrable trial skills required to become a litigation partner?
- How does the firm reward, value, and retain their younger partners who are in effect making many of the key judgment calls that determine the cost effectiveness and outcome of the litigation through their discovery management and their subjective presentation of the case to the managing trial partner at periodic team meetings?
- Last, and perhaps most significantly, is the hourly rate hierarchical model used by many large legal service providers more conducive to the law firm's own business model than the business model of the client who seeks cost-effective litigation solutions?

Step 5

Evaluate Whether Your Firm is Equally Comfortable and Formidable at Either the Defense or Plaintiff Table in the Courtroom

In order to make the most accurate diagnosis of where to allocate resources to achieve the most cost-effective result and create the maximum perceived vulnerability on the part of your opposition, it is enormously helpful to tap into the strategic advantage of blending the thinking of lawyers who have experience on both sides of the courtroom.

It is worth noting that companies at the tail end of the law firm convergence process, who have concluded that their present firms lack this competitive edge, have gone out and retained plaintiff's firms to round out the skill set of their defense-oriented counsel roster.

Determine how much experience your current firm has on the plaintiff's side, and whether any of that work is done on a contingency basis. If the answer to one or both of these questions is "very little," this is a persuasive indicator suggesting it is unlikely that your current firm is a strong candidate to share risk in accordance with any of the recommended hard tweaks to the hourly rate suggested above.

Conclusion

When *Inside Counsel* reports that only 8% of law firm lawyers believe reducing cost is a key improvement they could make, senior corporate counsel must recognize the burden is on them to take steps to facilitate change.

As projected, three more years of the usual business of paying unconditionally for hours instead of results will only make the year 2011 sound more like 2005. Demand more.

John F. Brown Jr. is a principal at Brown Law LLC. Until recently, Mr. Brown was a shareholder at one of the nation's largest law firms. He can be reached at jbrown@brownlaw-llco.com.