

## In-House Counsel: Key Questions and Checklist for Hiring Outside Counsel

1. Determine your reasons for hiring outside counsel
  - a. Improve risk mitigation
    - i. Teaming with outside counsel proactively may allow opportunities to provide better advice to the business and not just address issues after they arise.
  - b. Create operational efficiencies and cost savings
    - i. An in-house legal department may not be staffed to handle fluctuations in workload, especially those that are not expected to be permanent and that would warrant hiring permanent staff and may be too complex for temporary staffing solutions.
  - c. Address subject matter, jurisdictional, or geographic expertise needs
    - i. There may be matters that call for specialized expertise that do not recur with sufficient frequency or there is a scarcity of resources and it makes sense to refer to outside counsel.
    - ii. Geography and other local law considerations; these matters may be far removed from the office locations where the company maintains legal personnel and engaging outside counsel engagement makes fiscal sense.
  - d. Determine nature of the matter
    - i. A highly sensitive or high profile matter may present significant reputational risk issues and require a prestigious law firm with powerful persona or expertise in crisis management.
    - ii. Identify the type and volume of litigation/investigation that you want to outsource.
2. Define clear objectives and scope of the engagement
  - a. Measures of success
    - i. What is your goal against which to measure the matter's success? For example, is it settlement, arbitration, closing a deal by a certain date, if transactional, etc.?
  - b. Skill and experience requirements
    - i. Determine the type of lawyer who will do the best work for the engagement.
    - ii. Identify the law firm that will be best suited to do the work, and the specific individuals who will be required to staff the specific engagement.
    - iii. Generally, corporations select the lawyer and not the law firm, but you must ensure their law firm has the necessary resources for the engagement. Determine whether outside counsel has the capacity to handle a large volume of matters or staff a large and complicated case.
3. Identify key internal stakeholders and resources
  - a. Involve internal stakeholders, as necessary, in outside counsel's pitch and the eventual onboarding process of the firm.
  - b. Identify internal resources that you will make available to outside counsel throughout the engagement.
4. Conduct a preliminary cost-benefit analysis
  - a. Identify the type of engagement(s) under consideration, the volume of matters, their typicality, and their average historical costs.
    - i. Is this a complex, unusual, or specialized engagement that requires a specific expertise and would it make sense to pay premium hourly rates?
    - ii. Does the engagement involve repeating routine matters that have little risk or exposure where a fixed fee arrangement is appropriate?

- b. Evaluate the strengths and weaknesses of your company's position, and assess litigation exposure for the proposed engagement.
  - i. Many corporate legal departments utilize probability theory and decision trees and percentages to evaluate the corporation's litigation exposure.
- c. Review similarly situated lawsuits in determining budget and exposure.
- d. Determine if you will have outside counsel candidates submit a budget for proposed engagement.
  - i. If outside counsel submits a budget, confirm budget includes not only their rates/fees but all costs and anticipated legal costs. External costs can be as much as fees so it is critical to discuss costs upfront and add anticipated costs into the budget.
  - ii. Has outside counsel budgeted for all contingencies such as settlement negotiations that occur alongside litigation activity?
  - iii. Does outside counsel understand risk analysis and can they analyze the probability of liability, the range of damages and calculate the point at which it makes economic sense to settle rather than litigate?
- e. Evaluate outside counsel's use of technology and experience in legal project management, especially if the engagement involves a high volume of matters, and/or is a complex, high dollar, and/or high-risk litigation matter. Key questions and factors to consider are:
  - i. Does outside counsel have a legal project management team and experience in managing e-discovery, loan deals, repetitive (or massive) litigation, and/or special projects?
  - ii. Has outside counsel considered and presented how they will manage your proposed engagement? Do they have a clearly defined strategy with identified goals and checkpoints that can be measured?
  - iii. Does the firm have a matter management system in place that handles all facets of matter administration, calendar docketing, budgeting, and automation of workflows?
  - iv. Does outside counsel utilize document management software that catalogs contracts, pleadings, discovery related materials, case law of precedential value and training materials?
  - v. Is the document management software customizable and can be it customized to fit your legal needs?
  - vi. Does outside counsel utilize e-billing systems to track performance against budget and provide those metrics for your review?
- f. Evaluate outside counsel's cybersecurity safeguards. A company's level of cybersecurity is only as good as the cybersecurity of its vendors. In today's business climate cybersecurity is a regulatory requirement, an ethical obligation and business imperative.
  - i. If your company is a public company or in a heavily regulated industry (e.g., financial, insurance, utilities, etc.), does the firm understand the regulatory requirements on information security that would affect your company?
  - ii. Does the firm have cyber liability insurance? Do they have policies, procedures, and controls in place to prevent cyber-breaches and mitigate their risk?
  - iii. Has their firm ever had a cyber breach? If so, how did they handle the breach and what corrective actions were taken?
- g. Determine whether certain costs are allowable and budgeted.
  - i. Will the firm bill for travel time? How will it be billed?

- ii. Is there a separate/special fee arrangement for the transition from firm to firm?
      - iii. Is there a large file transfer that requires a separate fee arrangement?
    - h. Alternative fee arrangements to be considered: straight hourly billing, discounted hourly rates, contingent fees, capped fees, fixed fees, success fees, and/or bonuses.
      - i. Note: Highly regulated industries such as financial institutions have strict regulatory rules regarding volume discounts, success fees, bonuses, and performance incentives for legal work. Do your homework before you negotiate or discuss any of the above.
  - 5. During the pitch presentation
    - a. Brief outside counsel on the basic facts of the case or engagement.
    - b. Ask outside counsel questions about the matter that requires legal advice. This will demonstrate if they are agile thinkers who can communicate a fact-finding strategy by spotting issues and gathering evidence.
    - c. Determine whether outside counsel has knowledge of recent settlements for similarly situated cases.
    - d. Determine whether outside counsel understands and has experience in your industry. Do they have knowledge of the key legal risks your industry faces and recent court decisions that have set precedent(s)?
  - 6. Additional information and considerations
    - a. Request a key relationship partner as a point of contact for the engagement to streamline communications and reduce inefficiencies.
    - b. Gauge the firm's willingness to invest in the transition costs (i.e., are they willing to learn about the company, issues, and matters on their own time and not charge the client).
    - c. Determine whether outside counsel outsources any of their legal process to third party vendors. How do they vet these third parties, and oversee their work product?
    - d. Request a list of similar cases outside counsel has managed and review how those cases were handled (outside counsel should redact as necessary to protect attorney-client privilege).
    - e. Determine whether outside counsel partnered with any of your current law firms on past matters and how they partnered with them. The engagement may require the firm to work with multiple firms, and it will demonstrate to you how they will partner with your legal team(s).
    - f. If outside counsel has previously worked for the company on other matters, solicit feedback from other inside counsel and non-lawyers within the corporation regarding their performance and partnership.
    - g. Query whether there are potential conflicts. Is a special waiver required?
      - i. Note: Some outside counsel guidelines prohibit blanket waivers of conflicts of interest to law firms.
  - 7. Evaluate outside counsel's commitment to diversity
    - a. Ask whether the firm has an established and robust diversity & inclusion program with clearly defined strategies and goals.
      - i. Does outside counsel have a designated diversity manager or diversity committee, and track key metrics?
      - ii. Does outside counsel include diversity committee members on each of the top management committees so substantive dialogue is maintained at that high level?
      - iii. Request documentation and data with due diligence submissions.

- b. Determine whether outside counsel qualifies and/or is certified as a Diverse Supplier/Firm in any of the following categories: minority, women, disabled, veteran, lesbian, gay, bisexual, or transgender?
  - i. Note: To qualify, they must be able to demonstrate at least 51% ownership, control, and operation by one or more of the groups mentioned above.
- c. Query how outside counsel will staff the project to insure your diversity expectations are met.
  - i. Many corporate legal departments now require outside counsel to include the race and gender of each attorney who works/bills on their matters, and it is something your department may want to consider.
    - 1. This ensures that diverse attorneys are not just paraded out for the client pitch, but they also work on the matters.
- d. Request that outside counsel give appropriate credit and percentage to the diverse outside counsel partners on your matter(s), and request quantitative data of such.
  - i. This ensures your outside counsel is accountable for not only who performs the work, but also who gets the credit for the work.

## Law Firm: Key Considerations When Pitching to a Prospective Client

1. Consider the current relationship with the RFQ/RFP issuer; clarify the firm's strategy and formulate a pitch strategy in this context.
  - a. Is the company an existing client of the firm, or is it a new prospect? For many law firms, existing clients often take precedence over new ones in the decision to respond to a RFQ/RFP.
  - b. If it is a current client, take into consideration the strength of the relationship. If it is a new prospect, review the company's culture and the overall fit of the firm with their corporate culture.
2. Examine potential conflicts as soon as possible and before you formally respond to the RFQ/RFP. Do not invest time and resources into crafting a response, only to realize later that the firm is conflicted out due to existing client relationships.
  - a. If your firm has identified "potential conflicts," be prepared to address them in a clear and comprehensive manner during your pitch to the prospective client.
3. Research your potential client and their industry and demonstrate a clear understanding of their industry and the relevant laws.
  - a. Has your potential client been in the news lately? Are there issues concerning reputational risk (i.e., a recent merger or acquisition, business crisis, or financial restructuring)?
  - b. What are the industry trends?
  - c. What are the legal problems that others in the client's industry are experiencing to which you can offer a solution?
  - d. Are there recent changes mandated by law regulators?
  - e. Have there been any interesting or controversial court decisions recently decided in their industry or where their business has a physical presence or litigation?
4. Know your key objectives before you go in for the pitch, and the top 3 points you will make before you leave the meeting.
  - a. Keep your objectives and presentation client focused and tailored to the prospective client's specific needs.
  - b. Lay out a strategic plan to address litigation or transactional work and be as specific as possible.
    - i. For example, "This is what we will do in the first 48 hours of our engagement, 1 week, 1 month ... all the way through to the resolution."
5. Bring your key attorneys to the pitch meeting.
  - a. Identify key stakeholders: client relationship partner, key attorney(s) that will actually work the matter, and any lawyer in the firm that is well known in the client's industry and considered a subject matter expert.
6. What experience and knowledge does your firm have in the prospective client's industry? The client wants to know that you know their industry.
  - a. Examples of past work, war stories or experience in the industry or area of law are important, but be mindful and protect existing and past clients' confidential information. A prospective client will be mindful if you breach your existing client's confidentiality and worry that you will breach theirs if they hire your firm.
  - b. Have a list of references the prospective client can contact, especially if they are in the same industry as the prospective client.
7. Do not disparage rival law firms; if you don't have something good to say, then don't say anything at all.

8. Do any members of your firm have relationships with municipal, state, or federal agencies, judges, or politicians that may benefit the client? What clerkships have the attorneys at your firm completed that are relevant to your client's industry or the engagement?
9. Are there fields of law the client needs that your firm does not handle? If so, how will you make sure those matters are handled as well as the work your firm will be doing? Clients want to know what your firm does not do and how you will address it if an issue arises.
  - a. For example, if your firm lacks the bench strength or expertise in a specific area of law, be candid about what services you can and cannot provide, and offer a referral to counsel you believe are experts in that specific area of law your firm is lacking. This shows that you are willing to sacrifice business/billables to ensure your client gets the best service/partnership possible from your firm.
10. Discuss fees but do not send out generic rate information with no context in advance of the meeting unless specifically requested via a RFP/RFQ.
11. Discuss alternative fee arrangements the firm has utilized with past clients and suggestions on which option would provide the most value for the prospective client's current needs.
12. Focus on flexibility and the value-added services your law firm will provide. Ask questions and listen to find out how your prospective client measures value. Is it success, cost, or a combination?
13. Partnership with your prospective client can come in different forms.
  - a. Maybe the solution is a secondment arrangement in which a law firm attorney is temporarily "loaned" on-site to the client's corporate law department for the duration of the project.
  - b. What else can you do to add value to the client? Free seminar, CLE, or maybe something tangible to take away from the meeting or send them after the meeting such as a memo or article your firm has written that is relevant to their industry or legal issue.
14. Discuss your firm's use of technology and how it may benefit the engagement, streamline communications, and reduce costs, especially if the engagement will involve large-scale litigation or high volume of matters.
  - a. Highlight any document and/or matter management software you utilize, as well as, e-discovery and e-billing software.
  - b. Communicate efficiencies that will be gained (provide quantifiable date if available) and how they will be reported to in-house counsel. Define goals (e.g. budgetary reporting and communication protocols) and how you will measure value in achieving that goal.
15. Be prepared to discuss your firm's cybersecurity protocols.
  - a. Recent cyber-attacks on law firms and high profile data breaches at public companies such as Target, Home Depot, JPMorgan Chase, Anthem, and Citibank have increased companies' scrutiny of their outside counsel's cybersecurity standards and safeguards.
16. Be prepared to discuss your firm's pro bono program, such as recent successes and awards.
  - a. Research the prospective client's pro bono programs and commitments. Are there causes/charities that are important to the client? If so, can you think of ways you could partner with the client to further their goals in this area?
17. What is your client's commitment to diversity and how will you staff the engagement to meet client's diversity expectations?
  - a. Has the prospective client signed "A Call to Action: Diversity in the Legal Profession"? This document commits its signatories (corporate GC or chief legal officers) to reaffirm their departments' commitment to diversity in the legal profession through internal and external efforts, including hiring law firms that are firmly committed to diversity & inclusion.



- b. Does the prospective client have a supplier/vendor diversity program in place? Many corporations detail their diverse supplier programs on their websites, so do your research prior to your presentation.
  - c. Be prepared to discuss your firm's diversity & inclusion plan and outline your initiatives, goals and metrics in key areas, such as staffing, retention, number of minority and women partners (equity and non-equity), development and promotion of women and minority partners from within, etc.
  - d. Qualitative data submitted should include any information on diversity recognition or awards the firm has received, diversity in firm governance, scholarships, or programs for diverse law students and the firm's support for diversity pipeline programs.
18. Key questions to ask after your pitch that can guide your follow-up procedure and timing:
- a. What is the prospective client's timing for choosing outside counsel?
  - b. Are there any outstanding questions from the prospective client, and does your proposed response time work for the prospective client?
  - c. What concerns, if any, does the prospective client have with choosing your firm?