

## Deciding when, and when not, to outsource legal work



### Why legal departments turn to outside counsel: Insights for new lawyers

*By Daryl-Lynn Carlson*

There is no doubt that in-house counsel working either for major companies or government are busy. Coupled with their workload, they face financial restraints in their efforts to minimize their organization's risk.

Yet there are legal matters that arise which require niche expertise that many in-house lawyers don't have, requiring them to retain advice from a law firm while staying within the department's budget.

Robert Kirwin has faced this dilemma as counsel for MD Physician Services Inc. based in Ottawa.

"The complexity of the issue and also our workload are the primary reasons why we would go to an outside counsel," he says.

As well, there are instances when an outside lawyer must be retained to minimize risk for the company. Essentially, an outside legal opinion provides objectivity that has value in court or in a regulatory matter, he says.

"We may know the answer, but the answer contains a level of risk in our interpretation, so an outside law firm can become our insurance policy," he explains. "They're the ones who can stand behind the opinion and we get a level of comfort, whether we go to our board or our senior management or a regulator, to be able to say 'yes, we've done the necessary due diligence, our external counsel has provided an opinion.' If there are any concerns about the opinion, we will involve our external counsel and they can provide their view."

Furthermore, Kirwin notes, because in-house lawyers are extremely busy with their own workloads, it's imperative to retain an outside lawyer for complex issues. If the matter ends up in court and is unsuccessful, it may cost the company even more.

According to the 2010 Canadian Corporate Counsel Association's annual Barometer report, in-house lawyers work an average of 50 hours per week and have considerable budgetary limitations. Therefore, they seek to retain outside lawyers only for specialty matters that are beyond their area of expertise. When selecting a law firm, most corporate counsel surveyed said the lawyer's area of expertise is the most important consideration.

Diana Zangrilli, counsel for Sony Canada based in Toronto, agrees there are matters that call for a legal opinion from outside counsel. But there are always budget

considerations that require counsel to carefully select which matters they will outsource.

“Over the past six years, our company has significantly reduced the amount of money we’re able to spend on outsourcing,” she says. “But there are definitely cases where you have to go to someone who has the expertise, such as class actions and other special areas of litigation.” In the past five years, Sony Canada has been subject to several class actions, all of which reached a settlement.

When the company needs an outside lawyer to handle a legal matter that in-house counsel don’t have time to deal with or one which requires a particular expertise, they hire Cognition LLP. The 24-lawyer firm, established in 2005 by former in-house counsel, caters specifically to companies.

“The lawyers at Cognition know what we deal with,” Zangrilli says. Sony Canada has called on Cognition LLP’s assistance for a variety of matters, and has been pleased with the results.

“My experience when I was an in-house counsel is you have a continual strain in terms of the work demands on you, and ideally you just keep increasing the number of staff to cope,” says

Joe Milstone, co-founder of Cognition LLP. “But these days, there are very tight constraints on the head count you can hire, although the workload is still the same.

“We started Cognition with lawyers who had corporate law experience to assist in-house lawyers, at a price that they can afford.” He points to mergers and acquisitions, specialized litigation and other large transactional matters as types of work that can be overwhelming for in-house counsel to tackle on their own. As well, specialized areas such as tax issues and commercial litigation require expertise that most in-house counsel don’t have.

Milstone adds that it is important for in-house counsel to research the topic they are retaining an outside lawyer for in order to be able to track the lawyer’s progress and keep tabs on the work.

“It’s good to get to know all of the options and be creative in terms of how you structure your relationship and communication with the lawyer,” he says. “On the cost side, it’s best to explore fixed fee arrangements to make sure you stay within the budget.”

In the CCCA report from last year, developed jointly with the law firm Davies Ward Phillips & Vineberg LLP, only six per cent of in-house counsel responded that the outside lawyer’s service in a matter exceeded expectations; 77 per cent responded that the outside lawyer’s work met expectations; while 17 per cent indicated they were displeased with the lawyer’s work, largely based on poor communication.

Patricia Olasker, a partner in Davies’ corporate commercial practice group, said “companies will call on an outside counsel when they’re looking for expertise because for the most part, corporate lawyers are generalists,” she says.

She acknowledges that following the most recent recession, companies have cut back their legal expenses significantly. “The larger the company and the more bureaucratic it is, the stricter the budget is for legal,” she says.

Therefore, in-house counsel need to be mindful of which legal issue should be handled

externally. As well, Olasker says, she encourages in-house lawyers to make a decision to outsource sooner rather than later, and contact a law firm expeditiously so that the matter can be resolved at the earliest possible opportunity.

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