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Business of Law

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It's Not All About Rates

One of the many impacts of this punishing recession on the delivery of legal services has been an even heavier shift in the balance of power to in house counsel. The seesaw will always tilt toward clients, as they dispense the work that firms need to survive. The normal slant, though, is much more pronounced today, as the loss of work (especially in the transactional arena), has forced firms to cede more ground on rates. Many partners and firm leaders have privately bemoaned the bruises they have suffered, which only portend to worsen until the economy rebounds. This article addresses some of the reasons why in house lawyers need to be careful in wielding their enhanced powers.

The push by in house lawyers to extract continuing rate concessions is understandable. First, and foremost, in house lawyers have a duty to their company, and its shareholders (or owners) to get outstanding representation at the best, or, at least, a very reasonable cost. Second, the economic downturn has forced in house lawyers to do more with less; trying to replicate that with outside counsel is not surprising. Third, many companies unfortunately labor under a longstanding, and unfair view that the legal department is just a cost center, which only intensifies the pressure under which the lawyers operate. Finally, there are seemingly countless terrific law firms and lawyers that want a company's business. With demand (i.e., the amount of legal work) down a bit, and the supply of legal providers still high, an in house lawyer would be doing a disservice to his company not to at least explore, if not exact, some cost savings.

One of the interesting aspects of this recession is that even some of the largest firms in the country, which previously would have turned work away if it could not be done at full rates, have now succumbed and will offer discounts for certain clients in some practice areas. Firms have also responded by crafting many different types of alternative fee proposals, which seem to

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be taking hold (at least a bit). As firms have offered such proposals for decades, and mostly have had them turned down by corporations (in favor of discounts), it is premature to opine that the billable hour is dead, or even on life support. That ultimately may be the case (although I believe there always will be a place for hourly billing for certain types of work), but we certainly are not even remotely approaching that point.

In house counsel now have to be careful not to push for every last price concession and to not chase new counsel predominantly because of price. I can distinctly recall a situation encountered during my in house career. Our department was under mounting pressure to control costs and thus forced our longstanding outside counsel to compete against three other firms to handle a major litigation matter. In discussing the pros and cons of each firm with our general counsel, I heavily emphasized each firm's projected cost proposals. Our sage general counsel responded with a point that stayed with me the rest of my career. He duly reminded me that as important as it was to control costs, the bigger objective was to win. He implored me to visualize how the CEO may react if I had to inform him that a ten million dollar verdict had been returned against us, but I, nevertheless, had saved the company \$50,000 in legal fees. It was a point well taken.

The relationships that have been formed with key outside counsel have significant value to companies and their in house counsel that should not be forgotten when comparing one firm against another. Most companies have their own ways of conducting business, which take time to learn and are vitally important to understand. Similarly, executives in a company, some of whom can be quite difficult to manage, may develop a comfort level with certain lawyers, which is of inestimable value. I remember how challenging one of our most senior executives was, which was always vexing as he frequently was the key witness in most litigation matters. Despite many attempts by countless lawyers, there was only one outside attorney who had unlocked the key to successfully working with him; that skill was of incalculable importance and was not one that I ever wanted to test with someone else if at all possible.

If a company pushes too hard, or drastically reduces its flow of business to a firm, there can also be another consequence, namely, losing its status as a favored client. This may mean that it no longer can draw a firm's "A team" or even a core group of lawyers who can consistently be called on to do its work. This holds true even in those situations where companies tend to hire

individual lawyers and not their firms, as the lawyer may then have a lot less clout in getting the lawyers he needs on a new matter.

A counter argument is that companies should have no fear in driving a hard bargain, even if that means changing counsel. After all, there are legions of terrific lawyers and firms that are ready to step in at a lower cost, and most will get up to speed on their own nickel. While this is true, the nuanced understanding of a client takes much longer to achieve than a crash course primer. Moreover, for in house counsel, who already are working exceedingly hard, they, too, will have to expend a considerable amount of their own time (and that of their staff), in helping a new firm learn about their company, as handing over a dossier or DVD of background information simply will not suffice.

In conclusion, if a firm is not performing up to acceptable standards or is not in line with the market from a cost perspective, a change makes eminent sense. Similarly, challenging existing counsel from time to time by interjecting some competition, can also keep them hungry and cost efficient. I just urge some caution in this climate, as the ball peen hammer that an in house counsel normally wields may now seem more akin to a jack hammer. The economy will come back at some point, and that seesaw may then tilt the other way. When that time comes, and it will, you are going to want and need your most important, performing outside lawyers—don't drive them away in the interim or rue having dropped them for someone else who may be just a bit less costly. The dollars you saved today may cost you much more later.

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